A Tale of Two Judges:
A Judge Advocate's Reflections on
Judge Gonzales's Apologia

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I. INTRODUCTION

Government officials [in late 2001] clearly understood our moral and legal obligation not to kill these captives.

Judge Alberto Gonzales, 2010

Sometimes the pithiest of statements can reveal great insights. The fact that the former Attorney General of the United States felt the need, in 2010, to declare that U.S. officials knew that they could not summarily execute captives from the battlefields of Afghanistan is truly astonishing. Clearly, it says much about the mindsets of those responsible for creating the original legal architecture for what was designated, perhaps inaptly, as the War on Terrorism.2

Other than refraining from killing those rendered hors de combat, one might ask what legal and moral obligations did Judge Gonzales and his cohorts find they had towards what he terms as a “non-state enemy fighting an
unconventional war.”3 As subsequent events would show, protecting them from what responsible authorities found to be torture was not among the duties they believed they owed the detainees.4 That fact, along with other actions taken by Bush Administration lawyers of like mind, served to bedevil America’s efforts to defend herself against the terrorism threats of the twenty-first century.

Judge Gonzales’s Article, Waging War Within the Constitution, is in essence an “apologia.”5 He engages in an animated and unrepentant defense of what he and other government lawyers insist were well-founded legal positions that drove effective policy decisions. In doing so, Judge Gonzales illustrates an approach towards the practice of national security law that differed in fundamental ways from that evinced by another group of government attorneys he barely mentions. They are lawyers who, by the nature of their law practice, have great familiarity with national security issues: military attorneys called judge advocates—or “JAGs” in common parlance.6

The purpose of this short essay is not so much to parse Judge Gonzales’s analysis of particular cases (although there will be some of that), but rather to reflect upon the process he and other civilian government attorneys applied to resolving the legal issues of the post-9/11 world, especially with respect to collaboration with JAGs (or, more accurately, the lack of collaboration). While JAGs did not differ in every instance from the views expressed by Judge Gonzales and his colleagues, it is nevertheless true that JAGs had a very different perspective on several key issues, and this brought them in stark conflict with certain associates of Judge Gonzales, if not the Judge personally.

This Article argues that America’s war on terrorism unnecessarily suffered because of inadequate legal advice. It further contends that what we can learn from Judge Gonzales’s Apologia is that national security interests are best served when the supporting legal architecture is firmly based on American values, is fully cognizant of the strategic dimension, is designed to enhance the morale and discipline of the armed forces, and is the product of a process that

fully exploits the talent of the government’s entire legal community—civilian and military.

II. JUDGE GONZALES’S VIEW OF THE ROLE OF THE NATIONAL SECURITY LAW PRACTITIONER

It is obvious from his *Apologia* that the many allegations made not just against his legal reasoning but against his character sting Judge Gonzales. Yet his life story is a quintessentially American one. The son of a migrant worker, he represents the classic, up-from-the-bootstraps, Horatio Alger story of a dedicated public servant. Much of the harsh and over-the-top rhetoric used to describe him is, therefore, understandably hurtful to someone who, in this writer’s opinion, genuinely aspired to serve his fellow countrymen. Still, there is no question that controversy plagued him. When Judge Gonzales finally departed the Justice Department in 2007, it was a result of his altruistic conclusion that “as unfair as the attacks on him” were, he needed to “step aside for the good of the department.”

In short, the question is not whether Judge Gonzales loves America; rather, the real issue, and one central to his essay, is the degree to which he understands what America loves. In Judge Gonzales’s interpretation of Americans’ hierarchy of wants, for example, physical security seems to be at its pinnacle. Thus, an undisciplined preoccupation with the prospect of another attack, such as the one America suffered on 9/11, may have unproductively colored his thinking and that of many of the civilian “government lawyers” he references in his essay.

In truth, Americans do not obsess about their physical security. They have always embraced a powerful respect for their own rights, and the rights of others, even when doing so puts their own personal safety at risk. For example, in the eight years since 9/11, Americans have died in motor vehicle accidents at the rate of more the 40,000 a year, and 10,000 more were killed annually by firearms. These numbers reveal a frightful, and largely preventable, carnage. Yet, no one is suggesting putting in place a legal apparatus for “waging war” against motor vehicle deaths or even firearms that begins to parallel that which Judge Gonzales and others fashioned in response to 9/11.

Furthermore, if any war must be waged, Americans want it conducted in a manner that is not just technically legal but also consistent with their values.


In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.¹¹

The task then for national security law practitioners in a democracy like the United States is to ensure that war is conducted in a way that is as fair, humane, and noble as possible. This requires an attorney to bring to bear a sophisticated understanding of the law, as well as a multitude of non-legal considerations.

