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NATIONAL SECURITY LAWYERING AND THE PERSISTENT NEGLECT OF INSTITUTIONAL CULTURE

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National security legal advice often ignores institutional culture. As both the Bush administration and its critics have discovered, institutional culture in courts or agencies can undermine the careful verbal formulations that lawyers fashion in memos or briefs. Moreover, the interaction of legal language and institutional culture engenders predictably adverse effects. Ignorance of those effects—which can be inadvertent or strategic—creates both ethical and policy perils. To address these dangers, national security advice and advocacy should expressly consider institutional culture's impact.

Government lawyers discounted institutional culture in one of the worst injustices in American history: the Japanese-American internment during World War II. In preparing the Government's brief defending the forced evacuation of Japanese-Americans in *Korematsu v. United States*, elite Justice Department lawyers faced a dilemma. A War Department report had falsely claimed that Japanese-Americans had sent radio transmissions to the forces of the Japanese Empire. The report also made other claims based on stereotypes and discredited sources, documented by Peter Irons in his superb study, *Justice at War*. Assistant Attorney General Herbert Wechsler, who as a professor at Columbia, drafted the Model Penal Code, co-wrote a pioneering casebook on federal courts, and authored a profoundly influential article on "neutral principles" in constitutional law, recognized that he could not cite the War Department report on the question of radio transmissions. However, Wechsler and senior War Department officials were also unwilling to straightforwardly repudiate the report. As a compromise, Wechsler drafted the following footnote for the Government's brief: "We have specifically recited in this brief facts relating to the justification for the [forced evacuation] of which we

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ask the Court to take judicial notice, and we rely upon the . . . Report only to the extent that it relates to such facts."

The interaction of Wechsler's opaque footnote and the Supreme Court's institutional culture created a troubling tension with Wechsler's ethical obligations.

Lawyers must be candid with the tribunal, and refrain from submitting false evidence. Had the Court known that the most explosive charge in the War Department report was false, it might have taken a different view of the entire dispute. However, the Court was unlikely to do so without a clear statement by the Government, since the Court had earlier relied on material from the report in deciding *Hirabayashi v. United States.* Wechsler discounted the Court's investment in the report, and convinced himself that the cryptic language of the footnote would put the Court on notice of the report's problems. Predictably, the Court in *Korematsu* relied on the report in upholding the forced evacuation of Japanese-Americans.

The Bush administration's lawyers revealed a comparable ignorance of institutional culture in government agencies dealing with national security interrogations. Lawyers like William "Jim" Haynes, Pentagon General Counsel under Donald Rumsfeld, often resorted to elaborate distinctions in their construction of legal rules. Take the matter of "enhanced interrogation techniques." One technique recommended by Haynes and authorized by Rumsfeld regarding Mohammed al-Qahtani (the alleged twentieth hijacker held at Guantanamo) was "removal of clothing." Al-Qahtani's interrogators, and government personnel elsewhere, interpreted this technique to mean forced nudity for detainees, who were sometimes simultaneously exposed to angry dogs. However, in testimony before Congress, Haynes insisted that interrogators had failed to follow his instructions. Douglas Feith, Undersecretary of Defense, put it best: "removal of clothing," he insisted, "is different than naked." "Really?" a skeptical Congressman Jerrold Nadler responded.

Institutional culture plays a role in this fine distinction. Of course, on a literal level, Haynes and Feith were correct. An interrogator could merely take off a subject's jacket or cuff-links. As a matter of institutional culture, however, the great soul-jazz singer Chaka Khan surely had it right: "Once you get started, it's hard to stop." Interrogators will seek to push the envelope. Settling for a jacket or cuff-links will seem half-baked, particularly

when the interrogation occurs against a backdrop of concern about a fresh attack.

This indifference to institutional culture is either genuine or strategic. A lawyer like Haynes could well be sincere in assuming that interrogators, who like others in the military are accustomed to obeying orders, would not go beyond the conduct expressly authorized. However, a lawyer could also be strategic, using a particular verbal formulation to signal that interrogators could let institutional culture run wild, while preserving deniability if interrogation practices eventually triggered outside scrutiny. Plausible deniability, as F.A.O. Schwarz and Aziz Huq said in their important study of the Bush administration, *Unchecked and Unbalanced*, is a kind of insurance policy for willfully errant decision makers, allowing them to engage with impunity in acts that cross a legal threshold.

