

**THE THIRTY-FIRST CHARLES L. DECKER LECTURE IN
ADMINISTRATIVE AND CIVIL LAW***

MAJOR GENERAL THOMAS J. ROMIG, USA RETIRED¹

* This is an edited transcript of a lecture delivered on May 8, 2013 by Major General (Retired) Thomas J. Romig to members of the staff and faculty, distinguished guests, and officers attending the 61st Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the 25th Judge Advocate General of the Army.

¹ Thomas J. Romig became the 21st Dean of Washburn University School of Law and Professor of Law in July 2007. A native of Manhattan, Kansas, Dean Romig most recently served as deputy chief counsel for operations and Acting Chief Counsel for the Federal Aviation Administration (FAA).

Before joining the FAA, Dean Romig served four years as the 36th Judge Advocate General of the United States Army with the rank of Major General. He led and supervised an organization of more than 9,000 personnel, which was comprised of 5,000 active and reserve military and civilian attorneys and more than 4,000 paralegal and support personnel spread throughout 328 separate offices in 22 countries. He oversaw a world-wide legal practice including civil and criminal litigation, international law, administrative law, labor and employment law, environmental law, claims, and ethics compliance.

During his career, Dean Romig was assigned to the 18th Airborne Corps and the 82d Airborne Division as a Military Intelligence Officer; the 2d Armored Division, where he prosecuted criminal cases and served as Chief of Criminal Law and Chief of Legal Assistance; and the Judge Advocate General's School, where he taught International Law. His significant military positions included: Chief of Army Civil Law and Litigation and Chief of Military Law and Operations, both in Washington, D.C. His other military legal assignments included Chief of Planning for the JAG Corps; Staff Judge Advocate for 32d Army Air Defense Command in Europe; and Staff Judge Advocate for U.S. Army V Corps and U.S. Army forces in the Balkans.

He earned a bachelor's degree in social sciences from Kansas State University and was commissioned through the Army ROTC program. After serving six years as a military intelligence officer, he was selected for the Army Funded Legal Education Program, and he graduated with honors from the Santa Clara University School of Law, where he served as an editor on the *Santa Clara Law Review* and as a member of the Honors Moot Court Board.

Throughout his career, Dean Romig has received numerous awards and recognition, including the following: United States Army Distinguished Service Medal; United States Army Legion of Merit; and United States Army Meritorious Service Medal (five awards); United States Senate Tribute for Military Service, Congressional Record June 14, 2005; Kansas Senate Resolution #1833, March 2006, for Distinguished Military Service; Kansas House Resolution #6021, March 2006, for Distinguished Military Service; Hungarian Ministry of Defense Distinguished Military Service Award; Santa Clara University School of Law Alumni Association Special Achievement Award; and Kansas State University ROTC Distinguished Alumni Award. He retired from the United States Army Judge Advocate General's Corps in October 2005 after thirty-four years of service.

Thank you everyone and thank you Luis [LTC Rodriguez, Chair, Administrative and Civil Law]. This has been a terrific opportunity for my wife, Pam, and me to come back to the regimental home of the Judge Advocate General's (JAG) Corps here in Charlottesville. This is truly a special place, and this is only the second time we've been back to Charlottesville and to the JAG School since I retired in 2005. So this is a very special time for us.

I want to publicly thank General Darpino and her staff for their outstanding efforts in arranging my coming here, and particularly their persistence in the shadow of the congressional sequester. I heard today how it was done, and I am in awe of their ability to work the system and get the right results—so that's great. I especially want to thank Lieutenant Colonel Rodriguez and Major Candace Besherse for their efforts in getting us here and for all of their work.

Luis and I go back a little ways. I remember a different time when we were flying in a small plane to a military base in rural Colombia to meet with members of the Colombian JAG Corps. As we began our approach, I noticed we started something that was akin to the death spiral of a plane that has been shot down. And, of course surprised, I turned and looked at Luis, and I said, "What the . . . ?" Luis says, "No problem, sir, we do this so the FARC can't shoot at us as much if we come in like this"—the FARC being the Colombian rebels.