Judge Gonzales insists, however, that in providing his legal advice to the President, he “tried as best as [he] could not to allow [his] morals, religious beliefs, or personal views to influence [his] interpretation of the law.”¹² Does that mean a lawyer ought to exclude moral factors from legal advice? Consider that the American Bar Association’s Model Rules of Professional Conduct provide that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”¹³

This rule is especially important when one considers what has become the defining document of Judge Gonzales’s professional life: the now infamous January 25, 2002 memorandum for the President.¹⁴ The text of that document is often shorthanded to say that Judge Gonzales called the Geneva Conventions “quaint” and “obsolete.”¹⁵ He resists that characterization, saying that he “never described the Geneva Conventions as quaint,” but rather he said the following:

[T]his new paradigm[, a non-state enemy fighting an unconventional war,] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemies be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.¹⁶

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As will be discussed below, lawyers with extensive military experience disagree with that interpretation.\textsuperscript{17} Regardless, Judge Gonzaless’s conclusion that “Geneva’s strict limitations on questioning of enemy prisoners” were “obsolete” proved to be wildly inaccurate.\textsuperscript{18} Rather than obsolete, subsequent events have made few legal issues more current and high profile than the Geneva Convention’s prohibitions against harsh interrogation techniques.

Furthermore, what are not ever obsolete for any U.S. lawyer are American values. Yet, Judge Gonzalez apparently believes that references to them are somehow inappropriate. In an unusual interview for \textit{Esquire} magazine he said, “Putting my lawyer hat aside, the notion that we’d have to get legalistic about torture, yeah, can be offensive to me. It’s inconsistent with American values. But as a lawyer—as a lawyer—you have to try to put meaning to the words passed by Congress.”\textsuperscript{19}

For their part, JAGs do not take such a “legalistic” view of a practitioner’s responsibilities. They conceive themselves much as Harold Koh, Legal Adviser to the U.S. State Department, envisions the role of his lawyers—that is, as counselors for their government clients, who “also serve as a conscience for the U.S. Government with regard to international law.”\textsuperscript{20} A State Department lawyer, he says, “offers opinions on both the wisdom and morality of proposed international actions.”\textsuperscript{21} Similarly, experience demonstrates that both military and civilian leaders “expect judge advocates to discuss nonlegal factors along with technical legal advice” in their opinions.\textsuperscript{22} That, of course, presupposes JAGs have an opportunity to render legal advice.

III. Military Lawyers

As is now well-documented, senior military lawyers were not among the “government lawyers” of whom Judge Gonzaless speaks when he describes those who were involved with the initial development of the nation’s legal policies in the immediate aftermath of 9/11. That was done, author Jane Mayer relates, by Judge Gonzaless, along with David Addington, John Yoo, Timothy Flanigan, and William “Jim” Haynes, who formed an all-civilian team of government lawyers who called themselves “The War Council.”\textsuperscript{23}

\textsuperscript{17} \textit{See infra} text accompanying note 45.
\textsuperscript{18} Gonzalez, \textit{Waging War}, supra note 1, at 857.
\textsuperscript{21} \textit{Id}.
\textsuperscript{23} JANE MAYER, \textit{THE DARK SIDE} 66 (2008). David Addington was Vice President Cheney’s counsel, John Yoo was deputy chief of the Department of Justice’s Office of Legal Counsel, Timothy Flanigan was a
Despite the absence of significant military experience, the War Council drafted an executive order establishing a military commissions process soon after 9/11. In doing so, they largely excluded the armed forces’ senior military lawyers, the very government lawyers who might have something useful to add about military commissions. The JAGs were brought into the discussions only a few days before the order was issued, and even then they were marginalized. Because JAGs believed the commissions, as then conceived, were “fundamentally unfair,” they “threw up roadblock after roadblock” in the years before the commissions were “ultimately struck down by the Supreme Court in 2006.”

The exclusion of JAGs from the War Council deliberations was not a mere oversight. According to Mayer, Addington was overheard as saying “don’t bring the TJAGs into the process. They aren’t reliable.” Addington’s and Haynes’s antipathy towards JAGs was long-standing. In the early 1990s, when both were serving in the Pentagon, they unsuccessfully sought to eviscerate JAG independence by attempting to subordinate them to the political appointees who were the service general counsels.

For his part, John Yoo seems to have developed his antagonism towards JAGs at some point after the “bruising battle with military lawyers” Haynes and other War Council members underwent because of JAG opposition to their positions vis-à-vis military commissions, combatancy designations, and especially with respect to harsh interrogation techniques. In a vituperative 2007 law review article, Yoo and his co-author, Glenn Sulmasy, alleged that JAG opposition amounted to a “breakdown” in civil-military relations.

Yoo and Sulmasy came to their conclusion because they regard JAGs as simply agents of the executive branch. Thus, JAG testimony before Congress, criticism of interrogation techniques, and even recourse to the courts on behalf of assigned detainee-clients was, to Yoo and Sulmasy, inappropriately disruptive of proper civil-military relations. As they put it, “JAG attorneys representing enemy combatants . . . challenged the legality of their clients’ detention in federal court. Military officers with different policy preferences sought to introduce the judiciary as another actor to disrupt the unified decision making of the principal.”

