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Speaking Law to War:
International Law, Legal Advisers, and Bureaucratic Contestation in U.S. Defense Policy

DISSERTATION

submitted in partial satisfaction of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

in Political Science

by

Arturo Jimenez Bacardi

Dissertation Committee:
Professor Alison Brysk, Co-Chair
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2015

DEDICATION

To

Arturo, Montserrat, and Martha

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ABSTRACT OF THE DISSERTATION

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By

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On September 6, 2006, President George W. Bush declared that the so-called “enhanced interrogation techniques” program “has saved lives” and “remains vital to the security of the United States, and our friends and allies.” Yet, the President’s speech marked the closing of the CIA’s secret prisons where detainees had been routinely tortured. By the end of the Bush administration, every component of the torture program had been reformed, replaced, or revoked in a way that more closely aligned with the United States’ international legal obligations. Why did the Bush administration increasingly adhere to the laws governing the treatment of prisoners of war, even though it believed that doing so would constrain its ability to save American lives? More broadly, under what conditions are states most likely to adhere to the anti-torture provisions found in the laws of armed conflict and human rights law during war?

In order to answer these questions, I advance a new theoretical framework, called legalized bureaucratic politics, that emphasizes the degree to which six US national security

bureaucracies—the White House Counsel, the National Security Council, the Justice Department’s Office of Legal Counsel, the State Department, the Defense Department, and the Central Intelligence Agency—have institutionalized international law into their approval process, training, legal advice, and organizational culture. Once the degree of legal institutionalization has been identified, legalized bureaucratic politics involves four steps: intra-agency, inter-agency, operational, and review phase, where adversarial actors will compete for control over wartime management.

I test my theory by comparing two cases where the US used torture: the Vietnam War and the Global War on Terror. My findings show that the US legal institutional structure during the Vietnam War was too weak to eliminate the use of torture by US personnel throughout the war. During the Global War on Terror, the US experienced a medium degree of legal institutionalization, too weak to prevent the torture program from being initiated, but strong enough to reverse it.

INTRODUCTION

On September 6, 2006, the President of the United States, George W. Bush declared that the so-called “enhanced interrogation techniques” program “has saved lives” and “remains vital to the security of the United States, and our friends and allies.”¹ Yet, the President’s speech marked the closing of the CIA’s secret prisons where detainees had been routinely tortured. By the end of the Bush administration, every component of the torture program had been reformed, replaced, or revoked in a way that more closely aligned with the United States’ international legal obligations. Why did the Bush administration increasingly adhere to the laws governing the treatment of prisoners of war, even though it believed that doing so would constrain its ability to save American lives?

More broadly, this dissertation asks: under what conditions are states most likely to comply with their international legal obligations? I advance a new theoretical framework, called legalized bureaucratic politics, that illustrates the process where international law can condition a state’s decision making structure and policy implementation. With a focus on a state’s Executive Branch—the final arbiter of policy—legalized bureaucratic politics entails analyzing the degree to which international law has been institutionalized into the approval process, training, legal advice, and organizational culture of the key decision making and policy implementing bureaucracies of the state. Once the degree of legal institutionalization has been identified, legalized bureaucratic politics involves four steps: the intra-agency, inter-agency, operational, and review phases, where adversarial actors compete for control over wartime management. In addition, the theory highlights newly empowered agents—executive branch legal advisers—who serve as internal norm

¹ Bush, 2006.

entrepreneurs advocating a more law-conscious policy. This theoretical framework goes beyond macro explanations—self-interests or acculturation—for compliance. Instead, it opens the black box of the state to focus on the key self-enforcement mechanisms that increase the likelihood of states' compliance with the law.

More specifically, this dissertation asks: under what conditions are states most likely to adhere to the anti-torture provisions found in the laws of armed conflict and human rights law during armed conflicts? Legalized bureaucratic politics will be tested through a comparative analysis of the United States' interrogation policies during the Vietnam War and the Global War on Terror. Consequently, legalized bureaucratic politics will be modified to address the peculiarities of the US war making process. In each case it will be necessary to first assess the degree to which each of the core US national security bureaucracies—the White House Counsel, the National Security Council, the Justice Department's Office of Legal Counsel, the State Department, the Defense Department, and the Central Intelligence Agency—have institutionalized the laws of war and the human rights law concerning the treatment of wartime detainees. Then, process tracing will be used to show which actors had the most success at manipulating the four phases of legalized bureaucratic politics (intra-agency, inter-agency, operational, and review) and how law affected that process.

The remainder of the chapter is divided into four sections. The first section covers the laws prohibiting torture, defines the offense, and explains why states employ the brutal practice. The second section places legalized bureaucratic politics within the larger theoretical debates that focus on why states comply with international law, especially the laws of armed conflict and human rights law. The third section describes the cases for

comparative analysis: The Vietnam War and the Global War on Terror. This section also justifies their selection and explains the methods and analytical tools that will be employed to analyze them. The final section will summarize the rest of the dissertation.

Torture: What Is It and Why Do States Use It

The focus of this study is on the use of torture and cruel, inhuman, or degrading treatment (CID). Torture and CID are prohibited under both international human rights law (IHRL) and the laws of armed conflict (LOAC). The 1949 Geneva Conventions classifies torture as a grave breach. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) also makes torture illegal and has elevated the prohibition against torture to *jus cogens* or peremptory norm status where no derogation is ever permitted.² Finally, torture is classified as a crime against humanity by the Rome Statute of the International Criminal Court (Table 1.1 lists all the major post-WWII international agreements that ban torture and or CID).³

² Solis, 2010, 440.

³ Solis, 2010, 440.

Table 1.1: Post-WWII International Treaties Banning the Use of Torture and Cruel, Degrading, and Humiliating Treatment

Treaty	Year Adopted	US Ratification
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	1949	1955
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	1949	1955
Geneva Convention relative to the Treatment of Prisoners of War	1949	1955
Geneva Convention relative to the Protection of Civilian Persons in Time of War	1949	1955
International Covenant on Civil and Political Rights	1976	1992
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts	1977	No
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts	1977	No
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984	1994
Convention on the Rights of the Child	1990	No
Rome Statute of the International Criminal Court	1998	No

Normally IHRL and LOAC apply in different contexts. The former requires states to respect the individual rights of its citizens and those individuals residing within its borders during times of peace. LOAC comes into force during armed conflicts and requires belligerent parties to guarantee the rights of combatants and civilians caught within the geographical bounds of the conflict. But when it comes to torture these two legal regimes have merged to form a unified anti-torture regime that encompasses both IHRL and LOAC principles.⁴ Crawford has shown that the operation of LOAC, “does not negate the applicability of IHRL. Indeed, international judicial and quasi-judicial bodies have

⁴ Crawford, 2010, 118-152; Solis, 2010, 436-448.

acknowledged the place of human rights law in times of armed conflict,” especially concerning the use of torture.⁵ For example, the gap between the protections offered by LOAC to Prisoners of War (POWs) during international armed conflicts, with those offered to detained persons under non-international armed conflicts has been, “significantly narrowed by reference to human rights law.”⁶ Here, the United Nations International Law Commission noted in a 2006 report that “it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”⁷

At its most basic, Common Article 3, found in each of the four Geneva Conventions of 1949, bans, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture... outrages upon personal dignity, in particular humiliating and degrading treatment.”⁸ Article 1 of the Convention against Torture provides the most detailed legal definition of the offense,

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁹

⁵ E. Crawford, 2010, 123; Solis, 2010, 446-447.

⁶ E. Crawford, 2010, 125.

⁷ E. Crawford, 2010, 125.

⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, Article 3.

⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Document, A/39/51, 1984, Article 1.

Furthermore, Article 2 of CAT stresses that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁰

Although torture and CID are prohibited, they are relative legal terms, open to interpretation. Domestic, Regional, and International Courts and Tribunals have all ruled on specific instances of what constitutes torture, but the standard has evolved and will continue to evolve over time.¹¹ Here, beyond courts, government legal advisers at the level of the executive play a crucial role in deciding what constitutes torture or CID (more on legal advisers and compliance with international law below). For purposes of this study, torture and CID are defined as the use of any physical or psychological pressure or coercion intentionally employed on a detainee. Any interrogation technique that goes beyond those permitted in the 2006 United States Army Field Manual 2-22.3 on “Human Intelligence Collector Operations,” will be considered a violation of Common Article 3 of the Geneva Conventions.¹²

Scholars have found that states are most likely to engage in torture when authorities perceive an active threat—internal or external—that challenges the security of the state.¹³ Zech has found seven motivating factors or logics for why state agents might employ torture or CID.¹⁴ The first is the desire or need for intelligence. Torture is employed as a

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Document, Article 2.2.

¹¹ E. Crawford, 2010.

¹² For a detailed list of banned techniques see section 5-22, and for legal techniques, see Chapters 8 and 9, United States Department of the Army, 2006.

¹³ Einolf, 2007, 106; Kelman, 1995, 26; An active threat is not always necessary for a state to engage in torture, see, Rejali, 2009.

¹⁴ Luban, 2005; see also, Solis, 2010, 448-450; Zech, 2015, 5-8.

tool for extracting information from uncooperative prisoners.¹⁵ Second, torture is used to instill terror (or counter-terror) on a group in order to get them to submit.¹⁶ States also use torture as a form of punishment meant to deter opposition groups from challenging the prevailing authority. Fourth, authorities use torture to extract confessions from suspected criminals in order to assure convictions. Fifth, torture is used as a form of revenge or to fulfill the desire to “even the score”¹⁷ Sixth, torture may also reflect an act of impotence, especially when facing elusive targets during unconventional conflicts, as frustrations lead to the use of torture as a form of collective punishment.¹⁸ Finally, torture can also function as an affirmation of identity where an “us” versus “them” mentality dominates the conflict. Einof has found that torture is usually used against groups, “who are not full members of a society, such as slaves, foreigners, prisoners of war, and members of racial, ethnic, and religious outsider groups,” groups that are easy to classify as the “other” and dehumanize.¹⁹

What these logics suggests is that there are structural, political, social, cultural, and legal conditions that enable, facilitate, or encourage the use of torture by a state’s security forces.²⁰ Political hierarchies reflected in command structures are a key factor that can enable (or minimize) the use of torture. Kelman has noted that torture is both a “crime of authority” and a “crime of obedience,” where, “responsibility is shared at all levels of the hierarchy, with those on top held responsible for the policies they formulate and the atmosphere they create... and those on the bottom for the actions they carry out.”²¹

Therefore, for a state to adhere with the laws prohibiting torture, two groups of sub-state

¹⁵ Solis, 2010, 449.

¹⁶ Solis, 2010, 449.

¹⁷ Zech, 2015, 6.

¹⁸ Zech, 2015, 7.

¹⁹ Einolf, 2007, 101.

²⁰ Kelman, 1995; Luban, 2012 (forthcoming); Rejali, 2009; Zech, 2015, 3.

²¹ Kelman, 1995, 23.

actors must comply with the law: policymakers and operators.²² The former must enact (authorize) policies consistent with the law and the latter must follow those orders. Here, a clear command hierarchy that delineates who shall authorize and review potential policies is essential. In addition, the training and discipline of operators is also crucial to ensure that they obey orders consistent with the law *and* disobey orders that are illegal.²³ An organizational culture that values the law and does not dehumanize the enemy becomes key.²⁴ However most scholars have ignored the influence of these internal-compliance mechanisms and have instead focused on more general or macro explanations—self-interests or acculturation—for compliance.

State Compliance with International Law

During times of threat, especially under armed conflict, realists argue that a state is not going to elevate a treaty over its security concerns, making international law epiphenomenal to a state's power and security interests.²⁵ International law and institutions are useful tools for states to advance their interests in less coercive and costly ways, which explains why states devote time and resources to shape them.²⁶ However, for realists, compliance with international law is a mere coincidence of interests for powerful states, and for weaker states, a coerced compliance.²⁷

While realists have stressed a traditional notion of power—the ability of states to coerce other states into changing their behavior—liberal and constructivist theories have

²² Morrow, 2014.

²³ There are both "virtues" and "vices" to military obedience and training. See, Osiel, 1999, 13-40; See also, Wolfendale, 2007.

²⁴ Farrell, 2005.

²⁵ Mearsheimer, 1995.

²⁶ Gruber, 2000; Pape, 2005; Steinberg & Zasloff, 2006.

²⁷ Goldsmith & Posner, 2005.

expanded our understanding of power by emphasizing multiple conceptions of the phenomenon and highlighting how power interacts with other forces—including international law—to shape state behavior.²⁸ Duvall and Barnett have introduced a typology with four forms of power: compulsory, institutional, structural, and productive.²⁹ Compulsory power reflects the traditional, realist variety of the concept. Institutional power is the ability to shape the rules and procedures that guide, steer, and shape the decision making process of states which end up constraining their actions.³⁰ This form of power is emphasized by liberal theories of international relations that look at the domestic institutional structures of states to explain state behavior.³¹ Structural power shapes the constitutive features of society which fashion individuals and groups' identities, belief, and interests through the spread, legitimation, socialization, and eventual internalization of norms.³² Productive power significantly overlaps with structural power, but it emphasizes how discourse shapes systems of knowledge and customs—including law—and how they shape actors identities and actions.³³ The last two forms of power, have been used by constructivists to show that legal norms induce state compliance not only by setting expectations for appropriate behavior, but more importantly, through a socialization process where norms are internalized or acculturated, and ultimately reconstitute a state's interests and identity leading to the self-enforcement of the law.³⁴

²⁸ Barnett & Duvall, 2005, 15-16; Hafner-Burton, Victor, & Lupu, 2012, 51-52.

²⁹ Barnett & Duvall, 2005.

³⁰ Barnett & Duvall, 2005, 15-16.

³¹ For broad examples of liberal theories, see Avant, 1994; Cortell & Davis Jr, 1996; Goldstein, 1993; Moravcsik, 2013; for examples of liberal theories of international law see, Slaughter, 1995; Zegart, 2000.

³² Barnett & Duvall, 2005, 18-19; For the legitimacy of norms, see Chayes & Chayes, 1993; Franck, 1990.

³³ Barnett & Duvall, 2005, 20-21.

³⁴ Goodman & Jinks, 2013; Kratochwil, 1989; Risse, Ropp, & Sikkink, 1999.

Neo-liberal institutionalists highlight that international institutions, including law, can serve states' self-interests through the logic of absolute gains.³⁵ Institutions make cooperation less costly as they clarify obligations, set expectations, and increase transparency and information.³⁶ However, defection is always a concern, which makes reciprocity, reputational costs, and sanctions critical components of compliance with the law.³⁷ These rationalist theories have made the valuable contribution of explaining that different legal regimes (i.e. trade, human rights, war, and environment) operate under distinct strategic contexts, making compliance with international law easier or more likely in certain issue areas than in others.³⁸ For example, the costs and benefits of violating a trade agreement as opposed to a human rights treaty are completely different. Under trade law, reciprocity plays a major role in assuring self-enforcement, as trade partners are unlikely to violate an agreement for fear that the other contracting states will act in kind and destroy the mutual gains of the arrangement. The strategic context for human rights treaties is completely different. Reciprocity plays a minor role after all, it is highly unlikely that a state will repress its own citizens in retaliation for another state's breach of the agreement.³⁹

One of the least studied regimes is LOAC. Historically, war studies and security studies have focused on the consequences of war rather than war making or the effects of law on war.⁴⁰ In more recent years, a new wave of scholarship has begun to assess the

³⁵ R. Powell, 1991.

³⁶ Guzman, 2008; Keohane, 1984; Koremenos, Lipson, & Snidal, 2001; Krasner, 1983.

³⁷ Morrow, 2007; Morrow, 2014.

³⁸ Hafner-Burton et al., 2012, 60; even different issues within a single regime (i.e. anti-torture versus fair trial protections under IHRL) might have a different strategic context, see, Landman, 2005.

³⁹ Brysk & Jimenez, 2012, 7; Downs & Jones, 2002; Goldsmith & Posner, 2005.

⁴⁰ For a detailed outline of the theoretical debates on the causes of war, see Buzan & Hansen, 2009; Levy & Thompson, 2011.

effects of LOAC and other war related norms, including the use of chemical weapons,⁴¹ land mines,⁴² nuclear weapons,⁴³ rape,⁴⁴ looting,⁴⁵ the targeting of civilians,⁴⁶ assassinations,⁴⁷ and most recently, the treatment of POWs. The latter, has received the least systematic attention. Large-n studies are difficult due to the challenges of limited, reliable, and comparable data.⁴⁸ Furthermore, small-n studies have been more historically focused and have failed to provide a systematic theory to explain compliance with LOAC.⁴⁹

As noted earlier, although LOAC and IHRL represent two different legal regimes that operate in distinct strategic contexts, in recent years they have converged to form a unified anti-torture regime, therefore it is useful to go over the scholarly findings regarding compliance for each regime. Large-n studies have found that ratification of IHRL or LOAC agreements that deal with torture in and of themselves do not appear to have much independent effect on state behavior.⁵⁰ Hathaway found that after controlling for several factors, ratification of CAT, not only does not lead to more compliance, “but it is often associated with worse practices.”⁵¹ Similarly, after analyzing the effects of LOAC on inter-state conflicts and the treatment of POWs, Morrow concluded that “treaty law matters indirectly by clarifying what acts are violations and by inducing restraint in actors that

⁴¹ Legro, 1995; Morrow, 2014; Price, 1997.

⁴² Price, 1998.

⁴³ Hymans, 2006; Rublee, 2009; Tannenwald, 2007.

⁴⁴ Inal, 2013.

⁴⁵ Sandholtz, 2007.

⁴⁶ N. C. Crawford, 2013; Kahl, 2007; Kinsella, 2011; Thomas, 2001; Valentino, Huth, & Croco, 2006.

⁴⁷ Thomas, 2000, 2001.

⁴⁸ Morrow & Jo, 2006; Wallace, 2015.

⁴⁹ Carvin, 2010; Doyle, 2010; Forsythe, 2011; Springer, 2010.

⁵⁰ Hafner-Burton & Tsutsui, 2005; Hathaway, 2002; Morrow, 2007; Morrow, 2014; Simmons, 2009; Wallace, 2012, 2015.

⁵¹ Hathaway, 2002, 1989.

would otherwise violate” the law, but the driving force behind compliance is reciprocity or the fear of retaliation.⁵²

Morrow also found that of the nine LOAC issue areas he analyzed—chemical and biological weapons, armistice/cease fire, aerial bombing, conduct on the high seas, protection of cultural property, treatment of the wounded, prisoners of war, and treatment of civilians—the treatment of POWs saw the least compliance, other than the treatment of civilians.⁵³ As noted, Morrow concluded that reciprocity was the single most important factor given that, “Warring parties respond to violations on an issue with violations of their own, and they respond to first violations very quickly.”⁵⁴ The joint ratification of LOAC by belligerent parties strengthened reciprocity and produced higher degrees of compliance.⁵⁵ However, unilateral ratification by democracies was also statistically significant, suggesting that democracies are more likely than non-democracies to abide by LOAC even if the other side is not a treaty member or fails to abide by the law.⁵⁶

Wallace also analyzed the treatment of POWs during inter-state wars from 1898 to 2003 and found that more than half of non-democracies “limited themselves to little or at most moderate amounts of prisoner abuse,” suggesting that even autocracies show restraint in their treatment of POWs.⁵⁷ Like Morrow, he also found that democracies are more likely to abide by LOAC, however, “almost one-quarter of democratic belligerents inflicted extreme levels of violence on captives.”⁵⁸ Wallace concludes that the treatment of POWs has less to do with LOAC and more to do with the nature of the fighting (protracted

⁵² Morrow, 2014, Kindle 3691 of 10248.

⁵³ Morrow, 2014, Kindle 3325 of 10248.

⁵⁴ Morrow, 2014, Kindle 3366 of 10248.

⁵⁵ Morrow, 2014, Kindle 3366 of 10248.

⁵⁶ Morrow, 2014.

⁵⁷ Wallace, 2015, Kindle 170 of 7588.

⁵⁸ Wallace, 2015, Kindle 180 of 7588.

wars of attrition see higher levels of prisoner abuse), war aims (wars of territorial conquest see higher levels of prisoner abuse), and regime type (democracies are more likely to show restraint).⁵⁹

Therefore, in order to understand why states comply with international law we must turn our attention to understanding the exact conditions that make compliance with the law more likely. Here, scholars have made more progress in explaining how IHRL has affected states' decisions to comply with the prohibitions on torture and CID. Simmons, after excluding false positives and false negatives, finds that ratification of CAT is positively associated with improvements in human rights, but only in conjunction with civil society activism, judicial enforcement, and transnational socialization.⁶⁰ Conrad and Moore similarly find that the use of torture by a state will cease once violent dissent ends in democratic states with a free press and multiple veto points in government.⁶¹ What these studies highlight is the causal influence that international human rights law has on state-society relations.⁶² Ratification of international law creates new stakeholders at the domestic level, including, political elites,⁶³ civil society groups,⁶⁴ epistemic communities,⁶⁵ NGOs,⁶⁶ legislatures,⁶⁷ and courts.⁶⁸

In other words, the theories that focus on the third-level of analysis—neo-realism, neo-liberal institutionalism, and constructivism—fail to appreciate how international law

⁵⁹ Wallace, 2015, Kindle 181 of 7588.

⁶⁰ Simmons classifies false positives as those states that ratify a human rights treaty without any intention of compliance, and false negatives as states that support the principles of a treaty but do not ratify it due to domestic costs. Simmons, 2009.

⁶¹ Conrad & Moore, 2010.

⁶² Brysk & Jimenez, 2012.

⁶³ Moravcsik, 2000.

⁶⁴ Keck & Sikkink, 1998; Simmons, 2009.

⁶⁵ Haas, 1992.

⁶⁶ Forsythe, 2005.

⁶⁷ Berlin, 2015.

⁶⁸ E. J. Powell & Staton, 2009; Slaughter, 2005.

can make a difference in two important ways. First, by focusing solely in variables located at the international level (balance of power, reciprocity, and socialization) they ignore what takes place within the state, including state-society relations, or changes to the domestic institutional structure that conditions a state's decision making process. Second, by treating the state as a unitary actor, with either a single policy, interest, or identity, they fail to see how different sub-state actors with competing interests and identities contest to shape the actions of states (which usually result in multiple policies, as opposed to a single and rational one).

Therefore, analyzing the role of domestic politics and institutions shows the most promise for understanding how international law can affect state behavior given that the final decision in favor or against compliance is made by sub-state actors. The first wave of such theories include liberal theories that called for "two-level games" and emphasized how the national and international realms interact.⁶⁹ As noted earlier, the second wave of domestic politics theories argued that the legitimacy incurred from international law opens a space for critical agents—from civil society to courts—to pressure and influence a state's decision to comply with the law. Surprisingly absent from these theories is the role played by the most critical actors: the policymakers and operators of the Executive Branch of government. For example, as explained earlier, a state's use of torture is dependent on the actions of two sub-state groups: policymakers and interrogators. Therefore, any comprehensive theory that seeks to explain why states use torture—and if international law conditions the decision to torture—must at a minimum address the role played by those two sets of actors.

⁶⁹ Moravcsik, 1997; Putnam, 1988.

A second shortcoming of the domestic politics theories of international law is as Hafner-Burton, Victor, and Lupu explain, “IR scholarship largely ignores or does not understand some matters of central importance... such as the specific procedures for setting and interpreting the content of international treaties.”⁷⁰ If our focus turns to understanding the legal-policy process within the executive branch, foreign policy theories and theories of organizations offer fruitful frameworks.

Foreign policy theories range from those that highlight the personalities of presidents and their close advisers,⁷¹ leadership styles,⁷² small group dynamics and pathologies,⁷³ models of decision making—including bureaucratic politics and organizational politics,⁷⁴ as well as the games advisors play to manipulate the decision making process.⁷⁵ For the purpose of this study, any advisory system at the foreign policy level must be placed within an institutional or structural context. As Garrison notes, “Providing a framework of understanding and an explanation of the environment within which advisors act is the first step,” to understand foreign policymaking.⁷⁶ This is important because the degree to which factors like individual personalities, groupthink or leadership styles will affect the policy process depends largely on the kind of institutional structure present.⁷⁷ Theories of organizations are useful in illustrating this point.

⁷⁰ Hafner-Burton et al., 2012, 48.

⁷¹ T. Preston, 2001.

⁷² Hermann, Preston, Korany, & Shaw, 2001.

⁷³ Hart, Stern, & Sundelius, 1997; Janis, 1982.

⁷⁴ There are rational actor models, bureaucratic politics models, organizational politics models, prospect theory, and others. Allison & Zelikow, 1999; Clapp, Halperin, & Kanter, 2006; De Mesquita & Smith, 2005; Levy, 2000.

⁷⁵ Garrison, 1999.

⁷⁶ Garrison, 1999, Kindle 210 of 2801.

⁷⁷ Zegart, 2000.

Organizational theories argue that all organizations have a formal governing structure that delineates decision making hierarchies, rules, training, standard operating procedures, incentives, penalties, as well as a more informal organizational culture or “the set of basic assumptions, values, norms, beliefs, and formal knowledge that shape collective understandings,” which in turn condition and limit the choices that its members will make.⁷⁸ For bureaucracies like the US military or the Central Intelligence Agency, their respective organizational structures and cultures will guide the way its members fight.⁷⁹ If international law is incorporated or institutionalized within the structure or culture of any given organization, then the law will condition the actions of its members.⁸⁰ The problem with studies that incorporate organizational theory is that they typically focus on one organization at a time and they fail to connect that organization’s actions with the broader foreign policy system which supports that organization.

Put together, foreign policy theories as well as organizational theories emphasize that the way in which the state and the bureaucracies within that state are organized matters for both domestic and foreign policy outcomes.⁸¹ Therefore, it is important to open the decision-making black box of the state to see whether and how international law can affect that process and ultimately constrain state behavior.⁸² These domestic level theories argue that policy outcomes are not merely the preferred outcomes of a rational unitary actor intent on maximizing the so-called “national interest.”⁸³ Instead, policy is derived from the contestation, or conflicts, negotiations, and compromises within and among the

⁷⁸ Kier, 1997, 28.

⁷⁹ Dickinson, 2010; Farrell & Terriff, 2002; Kier, 1997, 28; See also, Legro, 1995.

⁸⁰ Dickinson, 2010; Kahl, 2007.

⁸¹ Allison & Zelikow, 1999; Barnett & Finnemore, 1999; Beach & Pedersen, 2013; Dickinson, 2010; March, 1988; Mintz & DeRouen Jr, 2010; W. W. Powell, 1991; Shapira, 2002.

⁸² Michael P. Scharf & Williams, 2010, 181.

⁸³ Zegart, 2000.

executive branch bureaucracies.⁸⁴ Foreign policy and organizational theories stress that bureaucracies will push for their bureaucratic self-interests, as actors within those bureaucracies (policy makers and bureaucrats) exploit their power and use the resources available to them as delineated by the decision making rules or structure governing the policy process.⁸⁵

Legalized bureaucratic politics is an attempt at merging domestic theories of international law, foreign policy theories, and theories of organizations to present a systematic theory that explains the necessary parameters for states to comply with their international legal obligations. In doing so, legalized bureaucratic politics also highlights the role of executive branch legal advisers, a group of actors that has been largely ignored by scholars, except those that formerly acted in such a capacity.⁸⁶ Legalized bureaucratic politics tries to correct that by elevating their import alongside policymakers and operators.

Case Selection

Legalized bureaucratic politics will be tested through a most similar focused comparison of least likely cases: the Vietnam War and the Global War on Terror. Both cases represent an armed conflict that pitted the United States against unconventional adversaries that were perceived as high-threats. However the degree of institutionalization

⁸⁴ Allison & Zelikow, 1999; Beach & Pedersen, 2013; Mintz & DeRouen Jr, 2010; Zegart, 2000.

⁸⁵ Beach & Pedersen, 2013, Chapter 6.

⁸⁶ For the National Security Council's legal staff see, J. E. Baker, 2007; for the White House Counsel, Gonzales, 2010; Rao, 2011; for former legal advisers at the state department see Chayes, 1974; Bilder, 1962; Scharf, 2009; Scharf & Williams, 2010; Ingber, 2013; Johnsen, 2007; Kaye, 2006; Koh, 2011; for the Department of Justice Office of Legal Counsel see, Lund, 1995; Yoo, 2006; Goldsmith, 2007, 2012; for the influence of Judge Advocate Generals who specialize in the laws of armed conflict, see Prugh, 1975; Parks, 1980; Borch, 2001; Dunlap Jr, 2001, 2003; for the role of CIA lawyers, see Radsan, 2008; Rizzo, 2014. Notable exceptions to the scholarly disinterest in legal advisers include, Dickinson, 2010; Carvin, 2010.

of LOAC and IHRL in the US national security apparatus varied significantly in each war. The extend literature expects low levels of compliance when one of the belligerent parties is an unconventional threat that poses a significant risk. These traits make both of these conflicts ideal cases for comparison.

I break down armed conflicts by “threat level,” a two-dimensional category, composed of “threat type” on the one hand, and “threat perception” on the other. As Table 1.2, Column 4 shows, there are two subsets of threat type: conventional and unconventional conflicts. Conventional forces have a clear unified military structure, uniformed soldiers, and a clearly delineated battlefield. Unconventional forces are more decentralized, distinctions between civilian and combatant are often unclear, uniforms are not always used by combatants, and the boundaries of the battlefield are not delineated. Threat perception is a dichotomous variable where US policymakers either perceive a threat as low or high (Table 1.2, Column 3). Low threat perception occurs when the enemy has not been able to show that it has the capability to inflict severe physical harm on its adversaries. If the perceived enemy has been able to inflict more than 1,000 casualty deaths, the level is considered high, less than 1,000, the threat remains low. Table 1.2, illustrates the universe of cases since WWII where the US has captured detainees during armed conflicts, along with how the enemy was perceived, what kind of threat it constituted, whether the US established an interrogation program that contravened LOAC, and the degree of institutionalization of international law experienced by the US at the time.

Table 1.2: Armed Conflicts where the United States Detained Combatants

Armed Conflict	Time Period	Number of US casualty deaths (Threat perception) ⁸⁷	Threat Type	Interrogation Program that violated LOAC	Degree of Legal Institutionalization
WWII	1942-45	405,399 (High)	Conventional	Fort Hunt; Camp Tracy	Low
Korean War	1950-53	36,574 (High)	Conventional	Operation Bluebird /Artichoke	Low
Early Cold War	1959-65	4-36 (Low)	Unconventional	Yuri Nosenko	Low
Vietnam War	1964-73	58,209 (High)	Unconventional	Operation Phoenix	Low
Intervention Dominican Republic	1965-66	9 (Low)	Conventional	No	Low
Intervention Grenada	1983	18 (Low)	Conventional	No	Medium
Intervention in Panama	1989	23 (Low)	Conventional	No	Medium
Gulf War	1990-91	383 (High)	Conventional	No	Medium
Intervention Somalia	1992-94	43 (Low)	Unconventional	No	Medium
Al-Qaeda pre-9/11	1993-2000	35 (Low)	Unconventional	No	Medium
Intervention in Haiti	1994-96	4 (Low)	Unconventional	No	Medium
Global War on Terrorism	2001-present	9,719 (High)	Unconventional	EITP of suspected members of al-Qaeda and the Taliban	Medium

⁸⁷ The data on column 3 was compiled mainly from US military sources. See, Naval History and Heritage Command, 2010; United States Department of Defense, 2014; for deaths caused by terrorist groups, see Wright, 2006. Since WWII, there have been over 50 cases where Americans have been killed by enemy actors not involving an armed conflict. Most of these cases were isolated incidents (downing of an American airplane in Chinese airspace; a bombing of a nightclub by a group that was not targeting Americans, etc.), and thus do not count as sustained conflicts. There were 3 (possibly 4) major terrorist attacks carried out by al-Qaeda between 1993-2000, killing a total of 35 Americans: 6 were killed in the 1993 bombing of the World Trade Center; 12 Americans were among the 224 killed in the 1998 US embassy bombings in Kenya and Tanzania; 17 Americans are killed in the 2000 USS Cole bombing. 19 Americans were also killed in the 1996 Khobar Towers terrorist attack, but the perpetrators of that attack remain disputed, including by American officials, therefore they are not counted here. 2,997 people were killed in the September 11, 2001 al-Qaeda attacks. There have been 2,299 American deaths in the war in Afghanistan, and 4,423 American deaths in the war in Iraq by the end of 2014.

The US has been involved in a total of 12 armed conflicts since 1942 where combatants were captured: five of them were major wars (WWII, Korean War, Vietnam War, Gulf War, and Global War on Terrorism); five were limited military interventions or peacekeeping operations (Dominican Republic, Grenada, Panama, Somalia, and Haiti); one was a limited engagements with an international terrorist group (pre-9/11 al-Qaeda); the final case involved limited covert engagements during the Cold War (Nosenko case). Figure 1.1 gives a visual representation of these 12 armed conflicts based on “threat level.”

Figure 1.1: Cases Based on Threat Level

		Threat Perception	
		LOW	HIGH
CONVENTIONAL	Threat Type	Dominican Republic	World War II
		Grenada	Korea War
		Panama	
		Gulf War	
UNCONVENTIONAL	Threat Type	Early Cold War (Nosenko)	Vietnam War
		Somalia	Global War on Terror
		Pre-9/11 al-Qaeda	
		Haiti	Least Likely Cases

Based on extand literature, skeptics of the independent effects of international law on state behavior—neorealists and neoliberal institutionalists—would expect the least amount of compliance with LOAC during conflicts with a high threat perception and unconventional forces. Realists would stress that international commitments are epiphenomenal to security needs, thus high threat scenarios would yield low degrees of

compliance with LOAC as policy makers would resist constraints on actions to defend the state, especially during existential crises.⁸⁸ Neoliberal institutionalists would expect low degrees of compliance with unconventional forces, as reciprocity—the main driver of compliance—would likely be ephemeral once policymakers realized that their compliance with the law placed them at a disadvantage as unconventional forces either lack the capacity or desire to comply with LOAC.⁸⁹ As figure 1.2 illustrates, the literature expects the highest degree of compliance during cases of low/conventional threat, followed by, low/unconventional threat, high/unconventional threat, and finally, the least likely case being high/unconventional threat.

Figure 1.2: Expectations of US Compliance with LOAC based on Threat Level

		Threat Perception	
		LOW	HIGH
CONVENTIONAL	Threat Type	HIGH DEGREE OF COMPLIANCE Most Likely Case	MEDIUM TO HIGH DEGREE OF COMPLIANCE
UNCONVENTIONAL		LOW TO MEDIUM DEGREE OF COMPLIANCE	LOW DEGREE OF COMPLIANCE Least Likely Case

⁸⁸ Goldsmith & Posner, 2005; Mearsheimer, 1995.

⁸⁹ Guzman, 2008; Osiel, 2009.

At first glance, neo-realist and neo-liberal assumptions appear to have a high degree of explanatory power. In the cases (Dominican Republic, Grenada, Panama, and Gulf War) that fall under the top-left quadrant of Figure 1.2, low/conventional threats, the US completely adhered to the prohibitions on torture and CID. Similarly, most cases (Somalia, pre-9/11 al-Qaeda, and Haiti) from the bottom-left quadrant, low/unconventional threats also experienced full compliance with LOAC and IHRL by the US. For example, concerning the US response to the pre-9/11 al-Qaeda threat, the FBI interrogation of Ramzi Youssef did not use any coercive measures. The only case in this group that contravened the laws governing the treatment of wartime detainees was the Yuri Nosenko case, a Soviet defector who was believed to be a double-spy by his US captors.⁹⁰

If we focus on the cases in the right-hand quadrants of Figure 1.2, where the threat perception becomes high, we begin to see more cases where the US violated the rights of detainees. During high/conventional threats, where reciprocity is expected to positively influence state behavior towards compliance with LOAC, but security concerns begin to weigh heavily as the threat is high, we begin to consistently see programs that violated LOAC and IHRL. During WWII, although the overall treatment of POWs by US forces was exemplary,⁹¹ two secret camps were created for high-value prisoners that violated some of the provisions in LOAC. Both Camp Fort Hood in Virginia and Camp Tracy in California were not open to ICRC inspections.⁹² During the Korean War, the CIA set up Operation

⁹⁰ Prados, 2013.

⁹¹ Doyle, 2010.

⁹² Kleinman, 2002.

Bluebird/Artichoke, a system of secret detention facilities where suspected double-agents were interrogated with several techniques that reached the level of CID and torture.⁹³

Finally, the cases (Vietnam War and Global War on Terror) in the bottom-right quadrant, where the US met high/unconventional threats, compliance with LOAC significantly decreases as security priorities seem to override international legal commitments. During the Vietnam War, as Chapter 4 will show, the use of torture by US armed forces and CIA interrogators was routine. Similarly, as Chapter 5 will show, after the 9/11 attacks, the Bush administration set up an elaborate torture program to extract information from suspected members of al-Qaeda and the Taliban.

Mill's "most similar" method compares cases that are alike in all key aspects except for one independent variable, whose variance may explain the divergent outcomes on the dependent variable.⁹⁴ Here, the variable "threat level" is held constant when comparing the Vietnam War with the Global War on Terror (GWOT), but the degree of institutionalization of LOAC and IHRL is different, and the eventual degree of compliance is also dissimilar (See Table 1.3). The Vietnam War and GWOT also represent least likely cases as the literature expects legal institutionalization to have minimal effects on US behavior, since they represent high/unconventional threats. Such cases as Levy suggests allow for the Sinatra inference where, "if it can make it there I can make it anywhere."⁹⁵ Therefore, this study will employ a most similar focused comparison of least likely cases.

⁹³ Weiner, 2008.

⁹⁴ A. L. George & Bennett, 2005, 81.

⁹⁵ Levy, 2008, 12.

Table 1.3: Cases Selected for Comparative Historical Analysis

Armed Conflict	Threat Perception	Threat Type	Degree of legal Institutionalization	Degree of US Compliance with LOAC
Vietnam War	High	Unconventional	Low	Weak
Global War on Terror	High	Unconventional	Medium	Weak to Strong

The most appropriate analytical tool for this project is process tracing as it “attempts to identify the intervening causal process –the causal chain and causal mechanisms- between an independent variable (or variables) and the outcome of a dependent variable.”⁹⁶ Although the legalized bureaucratic policy theory has four steps each one of those has its own set of internal processes. Reconceptualizing the theory as a set of causal mechanisms creates four distinct parts for each step: (1) Degree of legal institutionalization within that bureaucracy; (2) Contestation over policy choices based on the institutional structure; (3) Exploitation of powers by actors to influence the policy process; (4) Policy recommendations based on compromises reached by adversarial actors within each organization. These four mechanisms are repeated in each of the four steps of the legalized bureaucratic politics theory. In both cases—Vietnam War and GWOT—I will search for causal process observations to establish whether the hypothesized mechanisms of the bureaucratic politics model are indeed present and driving behavior, or if processes of competing theories show stronger explanatory power.⁹⁷ Table 1.4 delineates the evidence needed to determine whether a causal mechanism is present or not.

⁹⁶ A. L. George & Bennett, 2005, 206.

⁹⁷ Bennett, 2010.

Table 1.4: Evidentiary Guidelines for Process Tracing

Conceptualized Mechanism	Predicted Evidence	Type of Evidence Used to Measure Prediction
<p><i>Degree of legal institutionalization within the bureaucracy</i></p>	<p>Expect to see increased number of legal advisers in the policy process</p>	<p>Measured with data collected from agencies and interviews</p>
	<p>Expect to see evidence of a more inclusive policy process where higher number of lawyers and bureaucracies are involved in policy debates</p>	<p>Measured through data collected from account evidence (interviews), and archival evidence of policy memos, and legal memos</p>
	<p>Expect to see evidence of talk of the applicability of LOAC in policy discussions</p>	<p>Measured through data collected from account evidence (interviews), and archival evidence of policy memos and legal memos</p>
	<p>Expect to see evidence of training in LOAC</p>	<p>Measured through an analysis of training manuals</p>
	<p>Expect to see evidence that legal advisers are consulted early and in a recurring manner throughout the policy process</p>	<p>Measured through sequence evidence (timing of events) and accounts evidence (from interviews)</p>
	<p>Expect to see evidence that the consultation process with lawyers and between agencies becomes more formalized</p>	<p>Measured through account evidence (interviews) and through archival research assessing procedural memos, directives, and orders</p>
	<p>Expect to see evidence of legal advisers involved in key policy meetings</p>	<p>Measured through archival research of participants in key policy meetings, especially, National Security Council, or Special Group meetings</p>
	<p>Expect to see higher degrees of independence of legal advisers and bureaucrats from their superiors</p>	<p>Measured through account evidence (interviews), and comparison of legal and policy draft memos</p>
	<p>Expect to see a review or compliance unit with the authority to sanction those that violated the guidelines and to set policy recommendations to decrease future violations</p>	<p>Measured through analyses of inspector general reports, and other internal investigations</p>

<i>Contestation over policy choices</i>	<p>Evidence of legal advisers jockeying for higher positions in the policy process</p> <p>Evidence of bureaucrats disagreeing over the legality of their policy preferences or legal interpretations of their appointed superiors</p> <p>Evidence of inter-agency disagreement over the legality of the policy preferences or legal interpretations of competing bureaucracies</p> <p>Evidence of complaints by legal advisers or policymakers that their recommendations were not given enough consideration</p>	<p>Measured through account evidence (interviews)</p> <p>Measured through account evidence (interviews), and archival research of policy memos and legal memos within bureaucracies</p> <p>Measured through account evidence (interviews), and archival research of policy memos and legal memos between bureaucracies</p> <p>Measured through archival research of inter-agency memoranda</p>
<i>Exploitation of powers by actors</i>	Expect to see evidence that actors higher in the chain of command will use their position to get their preferences met and those of others ignored	Measured through account evidence (interviews), and archival research of policy memos and meeting minutes with special attention on groups being excluded from deliberations
<i>Policy recommendations</i>	Expect to see outcome that reflects either: (1) a purely defense-centric policy; (2) a compromised legal-defense policy where LOAC limited the discussed options; (3) a legal-centric policy approach, where LOAC dictated the policy options	Measured using analysis of final positions produced, and an assessment of the level of convergence between the law, policy positions, and outcomes

Organization of Dissertation

Chapter one will first define the independent variable, institutionalization of international law, followed by the dependent variable, compliance with the anti-torture provisions found in LOAC and IHRL. Then the chapter will turn to explaining the power, role, and challenges that executive branch legal advisers face maneuvering through the national security process. The chapter concludes by presenting the legalized bureaucratic politics theory and sets expectations for each of the four phases of the model: intra-agency, inter-agency, operational, and review phases.

Chapters two and three will trace the development of the institutionalization of international law in each of the six key national security bureaucracies of the United States Executive Branch. Chapter two will focus on the four organizations at the policymaking level: the White House, Department of Justice Office of Legal Counsel, the State Department, and the National Security Council. Chapter three will focus on the operational agencies: the Department of Defense and the Central Intelligence Agency. For each bureaucracy, special attention will be placed on how international law was incorporated into their approval and review structure, the training of their workforce, the role afforded to legal advisers, and the inculcation of a law abiding ethos.

Chapter four presents an analysis of the first case study: the Vietnam War. During this armed conflict, the US experienced a very low degree of legal institutionalization. Not surprisingly, US armed forces and CIA interrogators routinely tortured their prisoners. The torture was more a reflection of a culture of non-compliance at the operational level as opposed to a top-down policy mandating torture. Furthermore, given the weak institutional structure, attempts to put an end to the use of torture by US personnel were unable to succeed.

Chapter five is the second case study: the post-9/11 torture program. During the Bush administration the US national security process experienced a medium degree of institutionalization of LOAC and IHRL. However, the institutionalization was significantly uneven across the Executive Branch: the State Department and Defense Department having reached strong degrees of institutionalization; followed by the National Security Council and the Office of Legal Counsel with medium degrees of institutionalization; and ending with the Central Intelligence Agency and White House Counsel with weak levels of

institutionalization of the law. As a result, pro-torture advocates led by the Vice President's Office were able to exploit the medium institutional structure by excluding groups that they believed would be opposed to setting torture as official US policy. However, the institutional structure was strong enough where those groups originally excluded from the legal-policy deliberations over the torture program could only be kept out of the process for so long. Eventually, anti-torture groups were able to reform the torture program in a way that more closely aligned the US with its international legal obligations.

The conclusion will reflect on the generalizability of the legalized bureaucratic politics theory and propose some policy recommendations for strengthening the institutionalization of international law in the US national security apparatus.

CHAPTER 1:

Theory of Legalized Bureaucratic Politics

The introduction showed that although there has been an increase in the number and influence of regional and international courts and organizations, compliance with international law remains largely dependent on self-enforcement. Scholars have focused on either macro—self-interests or acculturation—explanations, or on the external pressure exerted on the executive by civil society, epistemic communities, NGOs, IGOs, and courts. However, how and why the executive branch decides to comply with the law, especially in a sustained long-term manner, has been largely unexplored.

This chapter advances a new theoretical framework, called legalized bureaucratic politics, that emphasizes that the degree to which the key US national security bureaucracies—the White House Counsel, the National Security Council, the Justice Department’s Office of Legal Counsel, the State Department, the Defense Department, and the Central Intelligence Agency—institutionalize international law will greatly affect both the policy-making and policy-implementing games.

This chapter is divided into three sections. The first section will define the key variables and explain how the institutionalization of the laws of armed conflict into the US national security apparatus works. The second section will analyze the power, influence, and challenges that Executive Branch national security legal advisers face. The final section will present the “legalized bureaucratic politics” theory.

Legal Institutionalization of the Laws of Armed Conflict

The independent variable, legal institutionalization is a process where bureaucracies incorporate international law as part of their formal and informal rules and procedures that make up the core structural features of that organization. It is useful to breakdown institutionalization between the formal rules and procedures on the one hand, and the informal ones on the other. Formal institutionalization of international law changes the rules, orders, training, budgets, contracts, incentives, penalties, compliance mechanisms, delegation of authority, hierarchy, and most important, the approval, review, and decision-making procedures of a national security agency in a way that incorporates the laws of war into its bureaucratic structure.⁹⁸ Informal institutionalization changes the patterns of assumptions, mission, ideas, beliefs, customs, discipline, and values of a bureaucracy.⁹⁹ In other words, it changes the organizational culture of an organization towards a more LOAC-conscious identity.

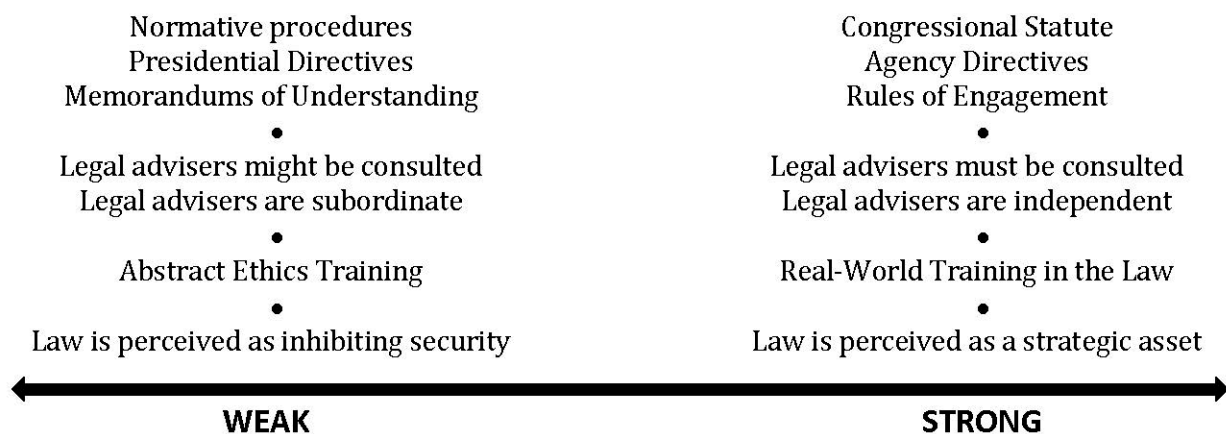
More specifically, as Figure 2.1 illustrates, there are four key mechanisms that affect the institutionalization of law: approval and review procedures; training; legal advisers; and inculcating a law abiding ethos. In the US context, executive branch approval and review procedures of foreign policy are governed by a series of laws and regulations. These include, from strongest to weakest: Congressional statutes, internal agency directives, legal opinions, Rules of Engagement, executive orders, presidential directives, inter-agency and intra-agency memoranda of understanding, and normative procedures. When a statute delineates who can approve an action, and which agencies or individuals must review the proposed action prior to its approval, it sets a clear formal process. If the process is violated it could lead to sanction. Statutes and agency directives are also less susceptible to

⁹⁸ Avant, 1994; Farrell, 2005.

⁹⁹ Eden, 2004; Kahl, 2007.

change, which provide continuity and a clear set of expectations and responsibilities. A less robust institutionalized process depends on Presidential executive orders and directives. These can be changed with the stroke of a pen by the Chief executive, or simply by his preferred management style, which could include disregard for the formal procedures he or she set. At its weakest point, the process might be guided by memoranda of understanding, or ad hoc procedures, or simply a normative process with vague expectations of appropriate decision-making channels. A weak institutionalized process is ripe for abuse and responsibility for approving and taking actions is diffuse. A strong approval and review process sets stakeholders, creates clear guidelines and standards, and provides a number of checks that are essential for the faithful application of the law.

Figure 2.1: Institutionalization Mechanisms



The second key mechanism is training in LOAC. Article 127 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, requires all parties to,

“undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular, to include the study thereof in their programs of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.”¹⁰⁰

¹⁰⁰ Geneva Convention (III), 1949, Article 127.

At its weakest, training can be very abstract in terms of how the law is presented and what is emphasized. Here, departments might only require training in “ethics” that indirectly addresses LOAC principals, if at all. More robust training includes the printing and dissemination of formal manuals that clearly explain the laws. At its highest degree, training in LOAC incorporates experiential learning through real-world exercises supervised by legal and non-legal staff with experience in how legal questions play out in the field.

The third mechanism are legal advisers. The experience of gross violations of LOAC during WWII showed that training and the publication of manuals alone was not sufficient to ensure compliance with the law.¹⁰¹ Recognizing these shortcomings, Article 82 of Additional Protocol I to the 1949 Geneva Conventions, states,

“The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”¹⁰²

Therefore, legal institutionalization of LOAC, at a minimum, has to provide a space for agency to legal advisers in the armed forces. For a more robust institutionalization, legal advisers must be involved throughout the national security apparatus. Under weak institutionalization, legal advisers might be consulted, but it is not the norm. Additionally, legal counsel play a subordinate role to the policymakers or commanders, making his or her legal assessments more susceptible to pressure from superiors, and the legal advice can be ignored. As institutionalization strengthens, legal advisers must be consulted before

¹⁰¹ Parks, 2002, 1008.

