**Holding the Line: Understanding the Role of Independent Legal Counsel in Command Decision-Making**

*Major Scott A. DiRocco*[*]

I. Introduction

Captain (CPT) Mark Smith is the judge advocate (JA) for a detention facility in Afghanistan. One wing of the detention facility is run by Central Intelligence Agency (CIA) operatives under Executive authority outside the Department of Defense (DoD); this wing is off-limits to DoD personnel.

The commander of the detention facility comes to CPT Smith for advice. The person in charge of the CIA operation instructed CPT Smith's commander to turn over three detainees to the CIA team for interrogation. He also handed CPT Smith's commander an order from the executive, approved by the Secretary of Defense, to hold ten other detainees in the DoD section of the detention facility for the CIA team. The order further instructs CPT Smith's commander to hold them in a manner inconsistent with Army regulations and applicable operational orders regarding detainee operations. Along with the order are legal opinions from the Office of Legal Counsel (OLC) and DoD General Counsel (DoD/GC) stating that the ordered detention procedure is legal under both domestic and international law. The commander doesn't like being told what to do by a CIA operative and wants to know if this order is legal. He has the CIA operative standing by for 90 minutes while he gets advice from his staff.

Captain Smith's research establishes that the ordered detention procedure is illegal and could subject his commander to personal criminal liability. Yet OLC and DoD/GC have both opined that it is legal. Office of Legal Counsel opinions are generally held to be binding on all executive agencies and DoD/GC is in CPT Smith's "technical" chain of command.[1] Captain Smith assumes that, if DoD/GC has approved these procedures in writing, a few higher-ranking JAs have also reviewed the opinion, with apparently no objections, before it reached him. Is he allowed to give an opinion that differs from OLC, DoD/GC, or senior JAs in his technical chain of command?

This is a time-sensitive issue and his commander needs an answer. Captain Smith has no idea what to do. As an attorney, who is his client? Is it his commander? The Army? The Department of Defense ? The President? The public? What do his state bar rules of professional conduct say? What about the Army's?

Captain Smith joined the military after the terrorist attacks of 9/11. He wants to support the War on Terror. He's proud to be a commissioned officer in the U.S. Army as well as an attorney. Would he be undercutting civilian control of the military if he disagreed with OLC and DoD/GC? How could he be correct when all of those senior lawyers found otherwise? Captain Smith knows the safe bet would be to go along with everyone else. But what if CPT Smith left his commander subject to criminal liability? Is this even legally permissible conduct for an attorney?

As CPT Smith discovered, the role of the Federal Government attorney advisor, as opposed to a private attorney, is complicated by a series of fundamental and surprisingly difficult questions: Who is the client? Is it the public? The agency? The agency head? The immediate supervisor? If it is the public, who determines what is the public's interest? What duties does the government attorney owe his client?

Judge advocates are unique among government attorneys in the number of ethical, professional, and legal responsibilities they have. Judge advocates have duties to the Constitution, Congress, the President, their respective branch of service and its rules of professional conduct, and the individual JA's state bar rules of professional conduct. In addition to these legal responsibilities, JAs also have operational and technical chain of command concerns. The interrelationships between these responsibilities and concerns are often undefined. In some situations, they are patently contradictory.

The challenges these responsibilities create have become readily apparent since the terrorist attacks on 9/11. It would be an understatement to say that 9/11 and the ensuing War on Terror changed the way our government operated. The U.S. Army is at the forefront of that change.[2]

---

[*] Judge Advocate, U.S. Army. Presently assigned as Deputy Staff Judge Advocate, National Training Center & Fort Irwin, Fort Irwin, California. The author thanks the following individuals for their time, advice, and assistance: Visiting Adjunct Professor Eric Jensen, Fordham University; Professor Victor Hansen, New England School of Law; Lieutenant Colonel Jonathan Howard, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; and Major John Merriam, U.S. Army. The author owes special thanks to Lieutenant Colonel Oren "Hank" McKnelly for his countless hours, guidance, and direction during the drafting of this article. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] George C. Harris, *Symposium Lawyers' Roles and the War on Terror: The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409, 423 (2005). *See also* Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000); Tung Yin, *Presidential Power in the 21st Century Symposium: Article: Great Minds Think Alike: "The Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 5013 (2009).

[2] *See* General Peter Schoomaker, then Chief of Staff U.S. Army, Address Before the Commission on National Guard and Reserves (Dec. 14, 2006), *available at* http://www.army.mil/-speeches/2006/12/14/989-statement-by-

The conflicts in Iraq and Afghanistan forced the Army to adapt to the nonlinear and persistent nature of combat in those areas of operation.[3] The Army responded by shifting the emphasis from the division to the brigade combat team (BCT) as the primary unit of action.[4] The Army Judge Advocate General's Corps (JAGC) kept pace with the rest of the Army, moving the emphasis on legal services from the division to the brigade and enhancing training on deployment and operational law.[5]

The JAGC's changes, while necessary to continue to provide quality legal support to the Army, have also raised collateral issues. One such issue is that these changes have shifted who is providing advice and where that advice is being provided. Prior to the War on Terror, situations such as that in which CPT Smith found himself were usually made at larger headquarters, where tough legal issues could be "round-tabled" or staffed. Now, these situations routinely occur at the brigade level with one or two JAs. Many times, due to location, logistics, or operational tempo, coordination with other JAs is not possible.

Another collateral effect is the location and frequency of the interactions with operatives and agents from executive branch agencies such as State Department, CIA, FBI, and Drug Enforcement Administration. These interactions consistently happen in deployed environments at the brigade level.

These types of issues did not historically confront the brigade judge advocate (BJA), who usually hasten to fifteen years less experience than the division staff judge advocate and a much smaller compliment of subordinates. Now, however, they are routinely resolved at the brigade level. Moreover, these issues were enhanced by the ideological climate and issue entrepreneurship of the Bush administration's legal organizations.[6]

These changes in policy, organization, and mission have helped the legal community supporting the national security infrastructure define their jobs, their roles, and their responsibilities. Sometimes, they were defined before action was taken. Many times, they were defined through lessons learned. While these changes are positive and beneficial, JAs must pause to address the fundamental questions before facing them in a deployed environment: Who are you? Who is your client? Where do you fit in the national security apparatus? And what duties do you owe your client?

Part II of this article will provide background regarding JAs and their history within the U.S. Armed Forces. Part III will define the JA's client and the correct model of representation that should be employed by JAs. Part IV will discuss the JA's place in the national security apparatus by discussing the other legal organizations that advise the United States on national security and military matters. Part V will then explore the JA's duties and responsibilities that he owes to his client, define "independent and candid advice,"[7] and explain why it must include independence from the Executive Branch legal organizations discussed in Part IV.

The purpose of this article is not to criticize past administration practices. Nor is it to suggest that the relationships between the legal organizations that advise the executive on national security and military matters and the respective JAGCs are strained. To the contrary, these relationships are healthy and functional. Rather, the purpose of this article is to assist the JA in defining his roles and responsibilities. The transformation of the Army and the JAGC requires JAs to critically examine their roles as both

---

general-peter-schoomaker-chief-of-staff-united-states-army-before-the-commission-on-national-guard-and-reserves/.

> As you know, the Army is steadfast in its determination to transform the total force from a Cold War structured organization into one best prepared to operate across the full spectrum of conflict; from full-scale combat to stability and reconstruction operations, including the irregular war that we face today. This effort includes modernization, modular conversion, rebalancing our forces across the active and reserve components, and a force generation model that provides for continuous operations.

[3] *Id*.

[4] In general, a brigade is a subordinate and smaller unit to the division. Divisions have roughly 15,000 to 25,000 Soldiers. A brigade combat team has 3500 to 5000. There are three to five brigade-size elements within a division. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM (4 Aug. 2006) (updated 14 Sept. 2010); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL, 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 3-3 (15 Apr. 2009) [hereinafter FM 1-04].

[5] *See* FM 1-04, *supra* note 4; Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting the Cycle, and All Aspects of a Full-Spectrum Practice*, ARMY LAW., Dec. 2004, at 22; Policy Memorandum 08-1, Headquarters, Office of The Judge Advocate Gen., subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008); Policy Memorandum 09-1, Office of The Judge Advocate Gen., subject: Pre-Deployment Preparation Program (3 Feb. 2009).

[6] Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 9, 22 (2008) ("Issue entrepreneurs assert their own identity through their ideas, seeking to establish the primacy of their analysis over perspectives from the past or competing perspectives from the present."). *See also* Harris, *supra* note 1, at 422.

[7] MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) [hereinafter MODEL RULES]. *See also* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 2.1 (1 May 1992) [hereinafter AR 27-26]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5803.1c, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL r. 2.1 (9 Nov. 2004) [hereinafter USN RPC]; AIR FORCE RULES OF PROFESSIONAL CONDUCT r. 21 (17 Aug. 2005) [hereinafter USAF RPC], *available at* http://www.caaflog.com/wp-content/uploads/AirForceRulesofProfessionalConduct.pdf.

military officers and attorneys and understand why the need for independent legal judgment and advice is so important to the military.[8]

## II. The Judge Advocate

Judge advocates have a long history within our military dating back to the Revolutionary War.[9] After being commissioned as the Judge Advocate of the Continental Army in 1775, William Tudor became the first Army Judge Advocate General on 10 August 1776.[10] While the Navy had legal counsel intermittently from the time of its creation, Colonel William Butler Remey, U.S. Marine Corps (USMC), became the first uniformed Chief Legal Officer for the Navy in 1878.[11]

From the Revolutionary War through the end of World War II, there was no requirement that a JA be a trained attorney. After World War II, and in response to problems with the military justice system,[12] Congress adopted the Uniform Code of Military Justice (UCMJ).[13] Among the many changes to the system, the UCMJ required JAs to be trained lawyers and members of a state bar.[14]

Statutorily, JAs are charged with overseeing the military justice system.[15] This includes assignments in both prosecution and defense. In addition to military justice, JAs practice in over twenty other areas of law including fiscal, administrative, environmental, legal assistance, contracts, international, and operational.[16]

Over the last half century, the role of the JA in military operations has steadily increased.[17] While some scholars question the wisdom of this trend,[18] there is no denying that JAs are routinely put into situations such as that faced by CPT Smith in the introductory hypothetical. The nature of current operations has challenged the Army JAGC to keep pace and find organizational solutions in order to give its client the best advice possible.[19]

## III. The Judge Advocate's Client

"Identifying the client is of great significance to the lawyer because of the ramifications it has on the carrying out of legal and ethical obligations."[20] For the private attorney, this identification is usually easily determined. For the Government attorney, however, this question is much more complicated. What seems like an easy question at first glance is actually a nuanced area of discussion that requires critical analysis.

For the JA, just as for his civilian counterpart, the question of who is your client initially seems quite easy: the military, or maybe more specifically, your respective branch of service, whether it is the Army, Navy, Air Force or Marines.[21] But from this recognition comes another fundamental question that must be answered before a true understanding of the JA's client can be reached. To truly understand the JA's client, the very nature of the military must be defined, for the military is unique in its position within the federal government.

