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JAGs Fought DOJ On Terror Memo

Military lawyers' warnings about pitfalls mostly ignored; EXTREME MEASURES; SOUNDING A RETREAT

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Six months before Abu Ghraib prison was put to use by U.S. forces to hold detainees in Iraq, the Bush administration received a warning that easing curbs on military interrogations could come back to haunt the country. The alarm wasn't sounded by human rights activists or war protesters, rather it came from four senior military officers inside the Pentagon -- lawyers with more than 100 years combined of active-duty military experience. And it was largely ignored.

In a series of memos written in March 2003, but only declassified by the Pentagon last week, the military lawyers predicted that adopting more aggressive interrogation techniques to fight the war on terror would undermine America's relationships with allies, hurt the reputation of the military, and possibly put U.S. troops in harm's way.

Today, the words "Abu Ghraib" have become synonymous with ghastly images of detainees being debased and abused by members of the U.S. military. In light of the events there and at other military prisons in Iraq, Afghanistan, and Guantánamo Bay, Cuba, some of the military lawyers' comments seem eerily prescient.

"Will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values† How would such perceptions affect our ability to prosecute the Global War on Terrorism†" wrote Rear Adm. Michael Lohr, then-judge advocate general of the Navy.

The new documents reveal deep disagreement between top uniformed lawyers in the Air Force, Army, Navy, and Marine Corps and the administration's civilian attorneys at the Pentagon and the Justice Department. The JAGs' memos blast legal positions taken by the Justice Department's Office of Legal Counsel and point to a secret memo from OLC lawyers that appears to have given the green light for U.S. troops to use interrogation tactics in violation of military law.

Tensions between the two groups of lawyers peaked during an internal Pentagon review of proposed interrogation techniques conducted in early 2003. Among the tactics under consideration then: intimidating prisoners with dogs, removing prisoners' clothing, shaving their beards, slapping prisoners in the face, and simulating drowning.

Military lawyers, mindful of the human rights violations that took place during the Vietnam War, argued for adherence to traditional interrogation methods consistent with the Geneva Conventions and existing military doctrine. The civilian lawyers pressed to give Pentagon leaders, who were desperate for better intelligence, as many options as possible.

The concerns of the JAGs may have gotten through to Secretary of Defense Donald Rumsfeld, who ultimately approved fewer interrogation methods than had been sanctioned by Justice Department attorneys. But as a legal matter, the military lawyers participating in the review were ordered to defer to the Justice Department's guidance -- advice the JAGs believed was not only flawed from a policy perspective but also legally unsound.

Army Judge Advocate General Thomas Romig stated concerns with several aspects of the DOJ opinion, including its theories of the president's power as commander in chief. Romig, who spent

six years as a military intelligence officer before entering law school, also argued that the Justice Department's views "could adversely impact" Pentagon interests by sparking international criticism and leading to the abusive treatment of American troops captured by the enemy.

"You might have thought the military folks would be pushing for more aggressive techniques, since they're out there fighting," says George Washington University law professor Stephen Saltzburg, general counsel of the National Institute for Military Justice. "Instead, it's very clear that the JAGs deeply opposed what the Justice Department had advocated."

According to a Pentagon investigation into detainee abuse completed earlier this year by Navy Vice Adm. Albert Church III, the advice from the OLC to the Pentagon group reviewing interrogation techniques was set forth in a classified March 14, 2003, opinion titled "Military Interrogation of Alien Unlawful Combatants." Though the Church report is also classified, some details about the DOJ memo have been made public by Democratic lawmakers.

At a hearing last month, Sen. Carl Levin (D-Mich.) stated that the March 2003 opinion was written by John Yoo, then an official with the OLC, and was directed to Pentagon General Counsel William Haynes II. Levin described the opinion as "virtually identical" to the infamous August 2002 "torture memo," which was later repudiated by the Bush administration. Both memos concluded that for physical pain to constitute torture, it had to be equivalent to that of "organ failure, impairment of bodily functions, or even death."

The so-called torture memo was prepared by the Justice Department for the Central Intelligence Agency. When it became public in 2004, the memo's narrow definition of torture and its suggestion that the president could authorize interrogation techniques prohibited by federal statute in his capacity as commander in chief provoked outrage from a range of liberal and conservative voices. It was ultimately disavowed by the administration.

So far, the Justice Department has refused to release the memo that was prepared for the Pentagon.