¹⁰² The United States has not ratified the Additional Protocols to the Geneva Conventions, but it considers several of its components to be customary international law; See, Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), 1977, Article 127.

a specific policy is approved, however, the adviser remains in a subordinate position in the decision making hierarchy. Strong institutionalization takes place when the legal adviser must be consulted prior to an approved course of action, the legal advice must be followed, and his or her position is independent of the decision making hierarchy, making it more difficult for policymakers to influence legal assessments.

The last mechanism is inculcating an ethos that values LOAC. While training is necessary to achieve such an ethos, it is not sufficient in itself.¹⁰³ Instead, informal processes, led by the leaders of a bureaucracy—through signals, example, and good relations with legal advisers—will indicate to the rest of the workforce how to approach the law. At a low degree of institutionalization, the bureaucracy’s workforce will treat LOAC as inhibiting their mission. Increased institutionalization will lead to perceptions of the law as a nuisance, but not harming operations. At its strongest point, an ethos that perceives LOAC as an asset to the organization will be established. The workforce will follow the law not just because it is their responsibility, or they fear sanction, but because it affords them rights, it legitimizes their actions, and it is seen as a force multiplier.

The dependent variable is a state’s overall compliance with the Laws of Armed Conflict (LOAC) focusing on the treatment and interrogation of its war-time detainees. The International Committee of the Red Cross’ (ICRC) Commentary on Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, and considered part of customary international law, will provide the baseline definition for compliance.¹⁰⁴ Article 3 guarantees that, “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness,

¹⁰³ Parks, 2002.

¹⁰⁴ International Committee of the Red Cross, 1960.

wounds, detention, or any other cause, shall in all circumstances be treated humanely.”¹⁰⁵

In addition, the Article prohibits, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” as well as, “outrages upon personal dignity, in particular humiliating and degrading treatment.” Finally, visitation by the ICRC are also afforded to detainees.¹⁰⁶ Any use of coercive techniques that use physical or psychological pressures will be considered as violations of Common Article 3.

Compliance is a matter of degree ranging from low to full. For full compliance, all of the state’s detainee operations, whether covert or overt, whether they are carried out by the military, law enforcement, or a spy agency, must comply with the provisions in common Article 3. When only some agencies comply, the overall policy will be considered to reflect medium compliance. When all the organizations responsible for detainees violate the basic provisions, the overall policy will be considered to reflect low compliance with the law.

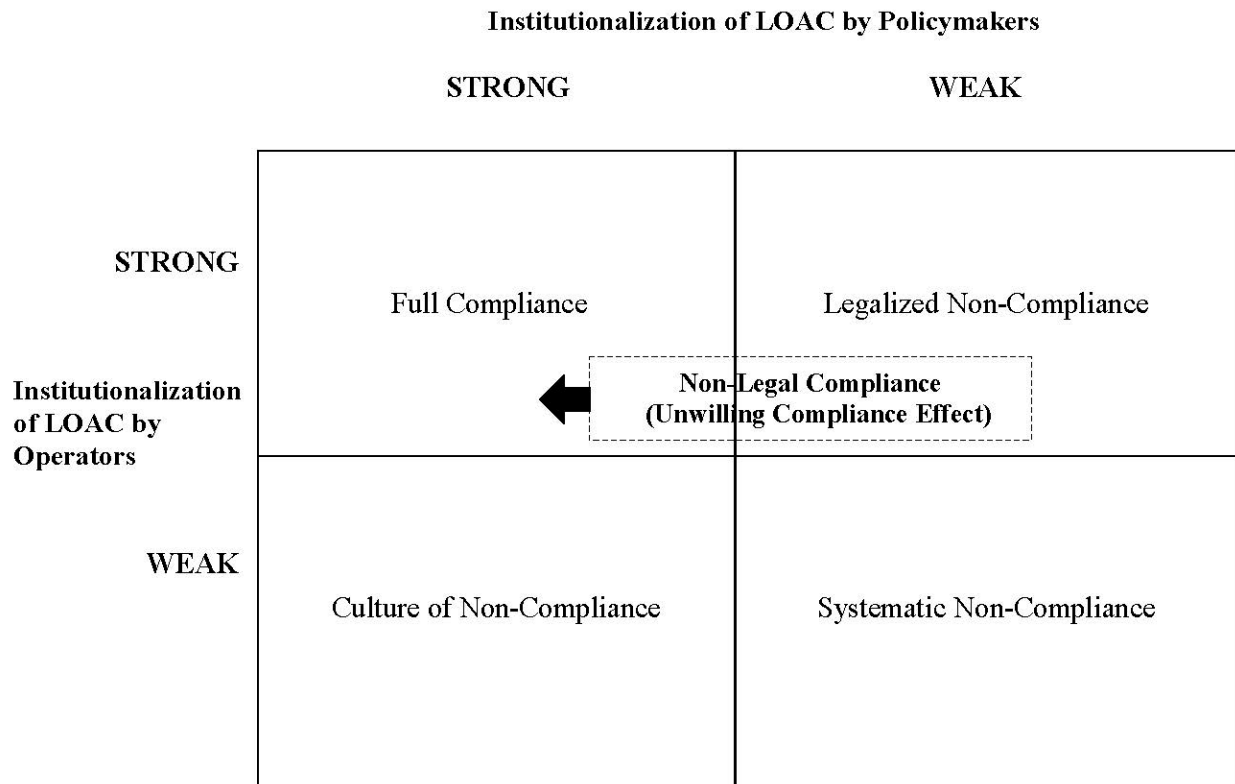
Although compliance will vary based on how the different national security bureaucracies institutionalize LOAC, it is useful to break down those bureaucracies based on their functional roles. When it comes to war-making there are two functional roles that executive branch bureaucracies play: those that give orders, and those that carry them out. The White House, the National Security Council, the Justice Department, the State Department, the civilian component of the Department of Defense, and the upper ranks of the CIA, represent the policymakers as they set the policy, give the orders, and approve the limits of what can be done in the field. The operators, including the uniformed members of DOD, and the case officers at CIA, are the ones that carry out the actions at the tactical level.

¹⁰⁵ Geneva Convention (III), 1949, Article 3.

¹⁰⁶ International Committee of the Red Cross, 1960.

Compliance with the law at its most basic depends on two sets of sub-state actors to adhere to the law: policymakers must give orders that are consistent with the law, and operators must follow those orders.¹⁰⁷ Figure 2.2 illustrates how the institutionalization of LOAC by policymakers and operators affects compliance.

Figure 2.2: Legal Institutionalization of LOAC based on Functional Roles



The bottom-right quadrant indicates low levels of institutionalization across the board. The expectation is to find “systematic non-compliance” as violations of the law are the norm. The orders from policymakers will disregard the law as will operators actions. The bottom-left quadrant expects a “culture of non-compliance” where violations are common but not systematic. The policymakers give orders consistent with the law, but the operators lack the discipline, training, and ethos to consistently follow those orders. The

¹⁰⁷ Morrow, 2014, Kindle 5006 of 10248.

top-right quadrant represents “legalized non-compliance,” where operators are well trained and have an ethos that values the law, but policymakers do not, and their orders reflect that. Policymakers will give orders that are inconsistent with the law but provide an exception clause or justification for non-compliance. The expectation is that violations will take place early in the conflict, but operators will eventually push back against the orders given that they are inconsistent with their training and ethos. I call this push-back phenomenon the “unwilling compliance effect,” or “non-legal compliance,” as policymakers will be forced to revert their guidelines even if they maintain their original justifications. Finally, in the top-left quadrant, “full compliance” is expected when both policymakers and operators have strongly institutionalized LOAC.

The key to institutionalization is that it creates mechanisms at each level of the command structure to assure compliance with the law. More important, when violations occur, it creates a process for finding and correcting those violations. At each level, legal advisers play a central role.

Legal Advisers

Since presidents and top decision makers do not have the time or expertise to oversee all the details of policymaking, they delegate many responsibilities to subordinates.¹⁰⁸ As the institutionalization of law has increased, legal advisers have come to dominate the legal-policy process. Executive branch attorneys are present at every level of the command structure. This section will explain the power that executive branch lawyers possess. It will analyze the pressures and conflicts they face. It will show the

¹⁰⁸ Marcella, 2008, 20.

different roles that political and career lawyers play. Finally, It will present the competing legal models that guide national security lawyers.

Today, executive branch lawyers exert an enormous amount of power. Their influence comes from four sources. The first, as Goldsmith explains is that, “many issues facing an executive branch lawyer have no or little judicial precedent. In those situations, the lawyer must apply not-entirely-neutral Executive Branch precedents, written by Executive Branch lawyers, in Executive Branch situations.”¹⁰⁹ When an executive branch lawyer (especially from OLC) provides a legal opinion they are treated as the final word on the law throughout the executive.¹¹⁰ Second, these opinions are rarely subjected to judicial review, either because the courts rule that plaintiffs lack standing, or they apply the political question doctrine, or they defer to the executive’s invocation of national security.¹¹¹ Similarly, Congress either lacks the means or the will of restraining the executive regarding national security affairs.¹¹² Thus, executive branch legal opinions attain a “quasi-judicial” character that effectively represents the law of the land.¹¹³ Third, most national security legal advice is provided in secret making it very difficult for civil society groups to challenge it. Finally, advice from legal advisers at a minimum provides legal cover, and might even bestow advance pardons to personnel throughout the executive.¹¹⁴

Not surprisingly, given the power they exert, executive branch national security lawyers feel constant pressure from multiple sources. First, there is the pressure

¹⁰⁹ Goldsmith, 2010, 195.

¹¹⁰ Kmiec, 1993.

¹¹¹ DiPaolo, 2010; Moss, 2000, 1303-1304.

¹¹² Auerswald & Campbell, 2012, 4-5.

¹¹³ McGinnis, 1993b, 427; Morrison, 2010, 1451.

¹¹⁴ Goldsmith, 2007, 149-150.

emanating from the nature of the job. As Robert Deitz, former General Counsel for the National Security Agency explains, “for most lawyers, in and out of government their objective is to reduce risk to their client. That cannot be the objective of the National Security lawyer because reducing risk to the client translates automatically into increased risk to the nation.”¹¹⁵ Second, there is contextual pressure. Wilson asserts that war, “is the greatest test of a bureaucratic organization,” and Former State Department attorney-advisor, David Kaye adds that, “War tests lawyers much as it tests civilian and military decisionmakers. The legal questions are often posed in crisis-like settings, pitting law against power in a uniquely direct way.”¹¹⁶ Third is the pressure of trying to please the boss and the groupthink that often follows. As former Attorney General James Comey illustrates,

“It is the job of a good lawyer to say “yes.” It is as much the job of a good lawyer to say “no.” “No” is much, much harder. “No” must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. “No” is often the undoing of a career. And often “no” must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.”¹¹⁷

Finally, there is political pressure, emanating from the White House, the heads of departments, or commanders that are determined to accomplish their goals.

As powerful as executive branch lawyers are, they remain subordinate to policymakers. Weber showed that in bureaucracies there is an asymmetric relationship between those that command the authority and those that have the expertise.¹¹⁸ Although he argued that the relationship favored the expert, theories of delegation and principal-

¹¹⁵ Author interview with Robert Deitz, 2015.

¹¹⁶ Kaye, 2006, 589; Wilson, 1989, 45.

¹¹⁷ Comey, 2007, 444.

¹¹⁸ Weber, 2015, Kindle 1875, 4807 out of 11177.

agent models have shown the opposite to be the case.¹¹⁹ Miller calls this phenomenon “Weber’s asymmetry,”¹²⁰ where principals (politically appointed policymakers and legal advisers) pressure the agents (career legal advisers) by “manipulating the agent’s incentives,” in order to “to minimize shirking, or agency costs—the losses imposed on the principal by an inability to align the agent’s self-interest with that of the principal.”¹²¹ This does not mean that principals are omnipotent. Agents wield their own authority by virtue of their expertise, their institutional memory, their familiarity with the management of the bureaucratic system, and the role that the institutional structure assigns them.¹²²

Policymakers can control the legal-policy process by not asking for advice or ignoring it—both of which carry political risks—or by excluding voices they disagree with, and “shopping” for advice elsewhere.¹²³ Most important, the institutional structure of the executive branch is set up in a way that provides the President with the power to fill the top positions in the federal bureaucracy with whom he chooses.¹²⁴ Although the President is responsible with filling more than 4,000 position, scholars have shown that their focus is on the “choke points” in government, including the budget, management, and general counsels’ offices.¹²⁵ With the exception of the Legal Adviser for the Joint Chiefs of Staff, every national security general counsels’ offices in the executive branch—White House, NSC, State, DOD, OLC, and CIA—are headed by politically appointed legal advisers and a series of political assistants. For key position, the President seeks appointees that are loyal, ideologically like-minded, competent, and ideally, that shared a previous personal

¹¹⁹ Weber, 2015, Kindle 1875, 4807 out of 11177.

¹²⁰ Miller, 2005, 203; Bendor, Glazer, & Hammond, 2001.

¹²¹ Miller, 2005, 204.

¹²² Radsan, 2008, 212.

¹²³ Author interview with Nicholas Rostow, 2014.

¹²⁴ D. E. Lewis, 2011; Waterman, 1989.

¹²⁵ Ingraham, Thompson, & Eisenberg, 1995; D. E. Lewis, 2011.

relationship with the President or one of his senior decision makers.¹²⁶ For example, reflecting on the reasons for his appointment, Jack Goldsmith, former Assistant Attorney General of OLC explains, “First, I was not an accidental pick for this job. The reason the President chose me for OLC was that his subordinates had read my writings and interviewed me and knew what my views were on various issues. They liked those views, so I was not a neutral choice. I was not chosen because they thought I was going to be completely neutral...”¹²⁷ Furthermore, political appointees owe their positions to the President, which might heighten their loyalty or commitment to the President’s agenda. Scholars have shown that political appointees serve as a mechanism for President’s to control the bureaucracy.¹²⁸ Appointees increases the President’s ability to get departments to accomplish his political goals.¹²⁹

The role of the political appointee is not lost on the careerist, as former CIA career lawyer, A. John Radsan explains, “In a practical sense, the CIA's General Counsel works for the DCIA [Director of CIA]. As a political appointee, the General Counsel is loyal to the President and to his political party. Thus, his potential as a pure watchdog is lessened.”¹³⁰ Career lawyers often derisively refer to their political counterparts as “politicos.”¹³¹ This does not mean that the politically appointed legal adviser will always act as a rubber stamp or “yes man” for the decision maker. After all, Presidents also value competence and performance and they need departments to successfully conduct their tasks for their policy

¹²⁶ Bertelli & Feldmann, 2007; D. E. Lewis, 2008; Maranto, 1998.

¹²⁷ Goldsmith, 2010, 195.

¹²⁸ Ingraham et al., 1995; D. E. Lewis, 2008; Moe, 1985.

¹²⁹ D. E. Lewis, 2011.

¹³⁰ Radsan, 2008, 210.

¹³¹ Author interview with three career lawyers for non-attribution, 2014.

goals to be met.¹³² Presidents also do not want to be engulfed in political crises, which bad legal advice could help propel. But, appointees and careerists have conflicting loyalties and identities: the former to the President, the latter to their organization.

The principal-agent literature has shown that agents (careerists) tend to be more risk-averse than the principal.”¹³³ From a legal policy perspective, we should expect to find career lawyers to be more risk-averse or unwilling to diverge from standing interpretations of LOAC. This is in part due to the fact that career bureaucrats are influenced by the legal, moral, and professional norms of their organization.¹³⁴ Careerists are also concerned about both their long-term employment and their agencies long-term prospects. Political appointees are concerned with making sure that the President’s goals are met, which makes them more open to “stretching” the law in order to attain those ends.

The legal advice process is further complicated by a lack of clarity as to who the client is. Scholars and practitioners are divided over who precisely is the client of the government lawyer. Potential clients include, the President,¹³⁵ the office of the President,¹³⁶ the head of the Department, the Department,¹³⁷ the Constitution,¹³⁸ and the public interests.¹³⁹ Furthermore, as Baker explains, “Consider that there are at least five possible and distinct facets to the president as client alone. At any given time the president may function as chief executive, party leader, commander in chief, the embodiment of the

¹³² D. E. Lewis, 2008; Maranto, 1998.

¹³³ For a review of theories of delegation and principal-agent models see, Bendor et al., 2001; Miller, 2005.

¹³⁴ Farrell, 2005; Khademian, 2002; Legro, 1995; D. E. Lewis, 2011.

¹³⁵ S. D. Lewis, 1983; Lund, 1995, 11.

¹³⁶ Author interview with John Dean, 2014; Dean cited the post-Watergate “Ethics in Government Act” of 1978, Public Law, Number, 95-521, Title VI.

¹³⁷ Johnsen, 2007; Radsan, 2008, 208.

¹³⁸ J. E. Baker, 2007, 318-320; Moss, 2000, 789.

¹³⁹ Berenson, 2000; Ugarte, 1999.

institution of the office of the president, or the president in his personal capacity.”¹⁴⁰ The murky ethics over who the client ought to be, and the overlapping roles that clients (and lawyers) represent opens the door for conflicts of interests. Some departments train their legal staff to deal with these issues. For example, as military legal adviser Gross explains,

“By policy our client is the command; our client is the United States Army; or if you are in a Joint Unit, it’s the Department of Defense, the Joint Unit. And that can create awkward situations sometimes. If a commander commits an offense for which they would need legal advice personally because they could be in trouble you can’t be their attorney because you represent the government, you represent the command, and the Army or the Joint Force. Those are difficult cases, but you have to disengage and say: ‘hey sir, listen, I can’t advise you on this, let me get you an attorney.’ That’s an awkward conversation to have because they often don’t see that nuance, you are working day to day, you are their lawyer, and you are discussing with them all the time and dealing day to day and all of the sudden you are like, ‘hey I can’t talk to you about that.’”¹⁴¹

At the opposite end of the spectrum is the CIA, as former CIA Assistant General Counsel A. John Radsan explains, “CIA’s OGC has little experience insulating its lawyers from conflicts of interest or from situations that have the appearance of impropriety.”¹⁴²

Institutionalizing stronger guidelines and training would ease some of these issues.

Smist argues that there are two forms of oversight in government: institutional and investigative. The former approaches oversight as a “cooperative relationship,” the latter as an “adversarial relationship.”¹⁴³ As an internal oversight mechanism, government lawyers represent the “institutional” model. A legal adviser that always says “no” will not last very long in that position.¹⁴⁴ Government lawyers are ultimately there to help the client and get to “yes.” At a minimum they at least assure that someone is thinking about and paying attention to the law. Nonetheless, as part of their role as overseers’ of the law, government

¹⁴⁰ J. E. Baker, 2007, 318.

¹⁴¹ Author interview with General Richard Gross, 2014.

¹⁴² Radsan, 2008, 210.

¹⁴³ Smist, 1994, 20-22.

¹⁴⁴ Comey, 2007, 444.

legal advisers often partake in four overlapping roles: judge, advisor, advocate, and counsellor.¹⁴⁵ These roles reflect disparate normative models of legal advice.¹⁴⁶

The judge role is based on the judicial model, where, as Baker explains, “the lawyer is expected to render neutral detached views on the law, as a judge might, ultimately rendering a decision as to what the law is.”¹⁴⁷ Like a judge, this entails saying “yes,” and more importantly, “no” to whoever is seeking the advice when the proposed policy is not consistent with the law. In its ideal form, as Former State Department attorney, Richard Bilder argues, the judicial function gives the government attorney the task of, “speaking law to power.”¹⁴⁸ However, this is a difficult role to play as lawyers are constantly pressured from various quarters to get to yes. (Lund, 1993)¹⁴⁹ For example, Former Assistant Attorney General of OLC, Jack Goldsmith explains how saying “no” is hardly that simple,

“I was influenced by one of my predecessors, William Barr, who said, ‘Being a good legal advisor [to the President] requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable.’ This was my attitude going in, and I think it’s a good attitude to have going in. But as soon as I got there, I realized this attitude was too simple. There are many countervailing considerations and pressures, almost all of which, I thought, were legitimate, and all of which made the job much more difficult.”¹⁵⁰

This leads to the advisory model, where the lawyer is expected to provide advice on a series of legally available options. Here, the legal adviser must assess the legal risk of proposed actions and suggest the best alternative. To do this, as former Attorney General Griffin Bell, explains, is for the government lawyer to manage, “the tension between the

¹⁴⁵ J. E. Baker, 2007, 318. The terms that legal advisers use to describe these roles vary. For example, Koh describes his role as, “counselor, conscience, defender of U.S. interests, and spokesperson.” See, Koh, 2010.

¹⁴⁶ J. E. Baker, 2007, 320.

¹⁴⁷ J. E. Baker, 2007, 318.

¹⁴⁸ Bilder & Vagts, 2004.

¹⁴⁹ Lund, 1993.

¹⁵⁰ Goldsmith, 2010, 195.

attorney general's duty to define the legal limits of executive action in a neutral manner and to the President's desire to receive legal advice that helps him to do what he wants."¹⁵¹ Therefore, the legal adviser must not simply be "neutral" as the judicial model espouses, but instead, to keep decision makers goals and interests in mind and help guide them toward legally available options."¹⁵² This will often entail providing alternatives or creative pathways. JAG Richard Gross explains the dynamic within the military,

"Often a Commander says I want to get from A to B, and I want to go this route. Most of the time you can say, "Sir, you need to get from A to B, I'll get you to B, but you gotta let me pick the route, you have to let me tell you how to do it legally, because the way you want to do it is not legal. But I can get you to where you want to be. So what is more important? the route? or the destination?" And ninety nine percent of the time it's where you end up not how you get there. And we do a lot of that, and when you write legal opinions you have to cover all of that."¹⁵³

Managing the tension between what is lawful and the desired policy outcome is difficult. But for the advocacy model, whenever there is any legal doubt the lawyer must side with the client's interests. In addition, the legal adviser must defend the client's actions even if they do not agree with them.¹⁵⁴ Former State Department Legal Adviser, John Bellinger III, explains this sometimes difficult task,

"Once the Military Commissions were set up, and I was never particularly a fan of the Military Commissions and they were set up behind my back. But they were the government policy, and there was a place for them because there were a lot of people that frankly couldn't be prosecuted in federal courts. So I had mixed feelings about explaining and defending Military Commissions because I had not been involved in the process, there had been a bad process, and yet I still felt that one could explain reasonably to allies why there was a need for military commissions even though I would often believe that some of the criticisms that were being made of them were correct."¹⁵⁵

¹⁵¹ Bell & Ostrow, 1982, 185.

¹⁵² J. E. Baker, 2007, 321.

¹⁵³ Author interview with General Richard Gross, 2014.

¹⁵⁴ J. E. Baker, 2007, 318-319.

¹⁵⁵ Author interview with John Bellinger III, 2014.

During crises, the job of the advocate legal adviser is to zealously push for the client's interests. Whenever there are gray areas in the law, as is often the case with LOAC, where many legal questions are a matter of judgement (i.e. when is a strike proportionate? When is an interrogation cruel?), the advocacy model suggests, as former NSA legal adviser Robert Deitz argues to, "work hard to find legal justification, even when that justification moves perilously close to a legal line."¹⁵⁶ Goldsmith explains how legal advisers for Abraham Lincoln, Franklin D. Roosevelt, John F. Kennedy, and George W. Bush "exploited ambiguities and loopholes in the law. They read the relevant precedents in ways that favored presidential power. They stretched the meaning of statutes and treaties. And they did not always give full play to contrary arguments or precedents."¹⁵⁷ In all of these cases, contemporaries considered the actions to have crossed the legal line, which increased the legal exposure for both client and counsel. Consequently, career lawyers, who tend to be more risk-averse than their political counterparts, tend to approach their job somewhere between the judicial and the adviser model. Political lawyers describe their role—at least in part—as that of an advocate.

Finally, government legal advisers also act as counsellors that provide non-legal advice. Harold Koh explains how sometimes he has had to warn policymakers that a proposed action is "lawful but awful," or as Rich Gross puts it, "lawful but stupid."¹⁵⁸ But as Gross explains, "it's a bad idea for policy reasons, for operational reasons, for command judgement reasons," and oftentimes, especially in the more hierarchical organizations, like the military, "the lawyers are the only ones who come up and say, 'hey sir, this is really a

¹⁵⁶ Deitz, Unpublished Draft, 18.

¹⁵⁷ Goldsmith, 2010, 199.

¹⁵⁸ Koh, 2010; Author interview with General Richard Gross, 2014.

bad idea.’ And I think it’s important for us [JAGs] to do that. What I will do is, I will say, “no legal objection, but here are some things you ought to think about.’ If I want to be stronger, I’ll say, ‘no legal objection, but I recommend against this course of action for the following reasons.”¹⁵⁹ Some clients are more open to non-legal advice than others, but as a general matter, legal advisers are valued for their experience, not just their legal expertise.

The following section posits the legalized bureaucratic politics theory, and sets the role of legal advisers squarely in the decision making process.

Legalized Bureaucratic Politics Theory

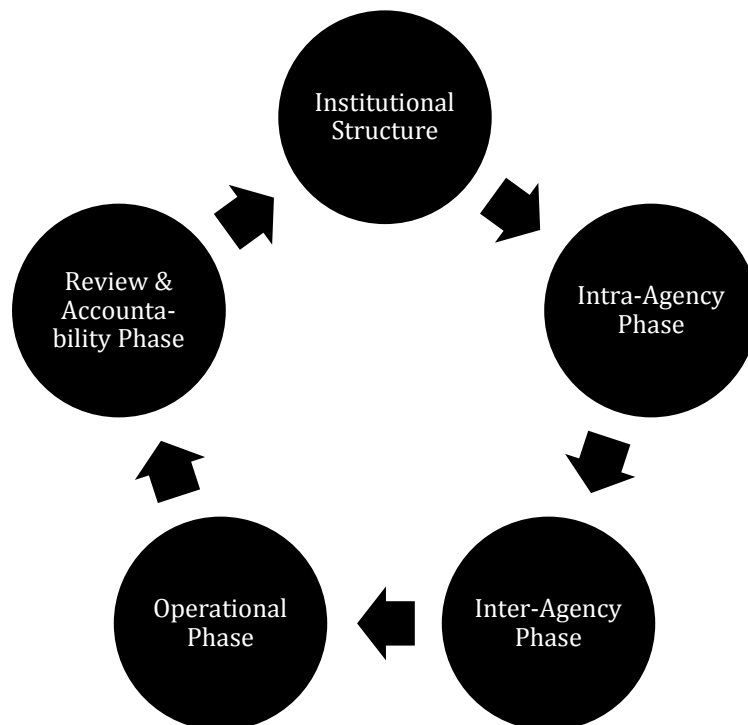
The Introduction showed that theories of institutional design, organizations, delegation, and foreign policy analysis argue that how executive branch bureaucracies are structured and interact with one another conditions a state’s domestic and foreign policy outcomes. The legalized bureaucratic politics theory opens the decision-making black box of the executive branch, to explain how and under what conditions international law constrains state behavior. At its most general level, the theory posits that *the more international law is institutionalized into a state’s national security decision making process, the more that state’s actions will align with its international legal commitments.*

As figure 2.3 shows, legalized bureaucratic politics involves a cyclical four step process: (1) intra-agency contestation; (2) inter-agency contestation; (3) operational contestation; and finally (4) a review and accountability process. Policymakers are the main actors involved in the first two steps. Operators dominate the third step, and all bureaucrats compete to influence the fourth step.

¹⁵⁹ Author interview with General Richard Gross, 2014.

Each one of the four phases of legalized bureaucratic politics involves contestation between adversarial groups. Borrowing from foreign policy theories, there are three main tactics that actors use in order to try to manipulate the bureaucratic process: exclusion, coalition-building, and framing. The first two try to control the structure of the process by setting the actors that will be involved. Exclusion is when an actor or a group of actors intentionally excludes another group from the deliberation process.¹⁶⁰ Coalition building is a form of alliance formation intended to strengthen a groups bargaining power by presenting a unified front. Framing is a strategic tool used to persuade actors to change their preferences or behavior. Here, actors use a variety of frames, including a strategic frame, a legal frame, a moral frame, and a practical frame in order to persuade others to adopt their preferences.¹⁶¹

Figure 2.3: Legalized Bureaucratic Politics Theory



¹⁶⁰ Garrison, 1999.

¹⁶¹ Brunstetter & Jimenez-Bacardi, 2015; Krebs & Jackson, 2007; Mintz & Redd, 2003.

Each cycle of legalized bureaucratic politics begins with a given institutional structure, ranging from weak to strong. The first step is the intra-agency phase. Here, actors within a single bureaucracy will compete to influence the policy position of that organization. The main adversaries are the career bureaucrats on the one hand, which represent the institutional memory and norms of the department, and the political appointees on the other, who lead the agency and reflect the interests of the White House. From a legal policy perspective, special attention needs to be paid to the role of the organization's general counsel office. Here the rival parties are the appointed legal adviser who will compete with the career civil servant lawyers. The organization's position will partly reflect the outcome of the contestation and compromises reached between the lawyers. The overall influence that the deliberations in the office of legal counsel have on the bureaucracy's final policy depends on the degree of the institutionalization of law within that organization. The expectation is that *the more independence and influence career legal advisers are given in the intra-agency process, the more US policy will align with LOAC.*

The second step, is the inter-agency phase, which depends on the contestation between the top six national security bureaucracies.¹⁶² These include: the White House, the National Security Council, the Department of Justice Office of Legal Counsel, the State Department, and the upper echelons of the Department of Defense, and the Central Intelligence Agency. As Table 2.1 indicates, each one of these organizations has institutionalized LOAC at difference degrees. In addition, each organization brings their

¹⁶² There are undoubtedly more than six organizations in the executive branch involved in national security affairs, including the Department of Homeland Security (DHS), the Office of the Director of National Intelligence (ODNI), and the Federal Bureau of Investigations (FBI). However, for simplification, and given this study's focus on the use of interrogations during the Vietnam War (when DHS and ODNI did not exist), and the post 9/11 War on Terror, I have decided to narrow the focus.

own institutional perspective or lens to the inter-agency negotiation process. The same is true for the lawyers that participate in inter-agency groups. To borrow from the timeless foreign policy theory aphorism, “how you interpret the law depends on where you sit.”

Table 2.1: Current Institutionalization of LOAC and Organizational Culture for the Top Legal Offices of the National Security Apparatus

Department	Size of Legal Staff	Organizational Lens	Degree of Institutionalization of LOAC
White House ¹⁶³	15+	Presidential Prerogative and policy goals	Weak
NSC	3-7	Presidential Prerogative and policy goals	Medium
OLC	20-25	Constitutional Powers, statutes, and litigation	Medium
State	200+	Amicable relations with other states, and the development of international law	Strong
DOD	10,000+	Mission success and force protection	Strong
CIA	150+	Can-do attitude	Weak

Each bureaucracy will approach an issue through both their organizational lens and the degree to which they have institutionalized LOAC. For example, both DOD and the State Department have institutionalized international law at a strong rate, however, DOD approaches the law, and any issue it confronts, with the added concern of military “force protection” and “mission success.” The State Department approaches issues with an eye towards maintaining amicable relations with other states and international organizations, and its lawyers are concerned with how US actions affect the development of international law and institutions. When lawyers from these two departments meet to discuss an issue, they will prioritize different laws, present different interpretations of those laws, highlight

¹⁶³ For simplicity, I am including the Vice President General Counsel as a member of the White House Counsel.

different concerns, and propose different solutions (Chapters 2 and 3 will trace both the institutionalization of LOAC and the organizational culture of all six bureaucracy in detail). The policy that the executive chooses will reflect the contestation and compromises reached by these six bureaucracies. How many departments, and thus how many stakeholders and perspectives are represented in these inter-agency deliberations depends on the degree of institutionalization of the inter-agency process. The expectation is that *the more inclusive the inter-agency process is, the more US policy will align with LOAC.*

The third step, the operational phase, involves the commanders, soldiers, and JAGs from the military, and the case officers and lawyers from the CIA, who are on the ground carrying out or supervising the actions ordered by the decision makers. Here, operators will press for their own way of making war, while military and CIA lawyers will provide legal advice to try and keep actions from transgressing legal bounds. A centralized vertical hierarchy for approving and supervising actions will clarify the roles, responsibilities, and expectations of these adversarial groups. Actions in the field will be a reflection of the contestation and compromises reached by those two groups. How much operators seek and listened to the advice of lawyers, and the quality of the legal advice they receive, will depend on the degree of institutionalization of that bureaucracy. The expectation is that *the more centralized the operational structure, the more US policy will align with LOAC.*

The fourth step is the review phase. Here, military investigators, inspector generals, and other investigators will review abuses, mistakes, or other inefficiencies in the proposal, deliberation, approval, and implementation phase of warfare. Legal advisers assist investigators to assure that potentially illegal acts are included in investigations, and to make sure that other legal concerns are properly addressed. Investigators are also tasked

with making recommendations based on their findings to try and prevent similar inefficiencies in the system to recur. These investigations take place during and after hostilities to permit both short-term and long-term recommendations and reforms. Their recommendations will meet resistance from the different security agencies, which leads to the final round of contestation between investigators, policymakers, and operators. The compromises reached by these groups will result in reforms to the overall structure of the decision making and operational process. The independence of the investigators and the openness to their recommendations will depend on the degree of institutionalization in each bureaucracy. The expectation is that *the more mandatory reviews of violations are, and the more compulsory the implementation of recommendations are, the more US policy will align with LOAC.*

The review phase is especially important because it explains how the institutionalization of LOAC increases over time. As iterations of the legalized bureaucratic politics cycle continue, individual departments will adopt at least some of the recommendations made by investigators. Over time, the reforms to the approval process, training, role of legal advisers, and the inculcating of a law abiding ethos will make the next round of legalized bureaucratic politics more LOAC-sensitive.

The following two chapters trace how each of the six key national security bureaucracies have institutionalized LOAC from their inception to the present.

CHAPTER 2:

Institutionalizing International Law: Policy Makers

There are four bureaucracies that dominate the US national security process at the policy making level: the White House, the Department of Justice Office of Legal Counsel (OLC), the National Security Council (NSC), and the State Department. This chapter will trace how each of these departments has institutionalized the law, with a special focus on international law and the laws of armed conflict. Special attention will be provided to delineate how each department has developed its approval process, the training of its workforce, the role and agency afforded to its legal staff, and the degree to which it has inculcated a law-abiding ethos.

The White House

Although both tradition and statute would suggest that the Attorney General is the President's and the Executive Branch's premier lawyer, today, it is the Office of Counsel to the President that is at the center of the legal-policymaking process. As such, it is the White House Counsel that is often referred to as "the President's Lawyer," even though as Rabkin notes, "The White House Counsel has no statutory duties—no statute even acknowledges the existence of the Office—and the Counsel produces almost no public documents under his own name."¹⁶⁴ The power of the White House Counsel lies in its proximity and loyalty to the President. In addition, the growth and influence of the White House Counsel reflects, as Strine has argued, "a longer historical trend of presidents seeking to centralize control over

¹⁶⁴ Rabkin, 1993, 64.

legal policy.”¹⁶⁵ Given the informal, secretive, and overlapping role of the White House Counsel as both a coordinator and provider of legal advice to the President, it often finds itself clashing with the Justice Department and the National Security Council’s Legal Adviser. With minimal statutory—or any other legal—guidance, the White House Counsel’s composition, structure, role, focus, and influence, depends largely on the desires of the President. Composed entirely of political appointees, the White House Counsel’s mission is to defend Presidential prerogative, and to represent the political goals and concerns of the President during legal-policy deliberations.

The organization of the Executive Office of the President owes its origin to the Reorganization Act of 1939. Although the Reorganization Act created the core structure of the modern-era’s White House Staff, neither the Act, nor the original staff of the President, included a legal adviser.¹⁶⁶ In 1943, President Franklin D. Roosevelt appointed Samuel Rosenman as the first legal adviser on the White House Staff with the title of “Special Counsel to the President.”¹⁶⁷ The actual role and duties of the Special Counsel were unclear, and Rosenman spent most of his time writing speeches and other communiqué for the President. Rosenman’s protégé and successor, Clark M. Clifford, explained his role as follows,

“To the inevitable question *What did a Special Counsel do?*, the simplest and most accurate answer was: Whatever the President wanted. The title of Special Counsel was grant [sic], but the job had no power or authority other than that conferred by the President... [M]y value was as an adviser or counselor, and not as an administrator or bureaucrat.”¹⁶⁸

¹⁶⁵ Strine, 1995.

¹⁶⁶ Rabkin, 1993, 65.

¹⁶⁷ Rabkin, 1993, 66.

¹⁶⁸ Rabkin, 1993, 66n14.

By President Harry Truman's administration, the White House Counsel began to play a significant role in legal-policy making. Neustadt has shown that as relations between the Truman White House and the Justice Department worsened, Truman's "Special Counsel," Charles S. Murphy, began to fill the legal-void,

"In the Truman administration, the Justice Department tended to be evasive, sometimes downright unresponsive in providing the Executive Office with forthright legal guidance on legislative or operational issues. This left a vacuum into which the Presidential Counsel was pressed to move, and on a number of occasions—particularly concerning controversial legislation and Executive Orders—Murphy's views were, in fact, decisive."¹⁶⁹

Under President Dwight Eisenhower, the position of White House Counsel continued its transformation, "from a generalist's position filled by personal advisers and friends to presidents to a specialist's position devoted to creating and effecting the administration's legal policy agenda."¹⁷⁰ President John F. Kennedy and Lyndon Johnson began to include their Special Counsel in deliberations over foreign affairs, including the Cuban Missile Crisis and US bombing campaigns in North Vietnam.¹⁷¹

The current title of "Counsel to the President," and the modern-day structure of the White House Counsel's Office was established in 1971. John Dean served as the first White House Counsel whose sole responsibility was to focus on legal questions.¹⁷² With minimal direction, Dean quickly moved to expand the size and scope of his office with the goal of creating a "small law firm at the White House."¹⁷³ This shift created a separate legal staff or bureaucracy within the White House that the President or White House staffers could turn to for legal advice, at the expense of other departments within the Executive. Dean explains the shift,

¹⁶⁹ Strine, 1995, 261.

¹⁷⁰ Strine, 1995, 259.

¹⁷¹ Rabkin, 1993, 67.

¹⁷² Rabkin, 1993, 68.

¹⁷³ Dean, 1976, 38.

“No question that the Office of Legal Counsel is where we went for legal opinions. However, sometimes we would do things on the staff ourselves. When for some reason the White House wanted to hold something tight. For example, My Lai, I had a guy who knew the Military Code of Justice as well as they did at the Office of Legal Counsel and he did a lot of work on that, on some of the legal issues related to that. So, sometimes we did do our own legal work. But more than often we became the intermediary between the Justice Department in general, and the Office of Legal Counsel in particular.”¹⁷⁴

The Watergate scandal and the subsequent calls for an independent Justice Department, ironically, strengthened the role and influence of the White House Counsel.¹⁷⁵ By the Ford administration, as Strine explains, “White House counsel handled all legal business submitted by members and offices within the executive office of the president,” including, “many functions traditionally reserved to the OLC: advising on legal problems with presidential action (including claims of executive privilege); appraising legislative programs; overseeing regulatory agencies; and examining the form and content of executive orders.”¹⁷⁶ The position of White House Counsel grew in prestige as the scope and size of the office expanded.

The size of the White House Counsel has grown steadily over the years.¹⁷⁷ In 1980, the White House Counsel’s Office had seven lawyers. By 1986, the staff grew to ten. During the George H. W. Bush Administration, the legal staff grew to fourteen lawyers. By the George W. Bush administration, the staff increased to twenty. Under President Barack Obama, the White House Counsel consists of more than two dozen lawyers. In addition, other bureaucracies within the White House, including the Vice President’s Office, have also created their own legal staffs. All members of the White House Counsel are appointed by

¹⁷⁴ Author interview with John Dean, 2014.

¹⁷⁵ Strine, 1995, 264.

¹⁷⁶ Strine, 1995, 264-265.

¹⁷⁷ For numbers under George W. Bush and Obama, see Ackerman, 2009; For numbers up to the George H. W. Bush administration, see Rabkin, 1993, 71.

the President with no Congressional oversight.¹⁷⁸ The institutional culture at the White House Counsel is purely political. No career lawyers are detailed to the Office, and all its members owe their position to the President. Furthermore, whenever a new President comes in, an entirely new staff is established, making it very difficult for an institutional culture to survive beyond the loyalty and commitment to the desires of the President.

In its efforts to control the legal-policy process, the White House has grown increasingly dependent on the Office of the Counsel to the President for legal advice. The legal-policy process within the White House remains largely informal, secretive, and with minimal oversight mechanisms.¹⁷⁹ However, the size, resources, and expertise of members of the White House Counsel remains relatively weak compared to that of career lawyers in other Executive Branch bureaucracies. In addition, the institutionalization of law in the national security process has created stronger roles for other bureaucracies in the legal policy process, especially for the Justice Department, to which we turn next.

The Department of Justice Office of Legal Counsel

Within the Department of Justice, the Office of Legal Counsel (OLC) did not become an independent entity until 1933, yet it has slowly become the most important and powerful government bureaucracy focusing on questions of law in the executive branch. Known throughout government as, "the Attorney General's Lawyer," the OLC's power derives from three sources: (1) as the ultimate arbiter of legal disputes within the executive its legal opinions are considered the final word on the law; (2) the Courts and Congress rarely challenge OLC opinions, effectively expanding their standing as the final

¹⁷⁸ Rabkin, 1993, 63.

¹⁷⁹ Rabkin, 1993, 64; Strine, 1995, 261.

interpretation of the law throughout government; (3) its legal opinions often bestow an advance pardon for actions taken by US government personnel. Given its broad influence it is surprising that OLC's opinion writing process remains largely informal. Less surprising, given the stakes, is how politicized that process has become.

With the Judiciary Act of 1798, the Attorney General (AG) was tasked with providing legal advice to the President and the heads of the other departments in the executive branch.¹⁸⁰ By the mid-twentieth century the AG delegated most of its legal opinion writing duties to the OLC. This shift was formalized under federal regulation, which made OLC responsible for "Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet"¹⁸¹ In other words, OLC is responsible for providing formal and informal legal advice to the AG and the other departments at DOJ, as well as the President and the rest of the departments and agencies in the executive branch. The legal questions OLC addresses are often the most consequential, and as Morrison explains, its opinions, "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters."¹⁸² Additionally, OLC is tasked with reviewing potential legislation for the executive branch, and reviewing all executive orders for "form and legality."¹⁸³

Within the executive branch, OLC's expertise is viewed as covering domestic US law, especially concerning the President's constitutional authorities and statutory

¹⁸⁰ Kmiec, 1993, 337.

¹⁸¹ Code of Federal Regulations, 2010, Title 28, Chapter 1, Part 0, Subpart E, Section 0.25(a).

¹⁸² Morrison, 2010, 1451.

¹⁸³ Code of Federal Regulations, 2010, Title 28, Chapter 1, Part 0, Subpart E, Section 0.25(b); Gibson, 2008, 7.

limitations.¹⁸⁴ Since they are a member of DOJ, they often analyze the law with an eye on potential litigation down the road. Although DOJ and OLC have always opined on foreign policy issues, especially concerning the President's Commander in Chief authority and war powers questions, international law is not their area of expertise.¹⁸⁵ Nonetheless, OLC is charged with "Coordinating the work of the Department of Justice with respect to the participation of the United States in the United Nations and related international organizations and advising with respect to the legal aspects of treaties and other international agreements."¹⁸⁶ In recent decades OLC has increased its focus on international legal questions, including LOAC, human rights law, and customary international law. This shift has come at the expense of the State Department's Legal Adviser's Office, and to some extent the JAG Corps, the two entities with the most expertise in international law.

OLC is a small office, especially by US government standards: only 20-25 lawyers plus a small paralegal staff make up the entire office's workforce. At the top of the office is the Assistant Attorney General, a political appointee that reports to the President.¹⁸⁷ Then there are three to five Deputy Assistant Attorneys General, each with their own areas of expertise and portfolios. Only one of the Deputies is a career lawyer, the rest are political appointees.¹⁸⁸ Finally, the remaining career lawyers are known as attorney advisors. Some of these attorney advisors work in the office for years, making them the living institutional memory of the organization. However, OLC also has a high turnover rate, as new attorney

¹⁸⁴ Kaye, 2006, 591.

¹⁸⁵ For an overview of AG and OLC opinions on foreign policy, war powers, and the President's Commander in Chief authority, see J. Powell, 1999.

¹⁸⁶ Code of Federal Regulations, 2010, Title 28, Chapter 1, Part 0, Subpart E, Section 0.25(e).

¹⁸⁷ Lund, 1993.

¹⁸⁸ Morrison, 2010, 1460.

advisors, usually fresh out of law school, only stay there for a few years.¹⁸⁹ The unusually high proportion of political appointees in the office along with the small number of long-term careerists makes the legal opinion writing process more susceptible to politicization than in other departments.¹⁹⁰

As noted earlier, OLC's power stems from three sources. First, OLC is considered the final adjudicator of legal disputes within the Executive Branch. Second, as Morrison explains, "because many of the issues addressed by OLC are unlikely ever to come before a court in justiciable form, OLC's opinions often represent the final word in those areas unless later overruled by OLC itself, the Attorney General, or the President."¹⁹¹ McGinnis argues that this is especially the case in the realm of foreign affairs,

"Because decisions about such matters as troop commitments and the conduct of negotiations are so much more central to executive interests than to those of the judiciary or Congress, the executive and judiciary have structured the constitutional regime to allow the executive itself the opportunity to shape the law in these areas. Thus, even the power of constitutional interpretation, the fundamental authority in a constitutional republic, is neither indivisible nor immovable, but may be disaggregated so as to allot a portion to the branch that will gain the most utility from its exercise."¹⁹²

Third, as the former head of OLC, Jack Goldsmith, has argued, OLC opinions can serve as "get-out-of-jail-free cards,

"One consequence of OLC's authority to interpret the law is the power to bestow on government officials what is effectively an advance pardon for actions taken at the edges of vague criminal laws. This is the flip side of OLC's power to say "no," and to put a brake on government operations. It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards... Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws

¹⁸⁹ Gibson, 2008, 8.

¹⁹⁰ The OLC is often criticized for its politicization, both inside and outside of government. See, Johnsen, 2007; Koh, 1993.

¹⁹¹ Morrison, 2010, 1451.

¹⁹² McGinnis, 1993a, 293.

mean and thus effectively to immunize officials from prosecutions for wrongdoing.”¹⁹³

Therefore, the legal-policy implications of OLC opinions are very high. Every department in the national security apparatus understands the high-stakes involved. For example, echoing Goldsmith’s analysis, former Acting CIA General Counsel, John Rizzo explained his reasoning for seeking OLC opinions,

“I wanted a written OLC memo in order to give the Agency— for lack of a better term— legal cover. Something that we could keep, and wave around if necessary, in the months and years to come, when memories would fade or be conveniently altered to tack with the shifting political winds... An OLC legal memorandum— the Executive Branch’s functional equivalent of a Supreme Court opinion— would protect the Agency and its people forevermore. It would be as good as gold...”¹⁹⁴

Given such consequences, departments with a legal-stake in the issue will naturally seek ways to influence the process. As former State Department Legal Adviser, Conrad Harper explains, “given that OLC is the adjudicator of all the different departments, there is a lot of lobbying.”¹⁹⁵ Similarly, former NSC Legal Adviser Mary DeRosa recalls, “there is a lot of a dynamic going on where everyone is trying to persuade OLC because in the end of the day if OLC doesn’t buy it, if they disagree with the legal conclusion then that’s a very serious problem.”¹⁹⁶ At OLC, the pressure does not go unnoticed. Daniel Levin, former Acting Assistant Attorney General for OLC, explained the pressure he experienced from the White House when he was working on a legal opinion dealing with “Enhanced Interrogation Techniques,” as follows, “White House pressed... I mean, a part of their job is to push, you know, and push as far as you can. Hopefully, not push in a ridiculous way, but they want to make sure you're not leaving any executive power on the table.”¹⁹⁷

¹⁹³ Goldsmith, 2007, 149-150.

¹⁹⁴ Rizzo, 2014, 188.

¹⁹⁵ Author interview with Conrad Harper, 2014.

¹⁹⁶ Author interview with Mary DeRosa, 2014.

¹⁹⁷ United States Department of Justice, Office of Professional Responsibility, 2009, 131.

OLC personnel are not provided any special training for dealing with these pressures. In fact, besides training in handling classified materials, OLC lawyers learn the process on-the-job. Furthermore, the entire OLC opinion writing process is institutionally weak, making it vulnerable to political capture. Aside from certain legal-administrative questions concerning the military and the review of executive orders, there is no formal requirement that legal issues arising within the Executive Branch must be reviewed by OLC.¹⁹⁸ For example, whenever a legal dispute arises at the inter-agency level, Executive Order 12,146 merely notes that, “each agency is *encouraged* to submit the dispute to the Attorney General.”¹⁹⁹ Consequently, seeking legal advice from OLC is largely dependent on departments’ desire to do so (to add legal cover for their actions), or on informal procedural norms that have been developed over the years.²⁰⁰ At the same time, although OLC opinions can be technically overruled by the AG and the President, once they have been published, they constitute the legal position of the executive branch and are treated as conclusive and binding by all departments. As a result, several analysts argue that OLC opinions have a quasi-judicial quality to them.²⁰¹ Therefore, the OLC opinion seeking and writing process is very informal and institutionally weak, but the end product—the legal opinions themselves—greatly affect the legal-policy process.

Over the years OLC has relied on a series of informal procedural norms to guide their opinion writing duties. Some former OLC attorneys have argued that these informal procedural norms have allowed OLC to maintain its independence and to approach their

¹⁹⁸ Morrison, 2010, 1460.

¹⁹⁹ Emphasis added. Executive Order 12,146, 1979, Section 1-401.

²⁰⁰ For example, there is an informal norm where the department requesting an OLC opinion will be asked to write their own legal memo assessing the issue and provide it to OLC before OLC decides to analyze the issue. See, McGinnis, 1993b, 427.

²⁰¹ For different takes on OLC’s quasi-judicial role see, Lund, 1993; Moss, 2000.

duties in a “court-centered” as opposed to an opportunistic approach to provide legal advice.²⁰² However, a close inspection of these informal norms reveals their institutionally weak character. After the controversy surrounding the Bush administration’s “torture memos,” and critiques that OLC had been politicized, Steven G. Bradbury, OLC’s Principal Deputy Assistant Attorney General, codified several of the informal procedural norms in a 2005 memorandum titled, “Best Practices for OLC Opinions,” which was subsequently updated in 2010.²⁰³ As the title of the memo suggests, these were merely aspirational ‘Best Practices,’ not formal requirements. Furthermore, the Best Practices memos highlight how institutionally weak the whole process of requesting, writing, reviewing, and approving an OLC legal opinion is, and how easily the process can be abused or captured by the political echelon of the bureaucracy.