There are amazing things that our great JAG Corps does, and our people do. The places you go, the things you do are amazing. Many people never hear about it, but you always make a difference for our country and for the world we live in. Our nation has asked so much of all of you over the last ten to eleven years, and you have never let our country down. So, as I said, I'm always amazed at what you do, and I want to thank you for your service to our country.

In June 2009, the Kansas Bar Association awarded Dean Romig its Courageous Attorney Award. The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. The Courageous Attorney Award was presented to Dean Romig for his time as the Judge Advocate General of the Army when he took the position that waterboarding and other extraordinary methods of interrogation were in violation of the Geneva Conventions and the Uniform Code of Military Justice. This award is only given in those years when it is determined that there is a worthy recipient.

Well, thanks for inviting us back and giving me this opportunity to speak to you. It's always dangerous to have a retiree back because they tend to tell war stories. I will not fail in that obligation. As you heard, I'm a dean of a law school. I've been dean for nearly six years. There's no surprise that my background is a little different than the average law dean in academia. When I arrived at the job in 2007, I started looking around, and I wanted to get some insight into the job.

So I picked up the phone, and I called a colleague who had been a dean a couple of times and asked what happened on the first day of his first time as dean. He told me that when he arrived, he started going through his desk. In the top drawer he found three envelopes. And they all were labeled for the new dean; each had a number on it, 1, 2, 3. Each of them said, "open only upon a certain event." The first one said "the first major crisis," the second one said "the second major crisis," and the third one said "the third major crisis."

Well, he went along for about six months to a year, and everything was going swimmingly. He was popular with everybody, but suddenly something happened and the honeymoon was over. So with trepidation he went to that drawer and opened the envelope. And sure enough, it gave him the answer to the problem, it said: "blame the last dean." He did it and it worked. And so things went along well for another six months to a year, and again another crisis. He went back to the desk, opened that second envelope; and sure enough there was a solution: "appoint a committee to study it." He did that. The committee is still studying the problem, and the issue went away in the minds of everybody complaining. He was doing well. He's now into his third or fourth year, and there have not been a lot of crises.

More time passed and as sure as death and taxes, the next major crisis occurred. He thought, this is great; I will get the third envelope and the problem will go away. He opened it and read: "prepare three envelopes."

Well, the life of a dean can be interesting, and you learn very quickly you have a multitude of constituencies. In the question-and-answer period of this lecture, I will be happy to answer any questions you might have about that because we have a number of retired or former Judge Advocates who are out teaching at law schools, and we have some who are deans. I would be happy to talk about that.

Well, I'm going to give you a little of my background, and then I will talk about the time period just after 9/11 when I became the Judge Advocate General (TJAG) of the Army. I will talk about some of the major challenges and issues that we dealt with during that time, starting with military commissions; then the creation of the Legal Center here at the school; followed by the interrogation policy working group and what all occurred in that effort; then concluding with several topics that are all related to the role and the independence of TJAG and the JAG Corps.

As I said, retirees—they come in and tell war stories. You're going to hear some war stories. There's an old Chinese saying—actually it's a Chinese curse—that translates to “May you live in interesting times.” Well, these were certainly interesting times that I'm going to talk to you about. After I am done discussing those, I will open it up for questions, and I trust the topics that I will have talked about will provide fertile ground for questions. I'll generally limit my mentioning of names of people to only those I consider the good guys and gals. As to the others, I will only mention them by their positions at the time.