Pentagon spokesman Air Force Maj. Michael Shavers says interrogation policies were developed "in a deliberate manner with strict legal and policy reviews." Yoo, who teaches law at the University of California at Berkeley's Boalt Hall, and DOJ spokesman John Nowacki declined to comment.

Legal experts say the as-yet-unreleased Justice Department opinion for the Pentagon could offer an even more sweeping view of executive branch power than the August 2002 torture memo because members of the U.S. military face greater legal constraints than individuals at the CIA.

While the March 2003 memo has also been taken off the books by the Justice Department, critics of the Bush administration continue to press for its release and say it could help to explain the events leading up to Abu Ghraib.

"We need to know what was authorized and whether the techniques that were authorized were actually legal," says one Democratic Senate staffer. "This memo could be very important to answering those questions."

The unclassified summary of the Church report refers to a "contentious debate" within the Pentagon group reviewing interrogation techniques. The six newly released memos written by the Pentagon's highest-ranking uniformed lawyers show that the schism between the four military lawyers and the Justice Department's OLC was even wider than previously believed.

"They were essentially saying, 'What in the hell are you guys thinking†' " says retired Navy Rear Adm. John Hutson, now the dean of Franklin Pierce Law Center in Connecticut. "If they were

writing that, it would be interesting to know what they were saying, which I'm sure was even more blunt and direct."

Among other things, the military lawyers raised objections to the DOJ's judgment that the president can unilaterally override international treaties and federal statutes -- including the Uniform Code of Military Justice -- in the name of national security.

In one of the memos, Maj. Gen. Jack Rives, then-deputy judge advocate general of the Air Force, called the DOJ's legal advice "contentious" and argued that several of the interrogation techniques sanctioned by the DOJ would amount to violations of military law. Lohr, the Navy lawyer, asked that a sentence be added to the report being prepared by the Pentagon working group making it clear that the findings were almost exclusively based on the views of lawyers in the DOJ's Office of Legal Counsel.

In their memos, all four military lawyers contend that relying on the Justice Department opinion to justify otherwise unlawful interrogation techniques could put members of the U.S. military at risk of criminal prosecution for violating provisions of the military's code of justice.

"Applying the more extreme techniques during the interrogation of detainees places the interrogators and the chain of command at risk of criminal accusations domestically," warned Rives. "While the current administration is not likely to pursue prosecution, it is impossible to predict how future administrations will view the use of such techniques."

Marine Corps Brig. Gen. Kevin Sandkuhler asserted that because the Justice Department does not represent the armed services, "understandably, concern for servicemembers is not reflected in their opinion."

While the legal opinion on interrogation techniques provided to the Pentagon by the Justice Department in early 2003 remains secret, the context in which it was drafted has become a matter of public record in the wake of the Abu Ghraib scandal.

In October 2002, after the capture of Mohamed al-Kahtani, a Saudi national suspected of being the intended 20th hijacker, military leaders at Guantánamo Bay asked for the Pentagon's permission to use more aggressive interrogation methods.

Rumsfeld, relying on advice from several uniformed and civilian lawyers, agreed to allow some of the proposed techniques, including interrogating prisoners for up to 20 hours, intimidating prisoners with dogs, and forcing prisoners to remove clothing. The techniques were not authorized for use on prisoners covered by the Geneva Conventions, but several of the methods were later put into practice at Abu Ghraib and may have led to prisoner abuse there.

In January 2003, after concerns were raised by military lawyers stationed at Guantánamo Bay, the new techniques were revoked, and Rumsfeld requested a more thorough review. Pentagon GC Haynes requested guidance from the Office of Legal Counsel and appointed Air Force General Counsel Mary Walker to chair a working group that would assess legal and policy considerations related to interrogations.

According to statements made by Church to the Senate Armed Services Committee in March, the Pentagon working group was stopped from applying its own legal analysis to the issue and ordered by Haynes and Walker to adopt the Justice Department's positions. The DOJ memo was so sensitive that only Haynes and Walker were permitted to keep copies in their offices. Church told senators that his staff was allowed to review the memo only in Haynes' office and could not obtain a copy or take verbatim notes.

Hutson, who served as the Navy JAG from 1997 to 2000, describes the level of secrecy as "very, very, very unusual."

And that secrecy, he adds, leaves a lot of questions unanswered.

What has been answered at last for Hutson is how the military's uniformed lawyers weighed in on a very difficult debate.

"What we've seen here is that good people were trying to enforce the law," he says. "I'd like to believe that the memos, and perhaps what was said outside of the memos, had some tempering effect."