At its strongest, the Best Practices memos note that each request for an OLC legal opinion “is assigned to a Deputy and an Attorney-Adviser.”²⁰⁴ This makes it a requirement that at least one career lawyer will play a role in the legal analysis. From there, the guidelines become more aspirational as they present suggested but ultimately voluntary parameters, not formal requirements. For example, once the assigned Deputy and Attorney Adviser have completed their draft opinion, “the opinion is *generally* assigned to a second Deputy for a ‘second Deputy read.’”²⁰⁵ If and once the second Deputy read has occurred, “the principal Deputy *should* circulate the draft opinion for final review by the AAG [Assistant Attorney General], the remaining Deputies, and any particular attorneys within

²⁰² For another former OLC attorney's critique of this rosy assessment of the OLC legal review process, see Koh, 1993,514; for less critical assessments, see also, Lund, 1993; McGinnis, 1993b.

²⁰³ Bradbury, 2005; Barron, 2010; See also, Johnsen, 2007; Morrison, 2010.

²⁰⁴ Bradbury, 2005, 1.

²⁰⁵ Emphasis added. Bradbury, 2005, 1.

the Office with relevant expertise.”²⁰⁶ Once the opinion is finalized, “Each opinion ready for signature *should* include a completed opinion control sheet signed by the primary Deputy, the Attorney-Adviser, and the Deputy who did the second Deputy read.”²⁰⁷ In other words, the normative process within OLC recommends that more than one Deputy “should” review an opinion, and encourages Deputies to also include the career area expert in the review process. But this is not a formal requirement, nor is it derived from a strong source such as a Congressional statute. The approval and review process is thus institutionally weak. The normative process may prefer that the senior career lawyers and international law experts be included when the applicability of a provision found in treaty law is in question, but the process allows for their exclusion.

The Best Practices memos also indicate that draft OLC opinions “may” be shared with other departments within DOJ or in the larger inter-agency process.²⁰⁸ Here, OLC must strike a careful balance between sharing its preliminary views with others, understanding the concerns of other departments, seeking the expertise of other bureaucracies, and maintaining its independence. Within DOJ, the 2005 Best Practices memo notes that, “Our general practice is to circulate draft opinions to the Office of the Attorney General and the Office of the Deputy Attorney General for review and comment.”²⁰⁹ Here, the updated 2010 Best Practices memo is more forceful since, “OLC issues opinions pursuant to the Attorney General's delegated authority,” and clarifies that, “the Office keeps the Office of the Attorney General and the Office of the Deputy Attorney General apprised of its work

²⁰⁶ Emphasis added. Bradbury, 2005, 1.

²⁰⁷ Emphasis added. Bradbury, 2005, 3.

²⁰⁸ Bradbury, 2005, 3.

²⁰⁹ Bradbury, 2005, 3.

through regular meetings and other communications.”²¹⁰ Outside of DOJ, with the added concern of maintaining its independence, the memo states that, “when and as warranted” OLC will circulate an “informational copy” of the draft memo to the White House Counsel.²¹¹ However, the memos do not specify whether it is ever appropriate to share the entire draft memo with the White House or if members from the President’s staff can provide revisions to the draft memo.

When it comes to seeking the expertise of other departments, the Best Practices memos recommend that,

“When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. For example, when the question involves the interpretation of a treaty or a matter of foreign relations, our practice is to seek the views of the State Department... [OLC] Will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.”²¹²

Giving a veto to the requesting agency (i.e. the White House or the CIA) regarding what department can be consulted for their expertise might lead to suboptimal legal analysis. Finally, once finalized, certain OLC opinions will remain secret, and only the requesting department and the White House might get access to the opinion. Thus the legal position of the Executive Branch might not be known by all departments that have a legal-stake in the issue, which makes it very difficult to try and change contested legal-policy decisions.

The Best Practices memos show that the OLC opinion writing, review, and approval processes reflect a weak institutionalization of the law, as: expert career lawyers can be easily cut out of the process; where review can be kept to a minimum, within and outside

²¹⁰ Barron 2014, 4.

²¹¹ Bradbury, 2005, 3.

²¹² Bradbury, 2005, 2.

OLC; where clear procedures to maintain independence from the White House are lacking; and where seeking the legal expertise of other departments can be subverted by outside partial actors. Additionally, given that the stakes are so high, all the legal-stakeholders try to influence the process—especially the White House—and the weak institutional structure makes OLC especially susceptible to such pressures. The outcome, as former Acting State Department Legal Adviser, Michael Matheson explained, is that, “OLC will tend to have more of a political attitude, meaning that they are responding to the policy imperatives of the administration. And they will have much less understanding with respect to the operational concerns of the different agencies... it’s just because of the way that OLC has been used by the White House.”²¹³ At OLC, the politicization of the legal-policy process is especially acute when international law questions arise since that body of law is not within the historical area of expertise or concern of the office. The foremost expert on international law in the Executive Branch is the State Department.

The Department of State

In the early days of the American Republic, the Secretary of State—more often than not a trained lawyer—conducted most of his own international legal work.²¹⁴ In the early nineteenth century, State Department officials began depending on the legal advisor on Claims, but that position was transferred to DOJ in 1870. Finally, on February 23, 1931, Congress passed the Moses-Linthicum Act, which created the Office of the Legal Adviser as an independent organization within the Department of State.²¹⁵ Known throughout the

²¹³ Author interview with Michael Matheson, 2014.

²¹⁴ Bilder, 1962, 633-634.

²¹⁵ Koh, 2011.

Executive as “L” the State Department Legal Adviser’s Office was created in order, “to provide legal advice on all problems, domestic and international, that might arise in the course of the Department’s activities.”²¹⁶ L lawyers became the preeminent experts within the US government concerning international law issues. However, in more recent years, as the importance of international law has grown, other departments within the Executive no longer defer to L on international legal matters. At the policy level, the Office of Legal Counsel has become its main rival. At the operational level, the Department of Defense and the Central Intelligence Agency have also challenged L’s authority in order to control how international law affects its workforce.

The State Department Legal Adviser is politically appointed and must be confirmed by the Senate. Within the State Department’s hierarchy, the Legal Adviser’s rank is equivalent to an Assistant Secretary of State (between the fourth to fifth rank in the Department).²¹⁷ Although the Legal Adviser might bring in a small staff of politically appointed assistants, the core of the office is its large career staff. At its inception, L had less than 25 career lawyers, today, that number exceeds 200.²¹⁸ The Legal Adviser is assisted by four career Deputy Legal Advisers, who collectively supervise more than twenty career Assistant Legal Advisers that manage five regional and 23 functional offices.²¹⁹ The remainder of the legal staff are Attorney-Advisers, who are supported by a non-legal staff of close to 100 individuals.

From a LOAC-perspective, the Office of the Legal Adviser has six functional offices of special interest: Office of Treaty Affairs; Office of Political-Military Affairs; Office of Human

²¹⁶ Koh, 2011, 1750.

²¹⁷ Scharf & Williams, 2010, 15.

²¹⁸ Koh, 2011; United States Department of State, 2015.

²¹⁹ United States Department of State, 2015.

Rights and Refugees; Office of Law Enforcement and Intelligence; Office of United Nations Affairs; and the Office of Nonproliferation and Arms Control.

The Office of Political-Military Affairs, “Provides legal assistance in matters relating to global military and political-military activities, base rights and status of forces agreements; foreign military claims and suits against U.S. Armed Forces; munitions control; use of force and war powers; and laws of war.”²²⁰ Members of this office are in constant contact with Department of Defense attorneys during the negotiations of treaties, the decision to sign and ratify agreements, and during internal contests over the interpretation of the law. The Office of Political-Military Affairs is also in constant contact with the International Committee of the Red Cross and other humanitarian and human rights organizations during war. Similarly, the Office of Law Enforcement and Intelligence coordinates cases of international extradition, advises on US intelligence activities, including covert action, and “advises on proposed legislative initiatives and international agreements on anti-terrorism, narcotics matters, and other law enforcement issues.”²²¹ The Office of Human Rights and Refugees, “Leads U.S. delegations in multilateral negotiations of human rights instruments. Acts as counsel to U.S. delegations and participates in negotiations at the U.N.” and other international organizations, and “coordinates U.S. reporting to treaty bodies on U.S. implementation of human rights treaty obligations,” including the UN’s Committee Against Torture, and provides counsel to the State Department and the rest of the Executive Branch on matters relating to human rights law.²²²

²²⁰ United States Department of State, 2015.

²²¹ United States Department of State, 2015.

²²² United States Department of State, 2015.

The Office of Treaty Affairs, “provides guidance and assistance in the authorization, drafting, negotiation, application, and interpretation of international agreements.”²²³ L attorneys are true international lawyers. For example, in 1973, Deputy Legal Adviser George Aldrich, an expert on LOAC led the US delegation that helped negotiate Additional Protocols I and II of the Geneva Convention from 1974 to 1977.²²⁴ In other words, L attorneys are at the forefront of shaping international legal agreements. But they also push for the incorporation of international law into the US legal system. Here, the Office of Treaty Affairs also, “Reviews the transmittal of treaties to the Senate for advice and consent to ratification.”²²⁵ This involves constant work as former Legal Adviser John Bellinger III explains the role of this office during the 110th Congress,

“attorneys in L, working with an L lawyer detailed to the Senate Foreign Relations Committee, secured Senate approval of ninety treaties, more than during any single Congress in American history. These treaties included many multilateral treaties, including five international humanitarian law treaties, including The Hague Cultural Property Convention, which had languished unratified for more than fifty years. L's lawyers also successfully negotiated and secured ratification of the Third Additional Protocol to the Geneva Conventions, which created the Red Crystal, and allowed the entry into the International Red Cross and Red Crescent Movement of the Israeli and Palestinian national humanitarian societies.”²²⁶

L attorneys are constantly lobbying Congress for ratification of international treaties.²²⁷

But even when ratification is delayed, lawyers at L press the US government to follow the customary law provisions of non-ratified treaties. For instance, although the US has not yet ratified the Additional Protocols, another Deputy Legal Adviser, Michael Matheson wrote an article in his official capacity that identified the provisions in the Protocols that the US

²²³ United States Department of State, 2015.

²²⁴ Aldrich, 1985; Koh, 2011; See also, Mantilla Casas, 2013, 269-283.

²²⁵ United States Department of State, 2015.

²²⁶ Scharf & Williams, 2010, 136.

²²⁷ Scharf & Williams, 2010, 136.

considered part of customary international law, including Article 75 of Additional Protocol I, adding further protections to wartime detainees.²²⁸

L also keeps a library of the negotiation histories of treaties, and for several decades has published the comprehensive annual series of the *Digest of the United States Practice in International Law*, in order to, “provide the public with a historical record of the views and practice of the Government of the United States in public and private international law.”²²⁹ L career attorneys, unlike State Department’s Foreign Service officers, stay in the Office for their entire career working on international law issues.²³⁰ Thus, L’s workforce, library, and publications represent the largest institutional repository and memory of international law in the Executive Branch.

L attorneys also work with the Justice Department in litigation in US Courts where they stress the importance of the US maintaining its commitment to international law.²³¹ At the international level, L attorneys represent the US in international courts and tribunals. Thus L attorneys help shape the law internationally, they push for its implementation at home, they interpret its meaning, and they help develop transnational case law.

Although incoming L attorneys do not receive any formal training in international law, each Attorney-Advisers works in one of the 28 specialized offices on two to three year rotations. The culture at L is focused on developing a workforce of “generalists” on international law.²³² The advantage is that whenever a crisis ensues, there are a number of

²²⁸ Author interview with Michael Matheson, 2014; See also, Matheson, 1987; Matheson, 2006.

²²⁹ Author interview with David Bowker, 2015; Koh, 2011, 1752.

²³⁰ Koh, 2011, 1752.

²³¹ Scharf & Williams, 2010, 136.

²³² Author interview with Newell Highsmith, 2014; Author interview with Michael Matheson, 2014; Author interview with David Kaye, 2014.

experts within L that can provide legal assistance beyond those that are presently serving in one of the specialized offices.²³³

Other members of the State Department do receive periodic training from L attorneys. Richard Clarke, a State Department official during the 1980s, explains the training he received as a new employee,

“In the State Department, when I was appointed to the Assistant Secretary... they did hold a training program. It wasn’t terribly long, two or three days, and one of the sessions was with someone from the Legal Adviser’s Office. Mostly what they said was here is how we are going to relate to your organization. There were offices within the Legal Adviser’s bureau that corresponded to each of the other bureaus, so in effect the Legal Adviser gave you a legal team that worked for you but also worked for him, and it was an interesting dual-relationship, it worked well for me. Basically the things I remember from the class were: before you take the job, sit down with your legal adviser and have him or her go over with you your legal responsibilities and your legal authorities, what things are covered in law specifically about your organization. That was actually quite helpful, my organization had a lot of statutory responsibility and statutory authority, a lot of which I didn’t know.”²³⁴

L has been highly institutionalized in the approval and review process within the State Department. Scharf and Williams explain how within the State Department, "virtually no foreign policy decision can be made without first receiving clearance from L, and no delegation can be sent to an international negotiation or international organization without a representative of L."²³⁵ Although the Legal Adviser is subordinate to and answers directly to the Secretary of State, L attorneys respond directly to their own chain of command within L, as opposed to their clients throughout the State Department bureaucracy, which protects the independence of advice.²³⁶

²³³ Author interview with David Bowker, 2015; Author interview with Newell Highsmith, 2014; Author interview with David Kaye, 2014.

²³⁴ Author interview with Richard Clarke, 2014.

²³⁵ Scharf & Williams, 2010, xix.

²³⁶ Scharf & Williams, 2010, 15.

L's organizational culture highlights the importance of international law as a strategic asset for the US.²³⁷ As such, L attorneys are constantly focused on how US actions and positions towards international law potentially affect issues of reciprocity, but also how such actions shape the development of international law.²³⁸ Thus, L has institutionalized international law to a high degree. However, two main shortcomings limit the influence of the career lawyers at L. First, the Legal Adviser is a political appointee that exercises significant influence over how the office approaches the law, especially during crises. Second, as the next section on the National Security Council will show, it is not uncommon for L to be excluded or ignored during inter-agency legal-policy deliberations.

The National Security Council

For the US the inter-agency process is dominated by a highly informal process known as the National Security Council System. The NSC System has three components. First, there is the formal structure found in the statutory body of the National Security Council. As will be explained below, the significance of the formal NSC in the policy-making process has waned considerably over the years as a more informal process has dominated inter-agency deliberations. The Second component is the National Security Council *Staff*, led by the National Security Advisor, and supported by 50-400 politically appointed personnel to coordinate analysis, advice the President, and support the formal NSC meetings.²³⁹ Finally, the third, is the broader NSC System itself, which consists of both the

²³⁷ Author interview with Newell Highsmith, 2014; Author interview with David Bowker, 2015; See also, Koh, 2011.

²³⁸ Koh, 2011, 1754.

²³⁹ Zegart, 2000, Kindle 3111 of 3992.

National Security Council and the NSC Staff, as well as a number of other inter-agency committees, including ad hoc committees and informal meetings.

On July 26, 1947 President Harry Truman signed the National Security Act creating the formal framework of the modern national security decision making process of the United States. The statute significantly transformed the bureaucracy of the executive branch and “formally institutionalized a new set of relationships regarding civil-military coordination.”²⁴⁰ Most significant was the creation of the National Security Council, an inter-departmental body tasked with the function of advising the president “with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the government to cooperate more effectively in matters involving the national security.”²⁴¹

Amended in 1949, the NSC has four statutory members including the President, the Vice President, and the Secretaries of State and Defense. Additionally, the Chairman of the Joint Chiefs of Staff and the Director of Central Intelligence serve as advisors to the Council, “subject to the direction of the President.”²⁴² This statutory distinction between membership and advisory status follows from the tradition that the chairman and director of national intelligence should only provide input based on their expertise and defer on matters of policy.²⁴³ In practice, however, even in the formal NSC as Baker explains, intelligence and policy are “inexorably bound,” as policy is dependent on intelligence and intelligence is guided by policy.²⁴⁴ Moreover, in the informal NSC System, the advisor often

²⁴⁰ Mabee, 2011, 27.

²⁴¹ National Security Act of 1947, 2015, Section 101.

²⁴² National Security Act of 1947, 2015, Section 101(b); See also, J. E. Baker, 2007, 105.

²⁴³ Baker, 2007, 105-106.

²⁴⁴ J. E. Baker, 2007, 106.

acts as policymaker,²⁴⁵ and the common practice of manipulating intelligence further blends the intelligence/policy bifurcation.²⁴⁶

Paradoxically, the 1947 National Security Act increased the interdependence between the national security departments on the one hand, and created a new power center for foreign policy making on the other.²⁴⁷ Ideally, the NSC staff led by the National Security Advisor is tasked with making sure that any proposed policy is: consistent with the President's general preferences; that all the relevant departments are included in the policy deliberations; and that all the risks—including legal concerns—have been identified and assessed.²⁴⁸ The normative NSC process involves five steps: (1) identify the issue at hand; (2) formulate a list of potential options to take; (3) coordinate with the appropriate decision makers; (4) choose an action(s); (5) review and supervise the implementation of the policy chosen and make appropriate adjustments when necessary.²⁴⁹

The 1947 Act and the NSC system that resulted from it helped the inter-agency process by delineating the key stakeholders that needed to be involved in foreign policy making. As Marcella explains, these stakeholders, with varying resources, interests, expertise, and cultures, became bounded together by “functional interdependence,” where, “It is an iron rule of the interagency that *no national security or international affairs issue can be resolved by one agency alone.*”²⁵⁰ For example, even during military operations, the Department of Defense depends on the Department of State's diplomatic expertise in

²⁴⁵ The tenure of William J. Casey as DCI is an often cited example of the adviser being at the center of policymaking. See, Byrne, 2014.

²⁴⁶ For a brief discussion of the tensions between intelligence and policy and the different ways in which intelligence can be manipulated see, Treverton, 2008, 93; Wirtz, 2007, 144-146.

²⁴⁷ J. E. Baker, 2007, 102; Marcella, 2008, 8; Stuart, 2008, 234.

²⁴⁸ J. E. Baker, 2007; Marcella, 2008, 16.

²⁴⁹ Marcella, 2008, 17.

²⁵⁰ Of course a department's influence will vary depending on the issue at hand. Emphasis in original. Marcella, 2008, 25.

building and maintaining military coalitions. Over the years, as the NSC process evolved through its informal channels, new stakeholders have been added, including legal advisers, who were absent from most policy deliberations of the 1940s through the mid-1970s, but today are present in each of the five steps of the NSC system.

As the power of the NSC staff has grown, it established what Destler, Gelb, and Lake have called “the operational presidency” as both the development *and implementation* of policy moved towards the NSC staff in the White House and away from the Departments of Defense, State, and the CIA.²⁵¹ In theory, the NSC staff is tasked with coordinating affairs and making sure there is a healthy and inclusive inter-agency process. But due to its highly informal structure dependent on “the direction of the President,” as the 1947 Act made clear, the NSC staff oscillates between coordinator and policy implementer, often not allowing the Departments of State and Defense, or the CIA to take the lead in implementing the policy in their areas of expertise.²⁵² The old axiom that proximity and access to the President translates into power in the foreign policy process has made the NSC staff very influential.²⁵³ Consequently, the various national security departments resent the NSC staff for what they perceive as their overlapping role which diminishes their influence, as well as the micromanaging and operationalizing of policy which challenges their authority and autonomy. Robert Pastor, a member of President Carter’s NSC staff summarized the problem well,

“... tension between NSC and State derives in part from the former’s control of the agenda and the latter’s control of implementation. State Department officials tend to be anxious about the NSC usurping policy, and the NSC tends

²⁵¹ Destler, Gelb, & Lake, 1985, 247.

²⁵² National Security Act of 1947, 2015, Section 101(b); Marcella, 2008, 15; Rothkopf, 2009; Zegart, 2000, Chapter 3.

²⁵³ Marcella, 2008, 16.

to be concerned that State either might not implement the President's decisions or might do so in a way that would make decisions State disapproved of appear ineffective and wrong."²⁵⁴

Another point of contention is that the NSC staff is there at the behest of the President to represent his interests, not just the broader "national security interest." Although NSC staff members represent a mix of outside political appointees and detailed staffers from other Executive Branch bureaucracies, as Richard Clarke, an NSC staff member for three different Presidents explains, the culture at NSC is highly political,

"Although the NSC staff by law is supposed to be non-political, you are on the President's staff. Every President has exercised executive privilege for communications between him and the staff, so you cannot be called to testify... and while you are just as you would be at the State Department and the Pentagon, looking after the national interest, there is certainly also an element in the White House, if you are on the President's staff, that you are looking after the President. Now that doesn't usually conflict, the national interest and the President's interests tend to be the same, but there is more of a political overlay in the White House than there is elsewhere."²⁵⁵

Furthermore, the NSC staff receives no legal training, including the legal staff.²⁵⁶ Clarke explains his training once he arrived at NSC,

"At NSC, there was never any instruction at all, you become a Special Assistant to the President, and you just walk in, they give you instruction on stupid things like the Presidential Documents Retention Act. They will give you a security briefing, they will give you an ethics briefing, but there was never a single sit down: this is how to do your job briefing with a legal component."²⁵⁷

The NSC staff is also temporary. There are no career NSC staff members, and each new administration typically replaces the vast majority of the staff with their own appointed staff. Although there is an informal process that guides such transitions, including the creation of transition papers to assist and inform new staff members of policies, procedures, and concerns, the incoming administration also mandates policy reviews and

²⁵⁴ Marcella, 2008, 15.

²⁵⁵ Author interview with Richard Clarke, 2014.

²⁵⁶ Author interview with Nicholas Rostow, 2014; Author interview with Mary DeRosa 2014; Author interview with Judge James E. Baker, 2015.

²⁵⁷ Author interview with Richard Clarke, 2014.

rescinds past Presidential Directives in order to shape, organize, and focus the NSC system to meet the policy priorities of the new administration.²⁵⁸ This massive turnover of NSC staff, and the constant reorganization of the NSC system, has made it very difficult for the NSC to maintain an institutional memory or to develop its own distinct organizational culture—aside from its loyalty to the President. In 1987, the National Academy of Public Administration issued a report on the state of the US national security process which concluded that, “...the institutional memory of the United States Government for important national security affairs was worse than that of any other major world power and had resulted in mistakes and embarrassments in the past which would be bound to recur.”²⁵⁹ The current NSC system still suffers from most of the same structural weaknesses from two decades ago.

The approval and review process of the NSC system is also institutionally weak given that it is largely dependent on Presidential Directives and informal norms and groups. As Figure 3.1 illustrates, at the top of the approval and review hierarchy is the President, followed by the National Security Council, the Principals Committee, a Deputies Committee, and a series of Working Groups organized around specialized issue or geographical areas. Near the end of the Reagan administration, a new working group was established that focused on legal issues, known as the lawyers group. However, with the exception of the NSC and the Principals Committee, all of the other bodies are established through Presidential Directives, meaning that any President can change, replace, or disband any given group at his discretion. Furthermore, most Presidents have utilized informal groups that run parallel to the formal NSC process where a smaller group of

²⁵⁸ Marcella, 2008, 21.

²⁵⁹ Marcella, 2008, 46n48.

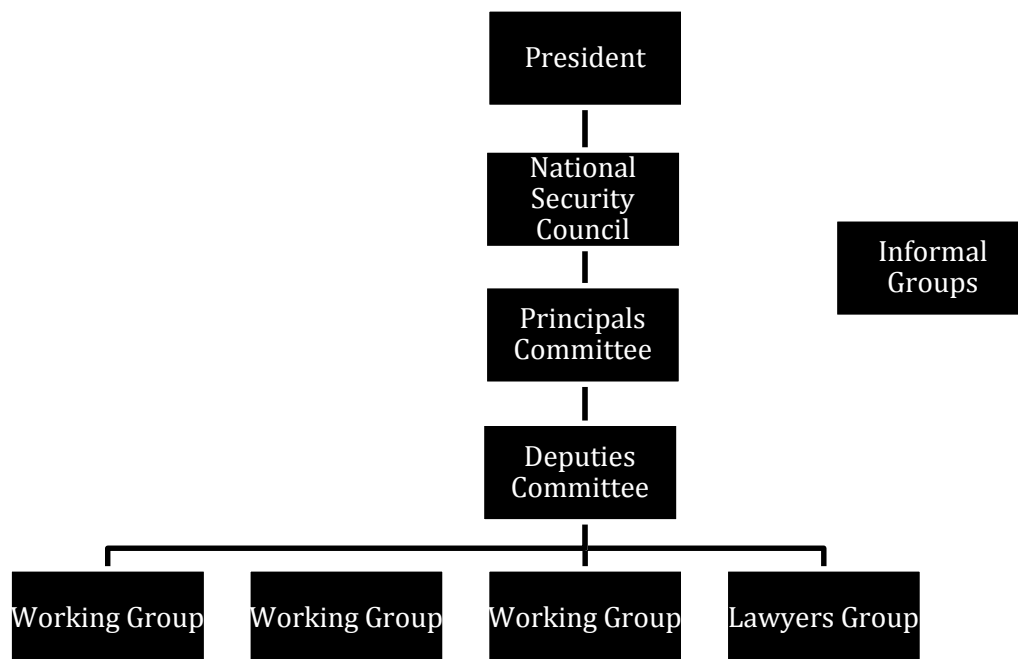
people—close to the President—review and approve the most important policy decisions.²⁶⁰ For example, as Auerswald has illustrated, President Kennedy depended on the “ExComm” group; President Johnson used “Tuesday Lunches;” President Nixon depended on private meetings with Secretary Henry Kissinger; President Carter used “Friday Breakfasts;” President George H. W. Bush convened the “Big Eight” and “Inner Circle” meetings; President Clinton used several special sessions, including the “ABC Meetings;” finally, as Chapter 5 will show, under the administration of President George W. Bush there was a parallel NSC process led by the Vice President’s Office that made the key decisions.²⁶¹ In other words, the NSC system is largely dependent on what the President demands, accepts, or tolerates, as opposed to clear, legally mandated procedures.²⁶² This reflects a weak institutionalization of the law.

Figure 3.1: National Security Council Review and Approval Process

²⁶⁰ Auerswald, 2011, Kindle 639 of 6327.

²⁶¹ Auerswald, 2011, Kindle 644 of 6327.

²⁶² J. E. Baker, 2010, 392.



Noticeably absent from the statutory membership of the NSC are any legal advisers. The Attorney General might be invited by the President or the National Security Adviser to attend such meetings, but the inclusion of members of the Department of Justice is not mandated. Neither is the White House Counsel, and until the late 1980s, the NSC staff had no independent legal adviser.

The Iran-Contra affair, which was organized and operated by NSC staff members, led to a series of reforms to the NSC system. In November 1986, President Reagan appointed a special commission led by former Senators John Tower and Edmund Muskie, and former National Security Advisor Brent Scowcroft, to investigate the alleged failures of the NSC system during Iran-Contra.²⁶³ The so-called Tower Commission made several key recommendations including, “that the position of Legal Adviser to the NSC be enhanced in stature and in its role within the NSC staff.”²⁶⁴ Nicholas Rostow, one of the authors of the

²⁶³ Byrne, 2014, Kindle 391 of 12861.

²⁶⁴ Tower, Muskie, & Scowcroft, 1987, V-6.

Tower Commission, explained the role of the NSC legal adviser during the early Reagan years, “there was a legal adviser at NSC, but that individual held more than one role, and they mainly just did ethics, they did not give advice on covert action, war powers advise, etc.”²⁶⁵ In 1987, Rostow was appointed to the NSC staff to set up the Legal Adviser’s Office, where he would serve as Deputy and then Legal Adviser until 1993.²⁶⁶ At NSC, Rostow would help author a series of Presidential Directives, including, NSDD-266, NSDD-277, NSDD-286, and a still-classified secret directive that substantively changed the legal-policy process at NSC (the classified Presidential Directive will be discussed in more detail in Chapter 3).

The NSC Legal Adviser’s Office is the smallest of the national security bureaucracies in the Executive Branch. It started with a total staff of three, which grew to four under the Clinton administration, and six under Obama.²⁶⁷ The main function of the NSC lawyer is also unclear. Although all NSC lawyers, “provide internal legal advice to the president, national security advisor, and NSC staff as well as review and write memoranda to the president, issue spotting and discussing the legal issues raised,” Baker explains that the role also, “appears to have varied in texture depending on whether the NSC staff are viewed as facilitators of interagency process or sources of rival legal advice to department general counsel.”²⁶⁸ The main problem is that the position is institutionally weak, as the role of the NSC legal adviser is not defined in statute, and only in certain narrow spheres (like covert

²⁶⁵ Author interview with Nicholas Rostow, 2014.

²⁶⁶ Author interview with Nicholas Rostow, 2014.

²⁶⁷ Author interview with Nicholas Rostow, 2014; Author interview with Mary DeRosa, 2014.

²⁶⁸ J. E. Baker, 2007, 312.

action) do Presidential Directives provide some guidance.²⁶⁹ Therefore, the main functions of the NSC lawyer are dependent on custom and informal norms.

For example, the kind of meetings that the NSC Legal Adviser is allowed to attend has changed over time. Rostow was present at all covert action meetings, as the still-classified Directive mandated. He was also a regular attendee of Deputies' meetings, but he was not allowed to attend most Principal or NSC meetings.²⁷⁰ He recalls his tenure as the NSC's top lawyer as a constant struggle to get access to key meetings and issues,

“Scowcroft had been National Security Adviser under Ford and had not had a legal adviser... I learned later [that on the Tower Commission, Scowcroft] had not agreed with the recommendation to create such a position. On the other hand, I'm not sure that he found it a bad thing, he just didn't use it very much and I was always having to fight my way into things... I never got regularly included in things. For example, I sort of invited myself to the party when Iraq invaded Kuwait and spent the night at the White House and the Situation Room, and in the morning there was going to be a meeting with the President, and I asked Scowcroft if I could go, and he said no. So, I was there working on freeze orders and that sort of thing; the legal implementation of sanctions against Iraq... I didn't have any complaints but I was a bit frustrated.”²⁷¹

By the Clinton administration this changed, and the NSC Legal Adviser began to be invited to most top level meetings.²⁷² Under Obama, NSC Legal Adviser, Mary DeRosa explains that,

“I was at almost all of the Principals meetings... there is almost no national security issue that doesn't have a legal element to it or legal questions that need to be answered or legal minefields that need to be navigated. I wasn't at every single one... in the series of the purely policy PC's [Principal Committee] about Afghanistan or Iraq very early on I was not involved in all of those because there really weren't legal issues. But for the most part, I or one of my lawyers was in almost all of PC meetings. I'd say 95 percent of PC's. And the deputies committee meetings, pretty much the same.”²⁷³

Legal advisers' access to key NSC meetings where policy options are being reviewed or decisions are being made is essential for legal review to succeed. The lawyer can try to

²⁶⁹ J. E. Baker, 2007, 312.

²⁷⁰ Author interview with Nicholas Rostow, 2014.

²⁷¹ Author interview with Nicholas Rostow, 2014.

²⁷² Author interview with Judge James E. Baker, 2015.

²⁷³ Author interview with Mary DeRosa, 2014.

anticipate what legal issues are going to come up ahead of time, but meetings are unpredictable, especially in the national security realm where events are constantly changing or new issues emerge. Here, if given access, the NSC lawyer can play a crucial role.

DeRosa explains the special function of the NSC legal adviser,

“Usually the NSC lawyer is the only lawyer in the room... I would have beforehand talked to my clients about what the legal conclusions were. They would know that before going in, the National Security Adviser or the Deputy National Security Adviser. But then I would be there to explain it as things came up and also if issues came up in their discussions that raised legal issues either that they had a question... or if I’m listening to the discussion and realize that they are going down some road that is going to have a legal issue. Then I would have to raise, ‘look this is something you need to be aware of,’ or, ‘I’m going to have to look at this,’ or ‘the lawyers are going to have to look at this.’”²⁷⁴

With a staff of only a handful of lawyers, and a legal agenda that has to cover, “every issue that is raised in connection with the foreign policy or a national security matter that is going to the President [and] that is being considered by the NSC,” the NSC Legal Adviser is going to devote, “a huge part of the job is to coordinate with lawyers outside of the NSC.”²⁷⁵

The Tower Commission recommended that there needed to be better inter-agency coordination between the various Executive Branch legal advisers,

“It is important that the Attorney General and his department be available to interagency deliberations. The Justice Department, however, should not replace the role of counsel in the other departments. As the principal counsel on foreign affairs, the Legal Adviser to the Secretary of State should also be available to all the NSC participants.”²⁷⁶

With regards to broader NSC matters, Presidential Directive, NSDD-266 tasked the NSC legal adviser with coordinating legal issues with, “the Counsel to the President, the Legal Adviser of the Department of State, and with senior counsel to all other NSC members,

²⁷⁴ Author interview with Mary DeRosa, 2014.

²⁷⁵ Author interview with Nicholas Rostow, 2014; Author interview with John Bellinger III, 2014; Author interview with Mary DeRosa, 2014; J. E. Baker, 2007, 312.

²⁷⁶ Tower, Muskie, & Scowcroft, 1987, V-6.

advisors, and participants.”²⁷⁷ The NSC Legal Adviser began setting up inter-agency lawyers meetings and ad hoc lawyers groups began to be organized.

One of the first was the “War Powers Group,” an inter-agency lawyers group set up during the George H. W. Bush administration, where, “every time there was an issue involving the use of force all the lawyers got together to discuss it to work the draft of the War Powers reporting letter.”²⁷⁸ The Group included the Legal Adviser to the NSC, the Counsel to the President, the State Department’s Legal Adviser, the Assistant Attorney General of the Office of Legal Counsel, the CIA General Counsel, the Department of Defense General Counsel, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.²⁷⁹ As the first Gulf War approached, the Group, “met with the President in the Cabinet Room. That was very unusual. And it was before Congress authorized the use of force, and we had all unanimously advised the President that you need Congress.”²⁸⁰ Even though the Lawyers Group was dealing with use of force issues, their focus did not extend much into international law. Rostow explains the legal focus,

“When the lawyers got together representing different departments and agencies they addressed issues like War Powers, coordinated responses to Congressional inquiries, we had lots of meetings on different things but they were mainly dealing with aspects of the constitutional separation of powers and how to deal with the War Powers... I do not recall us getting involved in targeting decisions during Desert Storm.”²⁸¹

The War Powers Group proved useful and similar inter-agency lawyers groups were created to deal with covert action (discussed in Chapter 3) and other national security issues. Figure 3.2 illustrates the normative membership of inter-agency lawyers groups.

²⁷⁷ National Security Council Decision Directive 266, 1987, 5.

²⁷⁸ Author interview with Nicholas Rostow, 2014; See also, Alito Jr, 1993.

²⁷⁹ Author interview with Nicholas Rostow, 2014.

²⁸⁰ Author interview with Nicholas Rostow, 2014.

²⁸¹ Author interview with Nicholas Rostow, 2014.

Figure 3.2: Normative Composition of NSC Lawyers Group



During the Clinton administration, with James E. Baker as the NSC Legal Adviser, inter-agency lawyers groups became more formalized, and their legal focus and role expanded to cover not just international law but operational law as well.²⁸² Baker explains how during the 1999 Kosovo war, “My sources were customary international law (including those portions of Protocol I recognized by the United States as customary international law), the Geneva Conventions, the Geneva Convention Commentaries, U.S. military manuals and academic treatises...”²⁸³ NSC lawyers with inter-agency coordination began to review a subset of targets for potential bombing operations to be approved. This meant that the NSC and inter-agency lawyers groups were now engaged in an operational role. It added a layer of review for approving targets that complemented the similar reviews conducted by military lawyers. This centralized the process but in an inclusive manner: it increased the number of lawyers that had to review the war making process. The problem is that this process is institutionally weak as it depends on informal procedural norms. As Chapter 5 will show, under the George W. Bush administration, the approval of the torture program was also centralized, but in an exclusionary manner, where legal advisers that opposed the program were cut out of the process.

²⁸² J. E. Baker, 2002, 2003.

²⁸³ J. E. Baker, 2002, 15.

Under Obama, more inclusive inter-agency lawyers groups were re-instated.²⁸⁴

DeRosa explains the frequency of these meetings and their operational scope,

“Lawyers groups meetings [are held] usually several times a week. It could even be daily on different issues, and with some different configurations. In the lawyers group you don’t always have everyone. If it’s a covert action, you always have everyone; if it’s a military operation, you might not have the CIA or DNI; if it’s an intelligence issue but not a straight covert action you might not have DOD there. You almost always are going to have State; almost always are going to have OLC. And obviously if it’s a lawyers group meeting, you are going to have NSC.”²⁸⁵

At these meetings, the NSC Legal Adviser tries to, “bring all the lawyers together, to coordinate, and to try to get a consensus. Or to try to correct for all the different perspectives, and get a view that is more balanced to try to balance the perspectives of the different agencies.”²⁸⁶ If agreement cannot be reached and the issue is of great importance, it will likely be sent to the Office of Legal Counsel to author a legal opinion. This tool is sometimes referred to as using the “OLC Hammer” to settle disputes. However, as DeRosa explains, “the ‘OLC hammer’ is one that you want to use sparingly; you don’t want to always say, ‘ok OLC, you decide.’ Because first of all, it’s not great at getting everybody bought into the process, but you also don’t know how they are going to come out.”²⁸⁷

While the establishment of these inter-agency lawyers groups represent an impressive development in the review and approval of legal-policy, the process has two main shortcomings. The first is that the use of these groups is part of an informal procedure that can be eliminated at any moment. As DeRosa explains, “my concern is that the lawyers group could go away in an instant because there is nothing keeping it there and there is so

²⁸⁴ Savage, 2015, 64.

²⁸⁵ Author interview with Mary DeRosa, 2014.

²⁸⁶ Author interview with Mary DeRosa, 2014.

²⁸⁷ Author interview with Mary DeRosa, 2014.

little institutional memory, but it is such an important process."²⁸⁸ Second, these lawyers groups are dominated by political appointees. With the important exception of the Legal Counsel to the Chairman of the Joint Chiefs of Staff, all of the members of the top inter-agency lawyers groups are political appointees. The process is also controlled and chaired by the NSC Legal Adviser, and the White House Counsel can assert significant control over these matters.²⁸⁹ The legal emphasis of these two actors, as Rostow argues, "we were all [NSC and White House] more or less concerned to preserve the President's prerogatives."²⁹⁰ Therefore, while the NSC legal process has increased its institutionalization of international law, it remains at a weak-to-medium degree of institutionalization. In addition, the process is dominated by political appointees, making the process highly susceptible to political manipulation.

This chapter has traced the degree to which four national security bureaucracies have institutionalized international law. The White House has experienced the least amount of institutionalization. The Office of Legal Counsel and the National Security Council have seen some increases in their institutionalization, but both offices remain highly controlled by political appointees, the training is minimal, the approval and review procedures are highly informal, and neither office has inculcated an ethos that values international law. The State Department Legal Adviser's Office is the only bureaucracy at the policymaking level that has reached a strong degree of institutionalization. The office specialized in international law and its workforce has come to value international law as a strategic asset.

²⁸⁸ Author interview with Mary DeRosa, 2014.

²⁸⁹ J. E. Baker, 2007, 312.

²⁹⁰ Author interview with Nicholas Rostow, 2014.

The next chapter will trace the institutionalization of the two main operational agencies. First, the Defense Department with special emphasis on the US armed forces and the JAG Corps. Second, the Central Intelligence Agency.

CHAPTER 3:

Institutionalizing International Law: Operators

This chapter traces the institutionalization of international law by the Department of Defense and the Central Intelligence Agency, the two key national security organizations composed of the operators that carry out US policy on the ground. As with the last chapter, the focus will be on how both of these agencies have incorporated international law into their approval process, training, legal advice, and organizational culture.

The Department of Defense and Military Lawyers

During armed conflicts decisions are made by and are carried out through the military chain of command.²⁹¹ The President, as Commander in Chief, is at the top of the operational chain of command, followed by the Secretary of Defense, the uniformed combatant commanders and their subordinates, and finally at the tip of the spear are soldiers, sailors, and pilots. Today, there are legal advisers—both civilian and military—providing legal guidance at each level of the operational chain. While the President and the Secretary of Defense—and their advisers—mainly deal with the legal questions surrounding when to go to war (*jus ad bellum*), the uniformed military lawyers (JAGs), have largely, though not exclusively, dealt with the legal issues surrounding how to wage war (*jus in bello*). In recent years however, as the NSC section in the previous chapter showed, civilian lawyers and non-lawyers are playing a growing role in *jus in bello* decisions as well. This section will focus on how the command structure at the Department of Defense, starting with its civilian elements and continuing through the uniformed chain of

²⁹¹ J. E. Baker, 2007, 225.

command, has developed over the years in a way that has increasingly institutionalized the laws of armed conflict. Special attention will be given to the JAG Corps and the training instituted to make sure soldiers comply with the law.

The National Security Act of 1947 created the Department of Defense (DOD) in an effort to unify the armed services and establish a civilian management structure to centralize and coordinate military affairs. The Act saw major modifications in 1953, 1958, and most recently in 1986 with the Goldwater-Nichols Act, which set the modern structure of the Department.²⁹² On the civilian side, the Office of the Secretary of Defense is currently headed by the Secretary of Defense, who is assisted by his Deputy Secretary, six Under Secretaries, and ten Assistant Secretaries.²⁹³ In 1953, Congress approved the Reorganization Plan No. 6 and the Defense Department issued Directive 5145.1, creating the position of General Counsel (DOD-GC) at the rank of Assistant Secretary.²⁹⁴ The DOD-GC is responsible for providing legal advice to the Secretary, his Deputy, and the Under and Assistant Secretaries. Finally, in 1978, Congress and Defense Directive 5106.01 established the position of Inspector General, technically as an Assistant Secretary, but with broad independent investigatory authority.²⁹⁵

Today, DOD operates with an annual budget nearing \$600 billion and an active workforce of over two million.²⁹⁶ Not surprisingly, with such a large bureaucracy many lawyers are needed to address legal issues. DOD employs more than ten thousand lawyers.²⁹⁷ DOD-GC is divided into seven offices where the International Affairs Office

²⁹² Meese & Wilson, 2011.

²⁹³ United States Department of Defense Director of Administration and Management, 2013.

²⁹⁴ United States Department of Defense, Directive 5145.01, 2013.

²⁹⁵ United States Department of Defense, Directive 5106.01, 2012.

²⁹⁶ Department of Defense home page, <http://www.defense.gov/About-DoD>.

²⁹⁷ Lat, 2011.

takes the lead on operational issues, and the Intelligence Office oversees covert action. In addition, each of the 17 Agencies within DOD have their own General Counsel (i.e. National Security Agency, Defense Intelligence Agency, etc.). On the Military side, the Joint Chiefs of Staff has a small Legal Advisor's Office of military lawyers headed by a one-star Brigadier General.²⁹⁸ Each of the military departments (Army, Air Force, Navy, and Marines) has a civilian General Counsel and a three-star Lieutenant General TJAG at the top of their respective branch.²⁹⁹ The DOD-GC oversees and coordinates legal issues with all these offices, and ultimately, as former DOD General Counsel, Judith Miller explains, "the DOD General Counsel has the ability to supervise in a somewhat loose way all the Defense Agency General Counsels. And on things that affect the Department, or calls that go across boundaries, DOD General Counsel makes the call."³⁰⁰ Given the LOAC focus of this study, the following section will focus on the role of military lawyers in the Judge Advocate General Corps, since they are the ones applying the law on the ground.

The Army JAG Corps were created by George Washington in 1775.³⁰¹ Even though JAGs have been deeply embedded within the military from the beginning, their role was originally limited to tasks not directly related to combat operations. In fact, prior to the Vietnam War, JAG responsibilities remained the same during peace and war.³⁰² The JAG portfolio focused on government-oriented law, including Military Justice, Administrative Law, Civil Law, Claims, Legal Assistance, and International Law.³⁰³ Concerning

²⁹⁸ The legal office at the JCS has about eight military attorneys. Author Interview with General Richard Gross, 2014.

²⁹⁹ TJAG stands for The Judge Advocate General of the United States, which is the highest ranking member of each military branch of the JAG Corps. For the Navy, the TJAG is a Vice Admiral.

³⁰⁰ Author interview with Judith Miller, 2014.

³⁰¹ Lohr & Gallotta, 2003.

³⁰² Borch, 2001, vii, ix.

³⁰³ Parks, 1991, 395.

international law, the focus of JAGs was on matters such as Status of Forces agreements and US treaty obligations (i.e. freedom of navigation, arms controls agreements, etc.).³⁰⁴

During the Vietnam War, JAG responsibilities began to expand, but the changes were ad hoc and were propelled by individual JAGs, as opposed to larger structural reforms (Chapter 4 provides a more detailed analysis of the Vietnam War).³⁰⁵ Nonetheless, as Graham explains, the traditional role of the JAG, “was supplanted by a new idea: that, while a JA [Judge Advocate] participating in a military operation might still prosecute and defend at courts-martial, adjudicate claims, and provide legal assistance, a military lawyer best enhanced mission success by integrating legal support into operations planning and execution at all levels of command.”³⁰⁶ During the war, JAGs began to be involved in operational matters, especially concerning Prisoners of War (POWs) issues and war crimes investigations. For instance, when the US government finally recognized North Vietnamese combatants as deserving POW status on March 5, 1966, JAGs began to be directly involved in Article 5 hearings to determine the status of detainees.³⁰⁷ JAGs also initiated investigations of potential war crimes. At first, inquiries centered only on actions committed against US forces, but as the war progressed, investigations expanded to include war crimes committed by American soldiers.³⁰⁸ Parks explains how the change in mission for JAGs “reflected the growing complexity of warfighting, and the degree to which a

³⁰⁴ Lohr & Gallotta, 2003, 469.

³⁰⁵ Borch, 2003.

³⁰⁶ Graham, 2005, 374.

³⁰⁷ “Terrorists, spies, and saboteurs” and civilians were not given POW status. See Chapter 4; see also, Prugh, 1975, 66. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War states, “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy... such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” See, Parks, 1980, 14.

³⁰⁸ Borch, 2001, 12. For a detailed account of the War Crimes investigations unit, see, Turse, 2013.

military commander's decisions were affected by politico-legal considerations.”³⁰⁹ Even with such developments, commanders and soldiers rarely interacted with JAGs. As Lieutenant Commander Richard Armitage, who went on three in-country tours in Vietnam, explains,

“I was a Naval Academy graduate, so I had ethics training, not legal training. After I graduated I participated in several Navy Schools, one of which was counterinsurgency, nowhere in there was there any legal exposure at all. Six years in Vietnam, none. No exposure, no interaction, no nothing. I wouldn't have known a Navy lawyer if I fell over him.”³¹⁰

Ultimately, the main legacy of the Vietnam War for the institutionalization of law came as a result of deficiencies in the operational process—the limited and informal role played by JAGs in operations and the lack of training in LOAC for soldiers—which led to gross violations of LOAC by US forces.

US war crimes in Vietnam would be defined by the My Lai Massacre. The massacre and its cover up was eventually exposed by the US press, deeply embarrassing the US military and its professional ethos.³¹¹ The massacre at My Lai took place on March 16, 1968, and was carried out by Charlie Company, which initially claimed that 128 enemy fighters had been killed when in reality between 200 and 500 civilians were killed. The first Army investigation into the massacre was conducted by the immediate elements of Charlie Company's chain of command, which not surprisingly concluded that only twenty civilians had been inadvertently killed.³¹² The story of the massacre was finally exposed by the US press in mid-November 1968, more than a year and a half after it had taken place. By late November, the Army ordered an independent investigation to assess the failure of the

³⁰⁹ Parks, 1991, 396.

³¹⁰ Author interview with Lieutenant Commander Richard Armitage, 2014.

³¹¹ For My Lai and its cover up see, Hersh, 2013. For countless other massacres see, Turse, 2013.

³¹² Hersh, 2013, Kindle 51 of 4109.

initial investigations into the massacre.³¹³ The investigation was titled, “The Department of the Army Review of the Preliminary Investigations into the My Lai Incident,” but it quickly became known as the Peers Inquiry, after its director, Lieutenant General William R. Peers. Peers quickly expanded the investigation to include the massacre itself and the causes which allowed it to happen.³¹⁴

The Peers Report concluded that inadequate training in LOAC was one of the primary reasons for the massacre. The unit that carried out the massacre, “had received only marginal training in several key areas prior to the Son My [My Lai] operation. These areas were (1) provisions of the Geneva Conventions, (2) handling and safeguarding of noncombatants, and (3) rules of engagement.”³¹⁵ In addition, the Peers investigation found that there was inadequate training pertaining to how to identify and respond to “illegal orders.” Finally, the procedures for reporting potential war crimes were lacking given that, “Directives prescribing the procedures for the reporting of war crimes were not clear as to the action which should be taken by subordinates when their unit commander participated in or sanctioned a war crime.”³¹⁶

Technically, during the Vietnam War the US was compliant with the Geneva Conventions when it came to training its soldiers. Article 127 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War merely states that,

“The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular, to include the study thereof in their programs of military and, if possible, civil instruction, so that the

³¹³ United States Department of the Army, 1970b.

³¹⁴ Graham, 2005, 375.

³¹⁵ United States Department of the Army, 1970b, Section 8-13.

³¹⁶ United States Department of the Army, 1970b, Section 12-17.

principles there of may become known to all their armed forces and to the entire population.”³¹⁷ US military personnel received training on LOAC, including the Geneva Conventions. However, the institutionalization of that training was very weak. First, training emphasized the rights of US soldiers rather than their responsibilities and other obligations under the law.”³¹⁸ Second, as the Peers Report made clear, training was minimal, often consisting of a few lectures by a JAG and a pamphlet describing the Geneva Conventions.³¹⁹ Third, as a commander in 1968 stressed after reviewing a numerous reports on the mistreatment of prisoners, “Instruction in the Geneva Conventions has tended to be abstract and academic, rather than concrete and practical.”³²⁰ Finally, the entire training process was very informal. As Parks explains, “The effort was uneven and often personality driven. If a commander believed in the law of war, and in the importance of a disciplined military force, law of war training was emphasized, as was investigation and prosecution of incidents when they occurred,” if not, as in the case of countless US military units in Vietnam, then the training was minimal.³²¹ The Peers Investigation’s findings and recommendations set in motion a reform process that garnered the institutionalization of LOAC by strengthening the training of soldiers and JAGs, and increasing the role of JAGs in combat operations.

In May 1970, at the initiative of JAGs, the Army regulation governing training in LOAC, AR-350-216, was changed to make clear that formal instruction was a command responsibility and that the training had to, “Be presented by officers of The Judge Advocate

³¹⁷ Geneva Conventions (III), 1949, Article 127.

³¹⁸ Parks, 2002, 984.