This section discusses the two most popular models of client representation noting their strengths and weaknesses, both in general and as applied to the military. It will then discuss the unique nature of the military itself, detailing the history of civil-military relations.

---

[8] This article focuses on the U.S. Army Judge Advocate. While there are organizational differences between the respective services' Judge Advocate Corps (JAGC), the positions of this article generally apply to all judge advocates (JAs). The other services will be discussed when differences add to the discussion.

[9] The Army TJAG position was created on 29 July 1775. U.S. Army Judge Advocate Gen.'s Corps-History (last visited 9 Mar. 2011) [hereinafter Judge Advocate Gen's Corps History], http://www.goarmy.com/jag/history.jsp; *see also* Lisa L. Turner, *The Detainee Interrogation Debate and the Legal Policy Process*, JOINT FORCES Q., 3d Quarter, 2009, at 40, 40.

[10] Judge Advocate Gen's Corps History, *supra* note 9.

[11] U.S. Navy Judge Advocate Gen.'s Corps-Navy JAG History, http://www.jag.navy.mil/history.htm; Colonel (Col) Reginald Harmon was selected as the first Air Force Judge Advocate General and promoted to the rank of major general on 8 September 1948. PATRICIA A. KERNS, THE FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 13 (2004). While Marine Corps JAs are a subdivision of the Navy JAGC, Col Charles B. Sevier became the first Staff Judge Advocate to the Commandant to the Marine Corps in 1966. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM 120 (1989).

[12] *See* Major Mynda G. Ohman, *Integrating Title 18 War Crimes Into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 8–10 (2005).

[13] UCMJ, 64 Stat. 109, 10 U.S.C. ch. 47 (2008). The UCMJ was passed by Congress on 5 May 1950 and became effective on 31 May 1951. *See* Ohman, *supra* note 12, at 8–10.

[14] 10 U.S.C. § 3065(e) (2006). *Id.* § 827.

[15] *Id.* § 806.

[16] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-2 (30 Sept. 1996) [hereinafter AR 27-1].

[17] FM 1-04, *supra* note 4, paras. 1-5 to -11; David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1999 (2008); Glen Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1838–842 (2007); *see generally* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

[18] *See generally* Sulmasy & Yoo, *supra* note 17.

[19] *See supra* note 4.

[20] AR 27-26, *supra* note 7, r. 1.13 cmt.

[21] The U.S. Coast Guard has JAs as well; however, they are excluded from this discussion because they are not a Title 10 entity.

A. Agency Versus Public Interest Model of Client Representation

The matter of properly identifying the government attorney's client has been well covered and hotly debated.[22] Two major models have emerged: the agency model and the public interest model.[23]

Under the agency model, the government attorney should treat the department or agency that he works for as his client.[24] The attorney owes his duty of loyalty, zeal, and confidentiality to the agency, just as if the agency was his private client.[25] He is, thus, the agent of the agency or department and responsible for carrying out the will of his client.

The agency model is also known as the "dominant" model, as it attempts to protect clients from being dominated by their attorney by placing the client's interests first.[26] It is based on the premise that "all client interests that are not illegal are legitimate, and that clients are entitled to legal representation to pursue those interests."[27] If it were otherwise, the attorney would wield great power over his client's affairs, whether a private citizen or the government, by placing his personal beliefs and interests above those of his client.[28]

In contrast, the public interest theory states that the government attorney's client is greater than one particular agency or agency head; it is the public at large. Thus, the attorney's loyalty should be to the public interest. Since the government itself is just a small representation of the public and serves the public interest (in theory), the government attorney owes his allegiance to the public interest. Under this model, serving the public interest is the government lawyer's primary duty. Therefore, the government attorney values the interests of his agency or department "only to the extent that those interests coincide with the public interest."[29]

Critics of the public interest model say that the public interest is a vague abstract and unworkable in reality. Professor Geoffrey Miller summed it up best when he said, "[i]t is commonplace that there are as many ideas of the 'public interest' as there are people who think about the subject."[30] Critics also note that it is impossible to define what the public interest is when the public is always divided.[31]

Professor Miller's fear, as with other critics of this model, is that a "renegade attorney" can supplant his beliefs of the public interest, which may be vastly different, for those held by his elected or appointed supervisor.[32] The public interest model "empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through [representative] governmental procedures."[33]

Yet it is the agency heads that are politically appointed and carry out the policies and intent of the executive. The chief executive is publicly elected and carries with him the support of the public through election. Ultimately, the policies and actions of the elected officials can be undermined by the government attorney who thinks he has a better understanding of what is in the public's best interest.[34] It was in part this reasoning that led the Supreme Court in *Myers vs. United States* to aver, "[t]he discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it."[35]

Supporters of the public interest model assert that there are "sufficient existing definitions of the public interest to guide government attorneys so they do not become 'loose cannons.'"[36] Moreover, unhindered loyalty "to the client's interests risks allowing lawyers to support manifest social injustice."[37]

---

[22] *See generally* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 (1999); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 111 HARV. L. REV. 1170 (2002); Harris, *supra* note 6.

[23] A third model, the "critical model," holds "the government lawyer's primary responsibility is to help the agency develop its position in a way that is consistent with democratic values." *See* Harris, *supra* note 1, at 422; *see also* Note, *supra* note 22, at 1173.

[24] *See* Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 27 (2007); Miller, *supra* note 22, at 1294; Note, *supra* note 22, at 1173.

[25] *See* Peretz, *supra* note 24, at 27; Miller, *supra* note 22, at 1294; Note, *supra* note 22, at 1173.

[26] *See generally* Harris, *supra* note 1; Note, *supra* note 22, at 1171.

[27] Note, *supra* note 22, at 1171.

[28] *See generally id.* at 1294; Harris, *supra* note 1, at 422; Note, *supra* note 22, at 1171.

[29] Note, *supra* note 22, at 1173.

[30] Miller, *supra* note 22, at 1294–95.

[31] Peretz, *supra* note 24, at 27 (quoting William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986)).

[32] Miller, *supra* note 22, at 1295; *see also* Peretz, *supra* note 24, at 28 ("[I]f an attorney is a 'loose cannon' with a vastly different perception of the public interest than his superiors and colleagues, he may be difficult to manage within his own workplace, and his agency will behave inconsistently and unpredictably as a result.").

[33] Miller, *supra* note 22, at 1295.

[34] *See generally* Miller, *supra* note 22; Peretz, *supra* note 24.

[35] 272 U.S. 52, 117 (1926). *See also* Yin, *supra* note 1, at 493.

[36] Peretz, *supra* note 24.

[37] Note, *supra* note 22, at 1171.

The applicable rules of professional responsibility that guide attorneys do not offer a definitive answer to this foundational question, either.[38] The American Bar Association (ABA) *Model Rules of Professional Conduct* do not offer any definitive guidance on identifying the Governmental client. Rule 1.13 addresses the organization as a client.[39] While the ABA states that Rule 1.13 "applies to governmental organizations," it goes on to state that,

> [A] different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statute or regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.[40]

This guidance leaves much to be desired, as we saw from CPT Smith's conundrum.[41]

Professor George Harris points out that the American Law Institute's *Restatement of the Law Governing Lawyers* (*Restatement*) concludes that "no universal definition of the client of a governmental lawyer is possible" and that each model has its benefits.[42] Specifically, in certain situations, "the preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the manner involved in the representation."[43]

B. Army's Model of Client Representation

The Army concurs with the *Restatement* and follows the agency model. Rule 1.13 of its Rules of Professional Conduct for Lawyers states in pertinent part, "[e]xcept when representing an individual client [in a criminal defense or civil legal assistance capacity], an Army lawyer represents the Department of the Army acting through its authorized officials."[44] Rule 1.13 defines "authorized officials" as "the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities."[45] The JA's attorney-client relationship with the authorized official (usually a military commander) exists "with respect to matters within the scope of the official business of the organization."[46]

The Army is correct in deeming that the agency model is the more appropriate model for the military. While the notion of representing the public interest sounds good in theory, and may even be the appropriate model for other governmental organizations, it fails to account for the unique nature of the military lawyer and his place within the constitutionally mandated civil-military relationship.

One of the basic tenets of our country's constitutional structure is civilian control of the military.[47] In this regard, the public interest is defined for the military by the two publicly elected branches of government that control it: the legislature and the executive.[48]

The JA, unlike his private practice counterparts, is sworn to uphold this constitutional system. As commissioned officers in the military, an appointment of "honor or trust under the Government of the United States," JAs are required to take and subscribe to the oath of office.[49] As part of this oath, the JA swears that he will support and defend the Constitution against all enemies, foreign and domestic.[50]

---

[38] Harris, *supra* note 1, at 418–19. *See also* Note, *supra* note 22, at 1175 ("the Model Rules offer little guidance to lawyers for organizational clients when the organization's interests diverge from those of its representatives and no guidance at all in situations that are unique to government lawyering.").

[39] MODEL RULES, *supra* note 7, R. 1.13.

[40] *Id.* cmt. 9.

[41] *See supra* Part I.

[42] Harris, *supra* note 1, at 422 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 97 cmt. C (2000)).

[43] *Id.*

[44] AR 27-26, *supra* note 7, r. 1.13(a).

[45] *Id.*

[46] *Id.*

[47] *See generally* U.S. CONST. arts. I & II; Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617 (2009); Eric Talbot Jensen & Geoffrey Corn, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553 (2007); SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 76 (1985) (1957); Sulmasy & Yoo, *supra* note 17, at 1816.

[48] *See generally* U.S. CONST.

[49] 5 U.S.C. § 3331 (2006); *see also* U.S. Dep't of Army, DA Form 71, Oath of Office-Military Personnel (July 1999) [hereinafter DA Form 71]. The oath for commissioned officers is as follows:

> I, _____ (SSAN), having been appointed an officer in the Army of the United States, as indicated above in the grade of _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; SO HELP ME GOD.

[50] 5 U.S.C. § 3331; *see also* DA Form 71, *supra* note 49.

Unlike his civilian governmental lawyer counterparts, the JA has the additional duty of military obedience. Military obedience has been called the supreme military virtue.[51] As Section C(1)(a) below will discuss in greater detail, one of the greatest fears of the original framers of our Constitution was a standing army. Thus, they subordinated the military to civilian control. Civilian control is nothing, however, unless those serving in the military respect and honor that control. Military obedience to civilian control, therefore, is paramount to our constitutionally mandated system.

The duty of military obedience adds yet another layer of responsibility onto the JA's decision-making process. Attempts by judge advocate to determine what the public interest is can interfere with civilian control of the military. In other words, JAs cannot go "rogue" and supplant their beliefs regarding what is good for the public for those of their civilian leadership. This would violate the Constitution, which JAs have sworn to defend.[52]

Judge advocate dalliance into policy decisions is a very real fear, one that has been at the forefront of discussion since President G. W. Bush took office in 2000.[53] It is for this reason that JAs cannot represent the public interest in the very broad definition of that term. Their duty of military obedience prevents them from making this determination. This is not to say that JAs, or military officers in general, are mindless automatons at the beck and call of the chief executive; their professional conduct, as both attorneys and military officers, is restricted by the law. But it does mean that JAs, unlike their civilian governmental lawyer counterparts, are further limited by their duty of military obedience.

