

THE JAG DISMISSES THE UNITARY EXECUTIVE

Via POGO, the Pentagon has made two key documents relating to the military's use of torture available on its website: a March 2003 JAG Memo slamming a draft of the Working Group's Report on Detainee Interrogation, and the Working Group's Report which was published the following month. As POGO notes, these documents were declassified some time ago (Marty Lederman had posted the JAG one here and WaPo posted the report here), but they provide important context to the discussions surrounding John Yoo's March 2003 Torture Memo.

I'll come back to the Working Group Report (which lays out the potential risks for when the public discovers the US is using torture and has a nifty list of the ways our interrogation techniques would piss off our allies), but for now I just wanted to show how dubious the Judge Advocate general, General Thomas Romig, found John Yoo's (and the Administration's) Unitary Executive theories to be:

The Office of Legal Counsel (OLC), Department of Justice (DOJ), provided DOD with its analysis of international and domestic law as it relates to the interrogation of detainees held by the United States Government. This analysis was incorporated into the subject draft Report and forms, almost exclusively, the legal framework for the Report's Conclusions, Recommendations, and PowerPoint spreadsheet analysis of interrogation techniques in issue. I am concerned with several pivotal aspects of the OLC opinion.

While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the "bottom line" defense

proffered by OLC is an exceptionally broad concept of "necessity." **This defense is based on the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war.** I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.

The OLC opinion states further that customary international law cannot bind the U.S. Executive Branch as it is not part of the federal law. As such, any presidential decision made in the context of the ongoing war on terrorism constitutes a "controlling" Executive act; one that immediately and automatically displaces any contrary provision of customary international law. This view runs contrary to the historic position taken by the United States Government concerning such laws and, in our opinion, could adversely impact DOD interests worldwide. On the one hand, such a policy will open us to international criticism that the "U.S. is a law unto itself." On the other, implementation of questionable techniques will very likely establish a new baseline for acceptable practices in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past five decades. [bold my emphasis]

I guess this makes clear—as if we didn't already know—why Cheney wanted to control the promotions process for JAGs. As Romig himself said of Cheney's efforts,

Retired Major General Thomas Romig, the Army's top JAG from 2001 to 2005, called the proposal an attempt "to control the military JAGs" by sending a message that if they want to be promoted, they should be "team players" who "bow to their political masters on legal advice."

It "would certainly have a chilling effect on the JAGs' advice to commanders," Romig said. "The implication is clear: without [the administration's] approval the officer will not be promoted."

As Marty and Scott Horton and Jane Mayer have reported extensively, this JAG memo (and the others at Marty's link) show the degree to which DOD was warned against accepting John Yoo's advice. Curious that the DOD is making this all more accessible now, just as we're about to start the Gitmo Show Trials.

Update: opps, mistranscribed "broad."