³¹⁹ See for example, United States Department of the Army, Pamphlet No. 20-151, 1951.

³²⁰ Hersh, 2013, Kindle 558 of 4109.

³²¹ Parks, 2002, 984.

General's Corps... together with qualified company or similar commanders.”³²² The goal was to formalize the training process and make it more grounded in real-world experience, something that the military services continue to struggle with to this day.³²³ In December 1972, as US military operations were tapering off, the Department of Defense issued Directive 5100.69 in an effort to address the legal loophole that had permitted much of the abuses against POWs: the US government had taken the position that handing over detainees—civilians and combatants--to the South Vietnamese government ended US legal responsibility over those detainees even if US personnel were still directly involved in detentions and interrogations.³²⁴ The directive of course came too late to have any impact in Vietnam.

The most sweeping changes came after the war. Military leaders realized that they needed to revamp both the training and monitoring of operations in order to prevent future My Lai's.³²⁵ On November 5, 1974, on the recommendation of JAGs, Defense Directive 5100.77 created a unified Law of War Program for all the Armed Forces and made the JAG Corps the lead organization responsible for its implementation.³²⁶ The Directive stated that the program was “designed to prevent violations of the law of war.”³²⁷

The Law of War Program enacted three major reforms. First, it ordered that every member of the US armed forces be required to receive LOAC training. Additionally, it set specific duties and responsibilities for LOAC training based on the expertise of the

³²² United States Department of the Army (1970c), Army Regulation No. 350-216, 2-3.

³²³ Borch, 2003, 54.

³²⁴ Parks, 1991, 396.

³²⁵ Lohr & Gallotta, 2003, 470.

³²⁶ Borch, 2001, 30-31; Graham, 2005, 375.

³²⁷ See amended, United States Department of Defense, 1979, Directive Number 5100.77, 1, 3.

individual (i.e. soldiers, commanders, and lawyers).³²⁸ Second, JAGs were now required to review operational plans. Borch explains how this change, “represented the first institutionally mandated involvement of military attorneys in the operational planning process,” and it further modified, “the historic mindset of the Army regarding the ‘appropriate’ role to be played by attorneys within the military...”³²⁹ Third, clearer guidelines were set for the notification of potential war crimes and their investigation.

The increased role of JAGs in operations and training was not well received by many in the armed forces. Parks explains the challenge for JAGs in the post-Vietnam era as one where, “Lawyers serving as law of war instructors in that period found themselves confronted with hostile clients. Lawyers and the law of war were blamed for restrictions placed upon the use of military force during the Vietnam War.”³³⁰ Before JAGs could prove their value they had to show that they (and LOAC) were not an impediment to accomplishing military missions. During training, JAGs had to explain that the restrictions set during Vietnam, “In each and every case, it was determined that the restrictions in question were the result of policy restrictions that were promulgated by either President Lyndon B. Johnson or Secretary of Defense Robert S. McNamara,” or even worse, they reflected a decision by an ignorant commander without legal counsel who, “had imposed on himself because he thought a particular course of action might violate the law of war, when in fact it did not.”³³¹ To this day, there are still some who warn against “lawyers creep,” or as Baker explains, “the legal version of ‘mission creep,’ whereby one legal question becomes seventeen, requiring not one lawyer but forty-three,” making war

³²⁸ Parks, 1991, 387.

³²⁹ Borch, 2001, 31.

³³⁰ Parks, 1991, 397.

³³¹ Parks, 1991, 397-398.

fighting slower, inefficient, and ultimately impeding mission success.³³² This pressure is strongly felt by JAGs since they want to be perceived as a “force multiplier,” and culturally they see themselves as having three overlapping missions: mission success, force protection, and adherence to LOAC. As General Rich Gross explains,

“We use the phrase, ‘combat multiplier’ that’s a common phrase in the military, its anything that allows a unit to multiply their capabilities to be much more effective. So a good operations law attorney is a ‘combat multiplier.’ A bad attorney will shut you down, a good attorney will find a way for you to do what you need to do legally, morally, and ethically. It’s hard work, it’s very easy to say no all the time and it’s very easy to say yes all the time too. And the ‘no’ guys keep the commander from getting their mission accomplished; the ‘yes’ guys get the commander in trouble; the middle guys help the commander accomplish the mission and stay out of trouble.”³³³

This is a difficult line to walk given that LOAC and a commitment to military goals are often at tension against each other. Furthermore, as Luban explains,

“JAGs’ double role as military officers and lawyers amplifies the tension. Both roles are quintessentially partisan: they demand loyalty to *us*, to our side. It is hard enough for a civilian lawyer with a civilian client to comply with the ethical requirement of candid, independent advice. How much harder, then, for a military lawyer to veto a tactic or a targeting choice that a superior would like to use. And yet, sometimes, that is the JAG’s job.”³³⁴

The US military has tried to address this problem by increasing its institutionalization of LOAC. This is shown by the expanding role given to JAGs in operations along with getting soldiers and commanders to become accustomed to and value legal instruction and advice. Specialized training for JAGs on how to advice a superior officer is also fundamental. Finally, highlighting the importance of maintaining the independence of JAGs in their legal role was also significant.

In 1979 the Joint Chiefs of Staff issued a directive expanding the role of JAGs to include, "Legal advisers should be immediately available to provide advice concerning law

³³² J. E. Baker, 2007, 314.

³³³ Author interview with General Richard Gross, 2014.

³³⁴ Luban, 2013, 321.

of war compliance during joint and combined operations..."³³⁵ Theoretically, by the time of the US invasion of Grenada in 1983, JAGs were supposed to be involved in both the preparation and operational phases of the war. Prior to engagement in hostilities, JAGs had to assist in the drafting of operational plans, policies, directives, and rules of engagement (ROE). Their purported role in drafting ROE was especially significant given their importance as, "directives issued by competent military authority which delineate the circumstances and limitations under which United States military forces will initiate and/or continue combat engagement with other forces encountered."³³⁶ In other words, ROE are shaped by both LOAC and the politico-military realities on the ground.³³⁷ As an illustration, when the war in Grenada fast approached, JAGs were not informed of the impending conflict making it impossible for them to assist in the planning phase of the war. During the war itself, active hostilities lasted for only four days, which meant that JAGs were once again relegated to Prisoner of War issues.³³⁸ As the fighting ended though, the occupation or "peacekeeping" phase of the invasion ensued. Here, JAGs proved their value and they were involved in the drafting of new ROE and other operational issues.³³⁹

There were two main lessons learned from Operation Urgent Fury. First, as Borch explains, "judge advocates must be included in the planning of contingency operations from the beginning; lack of notice hinders preparation for potential legal problems." Second, as JAGs proved their worth, commanders began to understand the added skills that military lawyers brought to the table. This led to what Graham describes as, "a springboard to an institutional decision that JAs [Judge Advocates] must be trained and resourced to provide

³³⁵ Parks, 1991, 399.

³³⁶ Parks, 1991, 401.

³³⁷ Borch, 2001, 72.

³³⁸ Borch, 2001, 67-69.

³³⁹ Borch, 2001, 72-73.

timely and concise legal advice on a broad range of legal issues arising across the operational spectrum.”³⁴⁰ In the 1980s the training of JAGs was revolutionized to the point where a new military legal specialty was created: operational law.

The Army Field Manual 27-100 defines operational law (OPLAW) as, “that body of domestic, foreign, and international law that directly affects the conduct of operations.”³⁴¹ Although OPLAW includes laws and directives dealing with contracts, claims, status of forces, etc., as Parks argues, “its heart lies with the heart of military operations - the application of force on the modern battlefield and the protection of noncombatants. Thus, operational law is the area of the law... commonly referred to as the law of war.”³⁴²

Starting in 1986, a concerted effort led by the Army’s Judge Advocate General’s Legal Center and School was set to reconfigure the training of JAGs by establishing a clear curriculum for study and creating an institutional repository for those specializing in OPLAW.³⁴³ The larger goal of this new enterprise was to define the contours of OPLAW by “identifying these issues, collecting and placing them under a common terminological umbrella, developing an extensive academic and training program dealing with these matters and compiling comprehensive resource materials for use by military attorneys who deal with such issues in the field.”³⁴⁴ In the fall of 1987, the first Operational Law Handbook was introduced, a publication that is updated every year that serves as a comprehensive reference guide for JAGs. Each of the JAG schools also developed their own legal field manuals—with a common baseline—but geared towards the specific tasks of each military branch, including the Army’s FM 27-100, “Legal Support to Operators.” Today,

³⁴⁰ Graham, 2005, 376.

³⁴¹ United States Department of the Army, 2000, Army Field Manual FM 27-100, 2-16.

³⁴² Parks, 1991, 394.

³⁴³ Graham, 2005, 377.

³⁴⁴ Graham, 2005, 377.

there is a massive online repository, JAGNET, available to all anywhere in the world. In addition, there are a series of military law journals that have helped develop the OPLAW discipline.

All JAGs must go through detailed classroom training. Although the curriculum for each of the branches varies they all have to complete similar courses. For the Army, the Judge Advocate General's Legal Center and School provides a twelve-and-a-half-week Basic Course for all new attorneys entering the JAG Corps.³⁴⁵ At least forty hours of international and OPLAW instruction are given to students through a mix of classroom and experiential exercises.³⁴⁶ Topics include, "extensive instruction on the 1949 Geneva Conventions, law related to the conduct of hostilities, U.S. practice regarding the 1977 Additional Protocols to the Geneva Conventions, and operational topics, including the ROE, Intelligence Law, Detention Operations, and Cyber Operations."³⁴⁷ The school also provides a ten-month Graduate Course for JAGs with five to eight years of experience. For this group, an additional eighty hours of international and OPLAW instruction are given, although if a JAG chooses to specialize in OPLAW, most of his or her studies will be in that field.³⁴⁸ The JAG schools also host dozens of shorter specialized courses each year as part of the Continuing Legal Education that is required of all lawyers.³⁴⁹

Once the training of JAGs in OPLAW had been set, their expertise and expanded role was tested in Panama (1989) and Iraq (1990-1991). During both wars, operational lawyers had a series of new institutionalized tasks for which they were responsible during each phase of a military operation, including: mobilization and predeployment; deployment;

³⁴⁵ DiMeglio, 2013, 1193; Graham, 2005, 400.

³⁴⁶ Graham, 2005, 400.

³⁴⁷ DiMeglio, 2013, 1196.

³⁴⁸ DiMeglio, 2013, 1198; Graham, 2005, 400.

³⁴⁹ DiMeglio, 2013, 1195.

once forces entered the field of operation; day-to-day operations; and post-conflict review and assessment.³⁵⁰ During the predeployment phase, JAGs reviewed and conducted training and briefings to commanders, other JAGs, and deploying units regarding ROE, LOAC, Orders, Directives, and Code of Conduct.³⁵¹ During deployment, JAGs were directly involved in the decision making processes by assisting in mission analysis and preparing legal estimates and annexes to operational plans.³⁵² Upon entry in the field, JAGs set up a coordinating and delivery system for legal advice with commanders and other lawyers up and down the chain of command to review specific operations such as proposed targets.³⁵³ During the fast-pace heat of battle, JAGs are deeply embedded with and provide advice to commanders at all levels in the decision making process. They must maintain situational awareness by going to meetings, studying other staff products including intelligence assessments, and being directly involved in operational matters to assure that unfolding operations stay within LOAC and ROE parameters.³⁵⁴ The final tasks are to advise commanders on soldier conduct and discipline issues, and to compile after action reports and, if needed, criminal investigations.³⁵⁵

After the completion of each war, the Center for Law and Military Operations, established in 1988 as a component of the Judge Advocate General's Legal Center, receives detailed feedback from JAGs and commanders, and carries out a comprehensive review of each phase of the war in order to learn from mistakes, unforeseen problems and other shortfalls in the military decision making process. The Center's focus is on legal issues; they

³⁵⁰ Graham, 2005, 378-379. See also, United States Department of the Army, 2012, Army Field Manual 1-04, 5-20.

³⁵¹ Graham, 2005.

³⁵² Lohr & Gallotta, 2003, 472-473.

³⁵³ Graham, 2005; Lohr & Gallotta, 2003.

³⁵⁴ Lohr & Gallotta, 2003, 473.

³⁵⁵ Graham, 2005, 379.

are tasked with issuing reports of their findings and making recommendations for changes in discipline, training, curriculum, doctrine, and all OPLAW related issues.³⁵⁶ They must also disseminate their reports to the appropriate departments and DOD at large. The Center also serves as a repository for all memos, after action reports, and lessons learned.³⁵⁷ Finally, during operations, JAGs can access the Center for any kind of assistance they may need.³⁵⁸

After the unconventional conflicts of the 1990s (Bosnia, Somalia, Haiti), and especially after the post-9/11 wars with their emphasis on counter-terrorism and counter-insurgency, the training of soldiers and JAGs underwent another round of significant reforms. Instead of continuing an emphasis on training soldiers in conventional warfare, the new training emphasized the lessons learned in these unconventional conflicts and set real world training environments that incorporated LOAC scenarios into their daily exercises. Furthermore, JAGs were given Observer-Controllers status at the Combat Training Centers. This served a dual purpose. On the one hand, JAGs were responsible for making sure that realistic LOAC issues were embedded in each of the training exercises, and for correcting and explaining to soldiers when and why they violated the law. On the other hand, this increased interaction with JAGs, side by side with their Commander, accustomed soldiers to the role of JAGs and emphasized the value and importance that operational lawyers provide.

It should be stressed that even with the impressive evolution of the role of the operational lawyer over the past decades, they remain in a subordinate position to

³⁵⁶ DiMeglio, 2013, 1202-1203; Graham, 2005, 402. See for example, Center for Law and Military Operations, 2008.

³⁵⁷ Graham, 2005, 402.

³⁵⁸ Graham, 2005, 402.

commanders. The military still emphasizes commander responsibility above anything else. JAGs play an assistant role and are one of several staff members that give advice to commanders (i.e. intelligence personnel).³⁵⁹ Ultimately, it is the commander's responsibility to seek legal advice, weigh it along with all the other advice and information he receives, and make a decision. General James L. Jones explains the JAG-Commander dynamic,

“it's important to remember that Commanders have the responsibility of their actions, and for a long time I thought the role of the JAG was to give advice, legal advice, just like the intelligence officer gave you intelligence advice or the logistics officer gave you logistics advice, and you receive all that advice, you think about it, you ask questions and then, as a Commander you decide what you are going to do...The problem people run into, I think, is they are so afraid of getting advice that they don't necessarily want to hear, and yet they feel trapped that if they don't follow the advice, somehow, there is some risk associated with doing that. I just try to make sure that I got the advice that I needed and never wanted to feel that I was obliged to take the advice if I didn't agree with it. Because ultimately it's the Commanders decision and the Commander is the one responsible for all that his unit does and fails to do.”³⁶⁰

Not taking the JAGs' advice comes at the personal risk of the commander, and a JAG following protocol will make clear what those risks might entail. But ultimately, JAGs are not policymakers or commanders, they are subordinate staff members that provide counsel in an area of expertise of growing importance. However, if the JAG believes that the actions taken by a commander violated the law, he must report it to his superiors and an investigation will ensue.

To increase the likelihood that commanders and soldiers seek and follow the advice of JAGs, Parks explains how it is not solely dependent on training, instead, “it is dependent

³⁵⁹ On the emphasis in the commander's responsibility see, Corn et al., 2012, 529-530.

³⁶⁰ Author interview with General James L. Jones, 2015.

upon an ethos, of which law of war training is an important part.”³⁶¹ An ethos needs to be inculcated that convinces military personnel of the efficacy of LOAC. Today, as part of the JAG Corps organizational culture, they are beginning to see LOAC as a strategic asset needed for mission success. Some commanders, especially those of the counterinsurgency school, are also moving in that direction. But LOAC is still viewed with suspicion in some circles within the military.

The Central Intelligence Agency

Until the mid-1970s, covert action was largely conducted in a legal vacuum. The 1947 National Security Act is the only major statute during this period and it was extremely vague, providing very little in terms of procedural guidance or in specifying the mission or scope of the new Agency.³⁶² Congressional oversight was best characterized by what Blechman has referred to as “under-sight,” given its informal and hollow nature.³⁶³ The Judicial Branch stayed away from intelligence matters altogether.³⁶⁴ Most of the legal and procedural guidance came from executive law, including executive orders, Presidential Findings, and national security directives. However, these too were murky and the procedural structure that they created informally delegated operational responsibility down the chain of command. Within the CIA, internal accountability mechanisms like the Office of General Counsel and the Inspector General’s Office were present from its

³⁶¹ Parks, 2002, 981.

³⁶² During this period the National Security Act was amended in 1949 (the Central Intelligence Act) and 1953, but the amendments remained extremely vague. For example, no definition of covert action is provided under this legislation. See, Stuart, 2008, 268-273.

³⁶³ For a bit more sympathetic take on Congressional oversight during this period, see, Barrett, 2005; Blechman, 1992, 139; see also, Zegart, 2011.

³⁶⁴ For a brief overview of the US Case Law on covert action, which does not begin until the 1970s, see, Reisman & Baker, 1992, 213-230.

inception, the former was routinely ignored or not included in the deliberations of controversial covert action programs, and the latter's function was to protect the CIA, not investigate it for wrongdoing. As the years passed and legally-dubious covert action programs became public, internal, Congressional, media, and other investigations sparked a set of reforms from the 1970s to the early 1990s that set a more clear and legally robust formal structure for approving, carrying out, and overseeing—both internally and externally—CIA covert actions. However, most of the reforms advanced a procedural structure meant to assure that CIA actions were consistent with US law and clearly approved by the President. As this section will show, when it came to international law, the CIA remains, at least partly, an Executive Branch tool used to bypass international legal commitments.

Organizationally, the CIA has been divided between two main functions: intelligence analysis and coordination on the one hand, and intelligence collection and covert action on the other. Although in recent years the division between these two different branches of the CIA has waned, historically, the separation was extremely formal, to the point where personnel from the Directorate of Intelligence hardly ever interacted with case officers from the Clandestine Service (previously known as the Directorate of Operations).³⁶⁵ This division has created distinctive subcultures within the CIA, with their own mission, separate personnel, priorities, norms, and style.³⁶⁶ From the beginning, the Clandestine Service³⁶⁷ culture was dominated by four informal norms: (1) a can do attitude; (2) operational autonomy; (3) the plausible deniability norm; and (4) an overall disregard of

³⁶⁵ Interview with Philip Mudd, 2014.

³⁶⁶ R. Z. George, 2011, Kindle 2778 of 6327.

³⁶⁷ Given this study's emphasis on the effects of the laws of armed conflict and human rights law, this section will only focus on the Clandestine Service, given their use of covert action.

the law. As this section will show, any attempts to formally institutionalize LOAC, human rights law, or any legal regime into the CIA has come into conflict with these four norms.

Today, the US government defines covert action as, “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”³⁶⁸ In practice, this has involved everything from traditional espionage, or obtaining secret information about other countries without their knowledge or consent, to propaganda operations, psychological operations, paramilitary operations, funding opposition parties, training and funding militaries and insurgencies, coups, assassinations, bombings, and torture—essentially secret warfare.³⁶⁹ By definition, covert action violates other states’ sovereignty and their laws, as well as international law.

From a legal-policy perspective, the CIA’s turn to covert action was legally dubious in a statutory sense, in its approval process, and more generally, in terms of how the Agency approached the law. In its most specific section, the National Security Act of 1947 expected the CIA’s main function to be, “coordinating the intelligence activities of the several Government departments and agencies in the interest of national security.”³⁷⁰ To do so, the Act gave the CIA five tasks. First, was to give advice to the NSC on intelligence.³⁷¹ Second, to make recommendations to the NSC on intelligence coordination.³⁷² Third, to evaluate intelligence through estimates and reports.³⁷³ Fourth, to perform, “additional services of common concern,” for the benefit of all intelligence agencies in the

³⁶⁸ National Security Act of 1947, 2015, Section 503b(e).

³⁶⁹ For a rich and detailed history of CIA covert actions, see Prados, 2006; for the institutional history of the CIA, see Zegart, 2000, Kindle 2363 of 3992.

³⁷⁰ National Security Act of 1947, 2015, Section 102(d).

³⁷¹ National Security Act of 1947, 2015, Section 102(d)(1).

³⁷² National Security Act of 1947, 2015, Section 102(d)(2).

³⁷³ National Security Act of 1947, 2015, Section 102(d)(3); see also, Prados, 2006, 34.

government.³⁷⁴ Finally, the last task that the Act set for the CIA was the most vague, and ironically, the most consequential, as it called on the Agency to, “perform *such other functions and duties* related to intelligence affecting the national security as the National Security Council may from time to time direct.”³⁷⁵ Such an ambiguous provision opened the door for abuse, as proponents of covert action within the executive branch would argue that “other functions and duties” gave them the authority to conduct such activities.³⁷⁶ Years later, Clark Clifford, a member of President Truman’s staff that helped draft the Act explained, “I reviewed this sentence carefully at the time, but could never have imagined that forty years later I would still be asked to testify before Congress as to its meaning and intent.”³⁷⁷

The legislative record shows that Congress did not intend to authorize covert actions, and that “other functions” referred to intelligence coordination.³⁷⁸ As Prados explains, “the terms covert operation, clandestine operation, paramilitary operation, secret operation, and special operation, all euphemisms for secret warfare, appear nowhere in the law. Nor do the terms political action, psychological warfare, propaganda, misinformation, or disinformation.” In its extensive investigation of the CIA, the Church Committee’s final report concluded that “there is no reference to covert action in the 1947 National Security Act, nor is there any evidence in the debates, committee reports, or legislative history of the 1947 Act to show that Congress intended specifically to authorize covert operations.”³⁷⁹ Similarly, the Church Committee also found that by 1949, as the CIA was already engaging

³⁷⁴ National Security Act of 1947, 2015, Section 102(d)(4).

³⁷⁵ Emphasis added. National Security Act of 1947, 2015, Section 102(d)(5).

³⁷⁶ Zegart, 2000, Kindle 2361 of 3992.

³⁷⁷ Prados, 2006, 34.

³⁷⁸ Stuart, 2008, Chapter 7; Zegart, 2000, Chapter 6.

³⁷⁹ United States Congress, Senate, 1976, 149.

in covert operations and Congress was moving to amend the 1947 Act, legislators had no idea that such actions were taking place or that they could be authorizing them, “the Committee reports on the bills that were to become the Central Intelligence Agency Act include no reference to covert action, and the floor debates do not indicate that the Congress knew that covert action, as opposed to clandestine intelligence gathering, was being or would be undertaken by the CIA.”³⁸⁰

Although it appears that even President Truman did not intend for the CIA to engage in covert actions, once the Act was passed, he immediately moved to approve such operations.³⁸¹ The same week as the National Security Act took effect, members of the National Security Council began discussing covert operations.³⁸² The issue came to CIA General Counsel Lawrence Houston, who was hearing arguments claiming that Section 102(d)(5) of the Act which authorized the CIA to conduct “such other functions and duties” as the NSC determined, was tantamount to sanctioning covert action. However, Houston was clear in his assessment that “commando type functions,” “ranger and commando raids,” “behind-the-lines sabotage,” “support of guerrilla warfare,” “black propaganda,” and “subversion,” were not legally covered by the Act, “In our opinion, however, either activity would be an unwarranted extension of the functions authorized in Sections 102 (d) (4) and (5).”³⁸³ Houston further warned that if “taken out of context and without knowledge of its history,” Section 102(d)(5), “could bear almost unlimited interpretation, provided the service performed could be shown to be of benefit to an intelligence agency or related to

³⁸⁰ United States Congress, Senate, 1976, 133.

³⁸¹ Zegart, 2000, Kindle 2366 of 3992.

³⁸² Houston, 1947, 622.

³⁸³ Houston, 1947, 622-3.

national intelligence.”³⁸⁴ Houston’s warning and legal judgement was ignored. On December 17, the National Security Council approved two national security directives, NSC-4 and NSC-4A, authorizing the CIA to engage in what the directives called, “covert psychological operations.”³⁸⁵

Shortly thereafter, the covert operations spigot was left wide open. From 1949 to 1967, according to CIA numbers, 556 projects were approved (See Table 4.1). In 1975, the Church Committee found that, “the CIA has conducted some 900 major or sensitive covert action projects plus several thousand smaller projects since 1961.”³⁸⁶ By the 1950s, covert action had become the bread and butter of the CIA, overtaking most of its budget, focus, and energy. Intelligence analysis, and especially intelligence coordination took a back seat. Furthermore, such an increase—in scope as well as frequency—the Church Committee concluded, indicated that the use of covert action had evolved from containing the USSR in the early 1950s to “merely serving as an adjunct to American foreign policy in the 1970s.”³⁸⁷ The CIA’s turn to covert action took place because Presidents pushed for it.³⁸⁸ As John Rizzo, the CIA lawyer that helped write hundreds of Presidential approvals for covert action explains, “Presidents learn that the Agency is a unique asset— it can move quickly, without the normal fiscal or operational constraints of other agencies, and it can do what it does in secret. It has no other client, no other master, than the occupant of the Oval Office. The CIA, in short, is a president’s personal pop stand. It does what— and only what— he

³⁸⁴ Houston, 1947, 622.

³⁸⁵ Souers, 1947, 650.

³⁸⁶ United States Congress, Senate, 1976, 445.

³⁸⁷ United States Congress, Senate, 1976, 57. For example, Presidential directive NSDM-40 of 1970 no longer justified the need of covert actions on countering the USSR, instead it was about “world peace.” The Directive states, “I have determined that it is essential to the defense and security of the United States and its efforts for world peace that the overt foreign activities of the U.S. Government continue to be supplemented by covert action operations.” National Security Council Decision Memoranda 40, 1970, 1.

³⁸⁸ Zegart, 2000.

(or she) tells it to do, including covert action. Especially covert action,”³⁸⁹ the temptation appears to be too great.

Table 4.1: Comparison of the Approval Process of CIA Projects from 1949-1967³⁹⁰

Years	Administration	Projects Approved	Authorization Process	Frequency of Meetings
1949-1952	Truman	81	DCI approves; informal review by State, Defense, and Joint Chiefs of Staff	Very infrequent
1953-1960	Eisenhower	170	DCI approves; informal review by State, Defense, and Joint Chiefs of Staff, Post-1955: “Special Group” approves with representative from President	Very Infrequent; post-1959 weekly
1961-1963	Kennedy	163	DCI and Three ‘Special Groups’ organized by theme approve; Chaired by National Security Advisor; Attorney General added to Committees	Weekly
1963-1967	Johnson	142	DCI and Special Group approves; President makes final decision if members disagree	Weekly to multiple times per week
1969-1974	Nixon	n/a	DCI and 40 Committee approves; major covert projects are reviewed every year; membership includes Attorney General	Frequent but become very infrequent

Presidents have argued that their legal authority to order covert actions rests in two sources: the already discussed vague provisions found in Section 102(d)(5) of the National Security Act of 1947; and the President’s inherent power, found in the Constitution, as Commander in Chief to conduct foreign affairs, an argument that is still made to this day.³⁹¹ Originally, even less clear than the legal justification was the approval process for covert actions—the main internal oversight mechanism for assuring that such actions are consistent with broader policy and legal considerations. Presidential directive NSC-4A,

³⁸⁹ Rizzo, 2014, 301.

³⁹⁰ Central Intelligence Agency, 1967, 4. This document from which the data in Column 3 is derived does not include numbers for the Truman administration for 1947-1948. Also, the document contains no data after 1967.

³⁹¹ The first time Section 102(d)(5) of the National Security Act was used as a legal justification for covert action was in, Souers, 1947. For an early argument on how covert actions fall under the President’s power to conduct foreign affairs, see Houston 1962; see also, Zegart, 2000, Kindle 3371 of 3992.

which authorized the first covert action program, did not establish any formal procedures for the approval, coordination, or review of such operations. The directive entrusted the Director of CIA to initiate and conduct covert actions with consultation from members of the State and Defense Departments, but the latter departments had no authority to approve, amend, or end any program.³⁹² No representative of the President needed to be consulted, though at the discretion of the Director of the Agency, he would from time to time brief the President on such matters.³⁹³ For years, the CIA protected this arrangement, as an early CIA legal memorandum explained, “While there was little specific discussion on the record, we feel it is quite clear that Congress intended CIA to look to the National Security Council only for broad direction, and that the day-to-day operations of the Agency were to be in the hands of the Director.”³⁹⁴ Finally, the directive made no mention of any legal constraints. The only thing the Director needed to worry about was to make sure covert operations were, “in a manner consistent with U.S. foreign policy, overt foreign information activities, and diplomatic and military operations and intentions abroad.”³⁹⁵

On June 18, 1948, Presidential directive NSC 10/2 supplanted NSC-4A. The President had been impressed with the success of CIA activities in the 1948 Italian election, and the new directive expanded covert operations to include not just psychological warfare, but also, “economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-communist elements in threatened countries of the free

³⁹² Souers, 1947, 650; Central Intelligence Agency, 1967; United States Congress, Senate, 1976, 49.

³⁹³ United States Congress, Senate, 1976, 49-50)

³⁹⁴ Houston & Pforzheimer, 1949, 612.

³⁹⁵ Souers 1947, 650.

world,” essentially anything short of, “armed conflict by recognized military forces.”³⁹⁶ The approval process also changed. A new group within the NSC system was created, “the 10/2 group,” consisting of the Director of CIA, civilian representatives of the Departments of State and Defense, and a military representative from the Joint Chiefs of Staff (especially during warfare). The 10/2 group was to review operations, not approve them (that function was still the Director’s responsibility). If disagreements arose however, the issue would be decided by the NSC, establishing some degree of Presidential control.³⁹⁷ Once again, no representative from the President was present in the 10/2 group, it was also unclear how often the group would meet, and no criteria was set for when to submit a covert project for review by the group (a problem that was not reformed until 1976).³⁹⁸

On October 23, 1951 Presidential Directive NSC 10/5 was passed, but no major changes to the approval process were made. In 1955, two more significant directives were approved by the NSC: NSC 5412/1 and NSC 5412/2. NSC 5414/2 finally created an approval committee for covert action, known as the “Special Group” with representatives from State, Defense and the Joint Chiefs, plus a representative from the President’s office.³⁹⁹ However, the group met sparingly and does not appear to have had a lot of control over operations, nor did it serve as a constraint on the Director of the CIA.⁴⁰⁰ One CIA memo explained the approval process as “cloudy,” another that was calling for a reform of the process warned, “strongly about the confusion which results when it is not clear at just

³⁹⁶ National Security Council Directive, 1948, 714; see also, Prados, 2006, 39.

³⁹⁷ National Security Council Directive, 1948, 714; United States Congress, Senate, 1976, 49.

³⁹⁸ United States Congress, Senate, 1976, 51.

³⁹⁹ National Security Council Directive, Undated, 748.

⁴⁰⁰ Stuart, 2008, 272; United States Congress, Senate, 1976, 51.

what level policy matters may be decided.”⁴⁰¹ This process would remain in place for almost a decade.

As a result of the Bay of Pigs fiasco, the Kennedy administration decided to reform the approval process for covert actions by creating separate committees for handling specific covert operations. The first was still called the Special Group, which met on a weekly basis and was chaired by the President’s National Security Advisor, making consultation with the President more routine. Two more groups were created: the Special Group on Counter Insurgency which dealt with paramilitary operations and devoted most of its energy on secret warfare in Laos; and the Special Group Augmented which focused on the paramilitary offensive against the Cuban government.⁴⁰² The groups were novel for two reasons. First, since the groups were theme focused, they created a standard for what types of actions were going to be reviewed and approved by the committees. Second, they were the first to include a government lawyer in the deliberations of covert actions, in this case, Attorney General Robert Kennedy, though the decision to include him had more to do with his close relationship with the President than with his legal role. President Johnson kept the original Special Group format, but renamed it the 303 Committee. This group meet weekly or more often when necessary, the CIA distributed papers in advance of meetings for Committee members to prepare, and if the Committee could not agree, the issue would be resolved in a meeting directly with the President.⁴⁰³ On actions in Vietnam, as Chapter 4 will show, President Johnson also convened his informal “Tuesday meetings” where

⁴⁰¹ Schwarz Jr, 2007, 52.

⁴⁰² National Security Action Memorandum, 1962; see also, United States Congress, Senate, 1976, 52.

⁴⁰³ Prados, 2013, 330.

decisions were made with input from his National Security Advisor, the Secretaries of State, Defense, and the Director of CIA.

The final significant reform to the covert action approval process during this period came in 1970 during the Nixon administration. Presidential directive NSDM 40 specified that the Director of CIA needed to get approval “for all major and/or politically sensitive covert action programs.”⁴⁰⁴ The DCI still had a lot of discretion in deciding if an operation met those standards, and the focus was mainly on budgetary concerns.⁴⁰⁵ For the first time, the Presidential directive also made the Director responsible for an annual review by the 40 Committee of all covert action programs previously approved. Additionally, the Attorney General was reinstated as a member of the Committee, though again, it appears that it had more to do with the close relationship he had with the President than for his legal expertise.⁴⁰⁶ The President was not always informed of decisions made at the 40 Committee, only if there was a disagreement among Committee members or if a member felt it was important enough to notify the President.⁴⁰⁷ The 40 Committee met frequently at first, but as time passed, the meetings waned as covert operations were increasingly controlled by Kissinger and Nixon.⁴⁰⁸

The role of the “Special Groups” in approving covert actions was very informal and left a lot of discretion to the DCI and the CIA as a whole. In 1962, a CIA study concluded that only 16% of covert action programs, large and small, were approved by the Special Group that year.⁴⁰⁹ Similarly, for the post-1961 period the Church Committee found that the

⁴⁰⁴ National Security Council Decision Memoranda, 1970, 1.

⁴⁰⁵ United States Congress, Senate, 1976, 54.

⁴⁰⁶ Prados, 2006, 384.

⁴⁰⁷ United States Congress, Senate, 1976, 54-55.

⁴⁰⁸ Prados, 2006, 385.

⁴⁰⁹ United States Congress, Senate, 1976, 57.

inter-agency groups considered only 14% of the projects that the CIA carried out.⁴¹⁰ As the numbers make clear though, on occasion the Special Groups did have an effect in limiting what the CIA could do. A 1967 CIA memo concluded that, “as the sophistication of the policy approval process developed so did the participation of the external approving authority. Since establishment of the Special Group (later 303 Committee), the policy arbiters have questioned CIA presentations, amended them and, on occasion, denied them outright.”⁴¹¹ More importantly, these inter-agency groups began to develop a set of informal norms on what the proper approval and oversight process of covert action should look like: the approval of covert action should not be left to the DCI alone; representatives of the President if not the President himself should be involved in approving such actions; clear standards need to be set to know what types of operations need to be approved; and ongoing operations need to be reviewed in a routine basis. But these norms remained in their early development stage and were ultimately unable to challenge three countervailing norms that dominated the process: plausible deniability; a broad disregard for the law; and a disregard for the CIA’s General Counsel’s Office.

Secrecy of course is of prime importance to any intelligence agency. The seminal Presidential Directive NSC 10/2 of 1948 also influenced the process of approving and carrying out covert operations by introducing the “plausible deniability” norm. The directive explained that part of the purpose of covert actions was to be able to, “plausibly disclaim any responsibility for them,” by the US government.⁴¹² Originally this clause merely intended to assure that the role of the US in its covert operations overseas was

⁴¹⁰ United States Congress, Senate, 1976, 57.

⁴¹¹ Central Intelligence Agency, 1967, 4.

⁴¹² National Security Council Directive, 1948, 714.

concealed, but it quickly extended to mean the muddling of the approval process as a whole. As Richard Bissell, the CIA's Deputy Director for Plans and a key architect of the assassination plots against Castro, explained,

“In the case of an operation of high sensitivity... there was a further objective that would have been pursued at various levels, and that was specifically with respect to the President, to protect the President... *to give the President just as little information about it as possible beyond an understanding of its general purpose.* Such an approach to the President would have had as its purpose to leave him in the position to deny knowledge of the operation if it should surface.”⁴¹³

Therefore, the President and other high-ranking policymakers were briefed in a “circumlocutious” manner, and approval was only “tacit” or it came in the form of a “wink and a nod.”⁴¹⁴ Until the 1970s, covert actions might be “reviewed” and “approved” by the Special Groups or even the President, but how much detail did the CIA share about these operations remains unclear. What’s clear is that the plausible deniability norm made the approval process even more hollow and confused.

More broadly, the whole point of having an agency that conducts covert action was at least in part a way to have a mechanism for bypassing the law. This sentiment was best captured by the 1954 Report on the Covert Activities of the Central Intelligence Agency, known as the Doolittle Report, which concluded that, “It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. *There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.*”⁴¹⁵ Not one of the Presidential directives of the time ever mentions that covert actions need to be consistent with the law, any law. The only standard that

⁴¹³ Emphasis added. United States Congress, Senate, 1975, 118.

⁴¹⁴ J. E. Baker, 2010, 589; Schwarz Jr, 2007, 291.

⁴¹⁵ Doolittle, Franke, Hadley, & Pawley, 1954, 6-7.

black ops needed to meet was that they were consistent with US policy—diplomatic or military—unless the President otherwise desired, of course.⁴¹⁶

The one office charged with making sure CIA operations were consistent with the law, the Office of General Counsel, was kept in the dark on most sensitive issues. During his testimony for the Rockefeller Commission, Lawrence Houston, the CIA's General Counsel from 1947-1973, repeatedly acknowledged that he had not been included in a number of legally questionable covert actions, ranging from operations that spied on American dissident groups to assassination plots against foreign leaders. Noticing a pattern, C. Douglas Dillon of the Rockefeller Commission asked Houston that "it was a rather widespread practice that when they wanted to do something that they knew was questionable, they did not talk to the General Counsel, and they only talked to him when they were not quite sure whether they wanted to do it or not." Houston replied by stating, "well, that is a little unfair," and argued that "we would say no, no, don't get into that or something like that. You won't find a memo from you to us, you won't find a record, but we were often consulted on that basis," yet he provided no concrete examples.⁴¹⁷ When Houston did dissent on key policies, he was simply ignored.⁴¹⁸ For example, in 1962 he once again made the argument that most covert actions were not statutorily permitted, "Some of the covert cold-war operations are related to intelligence within a broad interpretation of section 102(s)(5). It would be stretching that section too far to include a

⁴¹⁶ See for example NSDM-40, "the Director of Central Intelligence shall be responsible for assuring that covert action operations are planned and conducted in a manner consistent with U.S. foreign and military policies..." National Security Council Decision Memoranda, 1970, 1.

⁴¹⁷ United States President's Commission on CIA Activities within the United States, 1975a, 1696; see also, United States President's Commission on CIA Activities within the United States, 1975b.

⁴¹⁸ During his testimony, Houston also explains that during the cruel and degrading detention and interrogation of Yuri Nosenko, he tried to get it to stop, but was ignored. See, United States President's Commission on CIA Activities within the United States, 1975a, 1690.

Guatemala or a Cuba even though intelligence and counterintelligence are essential in such activities. In those operations therefore, the Executive Branch under the direction of the President was acting without specific statutory authorization, and CIA was the agent selected for this conduct,” by this point he had given up on seeking Congressional authorization.⁴¹⁹

Until the mid-1970s the institutionalization of law into the US covert action sphere had been very limited, informal, murky, and decentralized. Key norms of internal oversight were introduced but they were no match for the countervailing norms of plausible deniability and disregard for the law. As a result of such a weak legal institutionalization, controversies arose—the Phoenix program, domestic spying, coups, and assassination plots—that highlighted the dysfunction of the structure. These controversies led to a series of investigations into the CIA, including the Rockefeller Commission, approved by President Ford, and the Congressional investigations of the so-called Church and Pike Committees.⁴²⁰

During these investigations, Presidential administrations and the CIA were publicly shamed, and reforms followed. While part of the goal of the Congressional investigations was for Congress to assert its authority in foreign and covert affairs, as Smist notes, the larger purpose was to “ensure clear lines of authority and accountability.”⁴²¹ In this case, Congress fell short. With the exception of the 1974 Hughes–Ryan Amendment to the 1962 Foreign Assistance Act, a law that was passed within weeks of the first press reports detailing CIA spying on US citizens, all other Congressional legislation on the CIA and covert action has failed to achieve legislators’ original goals. After the Church Committee finished

⁴¹⁹ Houston, 1962, 2.

⁴²⁰ Prados & Jimenez-Bacardi, 2015.

⁴²¹ Daugherty, 2004, 63; Smist, 1994, 263.

its fifteen month investigation, it urged for an “omnibus legislation” that would replace the vague National Security Act of 1947 as well as the Presidential directives that had up to that point governed covert action. The new law was to create a comprehensive intelligence charter that would clearly delineate the responsibilities, functions, and limits of each intelligence agency, outlaw several covert actions (i.e. assassinations), and establish a robust Congressional oversight of the intelligence community.⁴²² Congressional delays, a successful lobbying effort against legislation by the White House, the intelligence community, and its advocates, and world events thwarted any momentum towards meaningful legislation.⁴²³ The first Congressional bill that passed after the Church Committee investigations took four years to pass and by that point the bill had gone from 263 pages, in its first draft, to four when it was finally approved in 1980.⁴²⁴ The Intelligence Oversight Act of 1980 like its successors in 1991 and 2004, did not create an intelligence charter, did not ban any specific covert operations (except assassinations, but Executive Order 11,905 of 1976 had already done so), and did not require the CIA or the White House to brief Congress of a covert action program *before* it had been approved.⁴²⁵ Such lackluster Congressional action meant that the scope and approval process of covert actions would be determined by the President through executive orders, directives, and findings, all of which can be changed by the President with a stroke of a pen. In other words, the approval process remains informal.

⁴²² United States Congress, Senate, 1976, 426-450; Zegart, 2000, Kindle 2490 of 3992.

⁴²³ Prados, 2006, Chapter 18.

⁴²⁴ Zegart, 2000, Kindle 2511 of 3992.

⁴²⁵ Intelligence Oversight Act of 1980; Intelligence Authorization Act of 1991. This Act was amended in 1992, 1993, 1995, and 1997, but with no major changes of note; Intelligence Reform and Terrorism Prevention Act of 2004; see also, Zegart, 2000, Chapter 7.

As noted, the one meaningful legislation was the 1974 Hughes-Ryan amendment. In addition to increasing Congressional oversight of covert actions, the law set forth that,

“No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *unless and until the President finds* that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress.”⁴²⁶

The amendment established the Presidential Finding process where the President had to formally approve CIA operations in writing through a Finding that would bear his signature, or through a Memorandum of Notification (MON), if an extant Finding was “significantly” expanded or amended (significantly, it has yet to be defined).⁴²⁷ The introduction of Presidential findings was an attempt at ending the plausible deniability norm. But by not defining covert action, and not clearly stating what was meant by the exemption to, “other than activities intended solely for obtaining necessary intelligence,” the Hughes-Ryan amendment was not enough to overtake the deniability norm, as the Iran-Contra affair would make clear.

Nonetheless, the Presidential Finding created a formal structure for approving covert actions. John Rizzo, who drafted hundreds of Findings and MONs throughout his career in the CIA’s Office of Legal Counsel, explains the general process as follows,

“A directive would come from the National Security Council (NSC), or sometimes the president himself, to draw up a covert-action proposal... The CIA would then come up with a menu of options— it could run the gamut from a propaganda campaign to organizing an armed insurgency. The White House would pick and choose the options it was prepared to endorse, and that’s where I would come in. I would draft the Finding for the president’s signature, incorporating the White House’s wishes in language specific

⁴²⁶ Foreign Assistance Act of 1974, Section 662.

⁴²⁷ For the current definition of “significant undertaking” requiring an MON see National Security Act of 1947, 2015, 503(d)(2); see also J. E. Baker, 2010, 594.

enough to accurately convey the mandate but broad enough not to require going back to the president for a new imprimatur for every new ‘wrinkle’ after the program was launched.”⁴²⁸

In this process though, the end product (the actual Finding), was the only thing that was formally required, how you got there (the process itself) remained informal and depended on Presidential direction. For example, notwithstanding Rizzo’s description of the typical Finding process, the covert action proposal did not have to initiate from the President or the NSC, the CIA could introduce a covert action. Rizzo disregards this concern as a mere “Chicken or the Egg” issue, but as Chapter 5 shows, when the CIA proposes a project and uses a strategic frame and states that it is essential for the national security of the country, it becomes very difficult for the President to say no.⁴²⁹

The 1974 Act also did not clarify how specific the language in the Finding needed to be. Rizzo calls the Finding writing process a “legal art-form.”⁴³⁰ There was no manual of course and a new language had to be created, as Rizzo explains,

“[CIA General Counsel] Dan Silver and I cobbled together a shorthand vernacular for particular kinds of actions, the idea being that they could be plugged in as appropriate in all future Findings, thereby developing a glossary for covert action. When ‘political action’ is authorized, that means influencing a foreign government’s viewpoint toward the United States and/or U.S. policy objectives. It could include buying the favor of a local politician or creating a political movement abroad (the phrase does not include, however, the CIA effecting an outcome in a foreign election; something that aggressive and risky, we decided, required explicit presidential authorization). Some of the phrases we came up with were admittedly a bit sanitized, largely because we recognized that it was unlikely that any White House, and in particular the Carter White House, would countenance the president signing a directive to the CIA authorizing deception and misinformation campaigns or, in the ultimate case, killing people. No president would affix his signature to a piece of paper that contained the

⁴²⁸ Rizzo, 2014, 72.

⁴²⁹ Author interview with John Rizzo, 2014.

⁴³⁰ Rizzo, 2014, 72.

words lie or kill, so the former sort of activity was dubbed ‘all forms of propaganda,’ while the latter was described as ‘lethal action.’”⁴³¹ Although Rizzo claims that the language used made clear to everyone what the Finding authorized, and in some cases it undoubtedly did, “lethal action” was clear enough, but in other cases as in his explanation of “political action,” what precisely was being approved remained relatively vague.

Another problem arises from the fact that it is not clear when a new Finding is needed, or when an existing Finding needs to be updated. Although it has become the norm for new administrations to review all existing Findings, and a subcommittee of the NSC typically reviews most covert action programs each year, it is rare for a Finding to be rescinded. Rizzo explains,

“Over the years, Findings are seldom rescinded. Now some Findings are more active than others. Sometimes there is a political element involved. For instance, we had a Finding on Cuba for many years and we weren’t doing anything in Cuba. We couldn’t do anything in Cuba. But I don’t think any administration (I think this Cuba finding lasted through three administrations), but no administration wanted to be the one that showed on the record that they were the ones who pulled the plug on Cuba. So whatever the dynamics were, I found over the years that Findings or MONs tended not to be rescinded, they were kept on the books in one way or another.”⁴³² Therefore, the CIA Office of General Counsel has a lot of influence in deciding if a new covert operation is not covered by an existing Finding since there is no clear procedural guidance on the matter—either in Statute, or internally at the CIA. As Rizzo explains his decision in 1998 to ask for a new Finding on Counterterrorism instead of using an extant Finding from 1986,

“It’s a judgement call. It depends on what Findings we have in the books and of course if there is no Finding in the books you have no option, you have to write a new Finding. But here we are with the 1986 Finding and I looked at it and maybe, theoretically from a legal standpoint this is all the authority we

⁴³¹ Rizzo, 2014, 72-73.

⁴³² Author interview with John Rizzo, 2014.

need to apply now, but I thought it needed to be updated and amended and that's what led to the decision of the MON in the beginning of 1998.”⁴³³ Questions regarding when new authorization for CIA operations are needed and how specific they need to be is a problem that remains to the present.

Reforms kept coming in the mid-seventies. In 1976, President Ford issued Executive Order 11905, which banned “political assassination” but kept the key inter-agency oversight mechanisms for approving covert action created in the pre-Church Committee Period. He replaced the previous “Special Group” Committee with an Operations Advisory Group, composed of the National Security Advisor, the Secretaries of State and Defense, and the Director of CIA. The Attorney General and the Director of the Office of Management and Budget, or one of their representatives were added as observers, emphasizing the importance of some form of legal oversight. The President now had to approve covert actions, meaning that the Operations Advisory Board would, “consider and develop a policy recommendation, including any dissents, for the President prior to his decision.”⁴³⁴ The order also required annual reviews of covert projects. In other words, the norms of Presidential approval and inter-agency oversight were strengthening, and by adding a representative of the Department of Justice, it signaled the importance of legal oversight.

Under Ford, the CIA's Office of General Counsel (CIA-OGC) also underwent some significant reforms. In 1975, the CIA-OGC had 14 lawyers and there were no subgroups with specific legal specialties within the office. Furthermore, most of their work dealt with logistics and management as internal CIA regulations only required consultation with CIA-OGC on, “all Section 7 alien immigration cases; (2) it reviews all procurement contracts; (3) it approves all administrative plans; (4) it approves all liquidation plans; and (5) all

⁴³³ Author interview with John Rizzo, 2014.

⁴³⁴ Executive Order 11,905, 1976, Section 3(c)(2).

regulations must be approved by the OGC.”⁴³⁵ Noticeably absent was any requirement of “operational units to consult it on propriety of planned activities.”⁴³⁶ Not surprisingly, the Church Committee found that,

“the participation of the General Counsel in determining the legality or propriety of CIA activities was limited; in many instances the General Counsel was not consulted about sensitive projects. In some cases the Director's investigative arm, the Inspector General, discovered questionable activities that often were not referred to the General Counsel for a legal opinion. Moreover, the General Counsel never had general investigatory authority.”⁴³⁷

Ford's E.O. 11,905 assigned additional duties to the CIA-OGC, including the submission of reports to the President's Intelligence Oversight Board on any activities that raised questions of legality or propriety, a practice that remains to this day.⁴³⁸ Pursuant to the President's executive order and the recommendations made by the Rockefeller Commission, CIA Director George H. W. Bush established several new internal CIA procedures designed to empower the CIA-OGC.

The first was to reorganize the CIA-OGC. The new structure consisted of the General Counsel, the Deputy General Counsel, an Executive Officer, several Special Assistants, and four specialized legal divisions: Freedom of Information and Privacy Law; General Law; Logistics and Procurement Law; and Operations and Management Law.⁴³⁹ From an institutionalization of LOAC perspective, the General Law division and the Operations and Management Law division were the most important.⁴⁴⁰ The former was responsible for, “legislation, regulations, classification, publications, copyright, conflicts of interests,

⁴³⁵ United States President's Commission on CIA Activities within the United States, 1975c, 1.

⁴³⁶ United States President's Commission on CIA Activities within the United States, 1975c, 2.

⁴³⁷ United States Congress, Senate, 1976, 459.

⁴³⁸ For a current example (though almost entirely redacted) see, S. W. Preston, 2009.

⁴³⁹ Central Intelligence Agency, 1976a.