## C. Defining the Military

In order to understand who the JA's client is, the true nature of the military must first be articulated. The Army, as previously discussed, maintains that the JA's client is the Department of the Army through its authorized officials. The Department of the Army by statute is an executive branch agency.[54] This article will articulate, however, that the JA's client can only be the Army defined as the uniformed military. The JA's client cannot be politically appointed officials such as the Secretary of the Army. The line must be drawn between the uniformed military and the civilian members of the respective service departments.

### *1. History of Civil–Military Relations*

#### *a. Civil–Military Relations in the Constitution*

Concerns about controlling the military predate the drafting of our Constitution. "Among other fears, the Framers were concerned about the existence of a large standing army, the danger of a military coup d'état, and the risks of military adventurism."[55] To address these fears, the framers decided upon a constitutional system in which the military would be controlled by the civilian population. The President was made the "Commander in Chief" of the armed services.[56] Under this arrangement, the military would always be subjected to the control of a single, publicly elected civilian official.

In our system of checks and balances, the original framers wisely subordinated the military to civilian control.[57] Even wiser still, the framers split that control between the two branches.[58] The framer's fear of a large standing army was matched by the fear of a chief executive that could wage war purely on executive authority. As James Madison aptly warned the constitutional convention, "[c]onstant apprehension of War, has the same tendency to render the head too large for the body. A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger, have been always the instruments of tyranny at home."[59]

While it is a necessity to have the military under the command and control of an executive rather than a large body of elected officials,[60] there is always the risk of placing too much power in the hands of one person.[61] Having the military controlled by a single civilian despot differs little from it being controlled by a single military one.[62] Thus, civilian control of the military is not just exerted by the executive, it is exerted by the legislature as well.[63]

To offset the President's power as Commander in Chief, Article I vests Congress with multiple powers, including the

---

[51] HUNTINGTON, *supra* note 47, at 76.

[52] *See supra* note 49.

[53] *See* Sulmasy & Yoo, *supra* note 17. For critical responses to Sulmasy's & Yoo's claims of Judge Advocate interference with executive branch policy decision-making, see Hansen, *supra* note 47; Michael L. Kraemer & Michael L. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407 (2008).

[54] *See* 10 U.S.C. § 111 ("The Department of Defense is an Executive Department . . . composed of the following . . . (6) Department of Army. (7) Department of the Navy. (8) Department of the Air Force . . .").

[55] Hansen, *supra* note 47, at 625.

[56] U.S. CONST. art. II, § 2, cl. 1.

[57] *Id.* arts. I & II. *See also infra* Part III.B.1.a.

[58] U.S. CONST. arts. I & II.

[59] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (Yale University Press 1911).

[60] Sulmasy & Yoo, *supra* note 17.

[61] THE FEDERALIST NO. 4 (John Jay).

[62] *See* Hansen, *supra* note 47, at 626.

[63] *Id.*; *see also* Jensen & Corn, *supra* note 47, at 561–62.

power to provide for the common defense;[64] define and punish piracy and offenses of international law;[65] declare war;[66] make rules concerning captures on land and water;[67] raise and support armies;[68] provide and maintain a navy;[69] make "Rules for the Government and Regulation of the land and naval Forces;"[70] ". . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[71] and ". . . provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States."[72] In addition to these specific enumerated powers, Congress also has the power to "make all Laws which shall be necessary and proper for carrying into power" the powers listed above.[73]

The bifurcated control of the military found in the Constitution not only protects the people from the military becoming too powerful, it also protects the people against one branch of Government exerting too much control over the military.[74] While our country has been exceedingly successful at preventing a military coup d'état throughout its 240-year history, the fact remains that the military has control of the great majority of the country's hard power.[75] Because we have managed that risk does not mean that there is no risk at all or that the risk is not significant.[76] Thus, the constitutional framework devised by the original framers not only mandates civilian control of the military but also reinforces the beliefs in its government officials that civilian control is essential to maintain our self-governing, republican ideals.

*b. Modern U.S. Civil–Military Relations: World War II to 1986*

In 1986, Congress passed the Goldwater-Nichols DoD Reorganization Act of 1986.[77] Goldwater-Nichols was the culminating response to years of defense organizational problems, leading back to the end of World War II, which hindered the performance of our military and threatened civilian control of the military.[78]

During WWII, the military consisted of two departments: one for the Army (War Department) and one for the Navy (Navy Department).[79] Infighting between the services hampered our overall war effort.[80] In 1943, the Army, convinced that separate War and Navy Departments were inefficient, proposed that they be replaced with a single unified military department.[81] The Navy and Marine Corps opposed unifying the military for various reasons, including longstanding traditions of independent command at sea.[82]

President Truman supported the Army's position[83] and, following the end of the war, moved to reorganize the military. The Navy, fearing loss of aviation and land missions, struck a compromise with their supporters in Congress.[84] The result was the National Security Act of 1947.[85] It created the "National Military Establishment" which was placed over the War and Navy Departments. It also created the Secretary of Defense to head the Establishment. However, the Secretary was given little power. The secretaries of the separate service departments kept their power and retained their cabinet seats.[86] They were even made members of the newly formed National Security Council and, thus, were not truly subordinated to the Secretary of Defense.[87] In the end, instead of unifying

[64] U.S. CONST. art. I, § 8, cl. 1.

[65] *Id.* art. I, § 8, cl. 10.

[66] *Id.* art. I, § 8, cl. 11.

[67] *Id.*

[68] *Id.* art. I, § 8, cl. 12.

[69] *Id.* art. I, § 8, cl. 13.

[70] *Id.* art. I, § 8, cl. 14.

[71] *Id.* art. I, § 8, cl. 15.

[72] *Id.* art. I, § 8, cl. 16.

[73] *Id.* art. I, § 8, cl. 18.

[74] THE FEDERALIST NO. 24 (Alexander Hamilton).

[75] KURT CAMPBELL & MICHAEL E O'HANLON, HARD POWER: THE NEW POLITICS OF NATIONAL SECURITY 7 (2006) (defining traditional hard power as "the application of military power to meet national ends.").

[76] This success in preventing coup d'états led Samuel Huntington to say in 1957, "[t]he problem in the modern state is not armed revolt but the relation of the expert to the politician." HUNTINGTON, *supra* note 47, at 20.

[77] Goldwater-Nichols Defense Reorganization Act of 1986, Pub. L. No. 99-43, 100 Stat. 992 [hereinafter Goldwater-Nichols Act].

[78] James R. Locher, III, *Taking Stock of Goldwater-Nichols*, JOINT FORCES Q., Autumn 1996, at 10.

[79] James R. Locher, III, *Has it Worked? The Goldwater-Nichols Reorganization Act*, 14 NAVAL WAR C. REV. 96 (2001).

[80] Locher, *supra* note 79, at 97.

[81] *Id.*; Dr. Charles A. Stevenson, *Underlying Assumptions of the National Security Act of 1947*, 48 JOINT FORCES Q. 129, 130 (2008).

[82] JAMES R. LOCHER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON 20–21, 24–25 (3d prtg. 2007); *see also* Stevenson, *supra* note 81, at 130; Locher, *supra* note 79, at 98.

[83] Locher, *supra* note 79, at 97–98.

[84] *Id.* at 100.

[85] National Security Act of 1947, Pub. L. No. 80-53, § 101, 61 Stat. 496 (amended 2007) [hereinafter National Security Act of 1947]. *See also* Stevenson, *supra* note 81, at 130.

[86] National Security Act of 1947, *supra* note 85.

[87] *Id.*

the military departments, the National Military Establishment merely added another layer of bureaucracy.[88]

In 1949, Congress passed legislation that created the DoD and the position of Chairman of the Joint Chiefs of Staff (JCS).[89] President Truman envisioned a principal military advisor to thwart JCS operation by consensus.[90] In addition, the separate military departments were subordinated to the DoD.[91] Their respective secretaries lost their cabinet seats and were removed from the National Security Council.[92]

In 1958, President Dwight D. Eisenhower revisited the organizational issues that he experienced while serving as the Supreme Allied Commander during WWII. Although the 1958 legislation moved the operational chain of command from the service secretaries to the unified commanders, "the organizational changes were not effectively implemented."[93]

The status remained essentially the same between 1958 and 1983. Multiple military failures during that period were blamed on these organizational problems, including Vietnam, Desert One, Beirut, and Grenada.[94] Two main concerns arose. First, the President, the Secretary of Defense, and Congress were not receiving informed and timely advice on defense matters from the military.[95] Second, the separate services were not organized properly to conduct successful joint operations.[96]

Prior to Goldwater-Nichols, the four services had tremendous power to shape defense operations and even national foreign policy.[97] If the President or the Secretary of Defense wanted to implement policy and organizational changes that the separate services did not agree with, the separate services would take various actions to frustrate and even thwart the executive intent.[98] Senior military officers would contact their allies in Congress to create legislative hurdles to the new proposals.[99] The services would also delay implementation of the executive proposals at every step of the process.[100] Thus, there was an imbalance of power between the three parties: the executive was weak to the point that it was having trouble operating as the constitution prescribed; the military had grown too powerful as a result of personal alliances to individual members of Congress; and Congress had increased its power by forming individual relationships with senior military officials.

Goldwater-Nichols addressed this imbalance between the military and civilian control of the military. Ultimately, Congress organized the military in such a way as to give the Secretary of Defense greater control over the four services under a more unified military. The Act also ensured that both Congress and the executive received timelier and higher quality advice from the military.[101]

### *c. The Goldwater-Nichols Defense Reorganization Act of 1986.*[102]

In 1986, after four years of effort, Congress passed the Goldwater-Nichols Act of 1986. Congress's stated intent with the Goldwater-Nichols Act was:

> (1) To reorganize the Department of Defense and strengthen civilian authority in the Department;
>
> (2) To improve the military advice provided to the President, National Security Council, and the Secretary of Defense;

[88] Stevenson, *supra* note 81, at 130; *see also* Locher, *supra* note 79, at 98.

[89] Locher, *supra* note 79, at 98.

[90] *Id.* at 101.

[91] *Id.*

[92] *Id.*

[93] According to James Locher,

> The 1958 legislation removed the service secretaries and chiefs from the operational chain of command, in order to strengthen civilian control, as Eisenhower wished. It also gave the unified commanders full operational command of assigned forces. However, those provisions were not effectively implemented. The military departments retained a de facto role in the operational chain of command and never complied with the provision strengthening the unified commanders.

*Id.* at 101.

[94] LOCHER, *supra* note 82, at 218, 45–46, and 127–29 (discussing Vietnam, Desert One, Beirut, and Grenada, respectively); Locher, *supra* note 79, at 99.

[95] LOCHER, *supra* note 82, at 79–80, 325.

[96] *Id.* at 325.

[97] Locher, *supra* note 79, at 103.

[98] *Id.*; *see also* LOCHER, *supra* note 82, at 15.

[99] Locher, *supra* note 79, at 106; *see also* LOCHER, *supra* note 82, at 15–16.