24. Id. at 88-89.
29. See John Yoo & Glenn Sulmasy, Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror, 54 UCLA L. Rev. 1815, 1845 (2007).
30. Id. at 1833.
It might have profited Professor Yoo if he had been more considerate of the “policy preferences” of JAGs. The Supreme Court rejected many of his views in the cases Judge Gonzales’s *Apologia* examines, and the Office of Legal Counsel withdrew several of the opinions he authored or helped author.\(^{31}\) Moreover, while a lengthy Justice Department investigation did not conclude that his work product amounted to formal ethics violations, the reviewer was nevertheless highly critical of Yoo, finding that he (and former Office of Legal Counsel co-worker Jay Bybee) “exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments” in their legal opinions.\(^{32}\)

It is not evident that Judge Gonzales shared the aversion to JAGs that other War Council members demonstrated, but there is also no evidence that he sought them out in the early stages of the war on terrorism. Even though he defines his role as Counsel to the President as helping to ensure that the views of people with “relevant experience and understanding of the issues” were provided to the President, he did little in those critical early days to ensure the JAG voice was heard.\(^{33}\)

It is true that Judge Gonzales and several other civilian attorneys under his direction *eventually* engaged directly with JAGs.\(^{34}\) This happened, however, only at Congress’s insistence after the Abu Ghraib detainee abuses came to light, along with disclosures that JAGs had “vehemently resisted” bypassing the Geneva Conventions.\(^{35}\) Although Judge Gonzales claimed to have incorporated what he heard into revisions of the military commissions’ process, senior judge advocates still found it necessary to testify before Congress against key provisions of the legislation as proposed by the Administration.\(^{36}\)

IV. THE MERITS OF COLLABORATION

The resistance of the War Council and others to collaboration with JAGs represents one of the great missed opportunities of the war on terrorism. Collaboration with lawyers of varying backgrounds can stimulate

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31. See, e.g., Goldsmith, supra note 25, at 146-58 (discussing the withdrawal of the interrogation opinions).


35. SAVAGE, supra note 27, at 279.

"entrepreneurial thinking" that can produce original solutions to the emerging security challenges. A collaborative approach, obviously, was not the War Council's approach—to its great detriment.

Professor Jack Goldsmith argues that had the clique engaged in wider consultation, it might have avoided many of the legal errors "that became very costly to the administration down the road." Similarly, Washington Post reporter R. Jeffrey Smith listed one of the lessons of the Yoo ethics investigation as "don't restrict decision-making to a clique of like-minded individuals."

Actually, waging war within the Constitution is within a sphere of expertise that JAGs are particularly suited to address. As both legal professionals and professional military officers, JAGs have insight unlike those of the civilians who composed the War Council. Of course, they have an in-depth knowledge of the law of armed conflict—a discipline that is classically *lex specialis*. In addition, military lawyers, through professional military education and extended uniformed service, internalize a comprehensive understanding of military history, doctrine, strategy, and weaponry—as well as a thorough understanding of the distinct motivations and mores of their fellow members of the profession of arms.

This profession has no counterpart in civilian life. President Obama acknowledged this in his observation that the "extraordinary willingness [of military personnel] to risk their lives for people they never met" is what "separates them from those of us who have not served in uniform." Eminent military historian John Keegan concludes that wars "must be fought by men whose values and skills are not those of politicians and diplomats." The Supreme Court describes the military as a separate society with its own history and traditions. As members of this "separate society" themselves, JAGs can intuit matters related to the waging of war in ways few civilian attorneys can, however well-motivated.

One need not debate Judge Gonzales's self-description as an "accomplished lawyer" to appreciate that success in today's effort against

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37. *But see* CAREERS IN NATIONAL SECURITY LAW xii (Lauren Bean ed., 2008), available at http://www.abanet.org/abastore/products/books/abstracts/3550019intro_abs.pdf ("While the nature of [national security] may be ambiguous at times, it presents an opportunity for collaborative, entrepreneurial thinking regarding new advancements in the areas of law and national security.").

38. GOLDSMITH, supra note 25, at 206.


42. *See* Parker v. Levy, 417 U.S. 733, 743 (1974). The Supreme Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history." *Id.*
terrorism requires more than legal acumen. Indeed, Judge Gonzales’s *Apologia* is replete with instances in which authentic collaboration with JAGs versed in military arts and culture would have productively increased the amount of information available to decision-makers regarding these critical issues.

For example, even Judge Gonzales’s early conclusion that the war against terrorism was a “new paradigm” that rendered “quaint” Geneva Convention provisions requiring such things as athletic uniforms and scientific instruments is not really accurate. Former Marine JAG Gary Solis points out that “[t]errorism, a tactic of insurgents for hundreds of years, was hardly a ‘new paradigm,’” and the Geneva Conventions “permit[] but do[] not require” athletic uniforms and scientific instruments.