⁴⁴⁰ Freedom of Information and Privacy Law dealt mainly with appeals, litigation, and legal issues relating to FOIA requests. The Logistics and Procurement Law division provided legal advice to the Director of logistics, especially relating to Agency procurement contracts.

international law and treaties, and for providing legal advice on Agency wide management and policy matters and Intelligence Community Matters.”⁴⁴¹ The focus on international law would range from writing a legal opinion regarding the applicability of a specific treaty, to making sure that when the US negotiated a new treaty the Agency’s interests were kept in mind, to lobbying Congress to adopt an exemption clause for the intelligence community when a treaty became ratified or when a new law was passed.⁴⁴² The Operations and Management Law division was responsible for “legal matters relating to clandestine operations,” which meant everything from legal logistical support for operations and case officers to assessing the legality of operations. In fact, the new regulations required that all, “The Deputy Directors and Heads of Independent Offices of the Agency must consult with the Office of General Counsel on the legality of all activities unless the legality of a proposed activity has been previously clearly established.”⁴⁴³ A senior lawyer was also assigned to work directly with the Directorate of Operations (the Clandestine Service). Furthermore, a short list of specific covert activities could only be carried out with prior notification with CIA-OGC, the Director, and in some cases, the Attorney General.⁴⁴⁴ Finally, CIA-OGC was allowed to review ongoing projects. These guidelines were a direct attempt at challenging some of the most deep seated cultural traits of the Agency: the disregard for the law and CIA-OGC in particular; operational autonomy; and to some extent, the can-do ethos. Some of these norms were more successfully challenged than others.

CIA-OGC provides advice through legal memos, but also orally, and in more recent years via email, especially during time sensitive operations. Oral advice, though more

⁴⁴¹ Central Intelligence Agency, 1976a, 2.

⁴⁴² Author interview with John Rizzo, 2014; Author interview with Mary DeRosa, 2014.

⁴⁴³ Central Intelligence Agency, 1976a, 3.

⁴⁴⁴ For a list of banned activities or those that need specific approval from CIA see, Central Intelligence Agency, 1976b.

informal and not creating a clear record, can be very useful especially if given at an early stage of a proposed operation since it can guide the discussion towards legal compliance before anything has been decided.

The actual General Counsel is responsible for representing the legal interests of the CIA and providing legal advice to the Director, the Deputy Director, the Director of the National Clandestine Service, other lawyers at CIA-OGC, and officers throughout the Agency.⁴⁴⁵ Conflict of interests can arise from having so many “clients.” Although the General Counsel is not the personal lawyer of the Director, this distinction is harder to make in practice than on paper, especially when the interests of the Director—a political appointee—conflict with those of the Agency.⁴⁴⁶

The budget and personnel of the CIA-OGC were also increased. In 1975 the CIA-GC budget went from \$0.6 million in to an estimated \$1.7 million for fiscal year 1977. The Office went from 14 lawyers in 1975 to 34 in 1977. By 1980, the office had more than tripled in size.⁴⁴⁷ Today the CIA-OGC has over 150 lawyers.⁴⁴⁸ These new hires also came with changes to the Agency’s recruitment practices. In the past, the vast majority of lawyers in CIA-OGC came from within the Agency or had had experience in the WWII Office of Strategic Services. For example, of the 14 lawyers in the CIA-OGC in 1975, only one was not recruited from within the agency.⁴⁴⁹ The new guidelines stressed the need to hire new lawyers from outside the CIA. However, the CIA-GC would come to prefer that its new legal hires would have little experience, and if they had experience, it would only be from other government departments. This allowed the CIA-GC to mold its new lawyers; as A. John

⁴⁴⁵ Author interview with John Rizzo, 2014; Radsan, 2008.

⁴⁴⁶ Radsan, 2008, 208.

⁴⁴⁷ Silver, 1981, 2.

⁴⁴⁸ Krass, 2015.

⁴⁴⁹ United States President's Commission on CIA Activities within the United States, 1975c, 1.

Radsan, a former Assistant General Counsel at the CIA, explains, “OGC is reluctant to hire attorneys who have been trained in a different professional environment, such as a legal services office or a public defender's office. If challenged about this, OGC might point to a steep learning curve about intelligence issues. Another reason may be the conscious or unconscious need for conformity in the ranks.”⁴⁵⁰ This was especially the case for lawyers detailed to the Clandestine Service where they would deal with covert actions. As Radsan explains, the most desired job for a CIA lawyer was to work for the Clandestine Service, as it would come with the prestige of becoming, “the ultimate Company Lawyer,” or as John Rizzo would say, “the Company Man.”⁴⁵¹ However, the Clandestine Service would not allow just any lawyer to join (and presumably supervise) their ranks. Lawyers detailed to the Clandestine Service would be vetted by that directorate and they were expected to conform to their culture. Radsan explains the process,

“a lawyer who views her role as ‘providing adult supervision’ will not be sent into the DO [Directorate of Operations, renamed Clandestine Service]. Beyond technical competence, the DO prefers that its lawyers have bought into its culture. DO lawyers, whether by OGC's plan or by inertia, learn to accept the Directorate's special mores. In selecting lawyers for DO service, OGC consults the front office in the relevant division. Such consultation gives the DO an opportunity to scout its lawyers. The scouting is done by case officers who, after all, are reasonably adept at gathering intelligence. Only rarely will OGC impose a lawyer against the will of a division. The DO, aware of this, will not easily accept a lawyer who, based on a division's assessment, is going to be a problem.”⁴⁵²

Furthermore, the promotion mechanisms might also push lawyers to conform to operators' wishes. Although the CIA-OGC carries out the lawyer's fitness reports, if a lawyer works for

⁴⁵⁰ Radsan, 2008, 221.

⁴⁵¹ Radsan, 2008, 242; Rizzo, 2014.

⁴⁵² Radsan, 2008, 247.

the Clandestine Service, a review from that directorate will be part of the evaluation process.⁴⁵³

The main cultural trait of the CIA is the so-called “can do attitude,” or the idea that everything possible will be done in order to avoid failure.⁴⁵⁴ This informal norm has been internalized by any lawyer working in covert operations, and perhaps the entire CIA-GC.

John Rizzo explains the culture as follows,

“The GC Office at the CIA was always, ‘let’s try and be a can do, let’s try to the extent we can legally to facilitate the mission and operations of CIA. In the vernacular: trying to find a way to get to yes when we are asked something. And the idea of being positive, not just being: no, no, no, and no. So it was always very result oriented, very client oriented kind of place. It was also heavily inculcated unlike in my views the lawyers at the State Department or even DOD, CIA lawyers counterintuitively enough, but true, are embedded in the fabric of the Agency, all components of the Agency.”⁴⁵⁵

Robert L. Deitz, former General Counsel of the National Security Agency, who would then serve as Special Counsel to CIA Director Michael Hayden, found this embeddedness between the CIA-OGC and the operators problematic, “Good lawyers need some distance from their clients and career lawyers at CIA do not have this. Because co-collaboration leads to co-option.”⁴⁵⁶

Conversely, the empowerment of CIA-GC has also had an effect on operators and the CIA as a whole. Jack Devine, who entered the Agency in the late sixties and would work in the Clandestine Service for three decades explained the phenomenon thus,

“At a certain point you welcomed the fact that you had a lawyer and access to the lawyer. In other words, more and more, you were looking for insight from counsel because there were so many complicated aspects of the law that with the training you received you wouldn’t be expected to know. You needed to be a lawyer to understand the law, you even had to be a particular

⁴⁵³ Radsan, 2008, 248.

⁴⁵⁴ Author interview with Jack Devine 2014; Author interview with Philip Mudd; Author interview with Maura Godinez 2014; Author interview with John Rizzo. Everyone mentioned the “can do attitude.”

⁴⁵⁵ Author interview with John Rizzo, 2004.

⁴⁵⁶ Author interview with Robert L. Deitz, 2015.

type of lawyer to understand international law or privacy laws or whatever. I think if I ever pinpointed it, I would say the seventies or eighties there was apprehension [to lawyers], mental resistance. By the nineties it was, 'we better have them, we need them for our own protection.'"⁴⁵⁷

The can-do ethos began to have limits, as Devine explains, "You have the can do, and cannot do. The culture is we can do anything, but cannot do trumps can do."⁴⁵⁸ Part of the reason for the shift is the increased interaction that CIA employees have with CIA-GC throughout their careers.

The mid-to-late 1970s were a fruitful period for the institutionalization of law as a number of important reforms to the covert action approval process and to the management of these operations within the Agency were introduced. However, major weaknesses remained, and the Reagan administration seemed intent on testing the new oversight mechanisms. As soon as he became President, Reagan appointed William Casey as Director of CIA. According to Rizzo, Casey, "made it immediately clear to the workforce, especially the Directorate of Operations, that the Reagan administration was going to take the gloves off against America's adversaries around the world."⁴⁵⁹ Casey, perhaps sending another signal, had the CIA-GC office uprooted from CIA headquarters and moved to some offices in Virginia several miles away.⁴⁶⁰

On December 4, 1981, Reagan enacted Executive Order 12,333. The order clearly set the NSC as the process overseer of covert actions (called "special activities"), "The NSC shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and *special*

⁴⁵⁷ Author interview with Jack Devine, 2014.

⁴⁵⁸ Author interview with Jack Devine, 2014.

⁴⁵⁹ Rizzo, 2014, 78.

⁴⁶⁰ Rizzo, 2014, 33.

activities, and attendant policies and programs.”⁴⁶¹ However, unlike Carter and Ford who had required the Attorney General or one of his representatives to attend meetings that discussed covert actions, Reagan did not assign any special committees with mandatory members in his order. Instead, the order called on the NSC to, “establish such committees as may be necessary to carry out its functions and responsibilities.”⁴⁶² Eventually, in 1985, Presidential Directive NSDD-159 formally outlined the process for planning, approving, and coordinating covert actions that the administration had been using. At the top of the hierarchy was the National Security Planning Group (NSPG), a subcommittee of the NSC that included the Vice President, the Secretaries of State and Defense, the DCI, the National Security Advisor, the Chairman of the Joint Chiefs, and two of the President’s top political aids, the Chief of Staff, and his Counsellor.⁴⁶³ As with the executive order, the directive did not require the Attorney General or any legal adviser to be present in these committees, although they were occasionally invited.⁴⁶⁴ An additional NSC group composed of Deputies from the various departments was created, the Policy Coordination Group (PCG). The PCG was tasked with making sure covert programs were consistent with broader policy goals. Similar Deputies committees exist to the day. The directive also stressed that any discussion of covert activities shall not expand much beyond the NSPG or the PCG, “Knowledge of covert action policies, decisions, and programs shall be strictly limited to the absolute minimum number of senior officials and their immediate staff focal points. To the extent possible, knowledge of policies, deliberations, and programs knowledge of operations; and knowledge of supporting information or activities will be strictly

⁴⁶¹ Emphasis added, Executive Order 12,333, 1981, Section 1.2(a).

⁴⁶² Executive Order 12,333, 1981, Section 1.2(b)

⁴⁶³ National Security Decision Directive 159, 1985, 3.

⁴⁶⁴ Prados, 2006, 495.

compartmented from each other.”⁴⁶⁵ In practice, CIA Director Casey proposed most covert action programs (as opposed to the official policymakers from the NSPG). Finally, although the NSPG was tasked with making recommendations on covert action programs to the President for his final approval, Reagan himself sat in on most of the NSPG meetings and decisions were made on the spot.⁴⁶⁶

The informal ad-hoc nature of the decision making process, the premium placed on secrecy and compartmentalization, and the general disregard for legal advice—especially from career lawyers—whether at the CIA or elsewhere in the executive branch made the Iran-Contra Affair predictable.

As noted, the Hughes-Ryan amendment required any covert action project to be approved by the President through a signed Finding which then had to be shared with Congress in a “timely fashion.” The Reagan administration tested the boundaries of every element of the Finding process. First, the Findings were extremely vague. For example, a December 1, 1981 Finding authorizing the CIA to conduct “political and paramilitary” actions in Nicaragua consisted of a single forty-words-long paragraph that failed to describe what those actions were.⁴⁶⁷ Second, if a covert operation was “significantly” expanded, the normative process required the signing of a MON followed by a notification to Congress. The Reagan administration would continue to expand operations without issuing the requisite MON under the argument that the covert program was not expanded “significantly” or that the new actions were “activities intended solely for obtaining

⁴⁶⁵ National Security Decision Directive 159, 1985, 2.

⁴⁶⁶ Prados, 2006, 495.

⁴⁶⁷ Byrne, 2014, Kindle 688 of 12861.

necessary intelligence,” which were not covered by the Hughes-Ryan Act.⁴⁶⁸ Third, Presidential Directives were used as an alternative to Findings to approve covert actions since they did not require Congressional oversight.⁴⁶⁹ Fourth, Findings were also approved retroactively, which the Act did not allow, but administration officials would claim that the Act did not explicitly prohibit them.⁴⁷⁰ Fifth, the Reagan administration tested the boundaries of notifying Congress in a “timely fashion,” in one case taking ten months to notify the appropriate Committees, and only after the program had been revealed in the press.⁴⁷¹ Also troubling, in some cases, the President did not even read the Finding he was signing, requiring an aide to insert Reagan’s initials on the corresponding pages.⁴⁷² Finally, the whole process was tightly controlled by the NSC staff, which directly gave orders to operators (as opposed to going through the heads of the corresponding departments) and made sure career lawyers were cut out. As Richard Armitage, who was working at the Department of Defense at the time explains,

“Iran-Contra, it was so tightly controlled. The number of people who knew was small and there was no legal advice. At DOD, we were precluded from having any legal advice on that. The National Security Advisor to the President made it very clear that this is how this was going to work. Now we at the Department of Defense thought we had a handle on it. Weinberger is famously quoted on a memo that I wrote him as saying, ‘I think we’ve strangled this baby in its cradle.’ But had the government had legal advice on that we would have been on a lot better shape. It’s when you don’t have those guys speaking on their issues that you get in trouble.”⁴⁷³

Even though the Iran-Contra Affair was a direct affront by the White House against Congressional oversight of covert actions, as was the case in the immediate aftermath of the Church Committee investigations, Congress failed to pass any meaningful legislation.

⁴⁶⁸ Daugherty, 2004, 65.

⁴⁶⁹ Byrne, 2014, Kindle 679 of 12861.

⁴⁷⁰ Byrne, 2014, Kindle 2834 of 12861; Rizzo, 2014, 107.

⁴⁷¹ Daugherty, 2004, 66.

⁴⁷² Byrne, 2014, Kindle 3904 of 12861.

⁴⁷³ Author interview Lieutenant Colonel, Richard Armitage, 2014.

Once again, reforms on the approval, coordination, and review of covert actions would be left to the President.

In late November 1986, the President appointed a blue ribbon commission led by former Senators John Tower and Edmund Muskie, and former National Security Advisor Brent Scowcroft, to investigate how the NSC process had allegedly failed.⁴⁷⁴ The so-called Tower Commission made several key recommendations that were subsequently incorporated in four Presidential Directives: NSDD-266, NSDD-277, NSDD-286, and a still-classified directive. These four directives set the core normative framework for approving, coordinating, and reviewing covert operations that exists to this day.

With regards to covert action, members of the NSC staff could no longer approve, conduct, or order other departments or their staff to carry out covert activities. The main review committee for covert projects was still the NSPG, but NSDD-276 made the Attorney General a permanent member.⁴⁷⁵ The President also ordered the NSC Deputies subcommittee, the PCG to review all covert action programs to ensure that they were in “accordance with law and are consistent with United States policy.”⁴⁷⁶ This marked the first time where covert action programs needed to be reviewed to make sure they were consistent with the law and not just policy. NSDD-286 made the NSC itself responsible for making sure that covert actions were consistent with the law, “all special activities conducted by, or at the direction of, the United States are consistent with national defense

⁴⁷⁴ Byrne, 2014, Kindle 391 of 12861.

⁴⁷⁵ National Security Decision Directive 277, 1987, 2.

⁴⁷⁶ National Security Decision Directive 266, 1987, 7.

and foreign policies and applicable law,” although it did not specify which laws applied to covert operations.⁴⁷⁷

The most significant reforms were made with regards to Presidential Findings and MONs. First, NSDD-286 made clear that Presidential Finding and MONs could not retroactively approve covert actions,

“No special activity may be conducted except under the authority of, and subsequent to, a Finding by the President that such activity is important to the national security of the United States. In all but the rarest of circumstances, no special activity may be undertaken prior to the President's having signed a written Finding. In cases in which the President determines that time is of the essence and that the national security requires that a special activity be undertaken before a written Finding can be presented for signature, and that oral authorization therefore is required, a contemporaneous record of the President's authorization shall be made in writing, and a corresponding Finding shall be submitted for signature by the President as soon as possible, but in no event more than two working days thereafter. No Finding may retroactively authorize or sanction a special activity.”⁴⁷⁸

The Directive also clarified what needed to be included in a Finding,

“(a) the policy objectives the special activity is intended to serve and the goals to be achieved thereby;
(b) the actions authorized, resources required, and Executive departments, agencies, and entities authorized to fund or otherwise participate significantly in the conduct of such special activity;
(c) consistent with the protection of intelligence sources and methods, whether it is anticipated that private individuals or organizations will be instrumental in the conduct of the special activity;
(d) consistent with the protection of intelligence sources and methods, whether it is anticipated that a foreign government or element thereof will participate significantly in the special activity; and
(e) an assessment of the risks associated with the activity.”⁴⁷⁹

Presumably, Presidential Findings could no longer be just 40 words long. Regarding MONs, the parameters for what constituted a change to a covert project were specified, but what made a change substantial was not,

⁴⁷⁷ National Security Decision Directive 286, 1987, 2.

⁴⁷⁸ National Security Decision Directive 286, 1987, 2.

⁴⁷⁹ National Security Decision Directive 286, 1987, 3.

“In the event of any proposal to *change substantially* the means of implementation of, or the level of resources, assets, or activity under, a Finding; or in the event of any significant change in the operational conditions, country or countries significantly engaged, or risks associated with a special activity, a written Memorandum of Notification (MON) shall be submitted to the President for his approval.”⁴⁸⁰

Most of these requirements were included in the 1991 Intelligence Authorization Act, which formalized the covert action approval process structure, at least concerning Findings and MONs.⁴⁸¹ The more informal, Presidential Directives and Executive Orders continue to provide the only guidelines for the inter-agency review process.

NSDD-286 also required that each member of the NSPG had to review all proposed Findings or MONs prior to the actual meeting where the issue would be discussed. The President would receive a recommendation from the NSPG, including any dissenting opinions before his final approval. Once the President approved a Finding each member of the NSPG would be notified of his decision and would be provided a copy of the actual Finding or MON. In other words, all the Principals of each national security department—State, Defense, Justice, Joint Chiefs, NSC—would get a chance to review and challenge any proposal, and once a decision was made by the President, if his concerns were not addressed, he would know so and could potentially try to change the policy at a later date.⁴⁸²

The NSPG was also tasked with reviewing all ongoing covert action programs at least once a year, and to recommend to the President which ones needed to be extended, revised, or terminated. Equally important, if thirty days passed after a review of a covert action program and the President had not re-authorized it in writing, “such Finding and

⁴⁸⁰ Emphasis added, National Security Decision Directive 286, 1987, 2.

⁴⁸¹ Intelligence Authorization Act of 1991, Sections 502 and 503.

⁴⁸² National Security Decision Directive 286, 1987, 3-4.

associated MONs, if any, together with the authority to undertake special activities thereunder, shall be deemed cancelled upon appropriate notice to the DCI or head of such other Executive department, agency, or entity authorized to conduct the special activity.”⁴⁸³

An inter-agency legal process to oversee covert projects was also initiated around this time. As noted in Chapter 2, with regards to broader NSC matters, NSDD-266 tasked the NSC legal adviser with coordinating legal issues with, “the Counsel to the President, the Legal Adviser of the Department of State, and with senior counsel to all other NSC members, advisors, and participants.”⁴⁸⁴ Although with the more specific task of reviewing Presidential Directives, Presidential Findings, and MONs, the Directive only called for coordination between the NSC Legal Adviser and the White House Counsel, the broader inter-agency lawyers meetings proved so useful that they would soon convene a special lawyers group on covert action.⁴⁸⁵

At first, inter-agency lawyer meetings on covert action were very informal and consisted mainly of discussions between the NSC legal adviser and the General Counsel of the CIA. Nicholas Rostow, one of the authors of the secret Directive and NSC Legal Adviser under Reagan and George H. W. Bush, explains those early meetings as follows,

“The NSDD that has not been declassified deals with covert action and process and that one says that the NSC legal adviser *shall* attend. In those days most of the lawyers had not been cleared for covert action, so it was me and the CIA General Counsel. I would brief the Counsel to the President and I regularly attended his staff meetings and regularly briefed him on what was going on because that was part of my job to coordinate and make sure the counsel wasn't blindsided.”⁴⁸⁶

⁴⁸³ National Security Decision Directive 286, 1987, 4.

⁴⁸⁴ National Security Council Decision Directive 266, 1987, 5.

⁴⁸⁵ National Security Council Decision Directive 266, 1987, 6.

⁴⁸⁶ Author interview with Nicholas Rostow, 2014.

By the end of the George H. W. Bush administration, the legal review process became more robust as a still classified Presidential Directive set up a so-called “lawyers group” tasked with reviewing covert projects.⁴⁸⁷ Initially, the group would meet to review proposed Presidential Findings and MONs. Rizzo explains the personnel involved in such meetings,

“Usually on covert action there are at least two lawyers from every agency, the top person and a trusted subordinate who are in the loop, occasionally for really sensitive Findings or MON’s the number of lawyers would be restricted but it would always be at least one senior representative from each of the agencies.”⁴⁸⁸

The Directive stated that the Lawyers’ Group membership had to include the NSC Legal Adviser, the CIA General Counsel, the State Department Legal Adviser, the Assistant Attorney General for the Office of Legal Counsel, the General Counsel for the Department of Defense, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff. The group had to review every proposed covert action proposal, reach a conclusion on its legality, and send a position memorandum to the White House Counsel who would relay it to the President before his final approval of the program. Therefore, at the NSC there would be at least three committees that would review proposed covert action programs: first was a committee made up of the highest ranking officials of each department; second was a deputies committee tasked with conducting a risk analysis of proposed programs and making sure they were consistent with broader US policy goals; and the third, was the Lawyers’ Group.⁴⁸⁹

Not surprisingly, given the clearer guidelines for writing Presidential Findings and MONs, and the increased number of actors—with their own concerns and interests—

⁴⁸⁷ This section on the inter-agency covert action ‘lawyers group’ is based on interviews with the following former members of the group: Nicholas Rostow (NSC), Judge James Baker (NSC), John Bellinger III (NSC and State), Mary DeRosa (NSC), Michael Matheson (State), Conrad Harper (State), Judith Miller (Defense), John Rizzo (CIA), General Richard Gross (JCS), Robert Litt (ODNI), and Richard Clarke (NSC).

⁴⁸⁸ Author interview with John Rizzo, 2014.

⁴⁸⁹ Author interview with Richard Clarke, 2014.

involved in the approval process, the size and detail of Findings increased. Rizzo describes the transformation,

“In those early years [post-1979], the language in Findings and MON’s tended to be very short, terse, direct, and they were viewed as operational documents. What I saw evolving over the years and it continues is that there would be more input, not from CIA, but elsewhere in the reviewing community—whether it be the NSC, the State Department or DOD—they would want to have additional language put into these Findings and MONs, not so much that was directly related with tasking CIA to do x and y, but to explain the policy reasons why these actions were necessary, they became more like White Papers, so it was not a trend the CIA was in the forefront of, certainly. But it evolved that way and they gradually got longer and longer. The operational tasking was still in there, but it became more ornate in verbiage around the edges.”⁴⁹⁰

From an institutionalization of LOAC perspective, in 1991 Congress passed the Intelligence Authorization Act which stressed that “A finding may not authorize any action that would violate the Constitution *or any statute of the United States.*”⁴⁹¹ This included legislation that incorporated international law such as ratified treaties or conventions, as long as there was no exemption clause for the intelligence community.⁴⁹² This marked the first time where there was a clear statutory obligation mandating the CIA to comply with international law. In 1996, Congress passed the War Crimes Act, incorporating specific provisions of LOAC into domestic legislation, including Common Article 3 of the Geneva Conventions making torture and cruel and inhuman treatment a criminal offense.⁴⁹³ This complicated inter-agency legal discussions since some departments had more expertise in international law and took it more seriously than others.

Although the Lawyers’ Group would try to reach a consensus on the law, differences naturally occurred. Each lawyer involved in these meetings represented the interests of

⁴⁹⁰ Author interview with John Rizzo, 2014.

⁴⁹¹ Emphasis added. Intelligence Authorization Act of 1991, Section 503(a)(5).

⁴⁹² J. E. Baker, 2007, 154.

⁴⁹³ War Crimes Act of 1996.

their department, and more importantly they reflected the culture, expertise, values, and mission of their respective agencies. In other words, each member of the Lawyers' Group analyzed each case before them through their respective organizational prism: having varying degrees of knowledge of the law, emphasizing different legal regimes, and interpreting the law differently. Michael Matheson, who worked at the State Department's Legal Adviser's Office for three decades and served as Acting Legal Adviser on two separate occasions explains the dynamic as follows,

“There is this interesting triangle that we sometimes encounter, where, the State Department lawyer will say, ‘this is inconsistent with international law but if the President wishes to do it, he can do it,’ assuming there is no domestic prohibition. Then the CIA will say, ‘oh, it’s perfectly consistent with international law, and anyway, it doesn’t matter.’ Finally, the Justice Department will say, ‘It has to be consistent with international law, and therefore, here is the rationale for it.’ So that you would have a difference between the three of them on what international law provides and what the significance of that is in terms of your operational possibilities. Justice Department seems to take the view that we cannot do things that are inconsistent with international law, which is in my view an impossible position to have since every President does.”⁴⁹⁴

For example, for John Rizzo, the legal constraints for covert action—domestic or international—remained relatively limited from the CIA-OCG perspective. He explains the domestic law constraints,

“Keep in mind that there are relatively few things in the covert action arena that are unlawful. CIA must abide by US law, so any criminal activities by CIA, I mean they are not exempt from Title 18, those would be unlawful. But look at the criminal statutes, there is really not a lot in there about how they affect intelligence activity and there are a number of criminal laws that are specifically written so as to lawfully authorize US government activities are explicitly mentioned as this sort of outside the scope of the criminal statute. So when you get right down to it as a practical matter, there are very few laws including criminal laws that apply to intelligence operations.”⁴⁹⁵

Concerning international law, the scope is even less precise,

⁴⁹⁴ Author interview with Michael Matheson, 2014.

⁴⁹⁵ Author interview with John Rizzo, 2004.

“To what extent does international law play in CIA activities? Certainly CIA is required to follow all U.S. laws and U.S. treaty obligations. That would include the Geneva Conventions, plus you know there is a vast amount under the rubric of international law that doesn’t require that. The conundrum has always been of course that what CIA does, what any espionage service does in the world is you violate international law and you’re affecting foreign sovereignty. So international law, small ‘i’ small ‘l’, honestly was not a significant factor for us at CIA. I mean a lot of what we were doing probably you could find some tenant in international law that it wasn’t consistent with but that’s what spy agencies do.”⁴⁹⁶

Other Departments of course approached international law differently, especially State and DOD. Former State Department Legal Adviser, Conrad Harper, considered the two main operational departments—DOD and CIA—to have polar opposite approaches to international law, “Intelligence community [IC] lawyers can have a very relaxed view of international law. IC lawyers are very much intertwined with the operations, so there is a risk of clientitis. DOD GC lawyers are always concerned about authorities; they want very clear legal guidance because they need very clear authority. DOD and CIA are almost polar opposites. DOD wants clear authorities, and the CIA is flexible with the law.”⁴⁹⁷ Similarly, Robert Deitz who worked as the General Counsel for the NSA, before working at the CIA, explained, “On international law, for the CIA, who cares! I mean, for them, if you are violating another country’s foreign law and you get caught, you’re going to get hung anyway in that country as a spy. Their job in large part is to violate foreign laws and international laws.”⁴⁹⁸ In other words, different departments have institutionalized international law at varying degrees and the CIA remains the least institutionalized.

If a consensual position could not be reached by the Lawyers’ Group, there were three options available. The first and most common practice was for the dissenting

⁴⁹⁶ Author interview with John Rizzo, 2004.

⁴⁹⁷ Author interview with Conrad Harper, 2014.

⁴⁹⁸ Author interview with Robert Deitz, 2014.

department(s) to note their concern, but the proposed project would continue unabated. Second, if the legal disagreement was important enough, especially in an unprecedented manner, an official opinion from the Office of Legal Counsel could be requested (sometimes the mere threat of direct OLC involvement could resolve the problem). Third, if the issue was important enough, it could be taken up the chain of command, all the way up to the Principals, or even the President if necessary, for the matter to be resolved.

Noting reservations to covert action programs was the most common practice. As Matheson explains,

“We would probe it for whatever we thought we needed to know to give a legal opinion from an international point of view. So if we didn’t get what we needed we asked more questions. But if the proposal is to bomb somebody’s facility in such and such a country and you know there is no international legal justification for it you don’t need a lot of detail. We present our reservations, and the rest is up to them.”⁴⁹⁹

In such a case, Matheson continued, the Lawyers’ Group position paper “would note at the bottom of the memo that x and y will be regarded as inconsistent with international law in the following respects” according to the State Department, and “we always indicate what the consequences are of doing something that is contrary to international norms.”⁵⁰⁰ If such a proposed project was approved, it would constitute a case of legalized non-compliance, since policymakers authorized it irrespective of its illegality.

This does not mean that CIA-OGC does not care about all international law all the time. Nor does it mean that international law has no effect on CIA behavior. After all, when the Lawyers’ Group comes to a consensual position on a legal issue concerning covert action, it is likely to be consistent with international law. Second, although the CIA remains at a weak degree of institutionalization of LOAC, the mere interaction with such legal

⁴⁹⁹ Author interview with Michael Matheson, 2014.

⁵⁰⁰ Author interview with Michael Matheson, 2014.

questions is making it more attuned to international legal restraints. While they may not be opposed to a covert action merely because it violates international law, they are becoming more concerned with the political and practical consequences that may arise from violating the law. As former NSC Legal Adviser Mary DeRosa explains,

“Post 9/11 it was more on the operational issues that might raise law of armed conflict questions, and they [CIA] are very attentive to it. But I think for them it’s not so much that there is a legal obligation, but it’s more of a policy matter, of understanding the risk, say, if you are engaging in a covert action and if you are violating international law and something comes out about it, then there are consequences for that. So understanding what the international law is, and following it to the degree that you can, is something that is important to the lawyers [at CIA] in their legal analysis. But it’s not the same take on it that you would see at the State Department or even at the Department of Defense where they take the laws of armed conflict very seriously and it’s a matter of legal obligation. At CIA there is a lot less focus on international law, it just comes up less. But on operational issues I’d say there is a focus on it, it is important, but it’s thought of more in a policy risk kind of way.”⁵⁰¹

However, as a result of the Iran-Contra prosecutions,⁵⁰² further investigations of CIA wrongdoing in the 1990s,⁵⁰³ and two Congressional amendments changing the CIA’s own internal oversight mechanisms, the CIA’s workforce has become much more concerned about potential legal liabilities. In the Intelligence Authorization Act for Fiscal Year 1990, Congress required Senate confirmation for the position of CIA Inspector General and ordered the Director of CIA to, “report to the Attorney General any information, allegation, or complaint received from the Inspector General, relating to violations of Federal criminal law involving any officer or employee of the Agency.”⁵⁰⁴ Both moves had been greatly opposed by the CIA for years as DCIs warned that such requirements would make CIA

⁵⁰¹ Author interview with Mary DeRosa, 2014.

⁵⁰² Walsh, 1993.

⁵⁰³ Board, 1996; Helgerson, 2008; Rizzo, 2014, 145.

⁵⁰⁴ Intelligence Authorization Act of 1990, Section 17(b), and 17(b)(5).

officers less likely to report wrongdoings.⁵⁰⁵ The move significantly increased the independence of the CIA's Inspector General Office to the point where in 2006 Agency personnel viewed the IG as "hostile."⁵⁰⁶ In 2007, CIA Director Michael Hayden launched an investigation against the Inspector General Office.⁵⁰⁷ Tensions aside, the CIA IG's work remains impressive, including 405 finished reports from 1999 to 2013.⁵⁰⁸ Similarly, in 1996, Congress also made the position of CIA General Counsel subject to Senate confirmation.⁵⁰⁹ The CIA-OGC also had to report potential cases of wrongdoing to the Inspector General, and in cases of potential violations of US law, the CIA-OGC would have to prepare a "crimes report" to the Department of Justice Criminal Division.⁵¹⁰

While these investigations and reforms led to clearer and more independent internal oversight mechanisms at CIA, they also had unintended consequences. The Congressional investigations of CIA illegal activities followed by the distancing of the White House from such acts created a martyrdom identity at the CIA. Officers at the CIA began to believe that if anything went wrong they "would be left holding the bag" or "they would be thrown under the bus." At first, such beliefs harbored resentment and led to a more risk-averse culture; eventually, it was merely seen as part of the risk associated with the job. By the early 1990s CIA personnel working in high-ranking positions or in risky assignments began buying private liability insurance.⁵¹¹ During the early 2000s, the Agency encouraged

⁵⁰⁵ In 1976, CIA Director George H. W. Bush convinced President Ford not to include such a provision in his executive order. See, H. W. Bush, 1976. For DCI William Webster's opposition to Congressional legislation changing the CIA Inspector General, see, Check & Radsan, 2010, 254-255.

⁵⁰⁶ Author Interview with Robert Deitz, 2015; Author interview with General Michael Hayden, 2015; Author interview with Philip Mudd, 2014.

⁵⁰⁷ Mazzetti, 2007.

⁵⁰⁸ Harper, 2015.

⁵⁰⁹ Intelligence Authorization Act of 1997, Section 20(b).

⁵¹⁰ Rizzo, 2014, 149.

⁵¹¹ Devine, 2014, 85; Rodriguez & Harlow, 2012, 255; Tenet, 2007, 584.

several of its personnel to buy such insurance. And by 2008 the CIA both encouraged and reimbursed in full any professional liability insurance bought by its officers.⁵¹² Providing your workforce with professional liability insurance potentially sends an institutional signal where following the law is not a priority. As Robert Deitz explains, “Some of these people, at CIA General Counsel, they are like, ‘if we get away with it, it’s ok: better to ask forgiveness than permission.’”⁵¹³

The least legally institutionalized component of the CIA is its training of officers. Prior to the late 1970s, new CIA recruits, including future lawyers for the CIA-OGC, received no legal training whatsoever.⁵¹⁴ In 1978, CIA Director Stansfield Turner argued that the lack of training of past CIA mistakes had made, “so many of our people make the shallow contention that the Agency really has never done anything wrong whatsoever.”⁵¹⁵ By the early 1980s officers began to receive training in past mistakes and the CIA-OGC began informing officers of some of the basic legal guidelines governing covert operations. As Rizzo explains,

“I was heavily involved in creating programs where small groups of CIA lawyers—two or three—would literally travel around the world visiting CIA stations to give what we called, ‘Executive Order Briefings’ governing the gambit of CIA legal issues to give non-lawyers in CIA at least some fundamental understanding of what was out there in terms of laws, precedents, and requirements.”⁵¹⁶

There were also CIA-OGC briefings and seminars held at CIA headquarters, and during various courses in an employee’s career (i.e. “mid-career course”), they would also receive a presentation from CIA-OGC.⁵¹⁷ But these courses focused mainly on what Presidential

⁵¹² Shane, 2008; Smith, 2006.

⁵¹³ Author interview with Robert Deitz, 2015.

⁵¹⁴ Author interview with John Rizzo, 2014; Author interview with Jack Devine, 2014.

⁵¹⁵ Turner, 1978, 1.

⁵¹⁶ Author interview with John Rizzo, 2014. See also, Olson, 2006, 14.

⁵¹⁷ Author interview with John Rizzo, 2014.

Findings, Orders, and Directives, as well as some Statutory limitations and Court rulings said, which according to Rizzo, it was not much. No serious training on the Laws of Armed Conflict or Human Rights Law was provided, for such issues, officers remain completely dependent on CIA-OGC. For case officers out in the field, hundreds if not thousands of miles removed from any attorney from CIA-OGC,⁵¹⁸ it is often dependent on what Michael Hayden describes as, “There is a great Dylan song from the 1960s, ‘when you are working outside the law, you really have to be honest.’ The CIA and NSA don’t work outside of American law, that’s it, end of sentence. I’m very serious, it therefore requires a very balanced moral compass.”⁵¹⁹

Since 1947, the US government has made some significant reforms to its covert action approval, review, and oversight process. Some of these reforms have been more impressive than others. The strongest legal institutionalization can be found in the congressionally mandated requirement of Presidential Findings and MONs, making it clear that the President needs to approve all covert action projects ahead of time. However, while the details of what needs to be included in Findings and MONs has also improved, the guidelines could be more specific.

The inter-agency review process has also grown more robust in the past few decades, but it remains dependent on Presidential Directives and Executive Orders. While the establishment of this normative review process makes it difficult for future Presidents to deviate from it without some political consequences, as Chapter 5 will show, the process remains very informal, and it can be changed with the stroke of a President’s pen. Here, the

⁵¹⁸ There are no members of CIA-OGC deployed in CIA stations overseas, at least not on a permanent basis. Case officers have to communicate electronically with CIA-OGC. Author interview with Jack Devine; Author interview with General Michael Hayden, 2015.

⁵¹⁹ Author interview with General Michael Hayden, 2015.

Lawyers' Group has proved to be a valuable mechanism, but as Mary DeRosa explains, "my concern is that the Lawyers' Group could go away in an instant because there is nothing keeping it there and there is so little institutional memory [at NSC]. But it is such an important process." Because the process is informal it can be easily abused.

Internally, the CIA has also undergone some impressive institutionalization of the law, but overall, it remains weak. The CIA Inspector General Office is very independent and is a major source constraining illegal activity. While the CIA-OGC has also seen its powers and responsibilities grow its lawyers are still too embedded with the decision makers of the Agency. Additionally, training on the laws—both domestic and international—is merely an afterthought at the CIA. While the initial norms of plausible deniability, can-do attitude, and disregard for the CIA-OGC and the law more broadly have been subdued, new norms, including a martyrdom identity, have made more progress difficult.

The larger problem concerning covert action remains that the President is both the policy actor and the legal authority, as Baker explains, "whereas in the case of intelligence collection the president is a consumer, with covert action, he is the essential policy actor as well as the essential source of legal authority for the conduct of covert action."⁵²⁰ This creates a conflict of interests, as Presidents are drawn to CIA covert actions precisely because they control most of the procedural levers and they remain secret. While Congress has made clear that the CIA needs to abide by all US laws—including ratified treaties and conventions—exception clauses and legalized non-compliance orders continue to make international law more of a nuisance than an actual constraint on the CIA.

⁵²⁰ J. E. Baker, 2010, 591.

This chapter has shown that the Department of Defense and especially the US military has significantly institutionalized international law since the Vietnam War, reaching a strong degree of institutionalization. The CIA has also made some important improvements, but their overall institutionalization of the law remains low. The next chapter will analyze how the very weak legal institutional structure of the overall US national security apparatus during the 1960s and 1970s affected US interrogation policies during the Vietnam War.

CHAPTER 4:

The Vietnam War

On December 23, 1950, the United States, Laos, Cambodia, and Vietnam signed the international agreement on Mutual Defense Assistance in Indochina, commonly referred to as the Pentalateral Agreement.⁵²¹ The treaty was short, its terms were broad, and it would come to govern the legal status of all US personnel—military and civilian—deployed to Vietnam for nearly a quarter century.⁵²² The treaty guaranteed all US personnel sent to “advise” the South Vietnamese government full immunity from the civil and criminal laws of Vietnam. The Pentalateral Agreement also expected that the number of US personnel would be “kept as low as possible.” Eighteen years later, the US presence in South Vietnam had ballooned to more than 550,000, and there appeared to be no end in sight.⁵²³

The Vietnam War was an armed conflict that defied traditional classification. The conflict had four separate dimensions: there was an inter-state war, a civil war, a transnational war, and a secret war. Combatants ranged from regular forces, guerrillas, paramilitary forces, and secret warriors. More than half a dozen states sent combat troops to Indochina. The war expanded into neighboring Laos and Cambodia. There were coups, assassinations, free-fire zones, and the use of torture was endemic. Such an unconventional conflict posed major challenges for international law, as Major General George S. Prugh, a Judge Advocate General during the war has noted, “the inherent difficulty of attempting to

⁵²¹ Prugh, 1975, Appendix I, 145-150.

⁵²² Prugh, 1975, p. 87.

⁵²³ Prugh, 1975, 88; Thayer, 1985, 37.

apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.⁵²⁴

While classifying the legal status of the conflict was difficult, making sure US soldiers and CIA case officers followed the United States' international legal obligations concerning the treatment of wartime detainees proved even more daunting. As the previous two chapters showed, as US involvement in Vietnam continued to escalate in the early 1960s, the institutionalization of international law in the US national security process was extremely weak. Not surprising, even as the US declared in 1965 that it would abide by the 1949 Geneva Conventions (III) Relative to the Treatment of Detainees, its actions on the ground for the remainder of the war showed otherwise.

The remainder of the chapter is organized into three sections. The first will analyze the legal-policy process, which primarily focused on Constitutional questions, though some attention was paid to *jus ad bellum* issues. The second section analyzes the US military's legal policy towards prisoners of war and use of torture by its armed forces. The third section focuses on the CIA-led Phoenix program, a brutal "neutralization" campaign that was highly dependent on the use of torture.

The Legal-Policy Process

Both the Johnson and Nixon administrations—the two Presidencies that had to deal with POW issues during America's long military engagement in Vietnam—largely depended on informal inter-agency decision making processes. Neither President liked the formal NSC structure. Johnson depended on the informal "Tuesday Lunches" to discuss and

⁵²⁴ Prugh, 1975, 62.

make decisions on Vietnam policy. These meetings mainly included the President, the Secretary of State, Dean Rusk, the Secretary of Defense, Robert S. McNamara, the National Security Advisor, McGeorge Bundy (to be replaced by Walt Rostow), CIA Director John McCone (and especially Richard Helms) the Chairman of the Joint Chiefs of Staff, Earl Wheeler, and the occasional White House staffer, including Robert Komer, near the end of the administration.⁵²⁵ Noticeable absent, from a legal-policy perspective, are any legal advisers. This does not mean that legal questions never occupied the policymakers—as will be shown below, the President had some Constitutional concerns over his continued escalation of the war— but they were less likely to be without a government lawyer present to help spot the issues.

Under Nixon, the policy-making process was essentially a two man game: President Nixon and his National Security Advisor, Henry Kissinger. There were some important NSC working groups reviewing policy, but most decisions were made in one on one meetings between the President and Kissinger.⁵²⁶

During the Johnson administration, the legal-policy process was dominated by Constitutional questions, specifically, the Constitutional authority of the President to employ US armed forces in Vietnam. In June 1964, after “the President inquired concerning the legal basis for sending United States troops to Viet-Nam,” the State Department’s Legal Adviser’s Office, in consultation with the Office of Legal Counsel, wrote the first opinion on the matter and argued that the escalating war in Vietnam rested largely on the President’s Commander in Chief powers and his authority to conduct foreign affairs.⁵²⁷ In June 1965,

⁵²⁵ Komer, 1986, 86.

⁵²⁶ Komer, 1986, 88.

⁵²⁷ Meeker, 1964a; see also, Meeker, 1964b; Meeker, 1964c.

ten months after Congress passed the Gulf of Tonkin Resolution, the Attorney General, Nicholas Katzenbach wrote a legal memo that focused on whether additional Congressional approval was “necessary or desirable” given the significant increase in US military deployments to South Vietnam, and the changing operational role of those forces, which were no longer mere “advisers,” as they were ordered to engage in direct attacks on “targets of opportunity.”⁵²⁸ The Attorney General concluded that, “It is my view that, as a matter of law, further Congressional approval at this time is not necessary.”⁵²⁹ The State Department and the Defense Department concurred.⁵³⁰ The former argued that the President had the authority to “send very large numbers of American troops to Viet-Nam (e.g., 300,000 ground troops).”⁵³¹

The State Department Legal Adviser’s Office (L) also addressed some international law issues, although its focus was on *jus ad bellum* questions. Focusing on the legality of US and South Vietnamese air strikes in North Vietnam, L proposed that the bombings were permitted under the doctrine of, “collective self-defense against North Vietnamese aggressive conduct amounting to armed attack; the right to collective self-defense is recognized in Article 51 of the United Nations Charter.”⁵³² The State Department also stressed that US involvement in Vietnam fulfilled its obligations under the Southeast Asia Collective Defense Treaty (SEATO), even though, “SEATO as an organization is not closely related to United States actions in Viet-Nam. There has been no request for assistance from

⁵²⁸ Katzenbach, 1965, 2.

⁵²⁹ Katzenbach, 1965, 2.

⁵³⁰ Meeker, 1965b; Niederlehmer, 1965; see also, Meeker, 1965c.

⁵³¹ Meeker, 1965b, 1.

⁵³² Meeker 1965a. For a more detailed legal memo justifying US military involvement in Vietnam under international law, see, Meeker, 1966.

South Viet-Nam to SEATO as an entity and no collective action by SEATO.”⁵³³ L also highlighted the Mutual Defense Assistance in Indochina treaty as further justification for the US war.⁵³⁴

During the Nixon administration, as the war continued to expand geographically into Cambodia and Laos, the Department of Justice and the State Department once again focused on Constitutional issues and *jus ad bellum* questions relating to the new phase of the war.⁵³⁵ On May, 1970, William H. Rehnquist, Assistant Attorney General for the Office of Legal Counsel stressed that the expansion of the war into Cambodia only represented a “limited” conflict or an armed conflict short of “war.” Rehnquist’s legal opinion cited the Gulf of Tonkin resolution and concluded that, “The President’s action with respect to the Cambodian border area, limited in time and in geography, is consistent with the purposes which the Executive... there is no doubt as to the constitutionality of the action in light of the prior affirmance of Congress that the Commander in Chief take all necessary measures to protect U.S. forces in Vietnam.”⁵³⁶

Later than month, State Department Legal Adviser, John R. Stevenson gave a public address where he presented the US position on international law with regards to the “incursion” into Cambodia.⁵³⁷ Building on the Johnson administration’s argument that the UN Charter purported the US with the right of collective self-defense against North Vietnam’s acts of aggression, the US claimed the, “authority for the proposition that, assuming the [UN] charter’s standards are met, a belligerent may take action on a neutral’s territory to prevent violation by another belligerent of the neutral’s neutrality which the

⁵³³ United States Department of State, 1967, 3.

⁵³⁴ Meeker, 1966.

⁵³⁵ Rehnquist, 1970a, 313-320; see also, Rehnquist, 1970b, 321-338.

⁵³⁶ Rehnquist, 1970a, 320.

⁵³⁷ Stevenson, 1970.

neutral cannot or will not prevent, provided such action is required in self-defense.”⁵³⁸

Thus, both the Johnson and Nixon administrations constantly engaged with questions over the Constitutional and international legality of their decisions to wage and continuously expand its war in Indochina. When it came to *jus in bello* principles, the lawyers at the policymaking level were much less engaged.

The US Military and the Use of Torture

With regards to *jus in bello* questions, especially concerning the treatment of Prisoners of War (POWs), the Department of Defense and the US military command, with assistance from JAGs, eventually took the lead. Even though US personnel had been involved in the interrogation of detainees for several years, the US did not take an official position regarding the status of the Geneva Conventions (III) Relative to the Treatment of Prisoners of War until 1965.⁵³⁹

The US created its Military Assistance Command, Vietnam (MACV) in early 1962. By the end of 1964 there were 23,000 US forces in South Vietnam.⁵⁴⁰ A year later, as the US began introducing ground combat units, it increased its forces eight-fold to 184,000. In 1969, US personnel—both civilian and military—reached its peak level of more than 550,000.⁵⁴¹ On the POW-front, with the buildup in military forces and their intensified combat role, US soldiers were increasingly capturing NLF combatants and were being captured themselves. Near the end of 1964, NLF forces executed several American POWs in retaliation for similar public executions of NLF combatants by the South Vietnamese

⁵³⁸ Stevenson, 1970.

⁵³⁹ For example, for CIA involvement in interrogations prior to 1965, see Ahern, 2001.

⁵⁴⁰ Thayer, 1985, 37.

⁵⁴¹ Prugh, 1975, 88; Thayer, 1985, 37.

government.⁵⁴² Furthermore, the North Vietnamese government declared that it considered captured US pilots “pirates,” not POWs, although they claimed that they would be treated humanely (which quickly proved to be untrue).⁵⁴³ The risks to US soldiers captured by enemy forces increased the stakes and added urgency for the US military to develop a legal position on the Geneva Conventions.⁵⁴⁴ Military lawyers played a key role in the decision to apply Geneva III to the conflict.

As Borch notes, “From mid-1962 to early 1965, the staff judge advocate’s operation at MACV was so small that there was minimal formal organization.”⁵⁴⁵ In 1964, the MACV commander, General William C. Westmoreland agreed to upgrade the position of MACV Staff Judge Advocate from Lieutenant Colonel to full Colonel.⁵⁴⁶ On November, Colonel George S. Prugh became the new Staff Judge Advocate for MACV, making him the top lawyer in Vietnam. Prugh’s office had three additional Judge Advocate Generals (JAGs) under his command. There was also a JAG advising the US Army Support Command, Vietnam. In other words, in 1964, there were only five military lawyers in Vietnam.⁵⁴⁷ Furthermore, as Chapter 3 showed, in Vietnam, JAGs focused on government-oriented law, including Military Justice, Administrative Law, Civil Law, Claims, Legal Assistance, and International Law (Status of Forces agreements, etc.). JAGs were not tasked with providing

⁵⁴² Prugh, 1975, 62-63.

⁵⁴³ Prugh, 1975, 63.

⁵⁴⁴ Borch, 2003, 18-19; Prugh, 1975, 63.

⁵⁴⁵ Borch, 2003, 15.

⁵⁴⁶ Borch, 2003, 14.

⁵⁴⁷ The number of JAGs would significantly increase starting in 1965, though they were never large enough nor did they have the training or mandate to become deeply engaged in operational issues. Borch, 2001, 2003; For a full list of Marine Corps JAGs, see Solis, 1989.

operational law advice. However, Prugh, in an *ad hoc* manner, inserted himself into POW issues.⁵⁴⁸

Up to early 1965, there had been debates within the Department of Defense and the US military command as to how the war should be legally classified, which had consequences for the rights that would be afforded to wartime detainees. There was agreement that combatants from the regular forces of North Vietnam deserved full POW status. However, there were disagreements with regards to members of the National Liberation Front (NLF or Vietcong).⁵⁴⁹ Some considered the war with the NLF to be not of an international character, meaning that Article 3 of Geneva III—which affords significantly less protections to prisoners—would govern detention operations.⁵⁵⁰ Ultimately, as Prugh explains, in mid-1965, the US decided that the war, “constituted an armed international conflict, that North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam, and that the Geneva Conventions applied in full.”⁵⁵¹

MACV Commander, General William C. Westmoreland explained the US motivation for providing full POW status to the NLF,

“... responsible officials recognized—and I constantly stressed—that aside from humanitarian reasons, there were advantages in taking prisoners and treating them decently. Live prisoners can talk, establishing a basic source of intelligence, and word that prisoners and returnees under the Chieu Hoi program were well cared for would spread, prompting more to give up. There was also hope, however vain, that the VC and the North Vietnamese would follow the example and treat their prisoners well.”⁵⁵²

⁵⁴⁸ Borch, 2003, 18.