Now, a little of my background relevant to the issues that I will discuss. Prior to becoming a JAG officer, I served almost six years as a military-intelligence officer. I had served in an airborne infantry battalion in an airborne brigade, in the 82d Airborne Division at Fort Bragg, North Carolina. One of the jobs I had before I went to the 82d, was at 18th Airborne Corps, where I supervised a small unit of interrogators. Now, these were people who had years, in some cases decades, of experience. They were senior non-commissioned officers (NCOs) and senior warrant officers. Almost all of them had experience in Vietnam and during the Cold War. Some of them even had experience in the Korean War. And they would get together and talk when they were not working. They would talk about ideas on interrogation and techniques they said worked and those they said did not work. They had pretty strong feelings about what worked and what did not work in interrogation. I remember them saying over and over again, torture will get any answer you want, but you'll never know what the truth is. That left an impression on me.

I had many great opportunities when I became a Judge Advocate, and one of those opportunities in my career was to teach for three years here at the JAG School in the International Law Department. I had the privilege of being here and helping in the development of the concept of Operational Law under the leadership of Colonel Dave Graham. Dave is

the same Dave Graham who is the civilian executive director here at the Legal Center and School. The areas of international law that I focused on and that I taught were Law of War and Operational Law. Among the subjects I taught in the Law of War were war crimes and military commissions. Little did I know how important that experience would become later in my career.

Well, moving to 2001, in the early summer of 2001, I learned that I had been selected to be the next TJAG. And I immediately reached out to a group of people who I called my brain trust to begin thinking about things we ought to do for the JAG Corps. What were the needs of the JAG Corps? What were the things that we would like to push forward and try to make happen? This was important because I'm very much aware that if you don't set a plan at the beginning, you will suddenly be in the middle of all the little details of life in your job, and you'll never get to accomplish very much other than keeping your head above water.

So we were starting to lay out a plan. And that group included Dave Graham; Cal Lederer, who's now the Assistant Judge Advocate General for the Coast Guard; Dan McCallum, who I selected to be my First Executive Officer; Chuck Pede; and a number of the division chiefs in the Office of the Judge Advocate General. We looked at developing a list of goals and objectives. Among the objectives we were hoping to accomplish in my four years was to create a legal center here at the JAG School—and I'll talk more about that. In conjunction with creating a legal center, we wanted to expand the physical layout of the JAG School. We didn't get that one accomplished, but it's still being worked, and that has been a desire of TJAGs and Commandants at the school for a number of years.

We also wanted to bring enlisted training into the JAG School, and I'll talk a little bit about that. We wanted to expand the operational-law positions or billets in our Army operational units at the brigade level. We wanted to expand the capabilities of CLAMO, the Center for Law and Military Operations. These were just some of the goals that we had before I was sworn in as TJAG.

This was a time when we also had a new administration in Washington, D.C. They were trying to get their feet on the ground; and many of us had very high hopes that this would be a good time for the military. We had a returning Secretary of Defense who had served as

Secretary of Defense in the 1970s. We had a Vice President who had been a Secretary of Defense during the Gulf War of 1990–91.

Now, there were two things—at least two things—that caused some concern for us. The first involved the new Secretary of Defense. He had announced before he really even come on board and saw what was happening that he was going to trim the fat from the military. He had released a multi-page document that he called his rules that he had developed over time in his career and that had guided him in his career. One of the things on that list of rules was the following: “Beware of lawyers, they’re like beavers, they dam up progress.” Well, we were wondering where that was going to go.

The second concern involved the Department of Defense (DoD) General Counsel. He had previously been the Army General Counsel from 1990 to ’93 and had been involved in a controversial attempt to subordinate TJAG and the JAG Corps to the General Counsel of the Army. We hoped that this individual would have learned from that experience and that we would have good relations with the service general counsels and the DoD General Counsel.

The Senate confirmation process can be very slow, as many of you know, so on September 11, 2001, I was still awaiting confirmation. After 9/11, everything sped up incredibly. They began confirming the backlog of nominations, and I was confirmed on the 28th of September, 2001.