More importantly, JAGs, like all military officers, are trained to think strategically, and thinking strategically is essential to successfully waging war within the Constitution. Professor Philip Bobbitt argues exactly this point in his book about 21st century conflicts when he calls for inculcating legal analysis with “a much-needed attention to strategy.” Unfortunately, too little appreciation for what Bobbitt calls the “strategic context for law” plagues Judge Gonzales’s *Apologia*—not to mention the overall thinking of the War Council.

For example, Judge Gonzales talks about President Bush’s understanding that to “win[] the war on terrorism required the United States to win the war of information.” He discusses information, however, exclusively in a tactical context—that is, obtaining information from detainees. This overlooks the fact that winning the war on terrorism requires international cooperation; that cooperation depends upon the strategic impact of information. Thus, when Judge Gonzales argues, as he does in his *Apologia*, that the Geneva Conventions have limited or no application, and that places like Guantanamo should be beyond the reach of such U.S. domestic law as habeas corpus, he seems unaware of their destructive strategic impact on important allies when these positions become known.

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44. See id. at 857.
46. Strategy is a “prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.” DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, http://www.dtic.mil/doctrine/dod_dictionary/data/s/7303.html (last visited Apr. 5, 2010).
47. PHILIP BOBBITT, TERROR AND CONSENT 287 (Alfred A. Knopf, 2008).
48. Id.
50. Id.
51. Habeas corpus is defined as “writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999).
The evidence of the adverse impact is ample. Professor Bobbitt asserts that many of the Bush Administration legal positions that Judge Gonzales touts served to “deepen the impression of the U.S. government as one indifferent to the rule of law.”\textsuperscript{52} This, he says, is a “staggering tactic in a war that is, at bottom, about the preservation of the rule of law.”\textsuperscript{53} It is no surprise that the percentage of the publics in allied countries who favored the U.S. effort to combat terrorism “had steadily declined from 2002 to 2007” and only recovered when a new Administration assumed power.\textsuperscript{54}

Few of the Bush Administration legal opinions were more controversial than those that sanctioned harsh interrogation techniques. Resistance to them emerged “at every level [of] the military legal community.”\textsuperscript{55} Considerable evidence shows that the harsh interrogation techniques were either unnecessary or of limited tactical utility.\textsuperscript{56} Moreover, among military officers there was great concern about their potential for negative strategic effects.\textsuperscript{57} This concern became manifest when the harsh techniques the War Council approved for “limited application at Guantanamo [nevertheless] migrated to Afghanistan, and later to Iraq.”\textsuperscript{58} Tragically, the Abu Ghrabai detainee abuse scandal erupted in Iraq soon thereafter with devastating effects on America’s war effort.

Abu Ghrabai represents the single most debilitating setback of the entire war on terrorism after 9/11. The abuse handed the enemy a “tremendous propaganda [victory]” and failed to “lead to any useful intelligence

\textsuperscript{52} BOBBITT, supra note 47, at 286.

\textsuperscript{53} Id.


\textsuperscript{55} See DICK JACKSON, INTERROGATION AND TREATMENT OF DETAINEES IN THE GLOBAL WAR ON TERROR, IN THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 126 (Michael W. Lewis ed., 2009).

\textsuperscript{56} Senator John D. Rockefeller IV, Floor Statement Regarding FY 2008 Intelligence Authorization Conference Report and Army Field Manual Provision Section 327 (Feb. 13, 2008), available at http://rockefeller.senate.gov/press/record.cfm?id=292883 (“Although the CIA has described the information obtained from its program, I have heard nothing that leads me to believe that information obtained from interrogation using harsh interrogation tactics has prevented an imminent terrorist attack.”); see, e.g., Michael Isikoff, We Could Have Done This the Right Way, NEWSWEEK, May 4, 2009, available at http://www.newsweek.com/id/195089.

\textsuperscript{57} General David Petraeus recently expressed the classic military perspective when asked if he wished he had the harsh interrogation methods approved during the Bush Administration available to him:

I have always been on the record, in fact, since 2003, with the concept of living our values. And I think that whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside . . . . Because in the cases where that is not true, we end up paying a price for it ultimately. Abu Ghrabai and other situations like that are nonbiodegradable. They don’t go away. The enemy continues to beat you with them like a stick in the Central Command area of responsibility. Beyond that, frankly, we have found that the use of the interrogation methods in the Army Field Manual that was given the force of law by Congress, that that works.