[100] Locher, *supra* note 79, at 99, 103; *see generally* LOCHER, *supra* note 82, at 15–31.

[101] Goldwater-Nichols Act, *supra* note 77; *see also* Locher, *supra* note 79, at 99.

[102] This is an extremely abbreviated synopsis of one of the most important pieces of defense legislation in our country's history. The purpose of this article is not to review the Goldwater-Nichols Act, however. I cover it only to address the balance (or imbalance) of power issues between the legislature, executive, and the military. Throughout this section, I refer simply to "Congress." This is a colossal generalization that does not do justice to the principles, such as Senators Goldwater and Nunn and Congressman Nichols who initiated, worked on, debated, and ultimately moved the Act through Congress. Nor does it do justice to those who opposed the Act every step of the way, such as Secretary John Warner, in such a professional manner as to make this Act one of the most thoroughly and professionally debated Acts in our country. For an extremely detailed account of the creation of the Goldwater-Nichols Act, see LOCHER, *supra* note 82.

> (3) To place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;
>
> (4) To ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with his responsibility of those commanders for the accomplishment of missions assigned to those commands;
>
> (5) To increase attention to the formulation of strategy and contingency planning;
>
> (6) To provide for more efficient use of defense resources;
>
> (7) To improve joint officer management policies; and
>
> (8) Otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense.[103]

In strengthening the Executive's control over the military, Congress ultimately forfeited much of the power it had gained and exerted since 1947. Congress realized the military was too powerful and independent and that the Executive could not effectively control it.[104] This independence, from the Executive and between the separate services, detrimentally affected military operations and detracted from the advice given to Congress and the executive.

The Goldwater-Nichols Act has seen mixed success. With regard to the areas that were most pressing to its namesake, the stature of the Secretary of Defense,[105] the quality of advice to the President and Secretary of Defense,[106] joint officer management,[107] and, most importantly, military effectiveness,[108] the act has been a success as these areas have seen marked improvements. However, strategy formulation,[109] efficient use of resources,[110] and defense management and administration[111] remain troubled and little improved, if at all.

[103] Goldwater-Nichols Act, *supra* note 77.

[104] *Id.*; Locher, *supra* note 79, 101.

[105] Locher, *supra* note 79, at 109.

[106] *Id.* at 109–10.

[107] *Id.* at 112.

[108] *Id.* at 111.

[109] *Id.*

[110] *Id.*

[111] *Id*. at 112.

D. Summation—The Judge Advocate's Client

The unitary executive theory has gained prominence of late with its proponents in the second Bush administration.[112] According to Professor Miller and other proponents of this theory,[113] the Government attorney is situated within a constitutional framework in which the executive branch as a whole is treated as a single department. Proponents of the unified executive theory believe that all of the executive power derived from the Constitution rests in the President.[114] Under this theory, an agency attorney, as an officer and employee of an executive department, reports ultimately to the President. Accordingly, "the attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head."[115]

However, the unified executive theory does not take into account the bifurcated structure of civil-military relations as mandated by the Constitution. Because of this constitutional "balance of power over the military," some scholars have argued the military is "more properly understood as a national agency with controls explicitly divided between the executive and legislative branches."[116] They assert that "the military is not under the control of the executive branch in the same way as other executive agencies"[117] and that "[m]aintaining this deliberate and carefully crafted balance of authority is vital to the effective functioning of the military and, more importantly, to the security of the nation.[118] In short, the President does not have exclusive control over matters related to the military.[119]

The purpose of this article is not to enter the debate on the executive power and civil-military relations and propose a definitive solution. An understanding of the nature of the military is essential, however, for the JA to understand what his role and responsibilities are and with whom his loyalties lie.

No matter how you classify the military, it is unique among federal entities. No executive agency is mentioned in the Constitution, and understandably so; their existence

[112] *See* Dana Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, WASH. POST, Oct. 11, 2004, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A22665-2004Oct10.html; *Frontline: Cheney's Law* (PBS television broadcast Oct. 16, 2007), transcripts and video *available at* http://www.pbs.org/wgbh/pages/front line/cheney/etc/script. html. *See also* Sulmasy & Yoo, *supra* note 17.

[113] *See generally* Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1077 (1997); Sulmasy & Yoo, *supra* note 17.

[114] U.S. CONST. art II, § 1.

[115] Miller, *supra* note 22, at 1298.

[116] Jensen & Corn, *supra* note 47, at 560.

[117] *Id.* at 559.

[118] *Id.* at 560.

[119] *See* Hansen, *supra* note 47, at 627.

doesn't present a threat to a republican nation like that of the military. Nor are they as vital to preserving it. This is the client of the JA.

As a result of the civilian controls, the JA must always understand that, along with his duties and responsibilities as an attorney, he also has the duty of military obedience. It is for this reason that the agency model is the most appropriate model for client representation in the military.

## IV. The Judge Advocate's Place in the National Security Legal Apparatus

Along with JAs, there are multiple other legal organizations that provide legal advice to our country relating to military and national security matters.

### A. Office of Legal Counsel

The Office of Legal Counsel (OLC) is a subdivision of the U.S. Justice Department comprised of twenty-four attorneys that "provides authoritative legal advice to the President and all the Executive Branch agencies."[120] The Attorney General was created by The Judiciary Act of 1789 and is statutorily required to give his advice and opinions on questions of law when required by the President.[121] The Attorney General must also render his legal opinion when required by a head of an executive department.[122]

The Attorney General has delegated much of his authority to render legal opinions to OLC.[123] The Office of Legal Counsel "drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department."[124] The Office of Legal Counsel opinions are published as opinions of the Attorney General.[125]

The President and the various agencies of the Executive Branch rely on OLC opinions when creating policy decisions.[126] With respect to the military, subsection (3) of 28 C.F.R. § 25 specifically gives OLC the responsibility of "advising with respect to the legal aspects of treaties and other international agreements."[127]

The OLC is headed by an Assistant Attorney General. Both the Attorney General and Assistant Attorney General in charge of OLC are appointed by the President and confirmed by the Senate.[128] The "[Office of Legal Counsel] lawyers are generally elite lawyers who have completed prestigious clerkships and have experience in federal statutory and constitutional analysis."[129] The Office of Legal Counsel opinions are treated as binding throughout the Executive Branch and can only be overturned by the President or the Attorney General."[130]

The OLC's unique mission puts it in somewhat of an ethical dilemma. There is a need for it to be balanced and objective in its opinions, sometimes quasi-judicial. Scholars have differing views on the degree to which OLC should be quasi-judicial, on the one hand, or an advocate for the President's position(s), on the other.[131] Recent writings on the topic by prior OLC attorneys indicate that there is an institutional norm in favor of independence and accuracy.[132] As Tung Yin points out, though, these are internal norms, not constitutional directives.[133]

### B. Department of Defense General Counsel

The position of the General Counsel (GC) of the DoD was established in 1953 by the Reorganization Plan No. 6 of 1953 and by Defense Directive 5145.1.[134] The DoD/GC is statutorily DoD's "chief legal officer."[135] Among other

---

[120] U.S. Dep't of Justice, Office of Legal Counsel, About OLC (n.d.), *at* http://www.justice;.gov/olc/.

[121] 28 U.S.C. § 511 (2006); *see also* An Act Created to Establish the Judicial Branch of the United States § 35, 1 Stat. 73 (1789) (also known as "The Judiciary Act of 1789") ("And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to . . . give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.")

[122] 28 U.S.C. § 512 (2006).

[123] 28 C.F.R. § 0.25 (2006).

[124] U.S. Dep't of Justice, Office of Legal Counsel, About OLC (n.d.), at http://www.justice.gov/olc/.

[125] 28 C.F.R. § 0.25 (2008). *See also* Yin, *supra* note 1, at 476.

[126] Turner, *supra* note 9, at 41.

[127] 28 C.F.R. § 25(3) (2006).

[128] 10 U.S.C. §§ 503, 506 (2006).

[129] Yin, *supra* note 1, at 500.

[130] Harris, *supra* note 1, at 423. *See also* Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000); Yin, *supra* note 1, at 501.

[131] For a comprehensive discussion on OLC attorneys, see Harris, *supra* note 1, at 423.

[132] *See* Memorandum from the U.S. Department of Justice, Office of Legal Counsel to Attorneys of the Office (16 May 2005) (providing the best practices for Office of Legal Counsel Opinions). *See also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 33 (2007); Yin, *supra* note 1, at 487.

[133] Yin, *supra* note 1, at 487.

[134] U.S. Dep't of Def., Office of the General Counsel, http://www.dod.mil/dodgc/.

[135] 10 U.S.C. § 140 (2006).

duties, DoD/GC is responsible for "provid[ing] advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense" and "establish[ing] DoD policy on general legal issues, determin[ing] the DoD positions on specific legal problems, and resolv[ing] disagreements within the DoD on such matters."[136]

Department of Defense regulations assign primacy to the DoD/GC opinions when there is a conflict with another DoD attorney.[137] This primacy does not include executive authority over the respective services' Judge Advocates General or their JAGC.[138] The DoD/GC is a presidentially-appointed position.[139]

C. Military Department General Counsel

The respective military departments all have general counsel as well.[140] The Department of the Army General Counsel (DA/GC) is the "chief lawyer of the Army ultimately responsible for determining the Army's position on any legal question."[141] The DA/GC serves as legal counsel to the Secretary of the Army, Under Secretary, five Assistant Secretaries, and other members of the Army Secretariat.[142] According to DA, the General Counsel also exercises technical supervision over the Office of The Judge Advocate General, the Office of the Command Counsel, Army Materiel Command, and the Office of the Chief Counsel, Corps of Engineers.[143] The military departments' GC are presidentially-appointed positions.[144]

Along with the JAGC of the respective services, these executive branch legal organizations help to advise the President and DoD on military and national security matters. They serve complimentary roles and generally maintain excellent relations with one another. These relationships were stressed in the aftermath of the terrorist attacks of 9/11.[145] A re-examination of the basic foundations of the JA's role, and his relationships to the aforementioned executive branch legal organizations, is now in order.

V. The Judge Advocate's Duties to his Client

Now cognizant of who JAs are, the other executive legal organizations that advise the executive on national security and military issues, and the unique nature of the U.S. military as a federal entity, we must understand what the JA's duties are to his client, the Army.

Judge advocates, like all attorneys, must conform their practice of law to their individual state bar's standards of professional conduct.[146] Unlike private attorneys, however, JAs must conduct themselves within the parameters of the professional rules of conduct of their respective branch of service as well.[147] Most of the time, these rules are the same; the respective services have modeled their rules of professional conduct after the ABA's *Model Rules*. A legal analytical framework can be derived from these sources.

The American Bar Association first promulgated its *Model Rules of Professional Conduct* in 1983 in its pursuit of assuring the highest standards of professional competence and ethical conduct.[148] Rule 1.2 addresses the scope of an attorney's representation. While encouraging candor when advising a client, Rule 1.2(d) also imposes limits on the advice that an attorney may provide.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[149]

Thus, while the attorney should be frank and honest with the client, he cannot be so candid as to advise the client how to break the law.[150]

Model Rule 2.1 addresses an attorney's role as an advisor to a client.[151] It provides, "[i]n representing a client,

[136] U.S. Dep't of Def., Office of the General Counsel, http://www.dod.mil/dodgc/. *See also* Peretz, *supra* note 24, at 51.