Something that you all might not be aware of for the first time in the Corp’s history, at least as far as I am aware, we had two swearings in. We had the first, official swearing-in on the 1st of October and the second formal swearing-in on 11 October. The Chief of Staff of the Army is normally the person who swears in TJAG. He was very busy after 9/11. He could not do it until the 11th of October. So we scheduled the formal swearing in on the 11th of October, 2001. At the time, I was being told by Administrative Law and Criminal Law folks that there were certain statutory actions that could only be done by a congressionally confirmed TJAG. But because we were at war (although not a congressionally declared war, there was no doubt in Washington that after the attacks of 9/11, we were at war) and we had no idea what was going to happen next, we needed to have the official swearing in as early as possible.

So we decided that we were going to have a swearing-in ceremony on that Monday, the 1st of October. We brought in a group from the OTJAG front office as witnesses and Major General John Altenburg, the Acting Judge Advocate General, swore me in as the 36th Judge Advocate General of the Army on Monday, October 1, 2001. I continued to wear the rank of a brigadier general even though I was authorized by position and act of Congress to wear two stars. I did this because it might have been an embarrassment to the Chief of Staff if I had been walking around as a two-star when he was going to do a two-star ceremony for me. So at the official ceremony on the 11th of October, thirty days to the day after 9/11, the Chief of Staff swore me in officially. As I said, I'm not aware of two swearings-in being done in the past; but there was a very good reason for us doing it. We didn't know what was going to happen in the war on terror, so we wanted to be prepared.

The next issue, the first really big issue was the military-commissions issue. This has been a hot topic lately. It's been a hot topic off and on for a number of years. It started for me on the 13th of October; two days after the Chief swore me in as TJAG. It was a Saturday—and I received a phone call at home from the Deputy General Counsel of the DoD. He said he had an extremely sensitive matter he had to discuss with me and could he come to our house and talk to me about it? We met in our kitchen. He explained that the DoD had been requested by the White House to explore options for prosecuting Al Qaeda personnel captured on the battlefield in Afghanistan. He said that they were leaning toward using military commissions, and if that happened, most likely, the Army would be given that mission. Many of you, I'm sure, know the Army has a history of trying military commissions in previous wars and conflicts. The first military commissions we used were in the Revolutionary War and the last time immediately after World War II.

He asked whether the Army had files and records on these military commission cases and could we begin a very quiet investigation/research project looking into past cases. They wanted historical precedents and were interested in how the cases were actually tried. What he did not tell me at the time was that the Justice Department and the State Department were also working on this same thing. He told me I could only tell one person about this. I looked at him and I said, "You expect me to go out and do all of this research when we were gearing up for war. I told him that wasn't going to work; I've got to have more people involved." He said, "Okay, you can tell a couple of people."

The first person I talked to was Dave Graham, who was our Chief of International Law. We decided that the right person to run this effort was Colonel Larry Morris, who was our Chief of Criminal Law and a great trial attorney. We thought we were going to have to try these cases, and we wanted our best lead trial person putting this together and probably being our Chief of Prosecution. So we started with a small group initially—we named it The Tiger Team. It quickly mushroomed into a much larger group of people. It included active-duty folks and reserve-component folks, and toward the end, we brought in members from the other services to be involved in this.

We discovered a huge number of records and documents in the Army's historical storage facility in Suitland, Maryland. We began sending reports to the DoD General Counsel and providing them information on specific cases. I never made it out to this place in Suitland, Maryland, but I did see *Raiders of the Lost Ark*. At the end of that movie, you have that scene where they're taking this thing in a box down this long hallway, and there are storage shelves on both sides, and it just goes on forever. That was my image of Suitland, Maryland. I don't know if that was what it was like or not. The DoD General Counsel was particularly interested in a file that we had on the Nazi Saboteurs cases, *United States v. Quirin*.² It was a WWII military commission case that went to the United States Supreme Court in 1942.

In the middle of November 2001, I received a call from the DoD General Counsel, who said, "We have a document that we're reviewing on the weekend." This was not unusual. After 9/11, we were working 24/7, we had people working all the time in the Army Operations Center, supporting the Army and JAG's working in support of the DoD General Counsel, so it wasn't unusual. But he said I could only have one person look at the document. Well, it was obvious I wanted our lead person who was working on the military commissions looking at the document, and that was Larry Morris.