\textsuperscript{58} JACKSON, supra note 55, at 148.
information.59 A former Army interrogator lamented that the abuses at Abu Ghraib were "unforgivable not just because they were cruel, but because they set us back."60 He explained that the "more a prisoner hates America, the harder he will be to break."61 Sadly, as one former JAG said, "[t]here is also no question that the fall-out from Abu Ghraib cost American lives and has prolonged the war in Iraq."62 Commanders, therefore, understandably use established military terminology to describe the scandal as "clearly a defeat" because its effect was wholly indistinguishable from a traditional battlefield loss.63

While the misconduct at Abu Ghraib "cannot be directly traced to the policy changes in Washington," analysts, nevertheless, believe that they played an important role in generating confusion and misinterpretation about the rules for the treatment of detainees.64 In wartime, even a wholly accurate legal opinion that carries complex caveats and other intricacies can be problematic in execution in the field. That is why getting the JAG perspective into the legal policymaking mix is so essential. In any case, as Rear Admiral John Hutson, the former Judge Advocate General of the Navy says, "[w]hen you say something down the chain of command, like 'the Geneva Conventions don't apply,' that sets the stage for the kind of chaos we have seen."65

JAGs are fully cognizant of the ever-present potential for a disciplinary breakdown under the stress of combat.66 Historian Stephen Ambrose observed that it is a "universal aspect of war" that when you put young soldiers "in a foreign country with weapons in their hands, sometimes terrible things happen that you wish had never happened."67 When troops come to believe that abuses that were previously prohibited by the law are now permitted, that abuse can

61. Id.
64. JACKSON, supra note 55, at 150.
66. This is not just a concern for the uniformed military. Author Christopher Dickey reports, "According to one senior CIA official I interviewed, part of the reason KSM [Khalid Sheikh Mohammed] was waterboarded was for revenge, pure and simple. 'People said, 'This guy killed three thousand Americans.' They said these people were just scum and they wanted to waterboard them every day forever.'" CHRISTOPHER DICKEY, SECURING THE CITY 94 (2009).
67. STEPHEN E. AMBROSE, AMERICANS AT WAR 191 (Univ. Press of Miss. 1997).
metastasize into an overall breakdown of morale and discipline.68 JAGs realized this reality and sought to resist diminishing the well-understood rules that the military had taught the troops. According to Rear Admiral Don Guter, a former Navy Judge Advocate General, "[i]f we—we being the uniformed lawyers—that is, the lawyers who are in the U.S. military—had been listened to and what we said put into practice, then these abuses [at Abu Ghraib] would not have occurred."69

Another benefit of a collaborative approach would be to take advantage of JAGs’ penchant for practicality.70 To JAGs, the hyper-technical analyses in which Judge Gonzales and his cohorts on the War Council engaged to justify the inapplicability of the Geneva Conventions are almost irrelevant. Too many sensible and concrete benefits to observing the Geneva Conventions exist even when they may not theoretically apply. It is a very different approach to the practice of national security law than that of the civilian War Council.

In an exceptionally insightful essay, Professor Richard Schragger explains the “difference between the [P]resident’s lawyers and the military’s.”71 He points out that military lawyers understand how reliance on established law of war standards protects the client-troop by providing explicit guidance. Schragger notes that “Geneva Conventions create clear, bright line rules” that help soldiers navigate legal and moral boundaries under the strain and chaos of combat.72

"[T]he Geneva Conventions are so honored by military lawyers,” Schragger says, “because they protect our own troops’ humanity.”73 While civilian lawyers see the laws of war as constraints on executive power, JAGs believe in what Schragger calls the “expressive power” of law. When troops have clarity of law, it creates “a well-defined legal space within which individual soldiers can act”—and do so without moral qualms.74 Schragger accurately concludes that military and civilian lawyers “have different conceptions of how the rule of law contributes to [the war on terrorism].”75

68. RICHARD OVERY, WHY THE ALLIES WON 302-04 (1995) (discussing how the freeing of the German Army from the constraints of the law of war during the campaigns in Russia led to a “criminal[iz]ation of warfare [that] produced a growing indiscipline and demoral[iz]ation among German forces themselves” that led, in turn, to the execution of 15,000 German soldiers by Nazi authorities to keep the Army fighting to the very end).

69. See Press Release, Senator Reid, supra note 65 (quoting Rear Admiral Don Guter).

70. See, e.g., WILLIAM THOMAS ALLISON, MILITARY JUSTICE IN VIETNAM: THE RULE OF LAW IN AN AMERICAN WAR 182 (2007) ("[F]lexibility and practicality are key characteristics that make judge advocates successful in their roles in combat and noncombat deployments.").