[137] *See* U.S. DEP'T OF DEF., DIR. 5145.01, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (2 May 2001).

[138] Turner, *supra* note 9, at 41.

[139] 10 U.S.C. § 140 (2006).

[140] *See generally id.* § 3019 (Army); *id.* § 5019 (Navy); and *id.* § 8019 (Air Force).

[141] *Id.* § 3019. Office of the Army General Counsel, http://www.hqda.army.mil/ogc/.

[142] Office of the Army General Counsel, http://www.hqda.army.mil/ogc/.

[143] *Id.*

[144] 10 U.S.C. §§ 3019, 5019, 8019 (2006).

[145] *See supra* Part I & note 4.

[146] AR 27-26, *supra* note 7, r. 8.5(e) & (f).

[147] *Id.*

[148] *Preface to* MODEL RULES, *supra* note 7.

[149] *Id.* at R. 1.2.

[150] *Id.*

[151] *See id.* Of note, forty-four state bars, including that of the District of Columbia, have adopted Model Rule 2.1 verbatim. Of the states that did not: Georgia and Texas have a slightly modified version of Rule 2.1; California has a rule regarding an attorney's advisory capacity which uses entirely different language; and Maine, Minnesota, New York, and North Dakota do not have a discernable rule in place regarding an attorneys advisory capacity. This does not mean, however, that these seven state bars do not interpret or regulate the conduct of their attorneys in the same substantive way as the other forty-four states. *See generally* Cornell

a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but other considerations such as moral, economic, social, and political factors, which may be relevant to the client's situation."[152]

The comments to Rule 2.1 are equally instructive. They stress the need for honest advice and, "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[153]

The respective services have regulations that guide the professional conduct of their JAs.[154] Their rules of professional conduct have been modeled after the ABA *Model Rules*.[155] All of the services have adopted Rule 2.1. Of interest, the Navy has slightly changed the emphasis on the attorneys conduct by stating that, "[in] rendering advice, a lawyer *should* refer not only to law but other considerations . . . " The Army and Air Force kept the model language, " . . . a lawyer *may* refer to . . . "[156] While not making it a mandatory duty, the Navy has gone a step further in guiding its attorneys by making it the default position to advise its clients about other considerations instead of it being an option as it is under Rule 2.1 of the ABA, Army, and Air Force's rules of professional conduct.[157]

These rules seem straightforward enough, but what do "independent professional judgment" and "candid advice" really mean?

A. Independent Professional Judgment and Candid Advice

"Candid" advice is self-explanatory: "[a] client is entitled to straight forward advice expressing the lawyer's honest assessment."[158] A JA should not be "deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[159] This duty is limited only by the JA's endeavor to "sustain the client's morale" and phrase the advice in as "acceptable form as honesty permits."[160]

Independent professional judgment, however, is more nuanced. Independent means independence at multiple levels: independent from the executive branch and independent from each level of the technical chain of command. For the JA, independence from the executive branch must include the ability to independently interpret all legal matters for the commander and not be bound by any executive branch interpretations.

The executive by its very nature is a political entity. The President is elected by the populace. He has the authority to nominate[161] his agency heads and fire them at will.[162] The Attorney General, DoD/GC, and DA/GC are all politically appointed positions and serve at the pleasure of the President.[163] The Office of Legal Counsel, while traditionally thought to be an objective arbiter of the law, is headed by a presidentially-selected attorney and can be politicized.[164]

The military's legal advice, on the other hand, must be free from political bias. Advice based on politicized opinions will ultimately affect the military's ability to give quality advice and information to Congress and the executive. If the military is bound by executive legal opinions (such as from OLC, DoD/GC, or DA/GC), Congress' ability to be well informed by the military will be hampered.[165]

This in no way suggests that the military has the authority to question the executive's foreign policy decisions, as those decisions are strictly under the sole purview of the executive.[166] If the executive's orders confine themselves to the law, the military must execute those orders, and the underlying policies, without question.[167] This military obedience is central to civilian

University Law School-Legal Information Institute, American Legal Ethics Library, http://www.law.cornell.edu/ethics/ listing.html.

[152] *Id.*

[153] MODEL RULES, *supra* note 7, R. 2.1 (2009).

[154] *See* AR 27-26, *supra* note 7, r. 1.13; USN RPC, *supra* note 7, r. 1.13; USAF RPC, *supra* note 7, r. 1.13.

[155] Slight changes were made where necessary due to the unique nature of military service. *See generally* RULES OF PROFESSIONAL CONDUCT, *supra* note 7 (providing references to the respective services' Rules of Professional Conduct).

[156] *See* USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1; AR 27-26, *supra* note 7, r. 2.1; MODEL RULES, *supra* note 7, R. 2.1.

[157] *See* USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1; AR 27-26, *supra* note 7, r. 2.1; MODEL RULES, *supra* note 7, R. 2.1.

[158] AR 27-26, *supra* note 7, r. 2.1 cmt.

[159] *Id.*

[160] *Id.*

[161] While the President can nominate people he chooses for office, he can appoint officers of the United States only with the "Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2.

[162] 3 U.S.C. § 301 (2006). *See also* Myers v. United States, 272 U.S. 52, 119 (1926).

[163] *See supra* notes 128, 137, 142, and accompanying text.

[164] As we've seen with post 9/11 opinions by Yoo and Bybee. *See generally* Harris, *supra* note 1; Op. Off. Legal Counsel, *Best Practices for OLC* Opinions (May 16, 2005); Memorandum for the Files, Office of Legal Counsel, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009).

[165] Jensen & Corn, *supra* note 47, at 571–76.

[166] United States v. Curtiss-Wright Exp. Corp. et al., 299 U.S. 304, 319–21 (1936).

[167] However, an executive's policy may be collaterally affected to the extent that it translates into unlawful orders given to the military, orders that cannot be followed.

control over the military and the democratic ideals we cherish.

*1. Independent Advice Supported by Congressional Action*

Over the past twenty-five years, the executive has tried on numerous occasions to subordinate the uniformed JAGC to civilian legal offices in the executive. Congress has explicitly stopped those attempts each time.

During the debates that ultimately led to the Goldwater-Nichols Act, Congress considered combining the General Counsels and the JAGC but expressly rejected the idea.[168] Congress noted with regard to the Navy that it saw a distinct role of the Navy General Counsel, "as a key assistant to the Secretary of the Navy particularly on matters directly related to civilian control of the military."[169]

On 3 March 1992, the Deputy Secretary of Defense designated the DoD/GC as the "Chief Legal Officer" of the respective military departments and placed the DoD/GC in a hierarchal position superior to the uniformed JAs.[170] During the Senate confirmation hearings of David Addington as the nominee for the DoD/GC, Congress showed its concern about this arrangement and asked pointed questions about the wisdom of the 3 March designation.[171] In response to Congress's inquiries (and implied warning), DoD halted its attempt at consolidation.[172]

The executive again attempted to subordinate the JAGC to their respective military department GCs during the post 9/11 debates regarding detainees and interrogation techniques.[173] In response, Congress added subsection (e) to 10 U.S.C. § 3037 which statutorily guaranteed JA independence from DoD interference.[174] Subsection (e) states that no officer or employee of the DoD may interfere with

> (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or
>
> (2) the ability of judge advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.[175]

Absent from this section are officers and employees of other executive agencies. This would include OLC.

*2. Independent from the Executive Branch*

A JA's ability to give candid advice independent from executive branch attorneys is a sensitive subject that strikes to the core of civil-military relations. For the JA's duty to give independent advice, free from executive interference, stems from the military's relationship with the executive and legislative branches of government. Thus, the JA's need for independence in professional (i.e. legal) matters must be critically reviewed and analyzed, paying particular attention to his military duty of obedience to civilian controls. The two are compatible but must be understood by the JA and executive attorneys alike to better facilitate relations and advice to the government on national security and military matters.

Any discussion on the topic of civil-military relations should start with the influential scholar, Samuel Huntington.[176] According to Huntington, "the principal focus of civil-military relations is the relation of the officer corps to the state"[177] for it is at this relationship where the functional and social pressures of national defense come to a head. Thus, Huntington states the "supreme military virtue is military obedience."[178]

Military obedience, however, conflicts with nonmilitary values at certain points.[179] These conflicts define the

---

[168] Turner, *supra* note 9, at 41; *see generally* Kurt A. Johnson, *Military Department General Counsel as "Chief Legal Officers": Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1 (1993).

[169] Johnson, *supra* note 168, at 2 (quoting S. REP. No. 280, 99th Cong., 2d Sess. 63 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2168, 2231).

[170] *Id.*

[171] *Id.* at 3; Turner, *supra* note 9, at 41.

[172] Johnson, *supra* note 168, at 3; Turner, *supra* note 9, at 41.

[173] Turner, *supra* note 9, at 40.

[174] 10 U.S.C. § 3037(e) (2006). An identical provision was added to the Navy, Air Force, and Marine Corps TJAG authorizing statutes as well. *See id.* §§ 5148(e), 8037(f) and 5046(c).

[175] *Id.* § 3037(e).

[176] Samuel Huntington is generally held to be one of the preeminent minds on modern civil-military relations. His 1957 book, *The Soldier and the State: The Theory and Politics of Civil-Military Relations, supra* note 47, along with Samuel E. Finer's *The Man on Horseback: The Role of the Military in Politics* (New York: Praeger 1962) and Morris Janowitz's *The Professional Soldier: A Social and Political Portrait* (New York: Free Press 1971), are considered to be the seminal works on modern civil-military relations. *See* Peter D. Feaver, *An American Crisis in Civilian Control and Civil-Military Relations?*, 17 THE TOCQUEVILLE REV. 1, 159 (1996). MICHAEL C. DESCH, CIVILIAN CONTROL OF THE MILITARY: THE CHANGING SECURITY ENVIRONMENT (Johns Hopkins University Press 1999).

[177] HUNTINGTON, *supra* note 47, at 3.

[178] *Id.* at 76. *See supra* Part III.B (discussing military obedience).

[179] HUNTINGTON, *supra* note 47, at 72–79.

parameters of military obedience. According to Huntington, there are four conflicts.[180]

The first conflict is between military obedience and political wisdom.[181] In this conflict, a military commander may question the political wisdom of an order to use military force given by the statesman. The military commander is the expert of military action, planning, training, and equipping and in the use and movement of those forces engaged in combat. The statesman, on the other hand, is the expert in politics. In this situation, the military commander must defer to the statesman or politician and his realm of expertise.[182]

The second conflict Huntington describes is between military obedience and military competence.[183] In this conflict, actions by the statesman interfere with the military's ability to succeed in their mission.[184] Unlike the conflict with political wisdom, the expert in this conflict is the military commander.[185] The politician must yield to the commander's expertise in the realm of military competence.[186]

The third conflict is between military obedience and law.[187] When dealing with this conflict, the decision-making process becomes complicated. An example would be when the statesman gives an order to the military commander to invade Iran and to kill all the women and children in three towns near the invasion point. This order in fact contains two directives. First, there is the order to invade Iran. This decision to use armed forces is purely a political decision. Therefore, the military commander does not have the discretion to review or question it. He must follow this order.