So when Larry arrived, he was told that he could not take notes on it, that he couldn't have a copy of it; he had to review it, make comments, but he could come back if he wanted to. After reviewing it and making a few comments, he left the General Counsel's office and called me. We had prearranged that he was going to come to my house, and we were going to go over what it was and go from there. So Larry came over, and

² *Ex parte Quirin*, 317 U.S. 1 (1942).

since he wasn't allowed to take notes, he had to recite the document from memory. He said the draft appeared to be a document that was to be signed by the President of the United States at some future date and that among other things—and he said the document did a lot of things—but among other things, it established the military commissions.

What was alarming to us, alarming to Larry and to me, was that it appeared to adopt the military-commissions process from 1942, the *Quirin* case.³ It totally ignored the fact that the military-justice system had advanced tremendously in the sixty years since 1942. The current military-justice system has substantially more procedural and substantive due process rights than our system had at that time in World War II. The Uniform Code of Military Justice and the *Manual for Courts-Martial* had not even existed in World War II.

Larry went back and provided those comments to them. Monday was Veterans Day. Tuesday, to our surprise, the President signed and issued the military order that established the military commissions. They had ignored all of our comments, all of our advice; all they wanted, apparently, was a rubber stamp. The specific rules—one of the things that gave us hope—the specific rules for the military commissions were to be promulgated by the Secretary of Defense. So we held out hope. We thought we could get our comments heard and suggested changes implemented during the process of getting the rules approved by the Secretary of Defense. So we began a process of proposing rules and procedures with the other services and the DoD General Counsel. Attorneys from the Department of State came over to work with us. There was a group of attorneys from the Department of Justice; several of them from the Office of Legal Counsel, which is the policy wing of the Department of Justice. They set legal policy for the Department of Justice and the federal government. Also attending some of the meetings was either the Counsel to the President or the Counsel to the Vice President. I learned very quickly that the Counsel to the Vice President was an extremely powerful individual and that most of the legal justifications up to that point for the war on terrorism had either gone through him or had been crafted by him. I also learned he apparently had antipathy for uniformed lawyers—his aversion to uniformed lawyers dated back to when he was the DoD General Counsel in 1992.

³ *Id.*

There were some incredible proposals that were raised by the civilian counsel that we worked with, particularly from a guy from the Office of Legal Counsel, Department of Justice, who was on leave from a law school in California. He seemed to think that the military-justice system was a criminal system that had few protections and was geared toward having quick convictions. He seemed to think that we merely ran them in one side of the court house as the accused and out the other side as convicted.

What was weird about this was he didn't seem to know anything about our system of military justice, but he was the guy to whom the DoD was deferring. I'll never forget a conversation I had with him where he likened the enemy today—this was in 2001—the enemy today, Al Qaeda, to the Indians of the Old West. He said they were tried by military commissions in the 1870s; and they, too, were stateless people. I told him that was 140 years ago and that we had advanced a little bit since that time. But beyond that, we had treaties with the Native Americans, Indian nations, they were not stateless people. So even his facts weren't correct.

I argued that we needed to use a system that reflected the practice of military justice as it is today. Sure, there would have to be some changes, particularly on evidence, hearsay, and other things like that, because you're taking evidence on a battlefield. Having said that, there is no need to throw out the whole system. I told him that every military commission in history basically adopted the practice and procedures existing in military law at the time. Well, that was falling on deaf ears.

We worked on the process and procedures from the 13th of November until mid-March of 2002. Some of the early proposals—we had people in the international-law division who were working this at the lower working-group level, and they were coming back with things that were being proposed that would just turn your hair white; I think that's what happened to me. They were draconian, and they were shocking. It was suggested, for example, that shifting the presumption of innocence to a presumption of guilt with the accused having to prove that they were innocent would ensure convictions. I had no doubt of that, but that's not the way the system works. Fortunately, that one failed fairly quickly.