72. Id.

73. Id.

74. Id.

75. Id.
V. JUDGE GONZALES’S ASSESSMENT OF THE COURTS

In important respects, the Supreme Court also had a different conception of how the rule of law contributes to the war on terrorism. In his Apologia, Judge Gonzales finds the Court’s decision in Hamdan v. Rumsfeld perplexing. 76 Hamdan held, inter alia, that the humane treatment standards of Common Article 3 of the Geneva Conventions applied to war on terrorism detainees. 77

Judge Gonzales correctly points out that by its terms, Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” 78 Through some admittedly tortuous reasoning, the Court circumvented the “occurring in the territory” language to adopt a theory that “asserted that Common Article 3 should be interpreted to apply to any armed conflict that fell outside the scope of Common Article 2’s “purview.” 79

What might have been the rationale for the Court’s convoluted approach? Retired JAG-turned-law-professor Geoffrey Corn finds that the Court intended to rebuke the Bush Administration’s selective application of the law of war, and wanted to express an “appreciation that armed conflict must be regulated by more than just policy: it must be regulated by law.” 80 The implications of controversial selection of Guantanamo as a detention site is another factor that may have invited scrutiny from the Court.

In his Apologia, Judge Gonzales insists that Guantanamo “was not selected based on a belief that the United States could operate there beyond U.S. law or without limitations under international law” but rather because of “security concerns.” 81 This explanation does not mesh well with the view expressed by General Richard B. Myers, then the Chairman of the Joint Chiefs of Staff. According to General Meyers, “[t]he White House, OSD General Counsel, and the Justice Department recommended that the prisoners not be housed on sovereign American territory to prevent their possible habeas corpus petitions, and to prevent giving them the full range of options criminal defendants have in U.S. courts.” 82

Concern about the establishment of a prison site that authorities thought to be beyond virtually all domestic and international law may be one reason the

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78. See id.
80. Id. at 12.
81. Gonzales, Waging War, supra note 1, at 860.
82. GENERAL RICHARD B. MYERS, USAF (RET.), EYES ON THE HORIZON 199-200 (2009).
Court, in Judge Gonzales’s words, chose to “second guess the President and Congress” in an unprecedented way.\textsuperscript{83} According to Professor Goldsmith,

What the Court really did was send a signal to the President that [Guantanamo] could not be a law-free zone, that the President did not have a “blank check” (as the Court put it) to conduct the war on terrorism, and that the Court was willing to step in to do more if the executive did not get its legal house in order.\textsuperscript{84}

Part of Judge Gonzales’s logic in relying upon cases from other conflicts to critique the Court for “second guess[ing] the President and Congress,” is hard to follow.\textsuperscript{85} On one hand, he insists that war on terrorism was a non-traditional one that represents a new paradigm requiring a different legal framework; yet, on the other hand, he relies upon historical precedents mainly from traditional wars waged in set legal environments in expressing his frustration about judicial interference with what he perceives as executive prerogative.\textsuperscript{86}

In most instances this reliance is inapposite. For example, Judge Gonzales cites with approval President Lincoln’s exercise of executive power.\textsuperscript{87} However, recent scholarship is careful to limit endorsement of Lincoln’s actions to the standards of the time, not to those of today.\textsuperscript{88} While there are “experiences” from that era that remain relevant, today’s war on terrorism does not equate to the crisis of the 1860s when the very survival of the United States was at issue.\textsuperscript{89}

Whether or not the very survival of a nation is at stake does matter. Not all extreme emergencies or even permanent emergencies constitute what ethicist Michael Walzer calls the “supreme emergency” that sometimes can warrant variance from otherwise applicable norms.\textsuperscript{90} Had Judge Gonzales and the War Council been able to distinguish between the very serious challenges posed by terrorism in the post-9/11 era, and truly existential threats, they might have—perhaps—devised a better legal response.

True, following 9/11 there was understandable anxiety that absent strong action, another attack could occur at any moment.\textsuperscript{91} But as Walzer warns, “[f]ear and hysteria” are always latent in the midst of a crisis, and such


\textsuperscript{84} GOLDSMITH, supra note 25, at 135.

\textsuperscript{85} Gonzales, \textit{Waging War}, supra note 1, at 877.

\textsuperscript{86} \textit{Id.} at 857, 881-82.

\textsuperscript{87} \textit{Id.} at 881.


\textsuperscript{89} See, e.g., GOLDSMITH, supra note 25, at 82-85.

\textsuperscript{90} MICHAEL WALZER, \textit{JUST AND UNJUST WARS} 251 (1977).

\textsuperscript{91} See, e.g., GOLDSMITH, supra note 25, at 72.
emotions carry the dangerous potential to “press us toward fearful measures and criminal behavior.” 92 The law of war, he finds, is designed to keep in check such impulses. 93 The War Council, in effect, applied Walzer’s supreme emergency concept to exempt executive actions from normal legal restraints despite the absence of the necessary predicates. 94

The war on terrorism simply does not engage the same profound, in extremis, perils as were extant during the Civil War or World War II. Although terrorists might wreak terrible damage in an attack, from a purely military perspective, nothing they can do could cause the United States to cease to exist. That fact limits the utility of Civil War and World War II precedents, such as they are, because those struggles actually were existential ones, as the war on terrorism is not. If the legal policy development process had been more collaborative at an earlier stage, a JAG, conversant with the history of human conflict, might have helped to provide better context for the policymakers on this and related issues.