⁵⁴⁹ Prugh, 1975, 62.

⁵⁵⁰ Prugh, 1975, 62.

⁵⁵¹ Prugh, 1975, 61.

⁵⁵² Westmoreland, 1976, 297.

By giving NLF fighters the full protections of the Geneva Conventions (at least as a matter of policy), the US military leadership and the JAG Corps hoped that they could get the North Vietnamese and NLF to reciprocate.⁵⁵³

The US now faced the challenge of convincing the South Vietnamese government and military of also granting POW protections to NLF combatants. The South Vietnamese government had regarded the NLF as an illegal insurgency, treated its members as criminals, and did not afford them any POW protections. The execution of surrendered NLF combatants was commonplace, and the use of torture by South Vietnamese interrogators was systematic (and remained so throughout the war).⁵⁵⁴ Captured detainees were imprisoned, “in provincial and national jails along with political prisoners and common criminals.”⁵⁵⁵ The US eventually pressured the South Vietnamese government to accept as a matter of policy (not practice) the applicability of the Geneva Conventions.⁵⁵⁶

On June 1, 1965, the Vice President of the International Committee of the Red Cross (ICRC), wrote to Secretary of State Dean Rusk, notifying him that the humanitarian organization considered the Vietnam War to be an international conflict and that all belligerent parties must abide by the Geneva Conventions,

“The hostilities raging at the present time in Viet Nam—both North and South of the 17th parallel—have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied. All Parties to the conflict, the Republic of Viet Nam, the Democratic Republic of Viet Nam and the United States of America are bound by the four Geneva Conventions of August 12, 1949, for the protection of the victims of war, having ratified them and having adhered thereto. The National Liberation Front too is bound by the undertakings signed by Viet Nam.”⁵⁵⁷

⁵⁵³ Prugh, 1975, 63.

⁵⁵⁴ Moyar, 1997, 90; Rejali, 2009, 170-173.

⁵⁵⁵ Borch, 2003, 19.

⁵⁵⁶ Borch, 2003, 19.

⁵⁵⁷ Aldrich, 1972, 636.

In August 1965, both the US and South Vietnamese governments notified the ICRC that they accepted the applicability of Geneva III and that their armed forces would abide by its provisions.⁵⁵⁸ In early 1966, the US invited ICRC representatives to inspect several South Vietnamese prisons that held POWs, as well as a POW camp that was still under construction.⁵⁵⁹ The ICRC would have visitation rights to POW camps for the remainder of the war, but they were not given access to CIA-South Vietnamese secret prisons. On January 8, 1969, US policy and procedures pertaining to the ICRC were finally formalized in MACV Directive 190-6.⁵⁶⁰

The US also helped set up a number of POW camps. The first camp was opened in May 1966 and by the end of 1971, “the Vietnamese government held 35,665 prisoners of war in six camps. Of these, 13,365 had been captured by US forces.⁵⁶¹ Although each POW camp was staffed by both Vietnamese and US military police, the former group was there in their “adviser” capacity, and legally speaking, the POW camps were under sole South Vietnamese jurisdiction. Springer explains that this arrangement allowed the US to abdicate some of its legal responsibilities “for POW treatment by turning virtually all captives over to the care of the South Vietnamese government, which made little pretense of following the Geneva Convention.”⁵⁶²

Having accepted the applicability of Geneva III, US and South Vietnamese forces began instituting a process for the capture, interrogation, screening, and detention of enemy combatants. Prugh explains the process as follows,

⁵⁵⁸ Prugh, 1975, 65.

⁵⁵⁹ Prugh, 1975, 68.

⁵⁶⁰ Prugh, 1975, 132-134.

⁵⁶¹ Prugh, 1975, 67.

⁵⁶² Springer, 2010, 180.

“the Commander, U.S. Military Assistance Command, Vietnam, established a policy that all suspected Viet Cong captives taken by U.S. forces were to be treated initially as prisoners of war by the capturing unit. Capturing units were responsible for all of the enemy taken prisoner during the course of operations, from the time of their capture to the time the prisoners were released to Vietnamese authorities. *Captives were to be interrogated and detained by U.S. forces only long enough to obtain from them any legitimate tactical intelligence they possessed.* Captives were then to be sent to a combined U.S.-Vietnamese Army interrogation center for classification and further processing. Prisoners of war were sent to prisoner of war camps; innocent civilians were released and returned to the place of capture...”⁵⁶³

By December 27, 1967, MACV Directive 381-46 formalized two exceptions where members of the NLF would not be given POW status when captured.⁵⁶⁴ The first where those that engaged in, “terrorism, sabotage, or spying.” The second were suspected members of the NLF that were not engaged in hostilities when captured. The first group were treated as criminals, the second group were essentially political prisoners. Members of both groups would likely be transferred to interrogation centers under the Phoenix program, where they were likely brutally tortured (more on Phoenix below).

Nonetheless, given that US forces captured, interrogated, and supervised POW camps and interrogation centers, the US military command passed a number of directives making it clear that Geneva applied and that torture constituted a grave breach of the laws of armed conflict. MACV Directive 20-4 issued in April 1965 was the first military directive specifically dealing with war crimes.⁵⁶⁵ Directive 20-4 noted that, “Some examples of ‘grave breaches’ are as follows... Willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health.”⁵⁶⁶ The Directive was established in order to create investigations of such war crimes. However, only crimes committed on US

⁵⁶³ Emphasis added. Prugh, 1975, 65-66.

⁵⁶⁴ United States Military Assistance Command, Vietnam, 1967b.

⁵⁶⁵ United States Military Assistance Command, Vietnam, 1967a.

⁵⁶⁶ United States Military Assistance Command, Vietnam, 1967b, 23.

soldiers were to be investigated.⁵⁶⁷ On March 25, 1966, Directive 20-4 was updated to include war crimes committed by US personnel.⁵⁶⁸

Similarly, concerning interrogations, MACV Directive 381-11 covered the “Exploitation of Human Sources and Captured Documents,” and once again made clear that, “All interrogations will be conducted according to the Geneva Conventions Relative to the Treatment of Prisoners of War (GPW) with particular regard to the prohibitions against maltreatment contained in Article 17 and the fact that these prohibitions apply equally to detainees/ PW.”⁵⁶⁹ Furthermore, when, “US personnel have knowledge that violation of these provisions occur on the part of FWMAF or RVNAF, the senior US commander involved in the operation should point out the violation to the FWMAF or RVNAF commander. A report will then be forwarded to this Headquarters, ATTN: MAC JA.”⁵⁷⁰ In other words, US policy in Vietnam in the post-1965 period consistently stressed that detainees were protected by the Geneva Conventions and that torture constituted a grave breach of the law and policy. Yet, torture committed by US soldiers and CIA personnel was commonplace. The legal-policy was not the problem, the problem was that there was a weak degree of institutionalization of LOAC at the operational level, where a culture of non-compliance reigned supreme.

Part of the problem was that training in the Geneva Conventions was kept to a minimum and was poorly presented.⁵⁷¹ Soldiers received two hours of formal instruction on the Geneva Conventions during basic training.⁵⁷² Advanced training would also include

⁵⁶⁷ Prugh, 1975, 72.

⁵⁶⁸ Prugh, 1975, 72.

⁵⁶⁹ Prugh, 1975, 127-131.

⁵⁷⁰ Prugh, 1975, 129-130.

⁵⁷¹ Prugh, 1975, 74.

⁵⁷² Prugh, 1975, 74.

further instruction on LOAC.⁵⁷³ Once in Vietnam, soldiers were given a three-by-five-inch card that noted some of the basic requirements of the Geneva Conventions, reminding US personnel that torture was illegal and that prisoners had to be treated humanely.⁵⁷⁴ In late September, 1967 Army Regulation 390-216 required that all Army personnel undergo annual training in the Hague and Geneva Conventions. However, ten months later, an Army general inspection found that, “approximately 50 percent of the personnel had not received the annual Geneva and Hague Convention training as required AR 390-216.”⁵⁷⁵ For military interrogators, the Army Field Manual 27-10 on “the Law of Land Warfare,” also failed to provide clear guidance. The Manual surely noted that, “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever,” however no list or description of legal and illegal techniques was provided.⁵⁷⁶

In the summer of 1967, the Army’s Directorate for Inspection Service investigated the instruction on the Geneva Conventions conducted at the Army’s Intelligence School at Fort Holabird, Maryland, where future Army interrogators were trained. The report concluded that, “additional clarification in the handling of prisoners of war is required... replies of some personnel indicate a lack of understanding of the provisions of the Geneva Conventions pertaining to the treatment of prisoners of war.”⁵⁷⁷ The report recommended that, “instruction in the Geneva Conventions has relied too heavily upon lecture-type presentation. To provide more realistic and stimulating training, it is suggested that personnel in training be confronted with type situations that require decisions on the part

⁵⁷³ Prugh, 1975, 74.

⁵⁷⁴ Prugh, 1975, 75.

⁵⁷⁵ United States Department of the Army, Vietnam, 1968, 317.

⁵⁷⁶ United States Department of the Army, 1956.

⁵⁷⁷ Matthews, 1967, 1.

of the men being instructed.”⁵⁷⁸ During a similar investigation, at the Infantry School for Army Rangers at Fort Benning, Georgia, a survey of students from two separate classes (one with 179 students, the other with 149) asked the students after their instruction had completed, “If you captured an enemy soldier in combat and there was an immediate need for information, would you mistreat the prisoner of war to obtain information?” to which 22% of the students from the first class and 50% from the second answered yes.⁵⁷⁹ Similarly, the Army’s independent investigation into the My Lai massacre concluded that the training of the company involved in the massacre had been inadequate—too little of it and too abstract.⁵⁸⁰

The review process was also institutionally weak. As noted earlier, the amended MACV Directive 20-4 required all field commanders to report any war crimes they witnessed. However, as Rejali explains, “But until 1970, these new rules did not anticipate the possibility that the commander himself may have been involved, as Lieutenant William Calley was at My Lai. Commanders were responsible for reporting their own deficiencies, and there was no independent office to investigate adherence to the laws of war.”⁵⁸¹

As a result of the My Lai massacre, the US military enacted some reforms to the training of soldiers and the investigations of war crimes. For example, a War Crimes Working Group was created which did increase the number of investigations conducted post-My Lai. Rejali explains how, “Of the 241 allegations of war crimes between 1965 and 1975, 191 (79 percent) were made after September 1969.”⁵⁸² However, “Most allegations were not made by officers of the units involved, but by individuals long since separated

⁵⁷⁸ Matthews, 1967, 1.

⁵⁷⁹ Matthews, 1967, 3.

⁵⁸⁰ United States Department of the Army, 1970b.

⁵⁸¹ United States Department of the Army, 1970b, Section 12-17; Rejali, 2009, 173.

⁵⁸² Rejali, 2009, 173.

from the service,” suggesting that soldiers had failed to inculcate a law abiding ethos.⁵⁸³

With regards to training, in May 1970, Army Regulation 350-216, was updated to make clear that formal instruction was a command responsibility and that the training had to, “Be presented by officers of The Judge Advocate General's Corps... together with qualified company or similar commanders.”⁵⁸⁴ The new training curriculum attempted to ground instruction in real-world experience, but the changes did not seem to have much of an effect.⁵⁸⁵

On May 21, 1971, an investigation by Major General Kenneth J. Hodson, found that US interrogators were still “on occasion” using electrical shocks to torture prisoners.⁵⁸⁶ The documents in the War Crimes Working Group, as Turse explains, “141 substantiated instances in which U.S. soldiers tortured civilian detainees or enemy prisoners of war with fists, sticks, bats, water, or electric shock. But this is the merest tip of the iceberg: most of these cases came from just one investigation of the 172nd Military Intelligence Detachment, a single unit of fifty to a hundred men, one of many such American units in Vietnam.”⁵⁸⁷ Another inquiry also found that the 29 members of the 173rd Airborne committed torture.⁵⁸⁸

The routine use of torture by US military personnel reflected a weak institutionalization of LOAC where JAGs played a limited role (they helped set POW policy, but did not provide much operational advice), training was significantly lacking, reviews were inadequate, and a culture of non-compliance trumped the law. But this was only one

⁵⁸³ For a detailed examination of the War Crimes Working Group that was established post-My Lai, see Rejali, 2009, 173; Turse, 2013.

⁵⁸⁴ United States Department of the Army, 1970c, 2-3.

⁵⁸⁵ Borch, 2003, 54.

⁵⁸⁶ Rejali, 2009, 173-174.

⁵⁸⁷ Turse, 2013, 172.

⁵⁸⁸ Rejali, 2009, 173.

facet of the US's use of torture in Vietnam. A more brutal torture program was led by the CIA, known as the Phoenix program.

The Phoenix Program

William Colby, the CIA's Chief for the Far East Division, explained how in 1966, President Johnson wanted, "To balance the huge American military operations underway on the ground and in the air, he demanded results in what he called the 'other war,' the one to improve the lot of the people of Vietnam."⁵⁸⁹ Johnson selected Robert W. Komer, a former CIA officer turned White House staffer with the task of creating a plan for the "other war," or the pacification of South Vietnam. Pacification was a catch-all term that had come to encompass a myriad of efforts in the contest over Vietnamese "hearts and minds."⁵⁹⁰ The range of tools encompassing pacification included, "population control, in which villagers were resettled... self-defense, including the creation of militias to involve villagers in their own security; civic action, in which security forces built community facilities, provided medical assistance... in an attempt to convince villagers the Saigon government cared about their concerns; economic aid; agricultural assistance; help with education; and direct efforts to root out NLF cadres among the people."⁵⁹¹ The military, CIA, State Department, and US Agency for International Development had all been playing a role in various pacification efforts for years. Komer devised a plan which sought to redouble the efforts but in a centralized and coordination manner.

⁵⁸⁹ Colby & Forbath, 1978, 235; see also, Komer, 1986, 87.

⁵⁹⁰ Prados, 2009, 322.

⁵⁹¹ Prados, 2009, 322.

On May 9, 1967, President Johnson signed Presidential Directive NSAM 362, “Responsibility for U.S. Role in Pacification (Revolutionary Development),” establishing the Civil Operations and Revolutionary Development Support (CORDS).⁵⁹² CORDS was technically placed under MACV’s command, creating a single chain of command for all pacification efforts. At the top of the hierarchy was General Westmoreland, the MACV commander, who had three deputies under CORDS, one civilian, Komer, and two military.⁵⁹³ As Andrade and Willbanks explain, “Civilian agencies were integrated into the military hierarchy... For the first time, civilians were embedded within a wartime command and put in charge of military personnel and resources.”⁵⁹⁴ The advantage was that civilian agencies—like the CIA—could now benefit from the vast resources of the military. However, the centralization and coordination goals fell far short of expectations, as organizations maintained enormous operational autonomy.

MACV Directive 381-41, established the Intelligence Coordination and Exploitation Program (ICEX) within CORDS.⁵⁹⁵ ICEX was to emphasize intelligence coordination, but also the “elimination of the VC infrastructure.”⁵⁹⁶ A CIA report explained the distinct task of ICEX in the larger pacification campaign,

“In addition to the ‘positive’ task of providing the rural population with security and tangible benefits sufficient to induce it to identify its fortunes with those of the GVN [Government of South Vietnam], the pacification program *also involves the ‘negative’ task of identifying and eradicating the Communist politico-military control apparatus known as the Viet Cong Infrastructure.*”⁵⁹⁷

⁵⁹² National Security Action Memorandum 362, 1967.

⁵⁹³ Andrade & Willbanks, 2006, 14.

⁵⁹⁴ Andrade & Willbanks, 2006, 14.

⁵⁹⁵ United States Military Assistance Command, Vietnam, 1967c, 2.

⁵⁹⁶ Prugh 1975.

⁵⁹⁷ Emphasis added. Central Intelligence Agency, 1969, 7.

By “Viet Cong Infrastructure,” US officials meant the NLF “shadow government,” or the civilian political leadership and administration of the NLF, as well as members of the Communist Party structure in South Vietnam.⁵⁹⁸ Therefore, to “eliminate” or “destroy” the NLF infrastructure, ICEX intended to “neutralize”—capture, kill, or convert—the civilian political leadership and activists of the NLF.⁵⁹⁹ Directive 381-41 explained the approach as one intended to resemble, “a ‘rifle shot’ rather than a shotgun approach to the real target—key, important political leaders and activists in the VC infrastructure.”⁶⁰⁰ The program turned out to be anything but a precise “rifle shot,” as thousands of innocent South Vietnamese were tortured and killed, at least in part due to the fact that a significant amount of ICEX/Phoenix intelligence was based on information obtained through torture.⁶⁰¹

In December 1967, ICEX was renamed Phoenix (with the South Vietnamese counterpart named Phung Hoang). After the Tet Offensive of early 1968, Komer and Colby introduced a plan for an “Accelerated Pacification Campaign,” with a special focus on “neutralizing” members of the NLF leadership. It is important to stress that the main targets for “neutralization” under Phoenix were not combatants (the military focused on them), they were mainly civilians—NLF political leaders and activist—as well as clandestine operatives.⁶⁰² As non-combatants, US legal-policy asserted that these groups were not covered by Geneva’s POW protections. As noted earlier, MACV Directive 381-46 of late December, 1967, made clear that individuals engaged in, “terrorism, sabotage, or

⁵⁹⁸ Moyar, 1997, p. 11.

⁵⁹⁹ Andrade & Willbanks, 2006, 19.

⁶⁰⁰ Prugh, 1975.

⁶⁰¹ On how unprecise Phoenix ended up being, see Kalyvas & Kosher, 2007; On the role of torture in leading to unreliable intelligence, see Rejali, 2009, 472.

⁶⁰² Moyar, 1997; Thayer, 1985, 208.

spying,” as well as suspected members of the NLF that were not engaged in direct hostilities would not be classified as POWs.⁶⁰³ This meant no visitations from the ICRC and fewer legal protections. In 1971, the State Department Legal Adviser’s Office reaffirmed the non-applicability of Geneva for these groups, but stressed that, “Nevertheless, the United States and South Vietnamese Governments have agreed that humanitarian treatment must be accorded to all persons, irrespective of whether an individual is considered a protected person within the meaning of the Convention...”⁶⁰⁴ For the Phoenix program, the legal-policy was much more permissive than its military counterpart.

Directive 381-41 explained that “non-Prisoners of War” would be transferred “to the appropriate GVN [South Vietnam government] civil authorities.”⁶⁰⁵ By civil authorities, the Directive meant, intelligence organizations, including the South Vietnamese Special Police, which was “advised” by the CIA, and ran the Province Interrogation Centers. Interrogators from the Special Police and the CIA would be largely responsible for interrogating Phoenix prisoners. In addition, the Provincial Reconnaissance Units, which were entirely controlled by the CIA were the main action arm for kill and capture operations.⁶⁰⁶

In order to “neutralize” the NLF infrastructure, the CIA and its South Vietnamese partners needed the necessary intelligence to create lists of NLF targets. The interrogation of prisoners was a centerpiece of their intelligence collection. As Moyer explains, when a suspected or known high-ranking prisoner was interrogated, CIA advisers, “watched over

⁶⁰³ MACV Directive Number 381-46.

⁶⁰⁴ State Department Legal Adviser’s Office, Memorandum, “The Geneva Conventions and the Phoenix Program,” August 27, 1971, 3. In The Virtual Vietnam Archive, Texas Tech University, <http://www.vietnam.ttu.edu/virtualarchive/>.

⁶⁰⁵ United States Military Assistance Command, Vietnam, 1967b, 116.

⁶⁰⁶ Moyer, 1997, 38.

the Special Police interrogations there, hired their own South Vietnamese interrogators to work in the centers, and conducted some interrogations themselves through interpreters.”⁶⁰⁷ US military personnel also conducted interrogations through translators.⁶⁰⁸ With lower ranking prisoners, “the Americans usually allowed the South Vietnamese to do most of the questioning. Interrogating or debriefing through an interpreter was cumbersome, and interpreters were not always reliable.”⁶⁰⁹

Scholars are divided over the frequency of use and the degree of brutality in the torture that was employed under Phoenix.⁶¹⁰ But no one denies that torture took place, and often. For example, Moyer, who presents the most sympathetic account of the program, acknowledged that, “it is clear that the large majority of South Vietnamese interrogators tortured some or all of the Communist prisoners in their care.”⁶¹¹ By torture, he means beatings, waterboarding, the use of electric shocks, and brutal stress positions. Moyer however wants make it clear that, “gruesome forms of torture, such as breaking bones, sawing through flesh, or chopping off fingers,” were only “seldom employed.”⁶¹² Although, he also recognizes that, “In a significant number of cases, the South Vietnamese killed Communist prisoners whom they had questioned... At times, they executed one prisoner in an effort, sometimes successful, to scare another prisoner into talking.”⁶¹³

⁶⁰⁷ Moyer, 1997, 88.

⁶⁰⁸ Herrington, 2012.

⁶⁰⁹ Moyer, 1997, 88.

⁶¹⁰ Andrade, 1990; McCoy, 2012; for more sympathetic views of Phoenix see, Moyer, 1997; for the more critical accounts, see Valentine, 1990.

⁶¹¹ Moyer defines torture as any use of physical pain, not just severe pain. He did not focus on psychological torture. Moyer, 1997, 90-91.

⁶¹² Moyer, 1997, 91.

⁶¹³ Moyer, 1997, 92.

According to Moyer, only a “few” CIA officers participated in or encouraged the use of torture.⁶¹⁴ However, almost all CIA personnel in their “advising” and “supervising” capacity witnessed the use of torture. A 1968 internal review of the Phoenix Program in the Cords II region, concluded that, “The truncheon and electric shock method of interrogation were in widespread use, with almost all [CIA] advisors admitting to have witnessed instances of the use of these methods.”⁶¹⁵ Yet, even though CIA officers saw their counterparts use torture and extra-judicial executions, most did not report the crimes to their superiors or make any complaints with the abusers or their chain of command. Instead, the internal review found that, “Most advisors claimed they did not personally take part in [torture sessions] but ‘turned their backs on them.’”⁶¹⁶ The problem was the weak institutionalization of the law. CIA officers lack clear guidance, had significant operational autonomy, lacked supervision, and had not been trained in the law.

Furthermore, the CIA’s interrogation manual sent mixed signals. Completed in 1963, “KUBARK Counterintelligence Interrogation” manual praised the rapport-building model of interrogation, but also included an entire section on, “Coercive Counterintelligence Interrogation of Resistant Sources,” including detailed assessments of “Deprivation of Sensory Stimuli,” “Threats and Fear,” “Pain,” and “Narcosis.”⁶¹⁷ The manual also cautioned that,

“Interrogations conducted under compulsion or duress are especially likely to involve illegality and to entail damaging consequences for KUBARK. Therefore prior Headquarters approval at the KUDOVE level must be obtained for the interrogation of any source against his will and under any of the following circumstances:

⁶¹⁴ Moyer, 1997, 96.

⁶¹⁵ Moyer, 1997, 90-91.

⁶¹⁶ Moyer, 1997, 99.

⁶¹⁷ Central Intelligence Agency, 1963.

1. If bodily harm is to be inflicted.
2. If medical, chemical, or electric methods or materials are to be used to induce acquiescence.
3. [Redacted]”⁶¹⁸

There also appears to have been significant confusion as to what constituted torture. For example, Richard Welcome, a Phoenix adviser, questioned whether the “abuse” he witnessed constituted torture,

“Prisoners were abused. Were they tortured? It depends on what you call torture. Electricity was used by the Vietnamese, water was used, occasionally some of the prisoners got beat up. Were any of them put on the rack, eyes gouged out, bones broken? No, I never saw any evidence of that at all.”⁶¹⁹

Similarly, there was disagreement among CIA officers regarding the effectiveness of torture. For example, William Colby claims he pushed for non-coercive interrogation methods and created a program to train the South Vietnamese in such methods, including,

“cross-checking a prisoner’s story with other known facts and gradually convincing him that the interrogator already knows the basic story... Combining this with the “good guy-bad guy” alternate team challenging and sympathizing with the subject can often lead to the first confidences, which then can be built upon to produce more, and certainly produces more accurate information than torture ever can.”⁶²⁰

Similarly, there were CIA interrogators like Orrin DeForest who was contracted by the CIA and received what he considered to be a useless ten week course at CIA headquarters before he was deployed to Vietnam where he found most of his new CIA colleagues, “most of them without a clue in the world,” as to how to approach the intelligence challenge.⁶²¹ DeForest had previously worked with the Japanese equivalent of the FBI where he learned how to conduct counterintelligence.⁶²² After witnessing the brutal torture session where a 15-year old girl was sexually assaulted by her South Vietnamese interrogators, DeForest

⁶¹⁸ Central Intelligence Agency, 1963, 8.

⁶¹⁹ Moyar, 1997, 91.

⁶²⁰ Colby & Forbath, 1978, 230-231.

⁶²¹ DeForest & Chanoff, 1991, 35.

⁶²² DeForest & Chanoff, 1991, 75.

decided to no longer participate in joint interrogation sessions with his Vietnamese counterparts.⁶²³ Without advice from CIA headquarters, DeForest came up with his own interrogation program. He was even able to create a small interrogation facility without notifying headquarters.⁶²⁴ He developed a rapport-based interrogation policy.⁶²⁵

On the other side, there were interrogators like Rex Wilson, a CIA “adviser” who conducted several mutual interrogations with his Vietnamese counterparts, and strongly believed that torture worked,

“The worst thing I saw was people from the Special Police putting a VC’s head in a pail of water and holding it there until he started sucking water down. In the cases that I saw, that method usually extracted accurate information from the prisoner, information that was acted upon. It didn’t always develop information, though, I only saw them do this kind of thing when they needed information urgently for combat situations, and it was not life threatening or disfiguring, so I did not put a stop to it. I never saw my counterparts do anything that remotely resembled torture in any but urgent combat situations. There was a shooting war going on, and people needed intelligence, so people were going to get hurt when they got caught. That’s war.”⁶²⁶

In addition to highlighting different approaches to torture, DeForest and Wilson’s accounts also show that CIA interrogators had significant operational autonomy to conduct interrogations as they pleased, with little to no repercussions. As Moyar notes, “When Vietnamese or Americans tortured or killed a prisoner, only a few people witnessed the act.”⁶²⁷ It is almost impossible to reform a program that nobody sees.

Finally, even if only a few CIA case officers directly engaged in torture, For example, the US-South Vietnamese two year interrogation of Nguyen Tain, the highest ranking North

⁶²³ DeForest & Chanoff, 1991, 56.

⁶²⁴ DeForest & Chanoff, 1991, 83.

⁶²⁵ DeForest & Chanoff, 1991, 86-87. DeForest would teach others to use similar non-coercive techniques, but this was done in an ad hoc basis. For another memoir detailing a rapport-building interrogation style that benefited from DeForest; see, Herrington, 2012.

⁶²⁶ Moyar, 1997, 102.

⁶²⁷ Moyar, 1997, 99.

Vietnamese spy interrogated by the US was highly dependent on torture. Tain was brutally tortured by the South Vietnamese interrogators who used waterboarding, beatings, starvation, brutal stress positions, and electric shocks. The US interrogators according to Pribbenow did not use physical torture, and Tain cooperated with them. However, US and South Vietnamese interrogators shared the prisoner, coordinated interrogations, and shared intelligence.⁶²⁸ Therefore, CIA officers did not need to torture the prisoner themselves. In another sense, they could play good cop bad cop. Tai cooperated with the Americans for fear that he would be returned to the South Vietnamese, which he eventually was.

Ultimately, for US military forces and CIA case officers to seize using torture against Vietnamese prisoners, they had to withdraw from South East Asia. The degree of institutionalization of international law in the US national security apparatus was very weak during the 1960s and 1970s. American personnel were inadequately trained in the laws of war, the role of military lawyers was barely entering the operational sphere, power was diffuse, as low level commanders or CIA case officers could take war-making into their own hands, with little to no consequences. Finally, it was a period dominated by a culture of non-compliance. From a legal-policy perspective, the US legacy in Vietnam War—from My Lai to the Phoenix Program—highlighting the weakness in the US legal-policy process and the need for reform. By the turn of the century, the US had institutionalized the laws of war to a significantly greater degree. As the next chapter will show, that increased institutionalization had a major impact on the eventual fate of another torture program.

⁶²⁸ Pribbenow, 2011.

CHAPTER 5:

The Post-9/11 Torture Program

In 2008 President Bush stressed that the controversial “enhanced interrogation techniques” program had “produced critical intelligence that has helped us stop a number of attacks.”⁶²⁹ Yet, by this time, the Bush administration itself had already revoked or reformed those same tools that it believed were essential for the national security of the United States. The question that this chapter seeks to answer is: Why did the Bush administration increasingly adhere to the laws governing the treatment of prisoners of war (POWs), even though it believed that doing so would constrain its ability to save American lives? This chapter will show that every key component of the Bush administration’s Torture Program (TP) was either reformed, drawn down, or replaced in a manner more closely aligned with the Laws of Armed Conflict (LOAC). The shift towards a more law-abiding policy was a result of the institutionalization of LOAC into the US national security apparatus that was illustrated in Chapters 2 and 3.

There were four major components to the US Torture Program. First, the US designated members of al-Qaeda and the Taliban as rights-free “unlawful combatants,” unprotected by the Geneva Conventions or any other body of law. Second, the US created extra-legal zones at the detention facility in Guantanamo Bay, Cuba (GTMO) and through a global network of CIA-run detention facilities, known as “black sites,” where prisoners were disappeared and routinely tortured. Third, lawyers at the Department of Justice (DOJ) Office of Legal Counsel (OLC) authorized the CIA to use at least a dozen “enhanced interrogation techniques,” including “waterboarding,” a technique classified as torture by

⁶²⁹ Bush, 2008.

the US military since 1898.⁶³⁰ Similarly, Secretary of Defense Donald Rumsfeld approved over a dozen interrogation techniques to be used by military interrogators that went beyond those permitted in Army Field Manual 34-52. Finally, the US expanded what came to be known as "extraordinary renditions," or the transfer of captured prisoners to third countries for interrogation or trial, even though (or precisely because) the receiving states were well-known for their use of torture and extra-judicial killings.⁶³¹

By the end of 2002, all of the core elements of the TP had been established. Yet, by the end of the Bush presidency almost every component had been replaced, reformed, or revoked in ways more closely aligned with LOAC. The CIA's black sites were closed, and while agency interrogators were still permitted to use six "enhanced techniques," they had to be approved on a case by case basis, which rarely occurred, and seized altogether in late 2007. Similarly, while still operating, the GTMO's prisoner population had decreased more than threefold, and the International Committee of the Red Cross (ICRC) publicly declared that detainee conditions had "improved considerably," though problems remained.⁶³² Finally, in 2006 the US military introduced its new guidelines for interrogations, Field Manual 2-22.3, which prohibited all the "enhanced techniques" approved by Rumsfeld. These reversals in policy are surprising given the power of the US, the threat perception of policy makers, and the conviction by key members of the administration that international law was at best "obsolete," and at worse, a dangerous and unconstitutional constraint on executive power.⁶³³

⁶³⁰ On waterboarding's illegality under US military law, see Solis, 2010.

⁶³¹ Extraordinary renditions are beyond the scope of this study. For a detailed discussion of the policy debates surrounding this practice see, Mayer, 2008.

⁶³² Reuters, 2006.

⁶³³ Gonzales, 2002; Cheney, 2011; Yoo, 2006.

Post-911 Following the Normative Process

Three days after the September 11 attacks, the US Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” By September 17, the President signed a Memorandum of Notification (MON) authorizing the CIA to destroy al-Qaeda and “to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.”⁶³⁴ John Rizzo, the CIA’s top career lawyer at the time, believed that, “it was the most comprehensive, most ambitious, most aggressive, and most risky Finding or MON I was ever involved in. One short paragraph authorized the capture and detention of Al Qaeda terrorists, another authorized taking lethal action against them. The language was simple and stark.”⁶³⁵ However, the MON made no reference to interrogation techniques.⁶³⁶ Over the next year, a small group of policymakers and their politically appointed legal advisers approved an international torture program to “break” prisoners and extract intelligence.⁶³⁷ The Vice President’s Office led the march towards torture. Potential dissenters of the TP from the Executive Branch had to be excluded from the approval process, including the State Department, the Joint Chiefs of Staff, the JAG Corps, and career bureaucrats. Slowly, as the excluded groups learned of the TP—thanks in part to internal review mechanisms—they forced themselves back into the internal debates on torture and the laws of armed conflict. By the end of the Bush Presidency, the excluded groups

⁶³⁴ United States Congress, Senate, 2014, 11.

⁶³⁵ Rizzo, 2014, 174.

⁶³⁶ United States Congress, Senate, 2014, 11.

⁶³⁷ Rizzo, 2014, 183.

successfully waged an internal campaign that reformed, replaced, and revoked the most egregious components of the TP.

Immediately after the September 11 attacks, two competing inter-agency processes were created to manage the new Global War on Terrorism. On the one hand, there was the traditional inter-agency process led by the National Security Council system intended to include every department in the counter-terrorism deliberations to ensure a comprehensive response to the new threat. Exemplary of this process was the creation of the Law of War Group, an inclusive inter-agency group established on September 19, 2001, to make legal-policy recommendations to the White House on how to deal with the incoming prisoners captured by the US in its early campaign against al-Qaeda.⁶³⁸ The group was chaired by Pierre-Richard Prosper, the State Department's Ambassador at Large for War Crimes Issues, and included members from each national security bureaucracy.⁶³⁹ On the other hand, there was a parallel national security process led by the Vice President's Office that often circumvented the traditional NSC process on sensitive national security issues, including detainee policy.

The Vice President's influence on US security policy was formalized in Presidential Directive HSPD-1 of October 29, 2001, which created a Homeland Security Council process and asserted that, "The Vice President may attend any and all meetings of any entity established by or under this directive."⁶⁴⁰ The new structure and the close relationship Vice President (VP) Cheney had with President Bush increased his power.⁶⁴¹ In addition, the Vice President was very adept at working within and influencing the national security

⁶³⁸ Greenberg, 2009, 2.

⁶³⁹ Bravin, 2013, 44; Rice, 2011, Kindle 2041 of 13388.

⁶⁴⁰ Homeland Security Presidential Directive 1, 2001.

⁶⁴¹ On Vice President Cheney's close relationship with the President and his influence on national security policy during the first term, see, P. Baker, 2013; Gellman, 2008.

decision making process, allowing him to forge a strong alliance with his old friend, Secretary of Defense Donald Rumsfeld. Richard Haass, the State Department's Director of Policy Planning explained how, "The vice president ended up getting, from what I could tell, three bites at the apple. He had his staff at every [NSC] meeting. He would then come to principals meetings. And then he'd have his one-on-ones with the president."⁶⁴² The VP exploited the weak institutional structure of the NSC system by creating a parallel national security process organized through his office. The VP's Office had its own 15 member national security staff, which as Haass explained, "the vice president's office has become the equivalent of a separate institution or bureaucracy... the vice president has his own mini-NSC staff."⁶⁴³ As VP Cheney explained, this parallel structure allowed him to, "In the aftermath especially of 9/ 11, we needed to get things done, and on occasion I would use the position I had, and the relationship with the president I had, to short-circuit the system. No question about it."⁶⁴⁴ As this section will show, "to short-circuit the system" meant excluding key members of the NSC process, including the President's National Security Advisor, the Secretary of State, the Joint Chiefs of Staff, the Attorney General, and career bureaucrats from the decision making process.

On the legal-policy side, buffering the VP's parallel NSC process, the Vice President's Counsel, David Addington, and the White House Counsel, Alberto Gonzales, created and led a secret group of five politically appointed lawyers intent on setting the legal policy of the administration.⁶⁴⁵ The group, known as "the War Council," also included John Yoo, the Deputy Assistant Attorney General of the Office of Legal Counsel, Jim Haynes, the General

⁶⁴² Rothkopf, 2009, Kindle 408 of 6327.

⁶⁴³ Auerswald, 2011; Rothkopf, 2009, Kindle 644 and 847 of 6327.

⁶⁴⁴ Rosen, 2015, Kindle 3612 of 5440.

⁶⁴⁵ Goldsmith, 2007, 22-23; Mayer, 2008, Kindle 1278 of 7741.

Counsel of the Department of Defense, and Timothy Flanigan, the Deputy White House Counsel.⁶⁴⁶ The group would quickly bypass Prosper's Law of War Group, as well as the traditional NSC inter-agency lawyers' group (discussed in Chapter 2). The War Council made sure that the legal concerns and recommendations of the NSC's Legal Adviser, the State Department Legal Adviser's Office (L), and the Legal Counsel of the Chairman of the Joint Chiefs of Staff were ignored or excluded from the process altogether. NSC Legal Adviser John Bellinger explained the shift away from the normative inter-agency process in those early days,

"A different group, for reasons that still remain unclear, decided that it was going to just run a parallel process and come up with the Military Commission order. And that was amongst the Justice Department, the Defense Department, and parts of the [White House] Counsel's office unbeknownst to the State Department, the CIA, and the National Security Advisor. So that was just a bad process. It resulted in a flawed Military Commission Order and Secretary Rice was upset about it. I didn't know about that [the creation of Military Commissions], the first call I got was from the CIA General Counsel, who had just read about it, saying 'what the hell are you doing down there at the White House' and I said I have no idea what you are talking about, and he said, go read your email."⁶⁴⁷

By October 2001 an alternative legal-policy process had been created to exclude key departments from the deliberations over the most sensitive counter-terrorism programs. When questions regarding the applicability of LOAC to the conflict against al-Qaeda and the Taliban arose in late 2001, and when decisions on the legality of interrogation techniques began in early 2002, the War Council dominated the legal agenda at the expense of the traditional, but institutionally weak, NSC legal-policy process.

Prior to the capture of the legal-policy decision making process by the Office of the Vice President and the War Council, career bureaucrats across the executive branch were

⁶⁴⁶ Goldsmith, 2007, 22.

⁶⁴⁷ Author Interview with John Bellinger III, 2014.

initiating detainee policies that were consistent with LOAC. In Afghanistan, Commander of the Coalition Forces, General Tommy Franks, issued an order to establish Article 5 hearings as mandated by the Geneva Conventions to assess the status of each captured individual (and free those deemed non-combatants).⁶⁴⁸ The creation of Article 5 hearings was indicative of the US Military's early inclination to treat prisoners according to LOAC.⁶⁴⁹ Similarly, as the first batch of prisoners arrived in Guantanamo in early January 2002, Brigadier General Michael Lehnert, and the Staff Judge Advocate at SOUTHCOM, Manuel Supervielle, invited the International Committee of the Red Cross (ICRC) to visit the detention facility as their training in LOAC had taught them to do.⁶⁵⁰ At CIA, the initial response by career lawyers from the General Counsel's Office to the President's MON authorizing the agency to "detain persons" was to recommend that any such operations be conducted "in a manner consistent with, but not pursuant to, the formal provision of appropriately comparable Federal instructions for the operation of prison facilities and the incarceration of inmates held under the maximum lawful security mechanisms."⁶⁵¹ On September 27, 2001, CIA headquarters sent orders to several CIA stations overseas noting that any future detention facility would need to be consistent with "U.S. POW Standards."⁶⁵² On November 7, 2001, a CIA Draft Legal Appendix on "Handling Interrogation" proposed that any interrogation operations conducted by agency personnel should, "meet the requirements of U.S. law and the federal rules of criminal procedure," and that "[s]pecific methods of interrogation w[ould] be permissible so long as they generally comport with

⁶⁴⁸ Forsythe, 2011, 97; Mayer, 2008, Kindle 2413 of 7741.

⁶⁴⁹ Forsythe, 2011, 97; see also, Greenberg, 2009, 1-10; Myers & McConnell, 2009, 197-200.

⁶⁵⁰ Greenberg, 2009, 58-59.

⁶⁵¹ United States Congress, Senate, 2014, 12.

⁶⁵² United States Congress, Senate, 2014, 12.

commonly accepted practices deemed lawful by U.S. courts.”⁶⁵³ The actions of these career bureaucrats reflected their organization’s institutionalization of LOAC, which was much stronger than that of the political strata. The VP’s Office and its allies—mainly Secretary of Defense Rumsfeld—along with the War Council quickly reversed these early initiatives by career bureaucrats. General Franks’ order on Article 5 hearings was rescinded by Secretary Rumsfeld on January 19, 2002.⁶⁵⁴ And the CIA’s initial hesitation and emphasis on adhering to LOAC and other US legal requirements was overruled by the War Council.

The first major clash in the inter-agency process took place on November 13, 2001, when President Bush signed Military Order 1, “Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism.”⁶⁵⁵ Both the content of the order and the process that created it presaged the policy process and legal rationale for the torture program. Procedurally, White House Counsel Gonzales had set up Prosper’s Law of War Group to assess the most appropriate avenue for prosecuting terrorists. When Military Tribunals were raised as an option, several members of the JAGs Corps, the State Department, the CIA, the NSC Staff, and the Justice Department, including Attorney General John Ashcroft and Assistant Attorney General of the Justice Department’s Criminal Division, Michael Chertoff, raised serious concerns over their legality, necessity, and desirability.⁶⁵⁶ Consequently, the Law of War Group began exploring other options, including federal courts, military courts-martial, hybrid-tribunals, or possibly an international tribunal in

⁶⁵³ United States Congress, Senate, 12)

⁶⁵⁴ Mayer, 2008, 97. See also, Rumsfeld, 2002.

⁶⁵⁵ Bush, 2001.

⁶⁵⁶ Bravin, 2013, 45-46; Gellman, 2008, 162-165; Mayer, 2008, Kindle 1587 of 7741; Author interview with David Bowker, 2015; Author interview with William Howard Taft IV, 2015; Author interview with John Bellinger III, 2014.

The Hague.⁶⁵⁷ Not liking the direction and duration of the talks, the VP's Office and the War Council decided to sidestep the Law of War Group and the inter-agency process as a whole. As Flannigan explained, "It had been decided it was going to be [Military] commissions. They were wasting their time... We were not going to have the Dutch deciding on what happened to Osama bin Laden."⁶⁵⁸

Addington was the main author of the Military Order.⁶⁵⁹ At OLC, Yoo and Patrick Philbin wrote the legal rationale without notifying the Attorney General, who opposed the Commissions.⁶⁶⁰ Ashcroft learned of the draft Military Order around November 10, and he immediately took his concerns to the White House.⁶⁶¹ The President was unavailable and he was met by VP Cheney who quickly shut him down.⁶⁶² On November 13, Associate Counsel to the President, Bradford Berenson was ordered by the VP's Office to get the President to sign the Military Order without conducting a staff review.⁶⁶³ Berenson delegated the task to his Deputy, Stuart W. Bowden, who noted that the procedural rules mandated that the Order be "staffed" or reviewed and signed-off by every Assistant to the President with a stake in the issue.⁶⁶⁴ At a minimum there needed to be routing slips and certification documents approved by the National Security Advisor (who would have sent it to her Deputy and Legal Adviser), the White House Counsel, the Chief of Staff and his Deputy, the Assistant to the President for Legislative Affairs, the Communications Director, as well as approval from the Office of Management and Budget, and the Justice

⁶⁵⁷ Bravin, 2013, 44; Mayer, 2008, Kindle 1720 of 7741.

⁶⁵⁸ Bravin, 2013, 44; Rice, 2011, Kindle 2051 of 13388.

⁶⁵⁹ Gellman, 2008, 163.

⁶⁶⁰ Philbin, 2001; Gellman, 164.

⁶⁶¹ Cheney, 2011, 357; Gellman, 164.

⁶⁶² Gellman, 164.

⁶⁶³ Gellman, 166.

⁶⁶⁴ Gellman, 166-167.

Department.⁶⁶⁵ Not to mention that the Law of War Group had been set up to include the views of the State Department, the CIA, the Joint Chiefs of Staff, and the JAGs Corps.

Berenson, with help from Flannigan of the War Council, convinced Bowden that the Order did not need to be staffed since the President had already discussed the issue with the VP earlier in the day.⁶⁶⁶ This was possible, as Chapter 2 has shown, because the inter-agency legal-policy process was institutionally weak and depended largely on what the President wanted and tolerated.⁶⁶⁷ When Secretary Rice found out about the approval of the Military Order without her prior knowledge she went to see the President to warn that, “‘If this happens again,’ I said, ‘either Al Gonzales or I will have to resign.’ The President apologized, but it was not his fault... in that case I told the President that the White House counsel and the Vice President’s office had not served him well.”⁶⁶⁸

At the State Department, L lawyers were also shocked by both the circumvention of the process, and also because of the legal foundation of the Military Order. Philbin and Yoo’s legal opinion depended largely on an obscure 1942 Supreme Court decision, *Ex parte Quirin*, which held the constitutionality of President Franklin D. Roosevelt’s use of military commissions against eight German saboteurs.⁶⁶⁹ The legal opinion ignored all subsequent statutory, case, and international law. David Bowker, an Attorney-Adviser at L at the time, explains how in his office, “Our analogy at the State Department was, ‘that’s what the Soviets did, make a mockery of the law.’”⁶⁷⁰ L, unlike the politically appointed lawyers of

⁶⁶⁵ Gellman, 166-167. See also Chapter 3.

⁶⁶⁶ Gellman, 166-167.

⁶⁶⁷ On the law surrounding the inter-agency national security process and how the President ultimately decides if his Directives are properly applied (in part by what he tolerates), see, J. E. Baker, 2007, 125.

⁶⁶⁸ Rice would not be included in other key decisions, including NSA domestic wiretapping proposals and other issues, but she never resigned. Rice, 2011, Kindle 2059 of 13388.

⁶⁶⁹ Philbin, 2001.

⁶⁷⁰ Author interview with David Bowker, 2015.

the War Council, had reached a strong degree of institutionalization of LOAC. Bowker explained that his office could not believe how the Military Order and the legal opinion supporting it completely ignored half a decade of developments in international law,

“It was based on an order issued by FDR, which was an order that was a perfectly good order and made a lot of sense in its context, sixty years prior. Before the entirety of Human Rights Law; before the new Uniformed Code of Military Justice; before the 1949 Geneva Conventions; before the Universal Declaration of Human Rights; Before the ICCPR [International Covenant on Civil and Political Rights]; before all of the key modern international law documents. This was before the UN Charter! And to use a document that predated all of those developments, and to use that as a template and to not get any input [from the inter-agency process], and then to put the Secretary of Defense in charge of the international law aspects, was, I think, a monumental error.”⁶⁷¹

The Military Order called for detainees to be “treated humanely,” but no specific reference to any rights or laws that protected prisoners was mentioned.⁶⁷² On November 14, the day after the Order had been issued, VP Cheney gave a speech where he announced that any terrorists does not “deserve to be treated as a prisoner of war.”⁶⁷³ No official decision had yet been made on the matter, but the VP’s Office and the War Council were preparing their legal positions on the status of the Geneva Conventions in the US conflict against al-Qaeda and the Taliban.

The deliberations over the Geneva Conventions would have to wait a few weeks as the attention of the inter-agency process turned to Guantanamo. Although Prosper’s Law of War Group was once again tasked with finding potential facilities for detaining captured combatants, members of the War Council quickly dominated the deliberations. The Law of War Group looked at facilities in Eastern Europe, Germany, Pakistan, several Pacific Island

⁶⁷¹ Author Interview with David Bowker, 2015.

⁶⁷² Bush, 2001, Section 2(2)(b)(c).

⁶⁷³ Mayer, 2008, Kindle 1526 of 7741.

states, and even considered the creation of floating facilities aboard US ships at sea.⁶⁷⁴ The main problem with most of these proposed sites was that they were under the authority of a foreign sovereign power, meaning that the US would not have total control over the operations at these facilities. In other words, the administration feared that international or foreign law could obstruct American behavior.

The Group also considered sites within the US, including Manhattan, subject to the US Southern District Court which had a strong success rate of prosecuting terrorism trials. But it was deemed insecure, politically untenable, and of course, as the Military Commissions Order had outlined, the administration did not want to give terrorism suspects access to the US legal system.⁶⁷⁵ Eventually, someone from the Justice Department suggested Guantanamo since, as Prosper recollected, “We have a 99-year lease there. We don’t need Cuban permission.”⁶⁷⁶ Yoo and Philbin wrote a memo arguing that Guantanamo appeared to address most of the administration’s worries: it was outside of the US, and while it fell under Cuban sovereignty, the bilateral treaty stipulated that the US “shall exercise complete jurisdiction and control over and within” the leased areas.⁶⁷⁷ Guantanamo was also a military facility, meaning that it was under the control of the Department of Defense and the purview of the President’s Commander in Chief powers. Finally, Yoo and Philbin concluded that, “the great weight of legal authority indicates that a federal district court could not properly exercise *habeas* jurisdiction over an alien detained at GBC [Guantanamo Bay, Cuba],” although they recognized that “there remains some

⁶⁷⁴ Greenberg, 2009, 4.

⁶⁷⁵ Greenberg, 4-5.

⁶⁷⁶ Greenberg, 6.

⁶⁷⁷ Philbin & Yoo, 2001, 3.

litigation risk that a district court might reach the opposite result.”⁶⁷⁸ Ultimately, while not perfect, the administration settled on Guantanamo as its military detention facility of choice.⁶⁷⁹ It was “the least worst place,” as Defense Secretary Rumsfeld explained.⁶⁸⁰ The Bush administration had now established its first extra-legal zone where they could detain and prosecute detainees.

The next step for the VP’s Office and the War Council was to make sure that the Geneva Conventions or any other body of law did not apply or protect any individuals detained by the US government during its conflict against al-Qaeda. By this point Prosper’s Law of War Group was completely excluded from any further deliberations. The War Council also intended to exclude the State Department as a whole, but at a White House meeting in early January 2002, State Department Legal Adviser, William Taft overheard “through a slip of the tongue” that there was a memo being drafted by OLC on the applicability of the Geneva Conventions and related laws.⁶⁸¹ Taft offered L’s assistance in that process as Bowker explained, because,

“The Geneva Convention offer from Will Taft was that we actually had some people at the State Department with deep expertise. Including a couple of folks advising at State Department who had been involved in the negotiations of the 1977 Protocols. We also had a great library, including the entire negotiating history for the 1977 Protocols, the 1949 Conventions, and the 1929 Conventions. All of that was in the Department of State Library, and ultimately in my office were I had thousands of pages of record, of negotiating history. So we could find out what the parties really intended, not just what we’re pretending they intended. We thought we had a lot of resources at our disposal and though we could be helpful.”⁶⁸²

On January 9, Taft received a 42-page draft memo from OLC authored by Yoo and Robert J.