The second order is the order to kill all women and children in three towns near the invasion point. This order is not a political decision; it involves military competence, i.e. how to implement the first order to invade Iran. In this realm, the military commander is the expert.[188] If the statesman gives this order knowing full well that it is illegal, the military commander does not have to follow that order as it is outside the constitutional authority given the statesman to command the military.

What happens however, when the statesman feels that the order is legal and the military commander questions the legality of the order? In this situation neither the statesman nor the military commander is the expert.[189] If there is no third party to settle the dispute, such as a judiciary, Huntington states that the military commander "can only study the law and arrive at his own decision."[190]

The final conflict is between military obedience and basic morality.[191] In this conflict, the statesman gives orders to the military commander that bring into question issues of human rights and basic morality.[192] In this realm, neither the statesman nor the military commander has expertise over one another.[193] Huntington points out that the statesman may disregard his own conscience for raison d'état, but questions whether that gives the statesman the right to make that choice for the military commander by subordinating him to his decision. If the order is clearly illegal, as with the order to kill the innocent women and children used above, it is outside the statesman's authority to issue. What happens when the order's legality is not clearly discernible?[194]

In this situation, the military commander has the same decision to make as the statesman: his conscience versus the good of the state. Thus, the military commander must decide whether his duty of military obedience as a Soldier must make him do something that he considers contrary to human morality.[195] Ultimately, Huntington reasons that the military commander must rely on his own judgment, and those he asks for counsel, to figure out whether these orders violate basic ideas of morality.[196]

It is the third and fourth conflicts, those dealing with legality and morality, which require independent professional judgment from the JA. The military commander must determine, from his review of the applicable law, whether the statesman's order is legal. As discussed earlier, the JA's client is the Army through its authorized officials; its military commanders. Thus, the JA has an attorney-client relationship with his respective military commander so long as their dealings are official business. If the military commander has a question about the legality of an order, he must be able to ask his attorney and trust that his JA will not only act in his best interests but give him honest, candid advice.

---

[180] *Id.* at 74–79.

[181] *Id.* at 76.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 77.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *See id.* at 76.

[189] *Id.* at 78.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

Another example for analysis would be a period of civil unrest in the United States. A disagreement between the President and Congress has created a national security crisis. The President, wanting to protect the country, asks OLC for an opinion on his possible legal options to restore normalcy. The Office of Legal Counsel issues an opinion that says, among other things, that the President can legally order the military to disband Congress. Relying on OLC's legal opinion, the President orders the Secretary of Defense to order the military to disband Congress. After receiving this unprecedented order from the Secretary of Defense, the Army Chief of Staff turns to the Judge Advocate General and asks if it's legal. What is the Judge Advocate General's response?

Obviously, this is an unconstitutional use of executive power. As a military officer sworn to protect the Constitution against all enemies, foreign and domestic, the Chief of Staff could not follow this order and maintain his oath of office.[197]

But, practically, how should the Judge Advocate General respond? If JAs are not allowed to provide independent advice, what is the correct response? Can, "illegal order–do not follow," be the legal answer? Will the answer be in the best interest of the client? Will the Judge Advocate General be forced to violate the professional rules of conduct of both his state bar and Army Regulation?

Proponents of the Unitary Executive theory say that there is only one executive power and that the JA's advice must ultimately represent the President's interest.[198] Thus, as an attorney for the executive, the Judge Advocate General would have to follow the opinion of OLC because OLC interprets the law for the executive branch and is generally held to be binding on all executive branch agencies.[199] The OLC has specifically opined that the military can legally disband Congress. Therefore, the orders from the Secretary of Defense would be legal. The Judge Advocate General could advise the Chief of Staff on other considerations in accordance with Rule 2.1[200] but his legal opinion would ultimately be in conflict with his duty to his client.

This hypothetical is extreme, and purposely so, to facilitate the discussion, but there are situations in which this type of issue can challenge a JA in the field today. And, as previously discussed, these situations are now routinely happening in deployed environments at the brigade level.

As the following sections will show, following illegal or immoral orders from the executive, or even interpreting them to facilitate the immoral policy, can result in personal criminal liability for both the military commander and the JA.

### *3. Independent Because Military Commander Is Personally Liable for his Actions*

A JA's advice must also be independent to assist the individual commanders he advises. Military commanders can be found personally liable for committing illegal acts under international law. It is not a defense that they were following executive orders or acting in furthering of their official position.[201] Thus, military commanders should know if they are being ordered to do something illegal. More specifically, it is the JA's duty to tell his client, the commander, that he is about to do something illegal.

Following the conclusion of World War II, the Allies met in London[202] to agree on a course of action "for the just and prompt trial and punishment of the major war criminals of the European Axis."[203] From those meetings, the Allies created the Constitution of the International Military Tribunal.[204] Article 7 of the London Charter stated that a Defendant was personally liable for his conduct regardless if he was acting on behalf of the state at the time.[205] In addition, Article 8 specifically states that, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility."[206] The subsequent judicial decisions at Nuremburg followed Article 8 of the London charter.

Take our hypothetical again where the statesman, in this case the President, ordered the military commander to invade Iran and kill all the women and children in three towns near the invasion point. If the commander follows this order and kills all of the women and children in the identified towns, he could be personally tried and found criminally liable for his actions. Moreover, under the precedent set at Nuremburg, the military commander could not use as a defense the fact that he was given the orders to

---

[197] *See* 10 U.S.C. § 3331 (2006).

[198] *See* Miller, *supra* note 22, at 1298.

[199] While OLC's binding nature is established within the executive branch, it has never been addressed by the federal courts.

[200] *See supra* note 7.

[201] *See infra* note 206 and accompanying text.

[202] Nuremburg London Agreement, Aug. 8, 1945. Agreement made by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.

[203] The Constitution of the International Military Tribunal art. 1, Aug. 8 1945 [hereinafter The London Charter] (also known as the London Charter of the International Military Tribunals.).

[204] *Id.*

[205] *Id.* art. 7 ("Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

[206] *Id.* art. 1 (" . . . but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.")

kill the women and children by the statesman, his superior in the chain of command.

*4. Independent Because the Judge Advocate Is Personally Liable for His Professional Conduct*

A JA's advice must also be independent because he is personally subject to criminal liability for his own professional conduct, both internationally and domestically.

*a. Under International Law*

Internationally, there are multiple examples of attorneys being convicted of crimes stemming from their legal duties. Precedents from the post World War II prosecutions of Nazis shows that attorneys can be held liable as accomplices when their actions directly impacted "how their clients' crimes were perpetrated."[207]

Franz Schlegelberger, for example, was tried by the allies in post World War II for his role as the German acting Minister of Justice. Herr Schlegelberger was found "guilty of instituting and supporting procedures for the wholesale persecution of the Jews and the Poles."[208] The military tribunal further recorded that his "attitude towards atrocities committed by the police must be inferred from his conduct," noting he quashed the proceedings of at least one policemen convicted of brutality even after the post trial proceedings held that revision proceedings were unfounded. [209] Even though Herr Schlegelberger ultimately resigned from his position, the tribunal found that, "Schlegelberger . . . took over the dirty work which the leaders of the state demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of the occupied countries, and wiping out political opposition at home."[210]

Herbert Klemm was another Nazi attorney convicted by the military tribunal. Among other things, as a prosecutor in the Ministry of Justice dealing with acts against the state and Nazi party, Herr Klemm ordered that criminal procedures dealing with more severe interrogations by the Gestapo were to be sent to him directly instead of being adjudicated in the normal criminal forums.[211] The result was that the state convicted many people based upon confessions illegally obtained through severe torture by the Gestapo that most likely would have been at least questioned by the Ministry of Justice. Regarding this action, the military tribunal stated:

> Certainly it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo, in October of 1940, was placed beyond the jurisdiction of law.[212]

Von Ammon, another German attorney convicted after the war, became a Nazi in 1937 and worked in the Ministry of Justice.[213] In 1942, working as a Ministerial Counselor in the Ministry of Justice, Von Ammon was in charge of the Ministry section that handled Nacht und Nebl cases from the occupied territories.[214] In 1944, Von Ammon made a report which stated that the death sentence averaged one in three days for the entire period that the Nacht und Nebl laws were in existence in the occupied territories.[215] While he did not enact any of the legislation, Von Ammon knowingly worked within the system and was directly responsible for the death sentences of numerous Jews and Poles. Von Ammon was found guilty of war crimes and crimes against humanity.[216]

---

[207] *See* Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 359 (2007). *See also* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1083 (1951) [hereinafter NUERNBERG MILITARY TRIBUNALS] (record of ten German attorneys tried by military tribunal).

[208] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1083. *See also* Markovic, *supra* note 207, at 359.

[209] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1085–86. In other words, Herr Schlegelberger waived convictions of brutality against policemen even though the convictions stood up to appellate scrutiny.

[210] *Id.* at 1086.

[211] *Id.* at 1088.

[212] *Id.* at 1093.

[213] *Id.* at 1033.

[214] "Nacht und Nebl" translates from German into "Night and Fog," referring to prisoners from occupied German territories disappearing into the night and fog. On 7 December 1941, Germany introduced the Nacht und Nebl laws for the Occupied German territories in order to fight those resisting Nazi rule and keep the local populace subdued. On 12 December 1941, Keitel issued a directive which explained Hitler's orders: "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminals do not know the fate of the criminal." He further expanded on this principle in a February 1942 letter stating that any prisoners not executed within eight days were "to be transported to Germany secretly, and further treatment of the offenders will take place here; these measures will have a deterrent effect because—A. The prisoners will vanish without a trace. B. No information may be given as to their whereabouts or their fate." The History Place—The Night and Fog Decree,

http://www.historyplace.com/worldwar2/timeline/nacht.htm (last visited Mar. 9, 2011).

[215] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1033.

[216] *Id.* at 1034.

Joseph Alstoetter was another attorney convicted during the Nuernberg[217] tribunals. Joseph Alstoetter joined the Nazi party and Schutzstaffel (SS) in 1937. Alstoetter had no hand in the enacting of the Nazi's discriminatory laws; he mainly interpreted the laws and procedures passed by the Nazi party. The tribunal noted that Alstoetter was not aware of the ultimate mass murder but that he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted its insignia, its rank, its honors, and its contacts with the high figures of the Nazi regime . . . For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.[218]

Because of his work and general membership in the SS, Alstoetter was convicted by the tribunal.[219]

The above examples are reason for pause for all attorneys as the precedents set at Nuernberg make no distinction between civilian or uniformed attorneys.[220] While some of the German attorneys played major roles in the Nazi war crimes, such as drafting discriminatory laws and supervising Government agencies in the implementation of criminal policies, others, such as Alstoetter, essentially followed and interpreted domestic law.[221] Under this precedent, a JA would most assuredly subject himself to criminal liability for advising a military commander that an order was legal because OLC, or any executive legal organization for that matter, had previously opined that it was legal.