For example, although some scholars argue that coercive interrogation techniques had been used in the past, none assert that the much-derided waterboarding procedure had ever gained acceptance. 95 Among JAGs, opposition to the technique was long standing. It was the subject of a scathing review more than a century ago by the Army Judge Advocate General when the technique was used in the Philippine War of the early 20th century. Insisting that no state could tolerate its use, he keenly understood its “slippery slope” potential.

[W]here is the line to be drawn? If the [“]water cure[“] is ineffective, what shall be the next step? Shall the victim be suspended, head down, over the smoke of a smouldering [sic] fire; shall he be tightly bound and dropped from a distance of several feet; shall he be beaten with rods; shall his shins be rubbed with a broomstick until they bleed? 96

The early legal opinions of the War Council that permitted such things as waterboarding that were to engender so much opposition among JAGs, also proved unpopular with the public. This seems to frustrate Judge Gonzales who observes with disdain that the Court may have “less deference to the political branches today . . . because of negative public opinion over some aspects of the war on terror.” 97 Judge Gonzales is likely right. An Air Force JAG recently considered whether factors beyond mere precedent were at play in the Court’s

92. WALZER, supra note 90, at 251.
93. Id.
94. Id.
97. Gonzales, Waging War, supra note 1, at 887.
recent decisions. Noting that *Rasul v. Bush* was decided just months after the Abu Ghraib, he adds:

The horrific depictions of humiliated prisoners published by newspapers throughout the world sparked global outrage and caused a devastating effect to America’s image . . . . Justice O’Connor even acknowledged in *Hamdi* that the scenes shown around the world impacted the Court’s decision-making process in a “very real” manner. Many believe that America needed to respond quickly and decisively in order to restore the faith of the international community. Perhaps *Rasul v. Bush* and its successors provided the Court with that very opportunity.

Actually, the case can be made that the adverse public opinion that Judge Gonzales indicates is improperly influencing the Court is traceable, at least in part, to the fall-out from his own legal decisions, and those of the War Council, that were made with little or no JAG input. As a result, the tendency of the Court that Judge Gonzales derides might well have been one of the War Council’s own making.

VI. CONCLUSION

Judge Gonzales closes his *Apologia* with the declaration that he is “proud of [his] service” and the role he played in “helping secure our national security.” He may rightly take solace in the fact that the current Administration—to the surprise of some—is continuing many of the legal policies of the Bush Administration, and especially those of its second term. At the same time, it is disheartening that he takes no responsibility for what flowed from his own memorandums or from his support of legal opinions now officially found to have displayed “poor judgment” and insufficient exposure of “countervailing arguments.”

Judge Gonzales rebukes the allegation that the “lawyers were too involved” and “had too much influence on policy.” He, quite ironically, seems unaware of the adverse impact of the War Council’s exclusion of JAGs from involvement in the early, critical decision-making process that produced the opinions that most damaged America’s efforts in the war on terrorism. In

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102. See supra notes 32 & 64-65 and accompanying text.
fact, he apparently still believes military lawyers exist to "support the work and legal advice of their general counsels." 104

Current law expresses a different view. In the aftermath of Abu Ghraib and other war on terror activities that made it clear that the nation needed the independent advice of apolitical JAGs, Congress acted. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 contained legislation that designated the Judge Advocate Generals as the legal advisors of the service secretaries, as well as for all officers and agencies of their service. 105 Most importantly, it made it unlawful to interfere with the ability of JAGs to render "independent legal advice." 106 In an effort to increase the influence of the services' senior military lawyers further, later legislation elevated the Judge Advocate Generals to the grade of lieutenant general. 107

In his closing remarks, Judge Gonzales repeats the theme from earlier in his Apologia, that is, that he "diligently . . . put aside [his] policy preferences" in performing his legal work. 108 This is rather inexplicable in light of his endorsement of John Yoo's legal opinions and philosophy (and his frequent citation of Yoo in his Apologia). 109 These opinions are infested with ideology and idiosyncratic policy preferences. The Department of Justice reviewer of Yoo's work said, "I fear that John Yoo’s loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client." 110

In other words, Judge Gonzales either failed to recognize policy preferences in Yoo's work, or he put aside his own policy preferences to adopt Yoo's. The point is that policy preferences infused the legal positions the War Council took. What is disconcerting, however, is that Judge Gonzales nevertheless felt compelled to exclude his own moral beliefs, as well as American values, in formulating his own legal advice. 111

While national security law practitioners "must take care to distinguish between what is the law and what is legal policy," they are not required, as was explained above, to exclude morals or values from the advice they give their clients. 112 As Harold Koh, Legal Adviser to the Department of State says,