The same failure to engage with institutional culture and other facts on the ground also mars the work of John Yoo, author of the infamous legal opinions from the elite Justice Department Office of Legal Counsel (OLC) now universally known as the "torture memos." Yoo's opinions brand him as a less ambiguous figure than Haynes; in his March 2003 memo, for example, Yoo gave categorical advice that interrogators receiving an express order from the President could use *any* technique, including methods such as biting and maiming that the Government apparently never employed. At first blush, this categorical approach might make institutional culture irrelevant: since Yoo was willing to authorize any method anyway, the exacerbating influence of institutional culture seems beside the point. However, Yoo did in fact make assumptions much like Haynes.

Yoo assumed, for example, that absent an express presidential order, interrogators would *not* resort to extreme methods. While this assumption appears to be correct for waterboarding—a technique used on three detainees with specific presidential approval—it may not hold true for other methods, such as forced nudity. Signaling from higher-ups, conveyed with statements that detainees are not protected persons under the Geneva Convention, can interact with institutional culture to prompt the use of techniques without presidential approval. However, Yoo and other administration lawyers, such as White House Counsel and later Attorney General Alberto Gonzales, naively assumed that the President could maintain discipline among interrogators in the

face of this signaling.

Yoo was more scrupulous in flagging the adverse consequences that can emerge from a clash of institutional cultures between government interrogators and the justice system. While Yoo advised that interrogators who lacked the specific intent to cause severe pain to their subjects would not be culpable, he invoked the institutional culture of the American justice system in warning officials about the limits of this advice. According to Yoo, "as a matter of practice" a jury would likely vote to convict if a reasonable person would have believed that a subject was suffering severe pain. In this passage, Yoo came close to appreciating the legal risks that an enhanced interrogation regime might engender when it encountered an institutional culture shaped by the rule of law. Yoo could profitably have extended this advice to the realms of global public opinion and international relations, where America's use of coercive interrogation has caused grave damage. Sadly, neither Yoo nor the senior officials he advised took this hint.

Jack Goldsmith, who as Assistant Attorney General heading OLC courageously withdrew several of Yoo's opinions, also failed to take institutional culture into account when he authorized temporarily removing undocumented aliens from Iraq for interrogation. While Goldsmith's draft opinion reflected a plausible view of international law and discussed opposing arguments, his advice failed to adequately consider that even temporary removal would allow the Government to conceal detainees from monitoring authorities like the International Committee of the Red Cross, thus augmenting the interrogation archipelago that the Bush administration created. To his credit, Goldsmith later worried publicly in his book *The Terror Presidency* that his advice, in combination with the aggressive institutional culture of the Bush administration, may have had this untoward effect.

Administration critics have also sometimes failed to take institutional culture into account. Consider, for example, criticism directed at Daniel Levin, who took over from Goldsmith at OLC and wrote a December 2004 memo stating that "torture is abhorrent." Levin's memo contained a problematic footnote that appeared to immunize prior administration decisions, asserting that conclusions reached in Yoo's opinions would remain unchanged under Levin's analysis. Administration critics like David Luban, in his fine study, *Legal Ethics and Human Dignity*, have

focused on the "get out of jail free card" provided by Levin's footnote. Levin did not help his cause with an arch explanation to a congressional committee last year, in which he claimed that he was merely offering a prediction based on Yoo's intellectual bent—i.e., that Yoo, with his boundless deference to presidential power, would have found *some way* to authorize enhanced techniques regardless of the analysis employed. However, focusing on Levin's footnote ignores a fact about the institutional culture of the Bush administration revealed in Jane Mayer's *The Dark Side*, which reports on interrogation policy after September 11.