They also wanted to be able to convict with a standard of proof that was less than beyond a reasonable doubt. That's the standard, as you all know, we use in criminal cases across the United States. They wanted a

preponderance of evidence, or fifty-one percent, or something that guaranteed that even in the shaky cases, they would get convictions. They wanted to limit the accuseds' ability to see evidence against them. They did not want to allow civilian counsel at all in the military commissions. Even though, as I pointed out to them, in World War II, all of the people tried at military commissions had the option of having civilian counsel, and many of them did.

While we were able to get some due process back into the commissions, the process was still flawed. At this time, there was truly no independent military judge. That was probably one of the biggest, flaws—the lack of an independent military judge who ruled on all questions of law. Under the proposed procedures, the admissibility of the evidence could be ruled on by a majority vote of the commission if one member disagreed with the opinion of the Judge Advocate. Evidence could still be presented without the accused being present.

The appellate process—at first there wasn't going to be any appellate process; and when the appellate process was granted, it was going to be very limited. Initially, there was going to be a review panel. This was a group of four old friends and acquaintances of the Secretary of Defense, who appointed them. They had no knowledge of the military-justice system as it existed today, and most of them didn't have any military experience before that. I attended their swearing in. They ranged in age from sixty-three to eighty-five. Each of them was given a temporary rank of major general. This group was composed of a former attorney general, a former transportation secretary, a former congressman, and a former state chief justice of that state's Supreme Court. Fortunately, that review panel was never used.

The Army was still in the lead. We had a group of about thirty to forty, as I said, active-duty and reserve-component people on The Tiger Team working and working hard, and we were moving forward prepared to have trials. We were probably overly optimistic looking back on it, but we were moving very fast, and we were hoping to have something tried in 2002. This was very early in 2002, so we thought in six to nine months or more, we could get it done.

We were then told that we were moving too fast. The DoD wanted to use the detainees more for intelligence gathering and not for trials. It became obvious that we were not going to have any trials for several years because of that. We kept pushing for trials, though, because that

was our mission. We thought it would work. Because of that, and the focus on intelligence, the DoD General Counsel decided to transfer the running of the military-commissions effort from the Army to his office, the DoD General Counsel's Office.

Initially, the overall supervision was placed under a civilian who had never tried a criminal case, never tried a military case, never tried a civil case; he had never tried the case in his life. It was approximately five-and-a-half years later before the first case was tried. It involved David Hicks, an Australian. You may remember that there was a pretrial agreement in which he pled guilty. He was convicted pursuant to his pleas and returned to his home in Australia the next month.

Today we are looking at trials of some of the key figures in Al Qaeda. We have a great team working toward this end. We have always had good people working on the military commissions. We have a great prosecutorial team today led by Brigadier General Mark Martins. There have been a couple of Military Commissions Acts: in 2006 and 2009; and each act made improvements on the military-commission processes and procedures. It would have been amazing if we had in 2001 and 2002 what we have today. If we would have had all the changes in the first year, our military-commissions effort would have had much more credibility both internationally and domestically. I am convinced we would have gone forward with trials, and we would not have had the kind of outrage and outcry that we have seen in the civilian bar in the United States and the international bar about what we were doing. We missed an opportunity; it is unfortunate.

I'm not sure that they will work today—and this is just my humble opinion—I'm not sure the military commissions are the right forum given their recent history and all the criticism of military commissions. Federal courts have shown that they can try these kinds of cases without much controversy, without the controversy we've seen around the military commissions. I am a believer in military commissions; I just wish and the changes we had pushed for had been adopted. If they had been adopted, we would all be proud of what we had created. Well, that is one of the topics.

