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Legal Breach: The Government's Attorneys and Abu Ghraib

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The most obvious victims of the brutal treatment of prisoners at American military jails are the men, women and children who have been humiliated, sexually assaulted, beaten, tortured and even killed. But, as in all wars, the Bush administration's assault on the Geneva Conventions has caused collateral damage - in this case, to the legal offices of the executive branch and the military.

To get around the inconvenience of the Geneva Conventions, the administration twisted the roles of the legal counsels of the White House, the Pentagon and the Justice Department beyond recognition. Once charged with giving unvarnished advice about whether political policies remained within the law, the Bush administration's legal counsels have been turned into the sort of cynical corporate lawyers who figure out how to make something illegal seem kosher - or at least how to minimize the danger of being held to account.

This upheaval has been particularly vivid at the Pentagon, where the usual balance between civilian and military authority has been stood on its head. The American system of civilian control of the military recognizes that soldiers' attention must be fixed on winning battles and staying alive, and that the fog of war can sometimes obscure the rule of law. The civilian bosses are supposed to provide coolheaded restraint.

Now America has to count on the military to step up when the civilians get out of control.

When Defense Secretary Donald Rumsfeld approved the initial list of interrogation methods for Guantánamo Bay in late 2002 - methods that clearly violated the Geneva Conventions and anti-torture statutes - there were no protests from the legal counsels for the secretary of defense, the attorney general, the president, the Central Intelligence Agency or any of the civilian secretaries of the armed services. That's not surprising, because some of those very officials were instrumental in devising the Strangelovian logic that lay behind Mr. Rumsfeld's order. Their legal briefs dutifully argued that the president could suspend the Geneva Conventions when he chose, that he could even sanction torture and that torture could be redefined so narrowly that it could seem legal.

It took an internal protest by uniformed lawyers from the Navy to force the Pentagon to review the Guantánamo rules and restrict them a bit. But the military lawyers' concerns were largely shoved aside by a team of civilian lawyers, led by Mary Walker, the Air Force general counsel. The group reaffirmed the notion that Mr. Bush could choose when to apply the Geneva Conventions.

That principle was originally aimed at the supposed members of Al Qaeda held at Guantánamo Bay, but it was quickly exported to Iraq and led, inexorably, to the horrors at Abu Ghraib and other recently disclosed crimes by American soldiers against Iraqi and Afghan prisoners.

If it had not been for a group of uniformed lawyers, the nation might never have learned of the torture and detention memos. In May 2003, soon after Ms. Walker's group produced its rationalization for prisoner abuse, a half-dozen military lawyers went to Scott Horton, who was chairman of the human rights committee of the City Bar Association in New York.

That led to a bar report on the administration's policies, a report that was published around the same time the Abu Ghraib atrocities came into public view. Those lawyers had to do their duty

anonymously to avoid having their careers savaged. Meanwhile, the Justice Department official who signed the memo on torturing prisoners, Jay Bybee, was elevated by Mr. Bush to the federal bench.

This month, several former high-ranking military lawyers came out publicly against the nomination of the White House counsel, Alberto Gonzales, to be attorney general. They noted that it was Mr. Gonzales who had supervised the legal assault on the Geneva Conventions.

Jeh Johnson, a New York lawyer who was general counsel for the secretary of the Air Force under President Clinton, calls this shift "a revolution."

"One view of the law and government," Mr. Johnson said, "is that good things can actually come out of the legal system and that there is broad benefit in the rule of law. The other is a more cynical approach that says that lawyers are simply an instrument of policy - get me a legal opinion that permits me to do X. Sometimes a lawyer has to say, 'You just can't do this.' "

Normally, the civilian policy makers would have asked the military lawyers to draft the rules for a military prison in wartime. The lawyers for the service secretaries are supposed to focus on issues like contracts, environmental impact statements and base closings. They're not supposed to meddle in rules of engagement or military justice.

But the civilian policy makers knew that the military lawyers would never sanction tossing the Geneva Conventions aside in the war against terrorists. Military lawyers, Mr. Johnson said, "tend to see things through the prism of how it will affect their people if one gets captured or prosecuted."

Some Senate Democrats have said they plan to question Mr. Gonzales about this mess during his Senate confirmation hearings. But given the feckless state of Congressional oversight on this issue, there's not a lot of hope in that news.

Meanwhile, the relationship between the civilian and the military lawyers has gotten so bad that Senator Lindsey Graham, the South Carolina Republican, pushed through legislation that elevated the military services' top lawyers to a three-star general's rank. That at least put them on a more equal footing with the civilian lawyers.