*b. Under Domestic Law*

Unlike his civilian counterpart, a JA is also criminally liable for his professional conduct under domestic law. As a military officer, a JA is subject to the UCMJ.[222] Under Article 92 of the UCMJ, a JA can be charged with dereliction of duty if he had certain duties; knew or reasonably should have known of those duties; and was willfully, or through neglect or culpable inefficiency derelict in the performance of those duties.[223]

Judge advocates have been court-martialed in the past for taking money from clients in a legal assistance capacity.[224] Recently, Captain (CPT) Randy W. Stone, a U.S. Marine JA, was charged with multiple specifications of dereliction of duty in violation of Article 92, UCMJ[225] for his conduct relating to the Haditha incident.[226] At the time of the incident, CPT Stone was the battalion JA of the unit that purportedly committed the alleged acts. When the reports came in about the shooting, CPT Stone failed to act in his legal capacity or otherwise. The command contended that CPT Stone, as the battalion JA, had a duty to report any alleged law of war violation to his higher headquarters[227] and had a duty to ensure that a thorough investigation was initiated into the alleged law of war violation.[228]

---

[217] Also referred to as "Nuremberg" or "Nürnberg." Nürnberg is the German spelling. Nuremberg is the Americanized spelling. I use "Nuernberg," the least used out of the three, in order to be parallel with the title on the record of the military tribunals.

[218] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1176–77. *See also* Markovic, *supra* note 207, at 360.

[219] NUERNBERG MILITARY TRIBUNALS, *supra* note 207, at 1177.

[220] *See* Markovic, *supra* note 207, at 359. Markovic makes a persuasive case how John Yoo and Jay S. Bybee could be held criminally liable under international law for writing the memorandum entitled, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340(A)*, commonly referred to as the "Torture Memo." Both were civilian attorneys in the Office of Legal Counsel at the time they drafted the memo. On 29 July 2009, the Office of Professional Responsibility (OPR) issued its final report stemming from its five-year investigation into Mr. Yoo's and Bybee's professional conduct. The OPR concluded that Mr. Yoo and Bybee engaged in professional misconduct by failing to provide "thorough, candid, and objective" analysis in their memoranda related to interrogation techniques. Consistent with OPR procedures, OPR indicated its intent to refer to finding of misconduct to the disciplinary authorities of Mr. Yoo's and Bybee's state bars. On 5 January 2010, the U.S. Associate Deputy Attorney General office decided not to adopt OPR's finding of misconduct, finding rather that Yoo and Bybee did not commit unprofessional conduct, only exercised poor judgment. *See* U.S. House of Representatives, Committee on the Judiciary—DOJ Report on Bush Administration Interrogation Memos and Related Documents, http://judiciary.house.gov/issues_OPRReport.html.

[221] *See generally* NUERNBERG MILITARY TRIBUNALS, *supra* note 207.

[222] UCMJ art. 2 (2008).

[223] *Id.*

[224] *See, e.g.*, United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001). Appellant generally told his legal clients that he was not permitted to perform the needed legal service himself, but that he had a friend or relative who could provide the service. Appellant then usually obtained a retainer check for the friend or relative, which was to be returned after the legal work was completed. He would then forge the payee's signature and cash the check. Appellant sometimes asked for payment in cash and made numerous excuses to avoid giving a receipt.

[225] In December 2006, CPT Stone was charged with three specifications of violation of Article 92: one specification of violation of a general order and two specifications of dereliction of duty. U.S. Dep't of Def., DD Form 457, Investigating Officer's Report (Aug. 1984) [hereinafter DD Form 457] (on file with author).

[226] On 10 November 2005, U.S. Marines allegedly killed twenty-four Iraqi civilians living in three housing in Haditha, Iraq. The incident began when an IED struck a supply convoy. The explosion killed Lance Corporal Miguel Terrazas. In response, the Marines allegedly went from house to house, killing the civilians inside. The Marines originally reported that fifteen civilians died in the IED blast. Further investigation questioned the Marines original account. Ultimately, eight Marines were charged in connection with the incident. To date, six have had their charges dropped and one was acquitted. The sole Marine left facing charges is going to trial on 11 April 2011. *See* Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, *available at* http://www.time.com/ time/world/article/0,8599,1174649-2,00.html; Gillian Flaccus, *Conflicting Portraits Emerge of Accused Marine*, ASSOCIATED PRESS, Dec. 4, 2009, *available at* http://www.fox12idaho.com/Global/story.asp?S=11604248&nav=menu439_2; *see also* www,frankwuterich.com.

[227] All Marines have a duty to report possible law of war violations to their higher headquarters. *See* U.S. MARINE CORPS, ORDER 3300.4, LAW OF WAR PROGRAM (23 Oct. 2003).

[228] DD Form 457, *supra* note 225.

Ultimately, CPT Stone was not court-martialed. The Government dropped the charges against him after a pretrial investigation recommended that there were no reasonable grounds to believe that CPT Stone committed the charged offenses.[229] The charges, however, were essentially dismissed for a lack of evidence, not because there was a foundational or jurisdictional issue with charging an attorney for negligent or reckless professional conduct. Regardless of the outcome, the fact remains that a JA may be held criminally liable for his professional conduct under the UCMJ.

*5. Independent from Technical Chain of Command*

A JA's advice must also be independent from other JAs in his technical chain of command. While the constitutional reasons for independence are removed when dealing with a superior JA within the same service, the professional and ethical responsibilities remain the same. Whether the superior attorney is wearing a uniform or not is immaterial.

A commander's personal criminal liability under international law is not relieved just because the JA is receiving a legal opinion or review from a civilian executive attorney or a superior JA. Nor is the JA's own personal criminal liability under both international and domestic law changed.

This aspect of independent judgment is difficult for subordinate JAs as the superior JAs in their technical chain of command can have considerable influence over their professional career. The JAGC understands this dilemma and provides guidance for its attorneys. According to the Army's *Rules of Professional Conduct*, "[t]he supervisory JA is . . . primarily a staff officer, responsible to his or her commander, and is subject to his or her command just as any other command member. Technical guidance is designed only to make the supervisory JA a more effective staff officer."[230]

In April 2009, the JAGC updated its keystone doctrinal publication, Field Manual (FM) 1-04, *Legal Support to the Operational Army*.[231] In the updates, the JAGC emphasizes the increasingly independent operation of JAs and acknowledges independence between JAs at different levels of command.[232] Paragraph 4-34 states that while "providing legal support to all levels of the command remains the chief mission of all JAGC personnel, . . . personnel at the [division and above] and the brigade level legal section may identify different ways and means to accomplish this mission."[233] Furthermore, technical guidance from the division level JA to the brigade JA is warranted where ". . . the BJA is contemplating issuing a legal opinion contrary to a legal opinion or interpretation issued by the [division level Judge Advocate]."[234] This paragraph is an implicit acknowledgement that JA at different levels of command must provide independent judgment and advice.

While recognizing the "increased decentralization inherent in the modular force" and the independence required from its JAs at different levels of command, FM 1-04 also provides useful guidance on the relationship between the brigade and division level JA.[235] As will be discussed, the importance of coordinating with other JAs and maintaining positive working relationships with all JAGC personnel is essential to mission accomplishment.

B. Duty to Communicate with Technical Chain of Command

As previously discussed, the JA owes his duty to his commander (or authorized official) and, thus, from a legal perspective, his professional conduct must be independent from superior JAs in his technical chain of command. With that said, independent from the technical chain of command must be distinguished from coordination.

"The supervisory JA of any command may communicate directly with the supervisory JA of a superior or subordinate command . . . He or she may receive and give technical guidance through these channels."[236] While the JA is ultimately responsible for his own professional conduct, only the unsuccessful JA operates in a vacuum. Coordination within the technical chain of command is essential to the JA for multiple reasons.[237]

First, and most obvious, senior JAs have more experience as both attorneys and JAs. They will be correct in their application of the law in the majority of situations. Moreover, they can provide the subordinate JA with useful and sound advice on other considerations beyond the law, just as they do with their commanders.[238]

---

[229] Josh White, *Charges Dropped Against 2 Marines in Haditha Killings*, WASH. POST (Aug. 10, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/08/09/AR2007 080900696.html.

[230] AR 27-26, *supra* note 7, r. 5-2*b*.

[231] FM 1-04, *supra* note 4.

[232] *Id.* paras. 4-34 to -39.

[233] *Id.* para. 4-34.

[234] *Id.* para. 4-37.

[235] *Id.* paras. 4-34 to -39.

[236] AR 27-26, *supra* note 7, r. 5-2*b*.

[237] Policy Memorandum 06-02, Headquarters, Office of The Judge Advocate General, subject: Use of Technical Channel of Communications (10 Jan. 2006). The challenges caused by the War on Terror and resulting transformation of the Army stressed technical chain of command communications. Whether because of logistical or other interpersonal reasons, The Judge Advocate General of the U.S. Army addressed the need for communication and coordination with the technical chain of command.

[238] *See generally* AR 27-6, *supra* note 7, r. 2.1; USN RPC, *supra* note 7, r. 2.1; USAF RPC, *supra* note 7, r. 2.1.

Second, superior JAs have a greater compliment of both JAs and paralegals in their office to assist in their mission.

Third, higher level commands are generally better staffed and equipped. A division or corps Staff JA will have access to a greater number of staff officers in a wider variety of specialties to consult than the Brigade JA. As with senior JAs, these staff officers will also have more experience in their respective areas of expertise. Along these lines, division, corps, and echelons above corps routinely have joint missions and officers from different services. This intra-service staffing also enhances the resources the senior JA has at his disposal.

Fourth, and of greater importance in deployed environments, division and higher level headquarters are generally located on more robust operating bases. These bases usually have both greater connectivity and better facilities to store resources in hard copy form. Many times the brigade JA will simply not have access to the resources needed to adequately respond to a legal issue. Coordination in these situations is essential.

Lastly, coordination is also essential to help the JAGC improve itself. As Major General Scott Black, then The Judge Advocate General of the U.S. Army, pointed out in 2006, "[g]ood stewardship of our Army and [JAGC] is a shared responsibility at all levels. Do not hesitate to use our channels of communications when you see a policy or practice within the [JAGC], at whatever level, that can be improved, or when you need help. Leaders must talk with one another."[239]

Coordination must be done carefully, however, and with respect to both the superior and subordinate JAs. Poorly handled communications within the technical chain of command can have a detrimental effect on the relationship each JA has with his commander. Ultimately, operations are the responsibility of the command. It is the commander's responsibility to brief his superior commander on situations and events deemed worthy of notification. As The Judge Advocate General of the U.S. Army has recognized, "[w]hile the use of technical channels is required in [sensitive or unusual matters with legal implications], it is not a substitute for briefing appropriate information through command channels."[240]

Problems may arise when a subordinate JA discusses a sensitive situation with his superior JA and the superior JA notifies his commander before the subordinate commander has notified him. In this situation, the relationship between the subordinate commander and his JA can suffer if the commander feels that his JA has loyalties outside his unit.