According to Mayer, Levin's footnote was the price he paid to persuade senior officials like Alberto Gonzales to permit issuance of his anti-torture memo. Levin's strong denunciation of torture may well have countered the administration's signaling: confirmed reports of coercive interrogations at Guantanamo declined precipitously after 2004. Levin's opinion may have had a causal, correlational, or coincidental relationship with this decline. However, Levin's critics have failed to acknowledge that his footnote gave him traction with officials like Gonzales and David Addington, Vice President Cheney's legal counsel. They have also failed to weigh whether in a world of compromises it was worthwhile to include the footnote in exchange for issuance of an opinion that clearly condemned torture. While Levin also backslid on another important point, by announcing a durational test for torture that may have exempted the brief but extreme technique of waterboarding, critics concede that the Government did not resort to waterboarding after issuance of Levin's memo. In failing to temper criticism of Levin with acknowledgment of his memo's positive impact, critics failed to heed Voltaire's observation that "the perfect is the enemy of the good."

Based on this track record, government lawyers giving national security advice should be required to consider the institutional culture that their advice would affect. Kathleen Clark, in her pioneering article, *Ethical Issues Raised by the OLC Torture Memorandum*, in the *Journal of National Security Law and Policy*, notes the significance of Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct. Rule 2.1 suggests that the lawyer may give advice about "moral, economic, social and political factors, that may be relevant." In the government lawyer context, the interaction of a legal opinion with institutional culture may determine if the lawyer is reasonable in assuming that the limits of

the opinion will be observed, or whether the force of ingrained culture will overwhelm those limits. If the limits are vulnerable, the lawyer should reconsider the advice and either require more limits on the conduct authorized or forego authorization entirely. Failure to pursue this deliberation could result in adverse consequences of the kind that were endemic to the Bush administration: damage to the reputation and global standing of the United States.

Considering institutional culture helps an entity's lawyer avoid agency costs that arise because officials are short-term oriented while the Nation has abiding interests. Careful deliberation forces the lawyer to account for the long term, and flags instances where agency costs may proliferate. This long-term orientation also serves the constitutional scheme of separation of powers. Unduly precipitous action by the executive, implemented in ignorance or defiance of institutional culture, can create a backlash among the other branches that ultimately weakens the executive branch. This happened during the Bush administration, as the courts weighed in heavily against administration policies on detention and trial of suspected terrorists after unilateral executive action. Goldsmith recognized in *The Terror Presidency* that forging a partnership with Congress may have mitigated this backlash, and provided for more steady executive power and prestige in the long term.

However, considering institutional culture will not always result in telling the Government what *not* to do. Such a course would institutionalize risk aversion to the detriment of national security. Sometimes, in matters such as striking quickly across borders to kill or capture terrorists, risk-preference will be the appropriate course. Time may be fleeting, and risk-aversion may result in a missed opportunity. Similarly, policies implemented in the 1990s such as the "wall" between law enforcement and national security that insulated prosecutions from tainted evidence may have been inadvisable, not so much because by their terms they prevented the free flow of information, but because they interacted with the turf warfare that dominated the institutional culture between law enforcement and national security agencies. In this highly territorial environment, legal advice to create a "wall" compounded, although it did not create, problems with information sharing.

One also hopes that Bush administration critics will consider institutional culture as they shape their stance on the policies of the

Obama administration. While the Obama administration is still young, it has already displayed signs of an eagerness for dialog and transparency that contrast sharply with the predispositions of its predecessor. Some of the outcomes reached by the new administration will not be radically different from the results insisted upon by Bush officials. For example, the Obama administration will clearly seek a way to confine some of the detainees now at Guantanamo. To achieve this goal, the new administration may explore measures beyond trials in the civilian justice system. However, the temperament and institutional culture of the administration should make a difference in the reception such measures receive. The new administration has clearly signaled that it will adopt such measures, if at all, only after extensive consultation with stakeholders. A predisposition toward dialog should enhance the legitimacy of the administration's proposals, even when those proposals yield results that may overlap with outcomes that the former administration would have reached. Bush critics should recognize that in the long term, an institutional culture favoring dialog and transparency is more important than outcomes in particular cases.

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