Delabunty on the “Application of Treaties and Laws to Al Qaeda and Taliban Detainees.”

⁶⁷⁸ Philbin & Yoo, 2001, 1.

⁶⁷⁹ D. Byrne, 2001.

⁶⁸⁰ Rumsfeld, 2011, 599.

⁶⁸¹ Author interview with David Bowker, 2015; Author interview with William Taft IV, 2015.

⁶⁸² Author interview with David Bowker, 2015; Author interview with David Kaye, 2014.

Indicative of the War Council's interest in receiving feedback from L, the State Department was given 24 hours to reply to the draft memorandum with any comments.⁶⁸³

Yoo and Delahunty's draft memo concluded that, "international treaties and federal laws on the treatment of individuals detained by U.S. Armed Forces during the conflict in Afghanistan... do not protect members of the al Qaeda organization... We further conclude that these treaties do not apply to the Taliban militia."⁶⁸⁴ In terms of al-Qaeda, the memo argued that as a non-state actor it was ineligible to sign any treaty and thus its members were not protected under any body of law.⁶⁸⁵ As for the Taliban, "Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions," and that the President has the authority to "suspend our treaties with Afghanistan pending the restoration of a legitimate government capable of performing Afghanistan's treaty obligations."⁶⁸⁶ Moreover, Common Article 3 did not apply because the current conflict was not an "armed conflict not of an international character."⁶⁸⁷ Finally, the OLC draft opinion disregarded customary international law altogether, a position relatively consistent with past OLC opinions that deemphasized the importance and influence of that body of law.⁶⁸⁸ Customary international law, the memo argued, "whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute

⁶⁸³ Author interview with David Bowker, 2015; Author interview with William Taft IV, 2015; Author interview with David Kaye, 2014.

⁶⁸⁴ Yoo & Delahunty, 2002, 1.

⁶⁸⁵ Yoo & Delahunty, 2002, 11-12.

⁶⁸⁶ Yoo & Delahunty, 2002, 2.

⁶⁸⁷ Yoo & Delahunty, 2002, 8.

⁶⁸⁸ For past examples of OLC opinions arguing that the US can disregard customary law, see, Koh, 1993, 519.

federal law...”⁶⁸⁹ Upon receipt, L lawyers, who had inculcated LOAC, including customary norms, as part of their ethos were once again shocked.⁶⁹⁰

Taft’s team took 48 hours to finish their hurried reply memo for Yoo. The State Department’s memo argued that the notion that the US could ignore the Geneva Conventions was based on “confuse[d]” analysis and “irrelevant” legal precedents.⁶⁹¹ L lawyers rejected Yoo and Delahunty’s theory on “failed states,” explaining that the concept, “has been developed as a historical and political analytic tool, not as a legal concept” and that a, “failed State does not thereby cease to be a State, nor does it cease to be a party to relevant Conventions.”⁶⁹² In addition, the Taliban had to be covered by Geneva through either Article 2 or 3 since, “the combination of Articles 2 and 3 was intended to cover all armed conflicts,” not just those of a non-international character.⁶⁹³ The State Department also took customary international law seriously and highlighted the potential risks of ignoring that body of law,

“In fact, however, customary international law creates obligations binding on the United States under international law and potentially under domestic law. Were the President, as contemplated by the Draft Opinion, to act lawfully under federal law in a manner that would be inconsistent with the obligations of the United States under customary international law, that action would, notwithstanding its lawfulness under U.S domestic law, constitute a breach of an international legal obligation of the United States. That breach would subject the United States to adverse international consequences in political and legal fora and potentially in the domestic courts of foreign countries.”⁶⁹⁴

⁶⁸⁹ Yoo & Delahunty, 2002, 2.

⁶⁹⁰ Author interview with David Bowker, 2015; Author interview with William Taft IV, 2015; Author interview with David Kaye, 2014. See also, Greenberg, 2009, 52.

⁶⁹¹ Taft, 2002, 2, 6, 14.

⁶⁹² Taft, 2002 4.

⁶⁹³ Taft, 2002, 12.

⁶⁹⁴ Taft, 2002, 31.

L lawyers further stressed the serious legal risks that adopting Yoo and Delahunty's theories could pose to the US government and its personnel.⁶⁹⁵ Moreover, abandoning the Geneva Conventions could open the door to actions that violated its provisions, including, "conduct that would constitute a grave breach," raising the possibility of "future criminal prosecution for U.S. civilian and military leadership and their advisers, by other parties to the Geneva Conventions."⁶⁹⁶ Taft attached a personal cover letter to L's memo where he made a personal plea to Yoo,

"John, I understand you have long been convinced that treaties and customary international law have from time to time been cited inappropriately to circumscribe the President's constitutional authority or pre-empt the Congress's exercise of legislative power. I also understand your desire to identify legal authority establishing the right of the United States to treat the members of the Taliban Militia in the way it thinks best, if such authority exists. I share your feelings in both of these respects. I do not, however, believe that on the basis of your draft memorandum I can advise either the President or the Secretary of State that the obligations of the United States under the Geneva Conventions have lapsed with regard to Afghanistan or that the United States is not bound to carry out its obligations under the Conventions as a matter of international law."⁶⁹⁷

In switching his role from legal adviser to counsellor, Taft closed the cover letter by urging Yoo that, "We should talk."⁶⁹⁸

On January 11, the first batch of detainees reached Guantanamo. Shortly thereafter, according to Yoo, there was a meeting at the White House marking, "the first time that the issue of interrogations comes up" and where representatives from the CIA said that, "We're going to have some real difficulties getting actionable intelligence from detainees," if

⁶⁹⁵ For example, the memo outlined the varied forums where US policy and actions could be challenged—either legally or symbolically—including: US courts, foreign criminal prosecutions, the UN Commission on Human Rights, the UN General Assembly, the International Court of Justice, the Inter-American Court of Human Rights, and the Organization for Security and Cooperation in Europe. Taft, 2002, 37-39.

⁶⁹⁶ Taft, 2002, 4.

⁶⁹⁷ Taft, 2002, 2.

⁶⁹⁸ Taft, 2002, 2.

Geneva had to be followed.⁶⁹⁹ Also in early January, within days of the Taft memo, Yoo visits the State Department Legal Adviser's Office to go over their disagreements. They debated several Constitutional and Case Law issues surrounding War Powers and the President's Commander in Chief Authority, as well as the applicability of international law. At one point in the conversation, L lawyers managed to get Yoo to acknowledge that legal provisions on interrogations were at the heart of the problem. Bowker explains the exchange,

"We said to John, 'what's the issue? Why are you fighting so hard to be free of any legal constraint? It feels a little bit like it's outcome driven. And if it's outcome driven, what's the outcome you are looking for? Why do you need this 'black check' why does the President need this 'black check'?' John had uncomfortable body language, and at one point, he said, 'that's not really relevant to the discussion.' We pushed a little further, and he said, 'well, suffice to say that we have an Article 17 problem.' Which is this Article in the Geneva Conventions that focuses on what you are permitted to do in interrogations. From that, it becomes clear that they want to be so aggressive in interrogations that they are worried about liability in the event they break the rules. And so they don't want there to be any rules. Now we didn't know how bad it would get. I think none of us [at State] imagined that they really wanted to do what they ended up doing. It was so un-American that it didn't occur to anybody."⁷⁰⁰

L lawyers would continue their campaign in favor of the applicability of the Geneva Conventions, but it was difficult to find allies across the executive branch. L lawyers had conversations with Addington, Gonzales, and other members from OLC, but they were not getting anywhere.⁷⁰¹ At NSC, Bellinger agreed with L, but was hesitant to get directly involved in the inter-agency clash.⁷⁰² At the Defense Department, career military lawyers—the few that were briefed on the discussions—were sympathetic with the State

⁶⁹⁹ Gellman, 2008, 174.

⁷⁰⁰ Author interview with David Bowker, 2015.

⁷⁰¹ Author interview with David Bowker, 2015; Author interview with William Taft IV, 2015; Author interview with David Kaye, 2014.

⁷⁰² Gellman, 2008, 169. In an interview with the author, Bellinger explained that he saw his role as NSC Legal Adviser as that of coordinator, not someone that should stake a position on a legal issue. Author interview with John Bellinger III, 2014.

Department's position, but Jim Haynes and other political appointees kept their career subordinates tightly controlled.⁷⁰³ In fact, on January 19, Secretary Rumsfeld rescinded General Frank's Order on Geneva, with his own Order directing the Joint Chiefs of Staff and all Combatant Commanders that, "Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."⁷⁰⁴ In the end, Yoo did not take L's arguments seriously, suggesting that, "Taft predicted that a presidential decision that Afghanistan was a failed state would cause the heavens of international law to fall."⁷⁰⁵ On January 22, Jay Bybee signed an updated version of Yoo and Delahunty's draft memo which remained largely unchanged and completely ignored all of L's concerns.⁷⁰⁶ A day later, L once again wrote another memo reasserting the importance and applicability of Geneva's Common Article 3.⁷⁰⁷ The decision now turned to the President.

At a news conference at the Pentagon, Rumsfeld defended his January 19 order by explaining that "unlawful combatants" captured by the US "do not have any rights" under LOAC.⁷⁰⁸ Both the order and the comments were making life very difficult for Powell, who began receiving complaints from allies and organizations.⁷⁰⁹ Powell asked to see the President directly to try and convince him that Geneva should apply in the war in Afghanistan. Before his meeting with the President, White House Counsel Gonzales

⁷⁰³ For a detailed discussion of DOD General Counsel, Jim Haynes' tough grip on career lawyers from the Pentagon, including the Legal Counsel of the Joint Chiefs of Staff, see United States, Senate, 2008. For legal concerns raised military lawyers at DOD including Joint Chiefs, see Gonzales, 2010, 853. Author interview with a lawyer from DOD General Counsel's Office, 2014.

⁷⁰⁴ Rumsfeld, 2002, 1.

⁷⁰⁵ Yoo, 2006, 34.

⁷⁰⁶ Bybee, 2002a.

⁷⁰⁷ Isikoff, 2006.

⁷⁰⁸ Gellman, 2008, 169.

⁷⁰⁹ Gellman, 2008, 169-170; Mayer, 2008, Kindle 2403 of 7741.

dispatched a decision memorandum for the President on Geneva caricaturing the views of the State Department and arguing in favor of non-applicability of LOAC.⁷¹⁰ In his memo, Gonzales argued that,

“The war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Convention III on the Treatment of Prisoners of War]... In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions”⁷¹¹ Gonzales presented two main advantages to making the Geneva Conventions inapplicable: flexibility during interrogations and limiting the threat of domestic criminal prosecutions under the War Crimes Act.⁷¹²

Secretary Powell responded with his own memo recommending the President to determine that “the Geneva Convention does apply to the conflict in Afghanistan,” although he took a more permissive approach than that offered by his lawyers given that, “members of al Qaeda as a group and the Taliban individually or as a group are not entitled to Prisoner of War status under the Convention.”⁷¹³ The VP’s Office and the War Council were able to assemble the stronger coalition.

CIA Director George Tenet used a clear security discourse in asking for an exemption for the CIA when writing his draft reply to the President as he warned that Geneva would “significantly hamper the ability of CIA to obtain critical threat information necessary to save American lives.”⁷¹⁴ CIA lawyers were growing concerned that if Geneva applied, “few alternatives to simply asking questions” would be permitted during CIA

⁷¹⁰ Gonzales, 2002b. This memo is leaked to the Washington Times painting Powell as naïve which only makes matters worst.

⁷¹¹ Gonzales, 2002b, 2.

⁷¹² Gonzales, 2002b, 2.

⁷¹³ C. L. Powell, 2002, 2.

⁷¹⁴ United States Congress, Senate, 2014, 20. The Senate report could not tell if Tenet did or did not send this request to the President. Not sending some reply is unlikely given that Gonzales’ memo clearly asked for one.

interrogations and concluded that, "then the optic becomes how legally defensible is a particular act that probably violates the convention, but ultimately saves lives."⁷¹⁵

On February 1, Attorney General Ashcroft got to the heart of the debate when he acknowledged to the President that "The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States."⁷¹⁶ To decrease the probability of criminal liability, the Attorney General recommended that,

"a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Conventions rules relating to field conduct, detention conduct or interrogation of detainees."⁷¹⁷

OLC issued an additional legal opinion on February 7 reassuring the President that he had the constitutional power to suspend the Geneva Conventions.⁷¹⁸

That same day, President Bush ostensibly reached a compromise by declaring that while he had, "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan," in a gesture to the State Department, he decided to "decline to exercise that authority at the time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban."⁷¹⁹ More important for interrogation purposes however, the Presidential Directive made clear that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees..."⁷²⁰ The Directive noted that US Armed Forces should treat all detainees "humanely" although only "to the extent appropriate and consistent with military necessity..." The President reserved

⁷¹⁵ United States Congress, Senate, 2014, 20.

⁷¹⁶ Ashcroft, 2002, 1.

⁷¹⁷ Ashcroft, 2002, 1.

⁷¹⁸ Bybee, 2002b.

⁷¹⁹ Bush 2002.

⁷²⁰ Bush, "Humane Treatment of al Qaeda and Taliban Detainees," 2.

the right to fully suspend Geneva in Afghanistan at his discretion.⁷²¹ The Directive made no mention of how the CIA needed to treat its detainees, and within months, Yoo, Addington, Gonzales, and Haynes all assured CIA officials that the humane treatment requirement in the Directive did not apply to CIA interrogation operations.⁷²²

By the spring of 2002, the focus quickly turned to approving a set of specific “enhanced interrogation techniques” that CIA operators could use in secret prisons and that military interrogators could use in Guantanamo. By this point, the State Department, including Secretary Powell, was completely cut out of the deliberations. Military lawyers, the Joint Chiefs of Staff, and at times the NSC Legal Adviser were also excluded. The legal-policy issues were thus entirely controlled by the VP’s Office and the War Council, although the CIA—the national security bureaucracy that had least institutionalized LOAC—began to press for their ability to torture prisoners. From August through December, a series of legal opinions authored by politically appointed attorneys at OLC approved a number of specific “enhanced Interrogation techniques.” The legal opinions presented three main arguments. First, the treaty in question would be interpreted in such a narrow fashion as to make its violation nearly impossible. Second, even if someone managed to violate the law, it would be immaterial since the treaty was deemed non-applicable. Finally, if the treaty did apply, it could be suspended or overruled by the President under his wartime Commander in Chief powers.⁷²³

The CIA’s role in detaining and interrogating suspected members of al-Qaeda began in late March 2002. On March 27, Pakistani authorities captured Abu Zubaydah, a high-

⁷²¹ Bush, 2002, 2.

⁷²² Muller, 2003.

⁷²³ Cole, 2009; see also, Bybee 2002c.

ranking member of al-Qaeda. Tenet explains that it was with Zubaydah's capture that the CIA "got into holding and interrogating" high-value detainees (HVDs).⁷²⁴ The CIA followed the situation carefully, as Tenet explains, "[d]espite what Hollywood might have you believe, in situations like this you don't call in the tough guys; you call in the lawyers."⁷²⁵ The CIA General Counsel's Office had been researching and coming up with "novel" legal defenses for torture since late November 2001.⁷²⁶ From the beginning, CIA lawyers depended on a security discourse to justify their positions. One internal memo from November 26, 2001, suggested that, "CIA could argue that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm," hoping that "states may be very unwilling to call the U.S. to task for torture when it resulted in saving thousands of lives."⁷²⁷ Yoo would use this same "necessity defense" argument in OLC's August 1, 2002 memo opening the legal door to torture⁷²⁸

Upon Zubaydah's capture, CIA officials began to maneuver for him to come under their custody. CIA argued against military custody for fear that the ICRC would have to be notified of his detention.⁷²⁹ On March 29, without input from the NSC, President Bush authorized the CIA to transfer Zubaydah to a secret prison in Thailand.⁷³⁰ Zubaydah had been hospitalized due to life-threatening injuries he sustained during the operation that detained him, which postponed his interrogation until he regained consciousness. At first,

⁷²⁴ Tenet, 2007.

⁷²⁵ Tenet, 2007, 232.

⁷²⁶ United States Congress, Senate, 2014, 19.

⁷²⁷ United States Congress, Senate, 2014, 19.

⁷²⁸ Bybee, 2002c, 30-37. The memo was signed by Bybee, but it was written by Yoo, see United States Department of Justice, Office of Professional Responsibility, 2009, 43.

⁷²⁹ United States Congress, Senate, 2014, 22.

⁷³⁰ United States Congress, Senate, 2014, 23. On the secret CIA prison being in Thailand, see Mayer, 2008, Kindle 2915 of 7741.

FBI agents were assigned to assist the CIA in the interrogation. Two experienced FBI interrogators were the first to arrive and question Zubaydah by building a “rapport” with him, in complete compliance with the law.⁷³¹ The CIA had other plans for Zubaydah’s interrogation.

The CIA’s first interrogation proposal of Zubaydah suggested that interrogators should try and engage with him, but also opened the door for a “harsh approach” led by foreign government agents “as a last resort.”⁷³² When discussing the proposal, a CIA lawyer suggested that James Mitchell, a psychologist under contract with the CIA’s Office of Technical Service, be directly involved in the interrogation to make recommendations for breaking, “Zubaydah’s resistance to interrogation.”⁷³³ Mitchell would be part of the first CIA team that interrogated Zubaydah.

Mitchell had no formal training or experience in conducting interrogations, but he had been involved with the US Air Force’s training course, Survival Evasion Resistance and Escape (SERE). SERE training was not an interrogation course, it was a program that placed soldiers in a mock POW camp and simulated conditions and interrogation techniques that might be used on them if they were captured by an enemy that did not follow LOAC.⁷³⁴ A SERE instructor explained during a Congressional hearing that SERE training is “based on illegal exploitation (under the rules listed in the 1949 Geneva Convention Relative to the

⁷³¹ United States Department of Justice, Office of Professional Responsibility, 2009, 33.

⁷³² United States Congress, Senate, 2014, 26.

⁷³³ United States Congress, Senate, 2014, 26. The Senate Report uses a pseudonym for Mitchell (Grayson Swigert). See, Mazzetti, 2014.

⁷³⁴ United States Department of Justice, Office of Professional Responsibility, 2009, 34; United States Congress, Senate, 2008, p. xiii.

Treatment of Prisoners of War) of prisoners over the last 50 years."⁷³⁵ Some of conditions and interrogation techniques used during SERE training included,

“stripping students of their clothing, placing them in stress positions, putting hoods over their heads, disrupting their sleep, treating them like animals, subjecting them to loud music and flashing lights, and exposing them to extreme temperatures. It can also include face and body slaps and until recently, for some who attended the Navy's SERE school, it included waterboarding.”⁷³⁶

Once Zubaydah was transferred to the CIA's secret prison in Thailand, CIA records indicate that by mid-April Zubaydah was constantly subjected to loud music, sleep deprivation, sensory deprivation, nudity and other conditions to attain a “sense of hopelessness.”⁷³⁷ These early techniques were not yet approved by OLC. The FBI interrogators opposed these techniques, warning CIA officers that they amounted to “borderline torture.”⁷³⁸ By early June, FBI interrogators had been ordered by their superiors to no longer participate in the CIA interrogations.⁷³⁹ However, there is no record of the FBI ever raising any direct concerns to the White House.

From June 18 to August 4, the interrogation of Zubaydah was temporarily suspended as CIA interrogators returned to headquarters to figure out an “endgame” to his detention.⁷⁴⁰ At CIA headquarters, Mitchell recommended that interrogators should begin using 12 additional techniques, “(1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of insects, and (12) mock

⁷³⁵ United States Congress, Senate, 2008, xiii.

⁷³⁶ United States Congress, Senate, 2008, xiii.

⁷³⁷ United States Congress, Senate, 2014, 29.

⁷³⁸ United States Department of Justice, Office of Professional Responsibility, 2009, 68.

⁷³⁹ United States Department of Justice, Office of Professional Responsibility, 2009, 69.

⁷⁴⁰ United States Congress, Senate, 2014, 30.

burial.”⁷⁴¹ By this point, having already done some research on the Torture Convention, CIA lawyers had concluded that most (though not all) of these techniques were lawful (although, no review had been conducted on waterboarding).⁷⁴²

However, several CIA personnel became concerned over the potential criminal liability that could result from using such techniques.⁷⁴³ At a small meeting in the Director’s office, Tenet asked Rizzo if the proposed techniques were legal, to which he replied, “some of the techniques seem okay, but others are very harsh, even brutal. What I can’t do is sit here and tell you now if it legally constitutes torture. And if it does meet the torture threshold, it doesn’t matter what the justification is, even it’s being done to prevent another nine-eleven.”⁷⁴⁴ Rizzo, protecting his and CIA’s interests then suggested that he could, “take this to the Justice Department, to get something definitive, something in writing.”⁷⁴⁵ Rizzo submits that seeking OLC’s advice was a way for the CIA to get “legal cover” for the interrogation program.⁷⁴⁶ More specifically, CIA Director, General Michael Hayden explained the importance of going to OLC as, “once Justice gives you a legal opinion it’s very difficult for the same government to then prosecute you for the activity.”⁷⁴⁷ However what no one from the CIA admits is that when they made these requests they presented them

⁷⁴¹ United States Congress, Senate, 2014, 32.

⁷⁴² Rizzo, 2014, 187; United States Department of Justice, Office of Professional Responsibility, 2009, 31-32, 37.

⁷⁴³ United States Department of Justice, Office of Professional Responsibility, 2009, 37.

⁷⁴⁴ Rizzo, 2014, 187.

⁷⁴⁵ Rizzo also claims that at this point he sought specific advice on each technique, “We tell them everything we want to do, every detail about how we would conduct the EITs. And let them make the final legal call. And not just settle for a simple yes or no— we make them go on the record for every single one of the techniques, especially if it’s a yes.” However, the Senate Report documents that each technique was not specifically described to OLC lawyers until Secretary Rice requested it on July 17. Rizzo, 2014, 188; United States Congress, Senate, 2014, 34.

⁷⁴⁶ Rizzo, 2014, 188.

⁷⁴⁷ Author interview with General Michael Hayden, 2015.

through a strong security discourse that warned that American lives were on the line if they did not receive the legal cover.⁷⁴⁸

Tenet informed the White House and Rice of the proposed torture program. The White House directed that the State Department should be excluded from these discussions.⁷⁴⁹ Sensing that NSC Legal Adviser, Bellinger, might also be kept in the dark, Rizzo decided to notify him.⁷⁵⁰ Rizzo explains the alternative inter-agency legal process that ensued,

Scott Muller or I, or both of us, would travel to the White House every month to meet with the president's counsel, Alberto Gonzales; the vice president's counsel, David Addington; and the national security advisor's counsel, John Bellinger. The meetings were held in Gonzales's West Wing office, and they were intended as a way for us to discreetly alert and update the White House about CIA legal matters *that weren't already being covered in the larger interagency lawyers' group meetings the White House was frequently convening post-9/ 11.*⁷⁵¹

This meant that the State Department and the Joint Chiefs of Staff—or any military lawyers—were excluded from all talks. This process ran counter to the normative inter-agency legal process (the NSC lawyers' group on covert operations) discussed in Chapter 3. The reason for excluding those groups was made clear in a CIA email that explained that the White House Counsel feared that if Secretary Powell was included in the process he would “blow his stack if he were to be briefed on what's been going on.”⁷⁵² Once in the loop, Bellinger could have decided to include L, but he chose not to because,

“On the issue that the CIA wanted to know about was whether it complied with the Criminal Statute, the responsibility for the interpretation for the Criminal Statute is going to lie with the Justice Department and that's why I got Mike Chertoff, who was the head of the Criminal Division, and the Office

⁷⁴⁸ United States Congress, Senate, 2014, 32-36.

⁷⁴⁹ Author interview with John Rizzo, 2014.

⁷⁵⁰ Rizzo, 2014, 189; Author interview with John Rizzo, 2014.

⁷⁵¹ Emphasis Added. Rizzo, 2014, 13.

⁷⁵² United States Congress, Senate, 2014, 118-119. Author interview with John Rizzo, 2014; Author interview with Richard Armitage, 2015; Author interview with John Bellinger III, 2014.

of Legal Counsel involved at that point. It would really not be appropriate to ask the Defense Department or the State Department what they thought of the interpretation of a criminal statute, you know, prosecutors couldn't care less. What I did say though was that this was going to be sufficiently important that I wanted the decision to ultimately come from the Attorney General himself, so the highest possible Justice Department official and I had recommended to PhD Rice that the legal opinion come from the Attorney General himself. I guess the initial memo was written by the Office of Legal Counsel with input from the Criminal Division, but it was presented by the Attorney General and that way when you are talking about the interpretation of a criminal statute and it's the Attorney General's view then it's essentially binding on the rest of the government"⁷⁵³

Lawyers at the State Department Legal Adviser's Office found the suggestion that L should be excluded from any discussions that touched on international law (as was the case here with the Torture Convention), as "ludicrous."⁷⁵⁴ Furthermore, Rizzo explained that "I don't recall a previous covert action proposal or any major legal proposal involving national security where the NSC Legal Adviser was not in the loop. Same thing with the State Department Legal Adviser, I don't think there was any precedent for that."⁷⁵⁵

The Justice Department, which had to author the legal opinions, was of course "read-in" on the proposed TP. At Justice, the Attorney General decided to include Bybee, Yoo, Philbin, and a new line attorney from OLC, his Counselor, the Deputy Attorney General, and Chertoff from the Criminal Division.⁷⁵⁶ The actual writing of the memos was done by Yoo with assistance from the newly hired attorney.⁷⁵⁷

On July 13, there was a special inter-agency legal-policy meeting where representatives of the CIA finally provided a detailed description to NSC and DOJ lawyers of how each one of the techniques would be administered. Rizzo and two more CIA lawyers

⁷⁵³ Author interview with John Bellinger III, 2014.

⁷⁵⁴ Author interview with Newell Highsmith, 2014; Author interview with David Bowker, 2015; Author interview with David Kaye, 2014.

⁷⁵⁵ Author interview with John Rizzo, 2014.

⁷⁵⁶ United States Department of Justice, Office of Professional Responsibility, 2009, 39, 45.

⁷⁵⁷ United States Department of Justice, Office of Professional Responsibility, 2009, 43.

went over each of the twelve proposed techniques with Bellinger from NSC, Yoo and Chertoff from DOJ, and Daniel Levin, the Chief of Staff to the Director of the FBI.⁷⁵⁸ The CIA lawyers told the group that Zubaydah was withholding critical information on future al Qaeda attacks and then asked for a formal and definitive legal opinion from DOJ on the lawfulness of the proposed techniques that they wanted to use on Zubaydah.⁷⁵⁹ Rizzo also asked for, “an advance declination of prosecution for any CIA employee involved in the EIT program whose participation was in good faith and within the terms and conditions of the memorandum.”⁷⁶⁰ Chertoff immediately rejected the notion of an advanced declination.⁷⁶¹ But Yoo explained that the proposed techniques did not constitute torture nor did they violate the law. Later that day, Yoo sent a letter to Rizzo explaining his legal theory,

“to establish that an individual has acted with the specific intent to inflict severe mental pain or suffering, an individual must act with specific intent, i.e., with the express purpose, of causing prolonged mental harm in order for the use of any of the predicate acts to constitute torture. Specific intent can be negated by a showing of good faith.”⁷⁶²

The CIA probably had enough legal cover to re-instate the interrogation of Zubaydah, but Secretary Rice (at Bellinger’s request) intervened and requested a delay in the approval of the techniques until the Attorney General issued a formal opinion.⁷⁶³ In follow up memos, Rice and her Deputy, Stephen Hadley, requested that the CIA provide written descriptions of each technique with an added explanation as to why they believed no lasting and irreparable harm will result from them.⁷⁶⁴ In addition, Rice asked the CIA to, “gather and provide any available empirical data on the reactions and likelihood of prolonged mental

⁷⁵⁸ Rizzo, 2014, 190; United States Department of Justice, Office of Professional Responsibility, 2009, 45; United States Congress, Senate, 2014, 33-34.

⁷⁵⁹ United States Congress, Senate, 2014, 33.

⁷⁶⁰ Rizzo, 2014, 192.

⁷⁶¹ United States Department of Justice, Office of Professional Responsibility, 2009, 48-49.

⁷⁶² Yoo 2002a, 1.

⁷⁶³ United States Congress, Senate, 2014, 34.

⁷⁶⁴ United States Congress, Senate, 2014, 34.

harm from the use of the 'water board' and the staged burial."⁷⁶⁵ By July 26, Attorney General Ashcroft verbally approved eleven of the twelve techniques.⁷⁶⁶

The OLC issued two formal opinions on August 1.⁷⁶⁷ The first one was delivered to the White House Counsel and argued that for the Torture Convention to be violated, the infliction of physical pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁷⁶⁸ Regarding the infliction of mental pain or suffering, it is not torture unless it results in "significant psychological harm of significant duration, e.g., lasting for months or even years."⁷⁶⁹ Moreover, for torture to occur, the infliction of severe physical pain or mental harm must be the interrogator's "precise objective," and even if the interrogator "knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."⁷⁷⁰ The memo concludes by arguing that prosecutions of interrogators, "may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."⁷⁷¹ The second memo issued on August 1 applied the legal theory of the first memo to eleven of the twelve requested "enhanced interrogation techniques," and found that none of them violated the Torture Convention.⁷⁷² Only "mock burial" was not approved, not because Yoo deemed it illegal, but

⁷⁶⁵ United States Congress, Senate, 2014, 34.

⁷⁶⁶ Bybee, 2002d, 1; United States Congress, Senate, 2014, 36-37.

⁷⁶⁷ Bybee, 2002d. A second opinion issued that same day presented an extremely narrow interpretation of the Torture Statute making it virtually impossible to violate. See Bybee, 2002c.

⁷⁶⁸ Bybee, 2002c, 1.

⁷⁶⁹ Bybee, 2002c, 1.

⁷⁷⁰ Bybee, 2002c, 3, 4.

⁷⁷¹ Bybee, 2002c, 2.

⁷⁷² Bybee, 2002d.

because he needed more time to find a legal justification.⁷⁷³ On August 4, the interrogation of Zubaydah was reinstated and all but one of the approved techniques—attention grasp, walling, facial hold, facial slap, insult slap, cramped confinement, wall standing, stress positions, sleep deprivation, and the waterboard—were used during his torture sessions. (Cross, 2007)⁷⁷⁴ Shortly thereafter, OLC informed Rizzo that the CIA could use those techniques on other detainees.⁷⁷⁵

With the introduction of eleven “enhanced interrogation techniques,” the CIA’s detention program had significantly changed from the parameters outlined in the September 17 MON which was silent on interrogations. As Chapter 3 showed, this expansion should have required a new Presidential Finding or MON to approve the enlargement of the covert action program. As a result, in July, the CIA expected and prepared for a new MON before they could start using the new techniques.⁷⁷⁶ But on August 2, 2002, Bellinger notified the CIA Director’s Chief of Staff that “Dr. Rice had been informed that there would be no briefing of the President on this matter, but that the DCI had policy approval to employ the CIA’s enhanced interrogation techniques.”⁷⁷⁷ In other words, not only were the torture techniques not approved by the President, but it also appears that the President was not even briefed on the specific techniques until 2006.⁷⁷⁸ As Chapter 3 illustrated, this is indicative of a weak institutional structure where it is still not clear what specifically constitutes an expanded covert action program requiring new

⁷⁷³ Rizzo told Yoo that the CIA could do without “mock burial” in order to not delay the legal opinion approving the other techniques. Rizzo, 2014, 192.

⁷⁷⁴ The only approved technique that was not used on Zubaydah was placing insects in a box. International Committee of the Red Cross, 2007, 29-30; United States Congress, Senate, 2014, 40-46.

⁷⁷⁵ Rizzo, 2014, 194.

⁷⁷⁶ United States Congress, Senate, 2014, 38.

⁷⁷⁷ Rizzo, 2014, 197; United States Congress, Senate, 2014, 38.

⁷⁷⁸ Rizzo, 2014, 197-198; United States Congress, Senate, 2014, 39-40.

Presidential approval. The VP's Office or the White House Counsel exploited this weakness in allowing the TP to ensue without direct Presidential authorization.

As soon as the torture sessions on Zubaydah began, CIA interrogators sent cables to their headquarters raising legal and moral concerns over the TP.⁷⁷⁹ Within the first week of Zubaydah's interrogation, one cable warned that the interrogation sessions were "approach[ing] the legal limit,"⁷⁸⁰ and another explained that it had "produced strong feelings of futility (and legality) of escalating or even maintaining the pressure."⁷⁸¹ Given that there was no one from the CIA's General Counsel's Office or any high-ranking CIA official at the interrogation site, the interrogation team asked headquarters to send someone up the chain of command to view the interrogations firsthand.⁷⁸² These early warnings from operatives were either ignored, or worse, they were met with a hostile response. Jose Rodriguez, the head of the CIA's Counterterrorism Center, responded to a cable that questioned the legality of the techniques by stressing that,

"Strongly urge that any speculative language as to the legality of given activities or, more precisely, judgment calls as to their legality vis-à-vis operational guidelines for this activity agreed upon and vetted at the most senior levels of the agency, be refrained from in written traffic (email or cable traffic). Such language is not helpful."⁷⁸³

In September 2002, the CIA opened its second secret prison, known as the Salt Pit, somewhere in Afghanistan.⁷⁸⁴ Exemplifying a weak institutionalization of LOAC, CIA interrogators at the Salt Pit had no training or prior experience in conducting

⁷⁷⁹ United States Congress, Senate, 2014, 43-44.

⁷⁸⁰ For a detailed personal account of a CIA interrogator who raised legal and moral concerns to his superiors, see Carle, 2011; United States Congress, Senate, 2014, 43.

⁷⁸¹ United States Congress, Senate, 2014, 45.

⁷⁸² United States Congress, Senate, 2014, 44-45.

⁷⁸³ United States Congress, Senate, 2014, 44-45.

⁷⁸⁴ Mak, 2014. For press reports tying Cobalt to the Salt Pitt, see Shane, 2014. The Senate report refers to this secret prison as "Detention Site Cobalt," but based on the description of the facility and press reports of it, it is quite clear that Cobalt is the Salt Pit in Afghanistan. United States Congress, Senate, 2014, 53-56.

interrogations or handling detainees.⁷⁸⁵ In fact, the CIA did not offer a course for interrogators until 2003.⁷⁸⁶ The approval process was also unclear. In some instances, CIA headquarters approved the use of torture techniques on specific detainees, in others, interrogators took the lead without notifying their superiors.⁷⁸⁷ The approval and review process was so weak that the CIA Director, the Associate Deputy Director of Operations, and the General Counsel did not know that “enhanced interrogation techniques” were being used in the Salt Pit.⁷⁸⁸ There was also no CIA legal team in Afghanistan able to provide real-time advice or to supervise interrogations.⁷⁸⁹ Finally, CIA personnel clearly did not have a law abiding ethos as interrogators used techniques—including mock executions—that had not been cleared by OLC or CIA headquarters.⁷⁹⁰ Not surprisingly, in November 2002, a CIA detainee named Gul Rahman was killed as a result of the techniques used against him.⁷⁹¹ At this time, the CIA torture program reflected a level of systematic non-compliance of LOAC given that both policymakers and operators showed complete disregard for the law.

At the Defense Department, the War Council’s Jim Haynes had been requesting detailed information on techniques used during SERE training since July 2002.⁷⁹² The OLC’s August 1 memo quickly made its way to the DOD’s General Counsel Office.⁷⁹³ However, as Chapter 3 showed, at DOD, the military and the JAG Corps had institutionalized LOAC to a

⁷⁸⁵ United States Congress, Senate, 2014, 52.

⁷⁸⁶ Central Intelligence Agency & Halgerson, 2004, 29-32.

⁷⁸⁷ United States Congress, Senate, 2014, 54.

⁷⁸⁸ United States Congress, Senate, 2014, 57.

⁷⁸⁹ Author interview with John Rizzo, 2014; Author interview with General Michael Hayden, 2015. Unlike military lawyers, CIA lawyers are not sent to permanent assignments overseas.

⁷⁹⁰ Central Intelligence Agency & Halgerson, 2004, 41-46, 69-80; United States Congress, Senate, 2014, 56.

⁷⁹¹ United States Congress, Senate, 2014, 54-56.

⁷⁹² United States Congress, Senate, 2008, 24-31.

⁷⁹³ United States Department of Justice, Office of Professional Responsibility, 2009, 64n64.

much higher degree than the CIA or the NSC system. Therefore, Secretary Rumsfeld and his team of politically appointed subordinates, along with the VP's Office and the War Council, faced a stiffer challenge in setting up and sustaining the Torture Program at DOD.

Rumsfeld and his allies excluded most of the JAG Corps and military interrogators from the discussions concerning “enhanced interrogation techniques.” At Guantanamo, Rumsfeld pushed for the creation of a parallel command structure that often bypassed the normative chain of command allowing Rumsfeld and his team to control the legal-review deliberations at the tactical level. However, the institutionalization of LOAC in the military proved too strong, and challenges to the torture program began as soon as the first torture sessions started.

In early 2002, after Brigadier General Lehnert, the Commander of Joint Task Force (JTF) 160—which ran Guantanamo—proved unreliable given his commitment to the Geneva Conventions including his decision to invite the ICRC to visit the island, Rumsfeld and his team decided to create a parallel authority to rival Lehnert's.⁷⁹⁴ On February 16, 2002, JTF-170 was created to lead and coordinate the varying intelligence gathering efforts at the island. JTF-170 was led by Major General Michael Dunlavey, and later by Major General Geoffrey Miller (Miller would later be in charge of and helped train interrogators at the Abu Ghraib prison in Iraq). Dunlavey had extensive intelligence gathering experience dating back to the Vietnam War, but he also had strong ties to the civilian leadership at the Defense Department, and was thus handpicked by Rumsfeld for the post.⁷⁹⁵ Reflecting the command divisions in the island, when it came to conducting interrogations, two groups with disparate approaches to the law had access to detainees.

⁷⁹⁴ Greenberg, 2009, 217; Sands, 2008, 81.

⁷⁹⁵ Greenberg, 2009, 168; Sands, 2008, 81.

The first group was composed of members of the military's Criminal Investigative Task Force (CITF), and was assisted by FBI interrogation experts detailed to Guantanamo. This group closely followed the guidelines found in Amery Field Manual (FM) 34-52 on military intelligence interrogations. FM 34-52 stressed that both LOAC and US policy, “expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”⁷⁹⁶ The interrogation manual also illustrated a number of techniques that constituted physical or mental torture, including, “Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time... Food deprivation... Any form of beating... [and] abnormal sleep deprivation.” (Army, 1992)⁷⁹⁷ Instead, the manual suggested a number of rapport building techniques and other tools such as good-cop-bad-cop routines.⁷⁹⁸

The second group was composed of members from Dunlavey’s JTF-170. On September 16, 2002, seven members of JTF-170, including four interrogators, were sent to Fort Bragg, North Carolina, to receive training in SERE techniques.⁷⁹⁹ This group stressed that Geneva did not apply, disregarded FM 34-52, and conducted a number of torture sessions on Guantanamo detainees.

On September 25, Haynes, Gonzales, Addington, Rizzo, Chertoff, and others visited Guantanamo and were briefed “on Intel successes, Intel challenges, Intel techniques, Intel problems and future plans for facilities.”⁸⁰⁰ Haynes held several private conversations with

⁷⁹⁶ United States Department of the Army, 1992, 1-8.

⁷⁹⁷ United States Department of the Army, 1992, 1-8.

⁷⁹⁸ United States Department of the Army, 1992, 3-10 to 13-13.

⁷⁹⁹ United States Congress, Senate, 2008, 43-48.

⁸⁰⁰ United States Southern Command, Office of Staff Judge Advocate, 2002, 1.

Dunlavey where “policy constraints” affecting interrogations were raised.⁸⁰¹ Haynes explained that he thought, “JTF-170 would have more freedom to command” in the near future.⁸⁰²

On October 2, several members of JTF-170, including Dunlavey’s Staff Judge Advocate, Lieutenant Colonel, Diane Beaver, held a meeting to discuss “counter-resistance” strategies that could be used against detainees.⁸⁰³ One participant noted that, “Psychological stressors are extremely effective (ie, sleep deprivation, withholding food, isolation, loss of time),” but the highest ranking officer noted that “We can’t do sleep deprivation,” to which Beaver replied, “Yes, we can – with approval.”⁸⁰⁴ Beaver also noted that “the ICRC is a serious concern,” and recommended that, “We may need to curb the harsher operations while ICRC is around.”⁸⁰⁵ Dunlavey had struggled to find a military lawyer open to torture, but he now had one in Beaver.⁸⁰⁶

On October 11, Dunlavey sent a formal request to SOUTHCOM seeking authorization for over a dozen interrogation techniques.⁸⁰⁷ Most of the proposed techniques went beyond those permitted in Army FM 34-52. The requested techniques were divided into three categories and included,

“Category I:

1. Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems);
2. Techniques of Deception:
 - (a) Multiple interrogator techniques;

⁸⁰¹ United States Southern Command, Office of Staff Judge Advocate, 2002; United States Congress, Senate, 2008, 49.

⁸⁰² United States Congress, Senate, 2008, 49.

⁸⁰³ United States Department of Defense, 2002, 2-5.

⁸⁰⁴ United States Department of Defense, 2002, 3.

⁸⁰⁵ United States Department of Defense, 2002, 3.

⁸⁰⁶ Sands, 2008, 81.

⁸⁰⁷ Dunlavey, 2002.

(b) Interrogator Identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees;

Category II:

1. The use of stress positions (like standing) for a maximum of four hours;
2. The use of falsified documents or reports;
3. Use of isolation facility for up to 30 days;
4. Interrogating the detainee in an environment other than the standard interrogation booth;
5. Depriving of light and auditory stimuli;
6. The detainee may also have a hood placed over his head during transportation and questioning;
7. The use of 20-hour interrogations;
8. Removing of all comfort items (including religious items);
9. Switching the detainee from hot rations of food to cold rations;
10. Removal of clothing;
11. Forced grooming (shaving of facial hair etc.);
12. Using detained individual's phobias (such as fear of dogs) to induce stress;

Category III:

1. The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family;
2. Exposing to cold weather and water (with appropriate medical monitoring);
3. Use of a wet towel and dripping water to induce the misperception of suffocation;
4. Use of mild, non-injurious physical contact, such as grabbing, poking in the chest with the finger, and light pushing."⁸⁰⁸

Dunlavey's request was forwarded with an attached legal assessment by Beaver that dismissed the long-standing military interrogation standards found in Army FM 34-52 as non-binding to GTMO interrogators, but she also argued that, "Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods undergo a legal, medical, behavioral science, and intelligence review prior to their commencement."⁸⁰⁹

⁸⁰⁸ Phifer, 2002, 1-3.

⁸⁰⁹ Beaver, 2002, 7.

The timing of the request was due to the desire of initiating torture sessions on three prisoners, including, Mohammed al-Qahtani, the so-called “20th high-jacker,” who had been identified by the FBI through legal means.⁸¹⁰ Al-Qahtani was tortured during the first week of October 2002 by JTF-170 interrogators before they received any formal approval from SOUTHCOM or the Pentagon’s General Counsel.⁸¹¹ The interrogation of al-Qahtani was suspended after October 8 to wait for the formal approval from the chain of command and given that CITF and FBI interrogators were strongly objecting to the proposed techniques.⁸¹² When the request for the torture techniques reached General James T. Hill of SOUTHCOM, his Staff Judge Advocate, Supervielle (who had approved Lehnert’s request to invite the ICRC to GTMO), opposed them on legal grounds. Hill refused to approve the techniques and sent Dunlavey’s request to the Pentagon. In his memo, Hill warned that some of the proposed techniques might run counter to the law and strongly recommended a thorough legal review before any of the techniques could be used.⁸¹³

The Joint Chiefs of Staff received General Hill’s memo and asked each of the military branches to weigh in on the proposed techniques. Each of the military branches responded in support of General Hill’s concerns and warned against the approval of the techniques. For example, on November 1, the Air Force expressed, "serious concerns regarding the legality of many of the proposed techniques... some of these techniques could be construed as 'torture,' as that crime is defined by 18 U.S.C. 2340."⁸¹⁴ Similarly, the Marine Corps concluded that, "several of the Category II and III techniques arguably violate federal law,

⁸¹⁰ United States Congress, Senate, 2008, 58-59.

⁸¹¹ United States Congress, Senate, 2008, 60.

⁸¹² United States Congress, Senate, 2008, 65-66.

⁸¹³ Hill, 2002.

⁸¹⁴ United States Congress, Senate, 2008, 67.

and would expose our service members to possible prosecution.”⁸¹⁵ For the Army’s Office of the Judge Advocate General, several of the Category II techniques, “crosses the line of ‘humane’ treatment, would likely be considered maltreatment under Article 93 of the [Uniform Code of Military Justice], and may violate the Federal torture statute,” and most Category III techniques, “appear to be clear violations of the federal torture statute.”⁸¹⁶ At the Joint Chiefs of Staff, Legal Counsel, Captain Jane Dalton, found Beaver’s legal analysis “woefully inadequate,” but she did not deny Dunlavey’s request for the proposed techniques.⁸¹⁷ Instead, Captain Dalton began to create a coordination process within DOD in order for her office to come up with their own independent legal analysis. As soon as Haynes found out about the intra-agency review process, he ordered the Chairman of the Joint Chiefs of Staff, General Richard Myers, to put an end to the review.⁸¹⁸ Dalton’s draft memos indicated that her office was going to conclude that several Category II and Category III techniques were illegal, and that “We do not believe the proposed plan is legally sufficient.”⁸¹⁹

On November 27, 2002, Haynes finally advised Secretary Rumsfeld that all of the proposed techniques were legal, but noted that, “While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.”⁸²⁰ Rumsfeld formally approved all Category I and Category II techniques on December 2, and his only written concern noted,

⁸¹⁵ United States Congress, Senate, 2008, 68.

⁸¹⁶ United States Congress, Senate, 2008, 68-69.

⁸¹⁷ United States Congress, Senate, 2008, 70.

⁸¹⁸ United States Congress, Senate, 2008, 71.

⁸¹⁹ United States Congress, Senate, 2008, 72.

⁸²⁰ Haynes, 2002, 1.

“However, I stand for 8-10 hours a day. Why is standing limited to four hours?”⁸²¹ The political echelons at DOD managed to approve several torture techniques. Nonetheless, the opposition from several career military personnel and JAGs most likely prevented the approval of the harshest techniques, including waterboarding.

On November 22, the new Commander for JTF-170 (now JTF-GTMO), Major General Geoffrey Miller, authorized an interrogation plan for al-Qahtani that included most of Rumsfeld’s approved techniques.⁸²² Al-Qahtani’s torture sessions were reinstated in late November and would continue until mid-January 2003. Several years later, the US government was forced to drop all charges against al-Qahtani because as Susan Crawford, the lead authority of the Military Commissions, explained, “his treatment met the legal definition of torture.”⁸²³

The torture programs under the Department of Defense reflected a top-down “legalized non-compliance” enterprise. Rumsfeld’s approved torture techniques would migrate to some (though not most) interrogation centers in Afghanistan and Iraq.⁸²⁴ Given the strong institutionalization of LOAC across the military branches, Rumsfeld and his politically appointed allies had to set up a parallel command structure at GTMO in order to push for an anti-LOAC approach to interrogations. Yet, even with their attempts at controlling the process, setting policy, and excluding key players from participating in the deliberations over torture, the political echelon at DOD were met with opposition at every turn. As a result, the torture program at DOD did not include the harshest torture

⁸²¹ Haynes, 2002, 1.

⁸²² United States Congress, Senate, 2008, 81-90.

⁸²³ Woodward, 2009.

⁸²⁴ Only three out of more than a dozen US interrogation centers in Iraq approved the use of torture techniques. The most notorious being Abu Ghraib, where interrogations were conducted by military police, not professional military interrogators. See Pryer, 2009.

techniques that the CIA was allowed to use. Furthermore, as the next section will show, the torture techniques that Rumsfeld did approve would quickly have to be reformed as a new wave of opposition to their use reemerged.

By the end of 2002, the core elements of the Bush administration's torture program had been established. For those individuals that wanted to reform or completely revoke the TP, they faced three main challenges. First, excluded groups did not know all the details or scope of the TP. They would have to find ways to get informed and to have their concerns heard in intra-agency and inter-agency debates. Second, the OLC—the final word on the law in the executive branch—had given its stamp of approval with its pair of legal opinions issued on August 1. Third, the top political officials had also approved the torture techniques: Tenet at CIA; Rumsfeld at DOD; and the President in his February 7 Directive setting the non-applicability of Common Article 3. Notwithstanding the challenges, the institutionalization of LOAC within the national security apparatus also provided some openings for agents to push their reform agenda. Excluded groups could not be kept in the dark indefinitely. Inspector Generals and other investigators would begin to learn about, critique, and make recommendations against the TP. The military was best positioned to challenge the TP given that organization's strong institutionalization of the law. Eventually, debates once again reached the inter-agency level, and this time, those groups opposed to torture made the most significant gains.

The Slow Progression towards Compliance with LOAC

On December 17, as the torture sessions continued at Guantanamo, members of CITF notified Navy General Counsel, Alberto Mora, of their objections to the treatment of

detainees.⁸²⁵ Mora was then given access to interrogation logs, Beaver’s legal memo, and Rumsfeld’s December 2 authorization of the interrogation techniques. As soon as he finished reading the material, he concluded that several of the proposed techniques were illegal, amounted to torture, and were based on flawed legal analysis.⁸²⁶ On December 2, Mora met with Haynes to explain that he and members of CITF considered several of the techniques to be unlawful. Haynes disagreed, to which Mora replied,

“What did ‘deprivation of light and auditory stimuli’ mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? Not only could individual techniques applied singly constitute torture, I said, but also the application of combinations of them must surely be recognized as potentially capable of reaching the level of torture. Also, the memo’s fundamental problem was that it was completely unbounded — it failed to establish a clear boundary for prohibited treatment. That boundary, I felt, had to be at that point where cruel and unusual punishment or treatment began.”⁸²⁷

Haynes did not make any additional protests to Mora’s comments. Given Haynes’ lack of objections, Mora assumed that the torture program and Rumsfeld’s authority would be suspended if not rescinded altogether.⁸²⁸ On January 6, CITF informed Mora that nothing had changed in the interrogation world. On January 9, Mora met with Haynes again, but this time he handed the DOD General Counsel a draft memo from Navy JAG Corps Commander, Stephen Gallotta, that included summaries of the November 2002 warnings raised by each of the branches of the military.⁸²⁹ CITF and Mora were building a coalition to contest the policies set by the DOD political strata. Mora would also raise his concerns at meetings with

⁸²⁵ Mora, 2004, 2-3; United States Congress, Senate, 2008, 106.