C. Independence in Action—Lieutenant Colonel V. Stuart Couch

Lieutenant Colonel (LtCol) V. Stuart Couch's experience while serving as a prosecutor in the Office of Military Commissions (OMC) has been well covered in the media.[241] Those accounts thoroughly covered the moral issues that confronted LtCol Couch but only touched on the legal ones from a general point of view. For the purpose of this article, it is worth it to review his experience here and explore the legal and ethical dilemmas he faced as both an attorney and military officer.

Lieutenant Colonel Couch was raised in North Carolina. He attended Duke University as an undergraduate and commanded his Navy ROTC battalion.[242] In 1987, LtCol Couch joined the U.S. Marine Corps and became a naval aviator.[243] After attending law school, LtCol Couch continued to serve in the Marine Corps as a JA. In 1998, LtCol Couch was on the team that prosecuted the high profile case against the flight team of a Marine Corps jet that clipped a gondola in Aviano, Italy, killing twenty civilians.[244]

Lieutenant Colonel Couch left active duty shortly after the Aviano trial but volunteered to return to active duty in the days after the terrorist attacks of 9/11. "I did that to get a crack at the guys who attacked the United States . . . I wanted to do what I could with the skill set that I had."[245] Lieutenant Colonel had personal reasons as well; one of his friends, and former squadron mate, was the co-pilot of United Flight 175, the second plane to hit the World Trade Center.[246]

After being assessed back onto active duty, LtCol Couch was assigned to the office of DoD/GC, who had operational control of the OMC. He arrived at OMC in August 2003 and, shortly thereafter, began working on files on Guantanamo Bay (GITMO) prisoners. One file, detainee Mohamedou Ould Slahi, stood out as one of the most culpable.[247]

---

[239] Policy Memorandum 06-02, Headquarters, Office of The Judge Advocate General, subject: Use of Technical Channel of Communications (10 Jan. 2006).

[240] *Id.*

[241] Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., March 31, 2007, *available at* http://www.meckbar.org/newsevent/CouchWSJarticle.pdf; *Torturing Democracy* (PBS television broadcast Oct. 9, 2007), transcript and video available at http://www.torturingdemocracy.org/.

[242] Bravin, *supra* note 241.

[243] *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241.

[244] Jeffrey E. Stern, *For God and Country*, DUKE MAG., Sept.–Oct. 2007, http://www.Duke magazine.duke.edu/issues/091007/god1.html.

[245] Bravin, *supra* note 241.

[246] *Id.*

[247] *Torturing Democracy*, *supra* note 241.

In October 2003, LtCol Couch traveled to GITMO on a familiarization trip. Once there, he had the opportunity to witness an interview of a detainee. While preparing to watch the interview, LtCol Couch was distracted by heavy metal music coming from down the hall. Escorted down the hall by a reserve Air Force JA, LtCol Couch saw a detainee "shackled to a cell floor, rocking back and forth, mumbling as strobe lights flashed."[248] Lieutenant Colonel Couch recognized these tactics from his experience going through SERE school.[249] "These tactics were right out of the SERE School playbook."[250] Lieutenant Colonel Couch asked his escort, "[d]id you see that? You know, I have a problem with that," LtCol Couch said to his Air Force JA escort. "Well, that's approved,"[251] the escort responded.

Lieutenant Colonel Couch was still troubled by what he saw at GITMO when he returned to OMC. He contacted a senior U.S. Marine Corps JA and explained what he had seen. The senior JA told him, "You're shirking your duties if you've got issues and you're not willing to do something about it."[252] Shortly thereafter, LtCol Couch discussed with the chief prosecutor what he had seen during his initial trip to GITMO, and how it might affect the prosecution of the detainees.[253]

In late 2003, Mr. Slahi finally started cooperating with his interrogators, providing information not only about himself but about Al Qaeda in Germany and Europe.[254] A colleague told LtCol Couch that Slahi had begun the "varsity program"—"an informal name for the Special Interrogation Plan authorized by Defense Secretary Donald Rumsfeld for the most recalcitrant [GITMO] prisoners."[255] The reports LtCol Couch was receiving made no mention of how the information was obtained.[256] Lieutenant Colonel Couch, along with a Navy Criminal Investigation Service (NCIS) agent detailed to the case, started looking into how the information was obtained from Mr. Slahi. After his initial experience at GITMO and the comments from his colleague, LtCol Couch was suspicious about Slahi's "sudden change, and felt he needed to know all the circumstances before bringing the case to trial."[257]

In the Spring of 2004, the NCIS agent showed LtCol Couch Government documents and other evidence that both he and LtCol Couch believed established that Slahi's information was obtained through the use of torture.[258]

At this point, LtCol Couch discussed the issue with an Air Force JA who was also working in the OMC. After a little research, LtCol Couch's colleague pointed out Article 15 of the *Convention Against Torture* (CAT) which excluded the use of any evidence obtained through torture.[259] The United States ratified the CAT in 1994 and it had been in force since November 1994.[260]

Lieutenant Colonel Couch now faced his dilemma. He volunteered for this assignment and thought Slahi was culpable, yet he was deeply troubled by what he learned. Legally, could he prosecute Slahi when there was evidence that Slahi's statements were obtained through torture and that international and U.S. law prohibited the use of any evidence obtained through torture? Ethically, was he obligated to provide this information to Slahi or any future defense attorney that represented Slahi? Morally, were the techniques employed against Slahi acceptable? Did his duty of military obedience require him to move forward with the prosecutions despite his misgivings?

Lieutenant Colonel Couch reviewed his state's professional rules of conduct to determine what his ethical obligations were in this situation. He reviewed the ABA's *Model Rules* and the Navy's *Rules of Professional Conduct* as well. Lastly, he turned to friends, colleagues, and a theologian to assist him with his moral concerns.[261]

In April 2004, a new chief prosecutor arrived at OMC. Shortly after his arrival, LtCol Couch again raised his

---

[248] Bravin, *supra* note 241.

[249] SERE stands for Survival, Evasion, Resistance, and Escape. In general, SERE school is a military school created to help servicemembers avoid capture or exploitation by the enemy and to familiarize them with the tactics and techniques that might be used against them if captured. It is a three-week course for those with a high risk of capture, such as pilots, aviators, special forces, and rangers. *See* U.S. DEP'T OF ARMY REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING (15 Dec. 1985) [hereinafter AR 350-50].

[250] *Torturing Democracy*, *supra* note 241.

[251] *Id*.

[252] Bravin, *supra* note 241.

[253] Telephone Interview Lieutenant Colonel V. Stuart Couch (ret.), Of Counsel, Poyner Spruill LLP (Feb. 25, 2010) [hereinafter Couch Telephone Interview].

[254] Bravin, *supra* note 241.

[255] *Id.*

[256] Under the structure set up at the time, "[LtCol] Couch had no direct contact with his potential defendants, but received summaries of their statements." *Id.*

[257] *Id.*

[258] *Torturing Democracy*, *supra* note 241.

[259] Specifically, "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15 (entered into force June 26, 1987 in accordance with Art. 27(1)) [hereinafter CAT], *available at* http://www2.ohchr.org/english/law/cat.htm.

[260] On 18 April 1988, the United States became the sixty-third signatory of the CAT. It was ratified in October 1994 and entered into force on 20 November 1994. Congress has also passed legislation to implement the requirements of the CAT. *See* 18 U.S.C. §§ 2340–40B (2006).

[261] Because of the classified nature of the situation, LtCol Couch spoke in generalities. Couch Telephone Interview Lieutenant, *supra* note 253; Bravin, *supra* note 241.

concerns. Lieutenant Colonel Couch was told that "we are going to stay in our lane" and "not question where the evidence was coming from."[262] After LtCol Couch raised the subject again on a separate occasion, the chief prosecutor told him that he "didn't want to hear about international law again."[263]

In May 2004, after much deliberation and soul-searching, LtCol Couch informed the chief prosecutor that he refused to prosecute Slahi.[264] The chief prosecutor responded by questioning LtCol Couch's loyalties, asking "What makes you think you're so much better than the rest of us around here?"[265]

Frustrated but still resolved, LtCol Couch put his objections about prosecuting Slahi into a written memorandum.[266] He separated his objections into three categories: legal objections, ethical objections, and moral objections.[267] Legally, he felt Article 15 of the CAT prohibited him from using the statements that Slahi made because they were obtained through torture.[268] Ethically, he felt that he had a duty to disclose what he had learned about the circumstances surrounding the statements to any future counsel who might represent Slahi.[269] Morally, he felt that what had been done to Slahi was reprehensible and, for that reason alone, refused to have any further participation in Slahi's case. Lieutenant Colonel Couch's moral reservations were based upon the Christian ethic of respect for the dignity of every human being and, while he wanted to prosecute Slahi, he couldn't forfeit his conscience and faith in the process.[270]

## VI. Conclusion

Lieutenant Colonel Couch's conduct regarding the Slahi file has generally been well regarded. Those who praised his actions because of their political objections to the Bush Administration's prosecution of the War on Terror, however, missed the true complexity of his predicament. Lieutenant Colonel Couch had served in the military for twenty years, supported the United States' War on Terror, volunteered for duty with the OMC, and thought Slahi was culpable. This was not a man with a political agenda or a proverbial axe to grind; this was a team player confronting two of the conflicts with military obedience that Huntington had so eloquently described forty-seven years earlier.[271]

As challenging as LtCol Couch's situation was, he was in a good position to face it. He had the benefit of almost twenty years experience; trusted colleagues available to discuss concerns and work out problems; he was in a well-funded department with access to all required resources; and he was morally grounded by his Christian faith.[272]

Even with his experience and resources, LtCol Couch struggled with the situation he faced working on the Slahi case. Compare his situation with that of CPT Smith from the introduction. These legal, ethical, and moral challenges are routinely occurring with JAs that do not have LtCol Couch's experience and in locations where the resources he possessed are not readily available.

The legal, ethical, and moral challenges faced by JAs in the War on Terror are unique among attorneys. The JAGC transformed to meet the needs of the Army. Just as it emphasized training and understanding of deployment and operational issues, the JAGC must make sure that its JAs know their client, its unique nature within the Federal Government, and their own duties and responsibilities.

The role of the JA is ethically challenging. Difficult decisions are commonplace and sometimes a JA must put himself on the line, both personally and professionally. But it is the job. Knowing the job, both ethically and legally, will allow the JA to focus on the client and mission accomplishment.

---

[262] Couch Telephone Interview, *supra* note 253.

[263] *Id.*

[264] *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241; Couch Telephone Interview, *supra* note 253.

[265] Bravin, *supra* note 241.

[266] *Id.*; Couch Telephone Interview, *supra* note 253.

[267] Couch Telephone Interview, *supra* note 253.

[268] *Id.*

[269] *Id.*

[270] *Id.*; *Torturing Democracy*, *supra* note 241; Bravin, *supra* note 241.

[271] *See* HUNTINGTON, *supra* note 47, at 76–79.

[272] Couch Telephone Interview, *supra* note 253; *Torturing Democracy*, *supra* note 241.