104. Id. at 846.
106. See, e.g., § 8037(f).
108. Gonzales, Waging War, supra note 1, at 888.
109. See generally id.
111. See supra note 12 and accompanying text.
112. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 316-17 (2007); see supra note 13 and accompanying text.
[O]ne of the most important roles of the Legal Adviser is to advise the [government client] when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." . . . [A]s my old professor, former legal adviser Abram Chayes, once put it: "There's nothing wrong with a lawyer holding the United States to its own best standards and principles." 113

In short, it is both ethical and eminently pragmatic for national security law practitioners to include non-legal considerations in their advice. Concerning the later, consider the strategy Professor William Eckhart, a retired JAG, contends we are facing from today's adversaries:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity." 114

Plainly, the nature of today's war on terrorism is such that the failure to include considerations of morals or values is not just unwise, it does affirmative damage to our security interests. Even so, there are times when asserting the military logic of righteousness is difficult to do, but JAG officers did so at a point in time when it was unpopular to do so.

JAGs were not, however, the only ones to demonstrate moral courage; many civilian lawyers did as well. Former Navy general counsel Alberto J. Mora is a classic example, and his principled opposition to coercive interrogations techniques is now the stuff of legend. 115 Likewise, it was Professor Jack Goldsmith, the civilian who formerly headed the Office of Legal Counsel who, according to Newsweek, "single-handedly rolled back the legal justifications for some of the Bush administration's most aggressive and controversial anti-terrorism policies." 116

Beyond moral courage, today's national security law practitioner must have an encyclopedic knowledge of all the instruments of national power, including a quite extensive knowledge of military means. To address particular situations, it may require the practitioner to familiarize him or herself with

113. See Koh, supra note 20.
114. William George Eckhardt, Lawyering for Uncle Sam When He Draws His Sword, 4 CHI. J. INT'L L. 431, 441 (2003).
everything from the capabilities and limitations of certain intelligence-gathering technologies, to the performance characteristics of specific weaponry, along with the methodologies for their employment. And, of course, the practitioner must have a keen appreciation of the psychology of both friend and foe.

Collaboration with JAGs can exploit not just their expertise in the areas of national security law as well as national security means; their presence in the process can itself help garner the trust of the American people.\footnote{117} Obtaining and retaining the trust of the American people is indispensable to winning the war on terrorism. While collaboration certainly does not necessarily require consensus, it is not helpful when JAGs are obliged to tell their masters in the other branches of government that they find certain legal opinions and policies not just militarily ineffective, but also contrary to American values.

The ability—and disposition—of national security practitioners to think strategically is critical. As Judge James Baker notes in his recent book on national security law, the “pressure of the moment may encourage short-term thinking.”\footnote{118} Under such circumstances it may be the “lawyer alone,” Baker posits, who can “identify enduring institutional consequences of a particular course of action.”\footnote{119} It is the inadequacy of just such analysis that doomed key parts of the War Council’s agenda.

Waging war within the Constitution makes great demands upon national security law practitioners, civilian and military alike. When the adversary is a “non-state enemy fighting an unconventional war” the complexities multiply.\footnote{120} Those wishing to practice this most demanding of legal disciplines must prepare themselves now. Once the crisis arises it is too late to sufficiently internalize the necessary depth of understanding required. What should complement that intellectual development is a determined effort to build relationships based on mutual respect with the many lawyers—to include JAGs—who populate the national security establishment. Even in the age of advanced technologies, the human dimension of the practice of law cannot be overestimated.

Judge Gonzales has done history a great service by sharing his thinking in his Apologia. There is much to learn from how he and the other members of the War Council approached their responsibilities. No doubt they are patriots who did their duty as they saw it. Nevertheless, we now know the adverse consequences of some of their decisions, and we must use that knowledge to root out any deficiencies, particularly in process, so that better judgments can

\footnote{117} Polls consistently show that the public has vastly more confidence in military leaders than in other institutions, including the executive, legislative, and judicial branches of government. See, e.g., Harris Poll, \textit{ Virtually No Change in Annual Harris Poll Confidence Index from Last Year, Mar. 9, 2010}, \texttt{http://news.harrisinteractive.com/profiles/investor/ResLibraryView.asp?ResLibraryID=36697&GoTopage=1&Category=1777&BzID=1963&amp;t=30}.

\footnote{118} \textsc{Baker, supra} note 112, at 324.

\footnote{119} \textit{Id.}

\footnote{120} Gonzales, \textit{Waging War, supra} note 1, at 843.
be made in the future. It is, tragically, a melancholy truth that new crises will certainly arise.

When they do, we ought to remember, as eminent military strategist Colonel Harry Summers observed more than twenty years ago, that “[e]thics may well be America’s secret weapon.”\textsuperscript{121} Our strength lies in our idealism. If we stick to our principles, we can unleash an extraordinarily energizing power that surely defeats our most heartless enemies. The law has an irreplaceable role to play, but that role “depends on the morality and courage of those who apply it.”\textsuperscript{122}


\textsuperscript{122} BAKER, supra note 112, at 325.