Now let's move on to the creation of the Legal Center here at the JAG School. As I have mentioned, that was one of the goals that I was thinking about, what I was hoping to do as TJAG. That all seemed feasible before 9/11; after 9/11, it seemed much less feasible. After 9/11,

the total focus of the Department of Defense and the Army was on homeland defense against terrorism and preparation for the war against al-Qaida and the Taliban in Afghanistan. Resources were reaching their breaking point. Part of this was because of the operational tempo and the missions and part of it was because the Secretary of Defense would not let the Army expand to meet the challenges. I'll talk a little more about that in a minute.

I came to the conclusion that the normal process of staffing and manpower justifications would not work if we wanted to create a Legal Center at the JAG School. The normal approval process would guarantee we would never have a legal center; it was too slow and cumbersome for it to work for us after 9/11. So the question was: how do we get this accomplished?

In the beginning of 2002, I decided that if we wanted to get it done quickly, the answer was to go directly to the Chief of Staff of the Army. If the Chief bought into it, the Secretary of the Army would buy into it, and we could have a center up and running.

General Rick Shinseki was the Chief of Staff at the time. I knew him from Europe, and I knew that when he served as the U.S Army Europe Commander in Europe, he relied very heavily on an Army colonel who was his Executive Officer. That individual had retired and had become an SES, Senior Executive Service, serving as a special assistant to the Chief of Staff of the Army. His name was John Gingrich and the word on the staff was nothing significant went to the Chief without John approving it first. So in early 2002, I approached John. I explained what we wanted to do. His first question to me was: "How does this help the war fighter?" The second question was: "Does this provide a reach-back capability?"

Now, I need to give you a little background on what was going on. The Army leadership, as I told you, had been told by the Secretary of Defense that the Army was not going to grow despite an ever increasing, operational tempo. The active Army was about 480,000 at the time. So we had to figure out, the Army had to figure out, how do you leverage what we have to accomplish the mission? How do we leverage the non-deployable base, the institutional Army, to support the war fighters? That personnel cap would become a very significant issue once we went into Iraq, both in the invasion and the occupation. By the way, we were told for months, "Don't use the word occupation, it's not an occupation."

Well, by operation of law, it was an occupation. That was just kind of the tenor of the times.

Interesting side note: there were these caps, caps on the forces in theater, caps on the size of the Army and Army staff. As they always wanted to come up with some humorous explanation of what was going on, they called it the Secretary of Defense's Lab Experiment, and we were the mice.

As I stated, it led to a number of challenges; but one of these actually became an opportunity for us for the Legal Center, and that was the idea of "Reach Back." Reach Back had been a very hot topic among the Army leadership, and it was believed that it would be a force multiplier. It was believed you could deploy with fewer forces and with fewer support staff within the deployment, and you could get that staff support from stateside or from offices in other areas outside of the theater of operation. Well, that was a theory. I will tell you, I did not buy into the idea that we could deploy with fewer JAGs and paralegals, but I did buy into the idea that "Reach Back" could provide a significant assistance to those deployed.

As I said, reach back was a hot topic. The interesting thing was it was one of those, "I'll know it when I see it ideas." Everybody talked about it, but very few people seemed to know very much about it. We did; we had already talked about it. We had the capability, at least a growing capability, in CLAMO; we had our lessons-learned capability, which fed into the support for reach back. So we just needed more resources so we could do it in near real-time for our forward-deployed JAGs. I told John, "Yes, we have a reach-back capability." We are going to expand that capability with the Legal Center; it's going to be one of the lynchpins of the Legal Center. And all of that was true. So John said to move forward, he would get it to the Chief and we will get this done.