⁸²⁶ Author interview with Alberto Mora, 2015.

⁸²⁷ Mora 2004, 7-8.

⁸²⁸ Author interview with Alberto Mora, 2015.

⁸²⁹ United States Congress, Senate, 2008, 107.

the Legal Counsel for the Chairman of the Joint Chiefs of Staff, and the General Counsels and senior JAGs for the other military branches.⁸³⁰

On January 15, Mora sent a draft memo to Haynes and Captain Dalton arguing that, “the majority of the proposed category II and all of the category III techniques were violative of domestic and international legal norms in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture... [and] rejected the legal analysis and recommendations of the Beaver Legal Brief.”⁸³¹ Mora called Haynes to inform him that if the techniques were not suspended he would formally sign the memo that afternoon. Later that day, Haynes informed Mora that Rumsfeld would suspend the one approved Category I technique and all Category II techniques (only Category I techniques—yelling and deception—were allowed).⁸³²

Rumsfeld ordered Haynes to assemble a "Detainee Interrogation Working Group" in order "to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the United States Armed Forces in the war on terrorism."⁸³³ In other words, by February 2003, three months after the use of torture had reached Guantanamo, the civilian and military legal advisers of the armed forces, who had either been excluded or ignored during the original intra-agency deliberations on the TP, had now forced themselves into the debate and worked to further reform the TP.

At the inter-agency level, NSC Legal Adviser Belliniger also, “repeatedly asked the Defense Department about conditions and detention policies at Guantanamo Bay” and “specifically raised concerns about interrogations practices used at Guantanamo, including

⁸³⁰ Mora, 2004, 14.

⁸³¹ Mora, 2004, 14.

⁸³² United States Congress, Senate, 2008, 108.

⁸³³ Rumsfeld, 2011, 581; United States Congress, Senate, 2008.

concerns raised by [Deputy Assistant Attorney General Bruce Swartzthe of the] Department of Justice.”⁸³⁴ Secretary Rice convened several Principals meetings to discuss “various issues and concerns relating to detainees in the custody of the Department of Defense.”⁸³⁵

At DOD, the Detainee Interrogation Working Group consisted of representatives from the Office of the Undersecretary of Defense for Policy, the Defense Intelligence Agency, the Legal Counsel to the Joint Chiefs of Staff, and the Joint Staff Directorate for Strategic Plans and Policy, as well as the General Counsels and JAGs of the Air Force, Army, and Navy, and Marines.⁸³⁶ The group reviewed 36 interrogation techniques, including those found in Army FM 34-52 as well as some of the Category II and Category III techniques. Members of the group wrote their own draft legal analysis which argued that, “obligations under the Torture Convention... apply to the interrogation of Operation Enduring Freedom detainees,” and concluded that Category III techniques “would likely be judged to constitute torture,” and Category II techniques, depending on their context, might, “rise to the level where they could be determined to be torture.”⁸³⁷ Disliking the draft, Haynes intervened on March 14 by presenting an OLC memo—written by Yoo—that was to supersede the group’s legal analysis and act as the “controlling authority for all questions of domestic and international law.”⁸³⁸ Several members of the group disagreed with Yoo’s legal analysis and protested its application to the group’s work.⁸³⁹

⁸³⁴ United States Congress, Senate, 2008, 109.

⁸³⁵ United States Congress, Senate, 2008, 110.

⁸³⁶ United States Congress, Senate, 2008, 110.

⁸³⁷ United States Congress, Senate, 2008, 118-119.

⁸³⁸ United States Congress, Senate, 2008, 119.

⁸³⁹ United States Congress, Senate, 2008, 119-120.

With the introduction of the OLC memo, as Mora explained, “Contributions from the members of the Working Group, including OGC [Navy General Counsel Office], began to be rejected if they did not conform to the OLC guidance.”⁸⁴⁰ On February 4, 2003, the Detainee Interrogation Working Group issued the final draft of its report which recommended that 36 interrogation techniques be used on DOD detainees. 19 of the approved techniques were taken from Army FM 34-52 (or its predecessors). Seven techniques that went beyond the Field Manual—hooding, mild physical contact, dietary manipulation, environmental manipulation, sleep adjustment, false flag, and the threat of transfer—were recommended for general use. Ten additional techniques— isolation, prolonged interrogations, forced grooming, prolonged standing, sleep deprivation, physical training, face slap/stomach slap, removal of clothing, increasing anxiety by use of aversions, and the waterboard—were also recommended with certain limitations.⁸⁴¹ The legal rationale for each technique was based on Yoo’s memo as Haynes had demanded.

Upon receipt of the final draft of the Working Group Report, senior military lawyers for the Army, Navy, Air Force, and Marines once again issued a series of memos expressing their concerns over the report and their opposition to several of the proposed techniques on legal, moral, and practical grounds.⁸⁴² Indicative of the JAG Corps strong institutionalization of LOAC was the inculcation of a law abiding ethos that considered the violation of the Geneva Conventions as running counter to military culture and honor. Major General Jack Rives argued that “harsh techniques” should not be introduced because of the negative effects they would have on the organizational culture of the military,

⁸⁴⁰ Mora, 2004, 17.

⁸⁴¹ For a description of each technique with their limitations, see, United States Department of Defense, Detainee Interrogation Working Group, 2003, 82-85; United States Congress, Senate, 2008, 124-125.

⁸⁴² See, Rives, 2003a, 2003b; Lohr, 2003a, 2003b; Sandkuhler, 2003; Romig, 2003.

“The cultural and self-image of the U.S. Armed Forces suffered during the Vietnam conflict and at other times due to perceived law of armed conflict violations. DoD policy, indoctrinated in the Law of War Program in 1979 and subsequent service regulations, greatly restored the culture and self-image of U.S. Armed Forces. U.S. Armed Forces are continuously trained to take the legal and moral ‘high ground’ in the conduct of our military operations regardless of how others may operate.”⁸⁴³

The Working Group issued its final report on April 4, 2003 and waterboarding was no longer recommended. The final report was never circulated to members of the Working Group given several members’ open opposition to its findings (Mora for example would not learn of the report for another year).⁸⁴⁴ On April 5, the Chairman of the Joint Chiefs, General Myers, recommended that only 24 of the techniques be approved. Several of Rumsfeld’s political appointees recommended that all 35 techniques be permitted.⁸⁴⁵ Given the objections, Rumsfeld approved 24 of the techniques on April 16.⁸⁴⁶ Only five of them were not listed in Army FM 34-52: dietary manipulation, environmental manipulation, sleep adjustment, and false flag.⁸⁴⁷ However, Rumsfeld included an exception clause, “If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.”⁸⁴⁸ According to a 2008 Senate investigation, Rumsfeld would approve additional techniques for at least three cases, including sleep deprivation, prolonged interrogations (16 hours in length), isolation, and sound modulation (loud music).⁸⁴⁹

⁸⁴³ Rives, 2003a, 1.

⁸⁴⁴ Mora, 2004, 20.

⁸⁴⁵ United States Congress, Senate, 2008, 131.

⁸⁴⁶ Rumsfeld, 2003, 1.

⁸⁴⁷ United States Congress, Senate, 2008, 132.

⁸⁴⁸ Rumsfeld, 2003, 1.

⁸⁴⁹ United States Congress, Senate, 2008, 138-146.

Notwithstanding the five “enhanced interrogation techniques” approved by Rumsfeld and the exception clause, the intra-agency challenge by opponents of the TP significantly constrained and began to reform the DOD TP. Most of the previously approved techniques for GTMO were no longer available for all detainees. Furthermore, additional techniques had to be directly approved by the Secretary of Defense on a case-by-case basis, centralizing the process, and in practice, decreasing the likelihood that such techniques would be used. This marked the first episode of “unwilling compliance” or “non-legal compliance” as the legal opinions rationalizing torture remained the law of the land, but behavior on the ground began to move towards compliance with LOAC.

At CIA, Inspector General (IG) John Halgerson had started a formal “Special Review” of the agency’s entire torture program in January 2003.⁸⁵⁰ As early as November 2002, staff members from the Inspector General’s Office began hearing references to “war crimes” and “torture” in connection with CIA detention facilities.⁸⁵¹ Members of the IG’s Office then met with personnel from the Counterterrorism Center and the Directorate of Operations and they were informed of Gul Rahman’s killing at the CIA prison in Afghanistan (Halgerson also launched a separate IG investigation into Rahman’s death that same January).⁸⁵² The IG special review concluded that during the early phase of the CIA’s torture program, “No formal mechanisms were in place to ensure that personnel going to the field were briefed on the existing legal and policy guidance,”⁸⁵³ and that the Agency, “failed to provide adequate staffing, guidance, and support to those involved with the detention and

⁸⁵⁰ Central Intelligence Agency & Halgerson, 2004.

⁸⁵¹ United States Congress, Senate, 2014, 56.

⁸⁵² United States Congress, Senate, 2014, 56.

⁸⁵³ Central Intelligence Agency & Halgerson, 2004, 41.

interrogation of detainees,”⁸⁵⁴ which resulted in interrogators from some facilities being, “left to their own devices in working with detainees.”⁸⁵⁵ The death of Rahman prompted CIA headquarters to enact a number of reforms in late 2002 and early 2003 in an attempt to reign-in on some of the torture program’s unplanned violations of the law.⁸⁵⁶ In December 2002, the CIA’s Counterterrorism Center made their Renditions Group formally responsible for the management and review of all CIA secret prisons and interrogations.⁸⁵⁷ In January 2003, after five months of CIA interrogations, Director Tenet finally approved the “Confinement and Interrogation Guidelines,” and “Guidelines on Interrogations Conducted Pursuant to [Redacted].”⁸⁵⁸ The new interrogation guidelines noted that, “unless otherwise approved by Headquarters, CIA officers and other personnel acting on behalf of CIA may use only Permissible Interrogation Techniques. Permissible Interrogation Techniques consist of both (a) Standard Techniques and (b) Enhanced Techniques.”⁸⁵⁹ Therefore, these new guidelines attempted to put an end to the use of unapproved techniques. They also intended to centralize or control the approval process by requiring that the most brutal techniques—waterboarding, walling, facial slap, cramped confinement, wall standing, stress positions, and use of insects—could only be used after headquarters approved them on a case by case basis. However, “Standard Techniques”—sleep deprivation for up to 72 hours, reduced caloric intake, the use of loud music or white noise, use of dippers, isolation, and “moderate” psychological pressure—only required approval

⁸⁵⁴ Central Intelligence Agency & Halgerson, 2004, 102.

⁸⁵⁵ United States Congress, Senate, 2014, 57.

⁸⁵⁶ United States Congress, Senate, 2014, 57.

⁸⁵⁷ United States Congress, Senate, 2014, 56-57.

⁸⁵⁸ Central Intelligence Agency & Halgerson, 2004, 24-25, 103; United States Congress, Senate, 2014, 62-63.

⁸⁵⁹ Central Intelligence Agency & Halgerson, 2004, 29-30.

“whenever feasible.”⁸⁶⁰ Interrogators were now forced to document each technique that they used. Quarterly reviews noting the conditions at the detention facilities were also mandated.⁸⁶¹ In November, the CIA started to formally train interrogators, offering a two week course, divided into classroom and “hands on” training. The guidelines noted that only trained and certified interrogators could use the “enhanced” techniques.⁸⁶² These reforms and others that resulted from the IG report moved the CIA torture program away from “systematic non-compliance” and into “legalized non-compliance.” The CIA still tortured its prisoners, but in a more controlled manner, limiting non-approved abuses of the law.

In mid-March 2003 there were major personnel changes at OLC that opened the door for another round of contestation at the intra-agency and inter-agency levels. Bybee left OLC to become a federal judge. Yoo, who wanted to replace Bybee, was not offered the position and instead resigned (Attorney General Ashcroft opposed his promotion).⁸⁶³ Yoo’s departure weakened the “War Council,” which strengthened the traditional inter-agency process.

Jack Goldsmith was nominated to replace Bybee. Before he was officially confirmed, he was approached by Philbin at OLC, who warned him of a legal opinion “that may contain serious errors, and that he had been working to correct.”⁸⁶⁴ Goldsmith asked Philbin to send him any additional legal memos that might be flawed. Philbin responded by sending

⁸⁶⁰ Central Intelligence Agency & Halgerson, 2004, 30; United States Congress, Senate, 2014, 63.

⁸⁶¹ United States Congress, Senate, 2014, 62.

⁸⁶² Central Intelligence Agency & Halgerson, 2004, 30.

⁸⁶³ United States Department of Justice, Office of Professional Responsibility, 2009, 63.

⁸⁶⁴ Goldsmith, 2007, 132.

him Bybee's August 1, 2001 memo, and Yoo's March 14, 2003 memo, the two opinions that provided the legal rationale for the TP.⁸⁶⁵

As soon as Goldsmith began to read the memos he was shocked, but he did not want to act recklessly and immediately withdraw them since the TP was largely dependent on them.⁸⁶⁶ Furthermore, his focus turned to another Yoo memo that had authorized a National Security Agency domestic spying program.⁸⁶⁷ After several months of research, Goldsmith decided that the "opinions written nine [March 13, 2003] and sixteen [August 1, 2002] months earlier by my Bush administration predecessors must be withdrawn, corrected, and replaced."⁸⁶⁸ By December, he withdrew the Yoo memo but decided not to withdraw the Bybee memo until he wrote an alternative opinion specifying exactly what was and was not legal with regards to interrogations.⁸⁶⁹ Both Ashcroft and Deputy Attorney General Comey supported Goldsmith's actions.⁸⁷⁰ However, according to Goldsmith, the White House and VP's Office "pressured" him to "stand by and reaffirm the August 2002 opinion."⁸⁷¹

In December 2003, Goldsmith told Haynes that DOD could no longer rely on the Yoo legal memo, but that military interrogators could still use the "noncontroversial" techniques approved by Rumsfeld following the Detainee Interrogation Working Group recommendations.⁸⁷² This effectively put an end to Rumsfeld's exception clause that approved the more brutal techniques on a case by case basis.

⁸⁶⁵ Goldsmith, 2007, 132-133.

⁸⁶⁶ Goldsmith, 2007.

⁸⁶⁷ United States Department of Justice, Office of Professional Responsibility, 2009, 112.

⁸⁶⁸ Goldsmith, 2007, 146.

⁸⁶⁹ Goldsmith, 2007.

⁸⁷⁰ United States Department of Justice, Office of Professional Responsibility, 2009, 113.

⁸⁷¹ Goldsmith, 2007, 159.

⁸⁷² United States Department of Justice, Office of Professional Responsibility, 2009, 113.

Goldsmith also wrote an opinion concluding that the Geneva Conventions applied to the war in Iraq (although non-Iraqi fighters could be transferred to CIA black sites). This move forced Lieutenant General Ricardo S. Sanchez to begin the process of revising US interrogation policy in accordance with the laws of war.⁸⁷³ By that point, the interrogation techniques approved by Rumsfeld for GTMO had migrated to Iraq and Afghanistan.⁸⁷⁴

In early 2003, after reports of US detainee abuse in Iraq, three military investigations were initiated to examine the allegations. The first started in January 2003, and was conducted by Major General Antonio Taguba, who was ordered to investigate the conduct of the 800th Military Police Brigade (which was involved in torture at Abu Ghraib). The second investigation was headed by Major General George Fay who was tasked with specifically investigating the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade.⁸⁷⁵ The third, started in February, and was led by Lieutenant General Paul Mikolashek, the Army's Inspector General, who began a comprehensive review into the Army's detention operations.⁸⁷⁶ These investigations, along with the CIA Inspector General's own reviews, initiated a thorough review process whose findings and recommendations would lead to further reforms of the torture program.

On April 28, the US press began publishing photos—gathered by military investigators—that graphically depicted the torture of Iraqi prisoners by US soldiers at Abu Ghraib. As soon as the pictures began to be shown on television, White House Counsel Gonzales muttered, “this is going to kill us.”⁸⁷⁷

⁸⁷³ Mayer, 2008.

⁸⁷⁴ Department of the Navy & Church, 2005; Pryer, 2009; United States Congress, Senate, 2008.

⁸⁷⁵ Fay, 2004.

⁸⁷⁶ Department of the Army & Mikolashek, 2004.

⁸⁷⁷ Goldsmith, 2007, 141.

Only Taguba's investigation had been completed when the scandal began to dominate the press. Within weeks of the Abu Ghraib scandal, three additional investigations into the military component of the torture program were initiated. First, Lieutenant General Anthony Jones was ordered to augment Major General Fay's investigation of Abu Ghraib, with a special focus on the military chain of command (military investigators can only investigate officers of a lower rank than theirs, not allowing Fay to investigate deep into the chain of command).⁸⁷⁸ The second was an independent panel, led by James R. Schlesinger, a former Secretary of Defense and Director of CIA.⁸⁷⁹ This independent review examined all DOD detention operations. The third was also an investigation of all DOD detention and interrogation operations, but it was conducted by the Navy's Inspector General, Vice Admiral Albert T. Church III.

The Abu Ghraib scandal greatly embarrassed the military as it exposed deficiencies in leadership, command, training, and it highlighted behavior that ran counter to its values and honor.⁸⁸⁰ The scandal certainly strengthened and added a sense of urgency to the review process, but that process had already been underway. The investigations and their recommendations led to a number of reforms that repudiated Rumsfeld's approved techniques and quickly put an end to DOD's torture program altogether. For example, Special Forces units—some of the most aggressive interrogators—as Commander Stanley McChrystal explains, seized to use torture in 2004, "I also made mistakes. As late as the spring of 2004, six months into my command, I believed our force needed the option of employing select, carefully controlled 'enhanced' interrogation techniques, including sleep

⁸⁷⁸ Jones, 2004.

⁸⁷⁹ Schlesinger, Brown, Fowler, & Horner, 2004.

⁸⁸⁰ Bland, 2005.

management. I was wrong. Although these techniques were rarely requested or used, by the summer of that year we got rid of them completely, and all handling inside our centers followed the field manual used by the Army.”⁸⁸¹ US Army doctrine, published after April 2004, more clearly asserted adherence to LOAC.⁸⁸² The Army began to work on a new field manual for intelligence collection, FM 2-22-3, which was finished in 2006 and prohibited all the “enhanced” techniques.⁸⁸³

At CIA, the Halgerson Special Review into the torture program was completed in May 2005. Most troubling for the Agency was the report’s conclusion that the OLC’s August 1 opinion, “does not address the separate question of whether the application of standard or enhanced techniques by Agency officers is consistent with the undertaking, accepted conditionally by the United States regarding Article 16 of the Torture Convention, to prevent ‘cruel, inhuman or degrading treatment or punishment.’”⁸⁸⁴ As a result, on May 25, 2014, the CIA decided to suspend its torture program until they received DOJ approval re-authorizing torture.⁸⁸⁵

The CIA IG report was sent to Goldsmith at OLC and Rice at NSC.⁸⁸⁶ Upon reading the report, Goldsmith wrote to CIA General Counsel Muller that the report, “raised concerns about certain aspects of interrogations in practice... the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant.”⁸⁸⁷ Goldsmith informed the CIA to cease the use of waterboarding until a new legal assessment was

⁸⁸¹ McChrystal, 2013, 202.

⁸⁸² Pryer, 2009, 107.

⁸⁸³ United States Department of the Army, 2006.

⁸⁸⁴ Central Intelligence Agency & Halgerson, 2004, 101.

⁸⁸⁵ United States Congress, Senate, 2014, 15; Central Intelligence Agency, 2004.

⁸⁸⁶ United States Department of Justice, Office of Professional Responsibility, 2009, 114; Author interview with Philip D. Zelikow, 2015.

⁸⁸⁷ United States Department of Justice, Office of Professional Responsibility, 2009, 115.

completed. He also noted that OLC never formally stipulated whether the Fifth, Eighth, and Fourteenth Amendments of the Constitution applied to the torture program.⁸⁸⁸ Around June 20, Goldsmith withdraws the Bybee August 1, 2002 memo (Goldsmith would resign from his post shortly thereafter, without finishing a replacement opinion).⁸⁸⁹

The CIA wanted the NSC Council to reaffirm the torture program, but Rice had argued that the, “next logical step is for the Attorney General to complete the relevant legal analysis now in preparation.”⁸⁹⁰ In early July, the CIA once again used a strategic discourse to try and influence the process to their liking, threatening that, “unless CIA interrogators can use a full range of enhanced interrogation methods, it is unlikely that CIA will be able to obtain current threat information from [Janat] Gul in a timely manner.”⁸⁹¹ By late July, the Attorney General sent a letter to the Acting Director of CIA authorizing the use of nine “enhanced” techniques—all except waterboarding—on Janat Gul.⁸⁹² Ashcroft also noted that those nine techniques, “outside territory subject to United States jurisdiction would not violate the United States Constitution or any statute or treaty obligation of the United States, including Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment...”⁸⁹³ On August 6, Acting Assistant Attorney General for OLC, Daniel Levin sends a legal memo to Rizzo authorizing the torture of another detainee, and this time waterboarding was once again permitted.⁸⁹⁴ The CIA however,

⁸⁸⁸ United States Department of Justice, Office of Professional Responsibility, 2009, 117; United States Congress, Senate, 2014, 136.

⁸⁸⁹ Goldsmith, 2007.

⁸⁹⁰ United States Congress, Senate, 2014, 135.

⁸⁹¹ United States Congress, Senate, 2014, 136.

⁸⁹² Ashcroft, 2004.

⁸⁹³ Ashcroft, 2004, 1.

⁸⁹⁴ Levin, 2004a.

chooses not to use waterboarding anymore because as Rizzo explains, it had become “politically toxic” by this period.⁸⁹⁵

In late December 2004, Levin issued an unclassified memo to replace Bybee’s August 1, 2002 opinion.⁸⁹⁶ The memorandum ostensibly argued that the US no longer needed the broader Commander in Chief Powers asserted in past opinions, nor was the narrow definition of torture still tolerable. On closer inspection, the memo reveals that it was intended for public consumption as opposed to an actual change in legal interpretation. Hidden in one of the footnotes, the memo made clear that, “[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”⁸⁹⁷ Similarly, in 2005, after an OLC internal review of all the torture techniques was completed, Steven Bradbury, the new Assistant Attorney General of OLC, once again concluded that all of the techniques were indeed legal.⁸⁹⁸ Bradbury went one step further, arguing that the techniques could be used simultaneously without violating the law (a practice that the CIA had been using from the inception of the TP).⁸⁹⁹ As Yoo explained in his memoir, “in the real world of interrogation policy nothing had changed.”⁹⁰⁰ Yet, when it came to practice, this marked another shift towards “non-legal compliance” or “unwilling compliance.” Waterboarding and nine other torture techniques were once again legally permissible at CIA prisons, but CIA interrogators no longer used the harshest

⁸⁹⁵ Author interview with John Rizzo, 2014. See also, Rizzo, 2014, 243.

⁸⁹⁶ Levin, 2004.

⁸⁹⁷ Levin, 2004, 2n8.

⁸⁹⁸ Bradbury, 2005b.

⁸⁹⁹ Bradbury, 2005b.

⁹⁰⁰ Yoo, 2006, 183.

methods, and they had to be approved on a case by case basis, which significantly reduced the scope of the torture program. In the latter half of 2004, three detainees were tortured by the CIA.⁹⁰¹ Four were detained and tortured in 2005, one in 2006, and the final one in 2007.⁹⁰² From 2002 to mid-2004, the CIA had detained at least 113 individuals (it is impossible to know exactly how many people were actually detained and tortured by the CIA because several prisons did not keep clear records of who they detained and interrogated from 2002-2003).⁹⁰³ In other words, by late 2004, the CIA torture program had been significantly reformed and drawn down, even if the legal foundation supporting it remained the same.

In 2005, at the inter-agency level, a significant push to further reform if not fully revoke the torture program was led by now Secretary of State Condoleezza Rice. After Rice read the CIA IG Special Review, she began to question not just its legality, but also its wisdom and effectiveness.⁹⁰⁴ Once at the State Department, she also began to be directly confronted with the counterproductive consequence of the TP. Rice explains, “those policies were creating their own security challenges. Diplomatic relations with our allies, particularly the Europeans, were increasingly strained by the mistaken perception that the United States’ detention and interrogation policies operated outside the bounds of international law.”⁹⁰⁵ In 2005, Rice selected Philip Zelikow as Counselor of the Department of State. Zelikow was then assigned to oversee intelligence issues for the Department and

⁹⁰¹ United States Congress, Senate, 2014, 136.

⁹⁰² United States Congress, Senate, 2014, 143.

⁹⁰³ United States Congress, Senate, 2014, 50, 143.

⁹⁰⁴ Author Interview with Philip Zelikow, 2015; Author Interview with John Bellinger III, 2014; Rice, 2011, Kindle 2069, 9098 of 13388.

⁹⁰⁵ Rice, 2011, Kindle 9080 of 13388.

was “read in” on the CIA torture program.⁹⁰⁶ The State Department finally re-entered the inter-agency deliberations on torture, and reflecting their Department’s strong institutionalization of LOAC, Rice, Zelikow, Bellinger (now the State Department Legal Adviser), and a few career lawyers at L, pushed to close the CIA black sites and to have the US adhere to its LOAC obligations.

In the spring of 2005, the President decided that the NSC should re-assess the torture program.⁹⁰⁷ A special, “off-the-record NSC meetings” process was set up that included White House Counsel Harriet Miers and her deputy, Addington from the VP’s Office, the Deputy National Security Advisor, Jack Crouch, Gordon England from the Department of Defense, and representatives from DOJ and the Office for the Director of National Intelligence.⁹⁰⁸ At the committee’s first meeting, Zelikow was kicked out by Crouch because he was not “read in” on the program. Rice then called National Security Advisor Stephen Hadley, and as Zelikow explains, “Condi tore some skin off Steve Hadley that morning, and that problem never arose again. Man she was pissed off, but that gives you some sense of the way people were acting around this program.”⁹⁰⁹ The goal of the State Department was to bring the TP to an “end game,” and Zelikow quickly found an ally in England. On June 12, 2005, Zelikow and England drafted what they hoped would be a Presidential speech that argued in favor of a comprehensive review of the TP, and stated that in the interim,

“the U.S. will choose - as a matter of policy - to treat such captives, once they move into the regular detention system, as if they were civilian detainees under the law of war. This is the system generally being used by our forces in

⁹⁰⁶ Author interview with Philip Zelikow, 2015; Zelikow, 2012, 33-34.

⁹⁰⁷ Author interview with Zelikow, 2015; Zelikow, 2012, 33.

⁹⁰⁸ Author interview with Zelikow, 2015.

⁹⁰⁹ Author interview with Zelikow, 2015.

Iraq. We thus accept the applicability of the baseline Article 3 that appears in all four of the Geneva Conventions on the Law of War. We would thus also draw upon the standards in the Fourth Geneva Convention on the Law of War.”⁹¹⁰

As soon as Rumsfeld found out about England’s role, he pulled him from the inter-agency discussions and replaced him with Under Secretary of Defense for Intelligence, Stephen Cambone.⁹¹¹ With fewer allies, Zelikow then co-wrote a draft memo with Bellinger that presented its arguments in a strategic frame noting that, “Special Operations forces against the Zarqawi network in Iraq, our forces have found, for example, that they do not need physical coercion in their interrogations.”⁹¹² The draft memo then recommended that the US should, “Accept as a matter of policy and customary law – not formally binding treaty obligation, the minimum definitions of humane treatment in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.”⁹¹³

On July 24, 2005 Senator John McCain introduced an amendment to the Defense Appropriations bill which prohibited any US personnel from using interrogation techniques that went beyond what was authorized in the new Army Field Manual 2-22.3. Inside the White House, Rice supported the amendment, but Cheney adamantly opposed it which led to a lobbying effort by the VP’s Office and the CIA to get Congress to either revoke the amendment or at least provide an exemption for the CIA.⁹¹⁴ On December 23, 2005 Congress passed the Detainee Treatment Act as part of the National Defense Authorization Act for Fiscal Year 2006. Cheney and Hadley thought they had managed to make the language of the amendment murky enough to exempt the CIA’s torture program,

⁹¹⁰ Zelikow & England, 2005, 4.

⁹¹¹ Author interview with Philip Zelikow, 2015.

⁹¹² Zelikow & Bellinger, 2005, 1.

⁹¹³ Zelikow & Bellinger, 2005, 3.

⁹¹⁴ Cheney, 2011, 359-360.

but the CIA once again suspended its TP for fear of criminal liability.⁹¹⁵ Still, the VP's Office pressed for a Presidential "signing statement" to be added to the Detainee Treatment Act. Addington wanted the signing statement to be clear in asserting Presidential power, but Bellinger managed to get the language toned down.⁹¹⁶ On December 30, Bush signed the bill into law with a "signing statement" asserting that his Commander in Chief powers allowed him to decide how the law would be carried out.⁹¹⁷

The State Department was furious with the addition of the signing statement.⁹¹⁸ Zelikow then distributed a memo arguing that the Detainee Treatment Act made it clear that not only was torture prohibited, but also "cruel, inhuman, or degrading treatment or punishment."⁹¹⁹ The memo also presented a direct legal challenge to the OLC opinions that had argued the opposite.⁹²⁰ Someone at the White House found the memo disturbing enough that they attempted to destroy all copies of it.⁹²¹

At CIA, with the TP suspended, personnel also began to push for an "end game" for the entire TP.⁹²² As CIA Director Michael Hayden explains,

"There were some people who were emotionally disturbed by actually doing this. Same way that there are people who are emotionally disturbed about killing people. But we still kill people. I'm just saying, we are asking people to do very difficult things. I'm glad that many of them were concerned about that. I would be disappointed if I sat in that room and people weren't concerned about doing what they did to another human being."⁹²³

In March 2006, CIA began proposing the renewal of the torture program at NSC meetings, but in a drawn down fashion, where only seven of the remaining ten "legal" techniques

⁹¹⁵ Cheney, 2011, 360; United States Congress, Senate, 2014, 151.

⁹¹⁶ Mayer, 2008.

⁹¹⁷ Bush, 2006b.

⁹¹⁸ Author Interview with John Bellinger III, 2014.

⁹¹⁹ Zelikow, 2005.

⁹²⁰ Zelikow, 2005, 1.

⁹²¹ Zelikow, 2012, 40; Author Interview with Philip Zelikow, 2015.

⁹²² United States Congress, Senate, 2014, 157-158.

⁹²³ Author interview with General Michael Hayden, 2015.

would be used: sleep deprivation (for up to 180 hours), nudity, dietary manipulation, facial grasp, facial slap, abdominal slap, and the attention grab.”⁹²⁴ Director Hayden explained that his rationale for reforming the program did not arise from any legal concerns, instead,

“I went from thirteen [sic] to seven not because I had problems legally, but because I had problems in the long-term viability of the program. And therefore, I’m willing to nudge it in from the sides, make it less dramatic. If I can build a consensus to go forward. It was just a conscious tradeoff.”⁹²⁵

After an internal CIA review, and a subsequent OLC opinion, the CIA was authorized to continue using: sleep deprivation, nudity, dietary manipulation, facial grasp, facial slap, abdominal slap, and the attention grab (although nudity was subsequently dropped at the request of Rice).⁹²⁶

For the rest of 2006, the White House was at war over the fate of the TP. The VP’s Office and the Secretary of Defense were losing their influence with the President, as the war in Iraq was quickly deteriorating and critiques of the TP continued to strengthen from every corner imaginable. Finally, on June 29, the Supreme Court ruled against the administration in the seminal case of *Hamdan v. Rumsfeld*. In a 5-3 decision, the court decided that the military commissions were unconstitutional because they, “violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions.”⁹²⁷ The majority decision also made clear that GTMO prisoners were protected under Common Article 3 of the Geneva Conventions.⁹²⁸ The judicial decision provided opponents of the TP further legitimacy to reform the program. As Rice explained, “The Hamdan ruling... allowed us to go even further in pursuing the goal of establishing an improved legal framework for the

⁹²⁴ United States Congress, Senate, 2014, 158.

⁹²⁵ Author interview with General Michael Hayden, 2015.

⁹²⁶ Bradbury, 2007; Rizzo, 2014, 270; United States Congress, Senate, 2014, 162.

⁹²⁷ United States Supreme Court, 2006, 2.

⁹²⁸ United States Supreme Court, 2006, 6.

war on terror.”⁹²⁹ Cheney wanted to push Congress to completely overturn the Supreme Court’s ruling on Hamdan and demand that Congress recognize the President’s authority in such matters. This time, Bush sided with the opponents of the TP.

On September 6, 2006 Bush admitted that the CIA had been interrogating and holding several HVDs in secret detention facilities around the world. He also declared that the CIA’s remaining prisoners would be transferred to GTMO where they would be given access to the ICRC, and tried by military commissions. This marked a significant shift in policy as the CIA’s “black sites” began to be shut down. Their closure turned out to be permanent. On several occasions, CIA director, Michael Hayden requested to have his agency’s detention facilities reinstated, but Rice refused to condone the move.⁹³⁰ On July 24, 2007 the OLC approved the CIA to use the remaining six techniques on Muhammad Rahim.⁹³¹ This was the final prisoner under US custody—overt or covert—to be subjected to torture.

By late 2007, although the CIA was still authorized to use six “enhanced interrogation techniques” in facilities in Iraq and Afghanistan, they would not be used again. State Department lawyers were not able to convince their counterparts at CIA or DOJ to completely abandon the legal justification for the torture program, but the program itself was terminated except in paper. In other words, since late 2004, in practice, not only were less techniques used, they were also more closely controlled and had to be approved on a case by case basis, which decreased the number of detainees subject to torture and

⁹²⁹ Rice, 2011, Kindle 9145 of 13388.

⁹³⁰ Cheney, 2011, 360-361; Rice, 2011, 503.

⁹³¹ Bradbury, 2007b; United States Congress, Senate, 2014, 163.

eliminated their use altogether in late 2007. This exemplifies the “non-legal compliance” or “unwilling compliance” effect discussed in Chapter 1.

The final components of the TP, the Guantanamo detention facility, and the military commissions associated with it remains operational to this day. Nonetheless, although GTMO remained open, its prisoner population had decreased sharply since its peak in 2003. From almost 800 detainees, GTMO had a prisoner population of less than 250 by the end of 2008.⁹³² As President Bush lamented, “[w]hile I believe opening Guantanamo after 9/11 was necessary, the detention facility had become a propaganda tool for our enemies and a distraction for our allies. I worked to find a way to close the prison without compromising security.”⁹³³ The facility could not be closed because several prisoners could not be prosecuted since they had been tortured, nor could they be transferred to other countries since no one would accept them.⁹³⁴ More important, as GTMO dwindled, the US government increasingly depended on federal prosecutions and prisons to deal with international terrorist suspects.⁹³⁵ The trend was the mirror opposite of GTMO. Before 9/11, approximately 50 inmates linked to international terrorism were in federal prisons, by the end of 2008, the number exceeded 200.⁹³⁶

Conclusion

The Legalized Bureaucratic Politics theory explains why and how the TP was created and eventually reformed. It illustrates the internal mechanism that show how law conditions policy and highlights how change towards more law-compliant actions occur.

⁹³² Shane, 2011.

⁹³³ Bush, 2010, 179.

⁹³⁴ Mayer, 2008.

⁹³⁵ Shane, 2011.

⁹³⁶ Shane, 2011.

The TP, which violated several of the LOAC commitments that the US was a party to, was established by a group of politically appointed policymakers and legal advisers that bypassed the traditional but institutionally weak inter-agency process. The torture advocates excluded the State Department, military lawyers, and career legal advisers for fear that they would object to the torture program. Nonetheless, the medium degree of legal institutionalization in the US national security apparatus proved strong enough to open internal avenues for reforming the TP. The inter-agency process could only be circumvented for so long. Key players, including the JAG Corps and the State Department's Legal Adviser's Office, with their strong institutionalization of LOAC, eventually forced their way back into the deliberations on interrogation policies. Internal reviews of both the military's and the CIA's interrogation programs also dealt a severe blow to the TP as it empowered opponents of the program. The reviews also proposed important reforms that eventually restructured and strengthened the legal institutionalization of LOAC in both the policy and operational realms, effectively changing US detention policy.

Notwithstanding the fact that certain elements of the Bush administration's TP remain in effect more than a decade after their inception, today, the program is a mere shadow of what it once was. By the end of Bush's second term, the global network of CIA black sites had been shut down and the CIA could only use six "enhanced" techniques, on a case by case basis, which in practice meant a handful of prisoners after 2004. Similarly, while GTMO still remains, the government began to use alternative channels to deal with new international terrorism suspects in a way that more closely aligned US policy with its international legal obligations. All the core aspects of the TP were either revoked, reformed, drawn down, or replaced in a manner more closely aligned with humanitarian

and human rights law. The shift was a direct result of the increased institutionalization of LOAC into the US national security apparatus, which while it was not strong enough to prevent the TP from being created, it did provide the necessary mechanisms to reform and revoke key aspects of it.

CHAPTER 6:

Conclusion

Although there has been an increase in the number and influence of regional and international courts and organizations, compliance with international law remains largely dependent on self-enforcement. Scholars have focused on either macro—self-interests or acculturation—explanations, or on the external pressure exerted on the Executive by civil society, epistemic communities, NGOs, IGOs, and courts. However, how and why the Executive Branch decides to comply with the law, especially in a sustained long-term manner, has been largely unexplored. I examined how international law affects a state's decision-making process and its conduct during armed conflicts. I highlighted the tension between security and human rights, how and why organizations change, how foreign policies are formulated, and when law can make a difference during war.

More specifically the dissertation asked: under what conditions are states most likely to adhere to the anti-torture provisions found in the laws of war and human rights law during armed conflicts? I introduced the legalized bureaucratic politics theory and set it within the US context to compare two most similar and least likely cases where the United States used torture: the Vietnam War and the Global War on Terror. Chapters 4 and 5 showed how the institutional structure in the US national security apparatus was too weak to reverse the torture programs during Vietnam, but strong enough to reverse the George W. Bush administration's post-9/11 torture program.

Legalized bureaucratic politics was modified to address idiosyncrasies in the US war making process (i.e. the heightened role played by political appointees in the bureaucratic process). Chapters 2 and 3 established the first necessary step of legalized bureaucratic

politics: assessing the degree to which each of the core US national security bureaucracies—the White House Counsel, the National Security Council, the Justice Department’s Office of Legal Counsel, the State Department, the Defense Department, and the Central Intelligence Agency—have institutionalized the laws of war and the human rights law. Then, process tracing was used in Chapters 4 and 5 to show which actors had the most success at manipulating the four phases of legalized bureaucratic politics: intra-agency, inter-agency, operational, and review phases. By opening the black box of the state and focusing on these internal dynamics within the Executive Branch I was able to illustrate the key self-enforcement mechanisms that make compliance with the law most likely and how they influence the decision making and operational process. These are, an executive branch structure that institutionalizes international law into its approval process, provides its workforce real-world training in the law, ensures legal review at all levels of command, and instils a law abiding ethos.

Although legalized bureaucratic politics was presented in the US torture context, the theory is generalizable and applies to other states and issue areas. Every state has an approval process, trains its operators, increasingly depends on government legal advisers, and has distinct internal organizations within the executive with distinct cultures. Therefore, international law can and is institutionalized in states across the world to varying degrees. Furthermore, every state’s national security or foreign policy apparatus goes through an intra-agency, inter-agency, operational, and review phase. Even the most autocratic and centralized regimes have to delegate tasks during war making. As long as there is a decision making process and a military (or intelligence agency), there is legalized bureaucratic politics.

Similarly, although the focus was on the international laws prohibiting torture, legalized bureaucratic politics also applies to other legal regimes, including trade, the environment, human rights, etc. The key actors analyzed will have to be modified (i.e. the Treasury Department would play a core role under trade law), but both institutionalization and legalized politics can help explain state policy beyond armed conflicts.

Policy Recommendations

Although the Bush administration's torture program elicited significant condemnation from within the Executive Branch, the Congress, the Courts (at least indirectly through *Hamdan v Rumsfeld*), the press, NGOs, allies, the international community, adversaries, and significant sections of the American public, few major statutory initiatives have been enacted to reform the weak institutional elements of the US national security apparatus in order to decrease the likelihood that another torture program is created in the future.

While the Detainee Treatment Act affected the military (but not the CIA) with regards to the use of torture, most other reforms have not come from Congress. Instead, the Executive has taken the lead by enacting Executive Orders and Directives that have banned the use of torture, but that can be replaced with the stroke of a pen. Some individual departments, especially the Department of Defense, have also enacted major reforms to their training and procedures in a way that has strengthened their institutionalization of LOAC. The military has seen the most impressive reforms since the Abu Ghraib scandal, but the CIA still operates under a very weak legal institutional structure. Therefore, legalized bureaucratic politics would expect that if members of a future administration wished to

reinstate torture, they would likely succeed as long as the torture program is controlled by the CIA.

Throughout the national security apparatus, the role of career lawyers needs to be elevated, the independence of all attorneys needs to be strengthened, and their training needs to be intensified. At the top of each bureaucracy there should be a career attorney with the same rank as the political appointee. This still allows a political appointee to oversee and challenge bureaucratic inertia or pathologies, but it decreases the likelihood that the organization will be politically captured. Politically appointed legal advisers should also be appointed to five year terms (as has been done with the Director of the FBI who serves a ten year term). This would increase the independence of the individual as their job will not be as dependent on the maintenance of their loyalty to the President's desires. Within each organization, the approval of any action needs to be vetted and signed by both a politically appointed legal adviser and the top career attorney. These reforms will surely slow the process down, there are always tradeoffs, but they are necessary costs to ensure compliance with the laws.

The White House Counsel is the bureaucracy in the executive that has institutionalized international law the least. This of course makes sense given that the position is purely political. However the legal staff of the Office of the Counsel to the President are technically there to protect and represent the interests of the Office, not the individual that was elected to lead the office. As such, the White House Counsel should introduce a permanent career legal staff to check the influence of the politically appointed lawyers. Furthermore, there should be a small group of specialists on international law, whose advice shall be sought prior to any opinion that deals with national security or

foreign affairs reaches the President's desk. All career staff members should also receive some legal training in international law, perhaps from lawyers in the State Department. Finally, the White House Counsel should not interfere with the National Security legal staff, as the independence of the former is crucial.

The Office of Legal Counsel, a bureaucracy that has reached a low-to-medium degree of institutionalization of international law, should undergo some major structural reforms. Congress needs to pass legislation that decreases the influence of the politically appointed legal staff. First, the politically appointed staff should be appointed to five year terms. Second, additional positions for career lawyers at the Deputy level need to be created. Third, a specialized office within OLC needs to be created that focuses on international legal issues. Fourth, any legal opinion authored by the office that deals with international law or national security must be reviewed and signed by a deputy career attorney and the international law sub-office. Finally, before the opinion is finalized, all inter-agency departments need to be able to review the memo, and while they should not be allowed to change it (to protect OLC's independence), appendices with their dissents should be noted on the record. If any opinion has a dissent annex, the opinion should be shared with Congress, and possibly a special court similar to the Foreign Intelligence Surveillance Court.

The State Department's Legal Adviser's Office has reached a strong degree of institutionalization of international law. The stature of the career staff needs to be elevated mandating the review and approval of any major State Department policy to be signed by at least one career lawyer.

The National Security Council as with the OLC, needs some major statutory reforms to its structure. The Attorney General or the NSC legal adviser should be made statutory members of NSC meetings. In addition, at NSC meetings, each Principal should be encouraged to bring a member from their legal staff. Congress also needs to amend the National Security Act to mandate the inter-agency Lawyers Group as a permanent sub-committee within NSC. The NSC legal staff should also create career staff members, especially at the Legal Adviser's Office. Finally, at least one career lawyer from the State Department, Defense Department, and Central Intelligence Agency should be appointed on a temporary basis to the NSC legal office.

Although the Defense Department, and especially the JAG Corps have reached a strong degree of institutionalization of the laws of war, the subordinate role of military lawyers needs to be eliminated. Under the current structure, the judge advocate of any command is in a subordinate position to the military commander. He or she is only one of many advisors that assist the commander (i.e. intelligence officers, logistics, etc). JAGs need to be given veto power over proposed actions.

Finally, the CIA, which experiences a weak institutionalization of international law needs to undergo some major restructuring. Statute needs to be introduced that more clearly delineates when a Presidential Finding or Memorandum of Notification is needed. Real-world legal training needs to be incorporated, especially for case officers in the Clandestine Service. Their training should be similar to that of the military. The General Counsel's Office needs to be expanded in order for them to be able to meet the increased training requirements and to be able to have lawyers at each station out in the field.

Unfortunately, the controversy surrounding the Bush administration's torture program was not met with the same level of reforms to the national security apparatus as those that were enacted following the war crimes scandals of the Vietnam War. Congress wasted yet another opportunity to act, which will surely haunt future victims of America's national security policies.

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APPENDIX A

Interviews

Armitage, Richard L. Deputy Secretary of State; Assistant Secretary of Defense for International Security Affairs.

Bahar, Michael, Lieutenant Commander. U.S. Navy Judge Advocate; Deputy Legal Adviser, National Security Council;

Bellinger, John III. Legal Adviser, National Security Council Legal Adviser; Legal Adviser, State Department.

Bowker, David. Attorney-Adviser, State Department Office of the Legal Adviser.

Carter, Phillip. U.S. Army; Deputy Assistant Secretary of Defense for Detainee Policy.

Chipman, Dana K., Lieutenant General. Judge Advocate General of the United States Army.

Clarke, Richard A. National Security Council staff; State Department.

Cordero, Carrie F. Counsel to the Assistant Attorney General for National Security; Senior Associate General Counsel at the Office of the Director of National Intelligence.

Cunningham, Bryan. Deputy Legal Adviser, National Security Council; Central Intelligence Agency.

Damrosch, Lori Fisler. Special Assistant to the State Department Legal Adviser.

Dean, John W. III. Counsel to the President, Richard M. Nixon.

Deitz, Robert L. General Counsel, National Security Agency; Senior Councillor to the Director of the Central Intelligence Agency

DeRosa, Mary B. Deputy Assistant and Deputy Counsel to the President, Barak Obama; National Security Council Legal Adviser.

Devine, Jack. Acting Director of Operations, Central Intelligence Agency.

Di Rosa, Paolo. Attorney-Adviser, State Department Office of the Legal Adviser.

Flournoy, Michèle. Under Secretary of Defense for Policy.

Godinez, Maura. Central Intelligence Agency.

Grant, Matthew R., Colonel. U.S. Air Force Judge Advocate.

Gross, Richard C., Brigadier General. Legal Counsel Chairman of the Joint Chiefs of Staff; U.S. Army Judge Advocate.

Harper, Conrad K. State Department Legal Adviser.

Hayden, Michael V., General. Director, Central Intelligence Agency; Director, National Security Agency.

Highsmith, Newell. Deputy Legal Adviser, State Department Office of the Legal Adviser.

Hill, Steven. Attorney-Adviser, State Department Office of the Legal Adviser; Legal Adviser and Director of the Office of Legal Affairs at the North Atlantic Treaty Organization.

Jensen, Eric T. U.S. Army Judge Advocate.

Jones, James L., General. U.S. Marine Corps; Supreme Allied Commander, Europe; National Security Advisor.

Kahl, Colin H. Deputy Assistant Secretary of Defense for the Middle East.

Kassel, Whitney. Assistant for Counterterrorism Policy, Office of the Assistant Secretary of Defense for Special Operations.

Kaye, David. Attorney-Adviser, State Department Office of the Legal Adviser.

Koplow, David A. Special Counsel for Arms Control to the General Counsel of the Department of Defense.

Leary, Tom, Commander. U.S. Navy Judge Advocate; Deputy Legal Counsel at Office of the Chairman of the Joint Chiefs of Staff.

Levitz, Andrew D., Commander. U.S. Navy, Judge Advocate.

Lietzau, William K. U.S. Marine Corps Judge Advocate; Deputy Legal Adviser to the Chairman of the Joint Chiefs of Staff; Department of Defense Office of the General Counsel.

Litt, Robert S. General Counsel of the Office of the Director of National Intelligence.

Lynn, William J. III. Deputy Secretary of Defense.

Matheson, Michael J. Acting State Department Legal Adviser.

Miller, James N. Under Secretary of Defense for Policy.

Miller, Judith A. General Counsel, Department of Defense.

Mora, Alberto J. General Counsel of the Navy.

Mudd, Philip. Central Intelligence Agency.

O'Brien, James C. Attorney-Adviser, State Department Office of the Legal Adviser.

Olson, Peter. Deputy Legal Adviser, State Department Office of the Legal Adviser; Legal Adviser to the Secretary General and the international staff of the North Atlantic Treaty Organization.

Padmanabhan, Vijay. Attorney-Adviser, State Department Office of the Legal Adviser.

Pennington, Todd W., Lieutenant Colonel. U.S. Air Force, Judge Advocate; Deputy Legal Counsel. Office of the Chairman of the Joint Chiefs of Staff.

Piccone, Ted. Associate Director, Policy Planning, State Department; Director, Inter-American Affairs, National Security Council.

Powell, Benjamin A. Associate Counsel to the President, George W. Bush; General Counsel, Office of the Director of National Intelligence.

Pozen, Danid. Special Advisor to the State Department Legal Adviser.

Rashkow, Bruce. Attorney-Adviser, State Department Office of the Legal Adviser.

Rizzo, John. Acting General Counsel, Central Intelligence Agency.

Rostow, Nicholas, Dr. National Security Council Legal Adviser; Special Assistant to the Legal Adviser, State Department.

Safrin, Sabrina. Attorney-Adviser, State Department Office of the Legal Adviser.

Scharre, Paul. U.S. Army; Office of the Secretary of Defense.

Schmittel, William A., Lieutenant Colonel. U.S. Army Judge Advocate; Associate Deputy General Counsel, Intelligence, Office of General Counsel, Department of Defense.

Schwartz, Eric P. National Security Council staff; Assistant Secretary of State.

Sharpe, Jeremy K. Attorney-Adviser, State Department Office of the Legal Adviser.

Taft, William Howard IV. State Department Legal Adviser; General Counsel, Department of Defense; Acting Secretary of Defense; Deputy Secretary of Defense.

VanLandingham, Rachel. U.S. Air Force Judge Advocate.

Witten, Samuel M. Deputy Legal Adviser, State Department Office of the Legal Adviser; Principal Deputy Assistant Secretary of State.

Zarate, Juan C. Deputy National Security Adviser for Combating Terrorism, National Security Council; Assistant Secretary of the Treasury for Terrorist Financing and Financial Crimes.

Zelikow, Philip D. Counselor of the United States Department of State; National Security Council staff.