Certainly CLAMO and its reach-back capability—was a key part of the Legal Center, but it was not the only part. We had a number of things going on that we needed help with. The Army was making rumblings about reorganizing again. In the past, the JAG Corps had often played catch-up on reorganizations. We traditionally had one or two people here at the JAG School who did force structure and doctrine; usually it was only one individual. Sometimes if they were lucky, we had one person for the active side and one person the reserve-component

side. The section was called Doctrine, Developments, and Literature. It had the unfortunate acronym of DDL or “Diddle.” I knew about this unheralded group from my time at the JAG School and then my time as a plans officer at Personal, Plans, and Training Office. Our JAG effort in working force structure and doctrine was grossly understaffed. There were stories from the past—it’s kind of incredible—about times when we didn’t adequately cover a force structure meeting and a year or two later the new force structure document would come out, and the JAG Corps was cut several dozen positions.

We were usually lucky to be able to get them put back in to the structure, but we’d sometimes have to engage one of the general officers to go and work the issue. As I said, we’d get it back into the document, but this was not a model of force-structure planning you would want to rely on. We knew the Army was in a time of high operational tempo. We knew the Army was reorganizing. We had to have a robust capability here at the Legal Center to work force structure and doctrine, or we were going to get our clock cleaned, so to speak, in the reorganization of the Army. Given the imperative to reorganize and the high operational temp, we knew that we would not have the luxury of playing catch up later. We did not get the Legal Center up and running a moment too soon because within a little over a year of 9/11, the redesign of the modular force, the brigade combat teams, was being done and in the final stages. We started filling key positions at the Legal Center in the Summer of 2002.

In the past, the way we provided legal support in a division was we consolidated all JAG assets at the division headquarters; we would detail trial counsel down to the brigades. The problem was that the Army was going to cut the division headquarters, and we wouldn’t have that capability to detail JAG’s down to the Brigades. So with our robust team in doctrine and combat developments we had here at the Legal Center, we provided the Army a plan for putting two JAG spaces in each of these combat brigades. And we ended up growing the JAG Corps in this process. So it was a big success.

I also wanted to include our enlisted training here at the JAG School, and the Legal Center and School would do that. Our enlisted training, Advanced Noncommissioned Officer Course and Basic Noncommissioned Officer Course, had always been at the Adjutant’s General School, Fort Jackson, South Carolina, and before that, at Fort

Benjamin Harrison, Indiana. We were considered part of the Adjutant General's school, and I always bristled at that when I heard that.

I remember one of our Corps' Sergeants Major, Howard Metcalf, used to say the JAG Corps was a family, but it was a dysfunctional family. I never knew what Howard meant by that until we finally incorporated enlisted training into the Legal Center and School with the establishment of an NCO Academy. Howard came to me with a big smile, gave me a hug, and told me that the JAG family is no longer dysfunctional. So it was important, and it was something that we needed to do.

In addition to bringing enlisted training into the LCS, I also wanted to create some civilian positions. We needed the civilian positions for continuity. This would help us build upon existing relationships with the University of Virginia. When we changed the school leadership every two to four years, that didn't allow for the establishment of long-term relationships like we would like to have had. So those civilian positions were a very important thing here at the Legal Center and School, something that we needed to get documented. Virtually every branch school had civilian positions at their schools. The other branch schools also had a historian; we didn't have a historian. We needed a historian to be able to document the successes of the JAG Corps; that was one of the positions I felt very strongly about. Thankfully, we do have a historian now, Mr. Fred Borch.

Probably one of the most controversial decisions I made in regard to the Legal Center was the decision to move a brigadier-general slot from Washington, D.C., down here to Charlottesville. In hindsight it seems like a no-brainer, but at the time, it was a scary proposition for a number of people. We had three brigadier generals in Washington, D.C. One was in the Pentagon as the Assistant JAG for Military Law and Operations, and we had two at the U.S. Army Legal Services Agency. One was the Assistant JAG for Civil Law and Litigation, and the other was the Commander of the Legal Services Agency. I was convinced that having two brigadier generals at the U.S. Army Legal Services Agency made us a prime target for losing a brigadier general. We knew that DoD was looking for brigadier-general positions that they could move into deployable units. We were a sitting duck. Therefore, part of the package I submitted to the Chief of Staff included moving a brigadier general from Civil Law Litigation, closing that position out, and moving it down here to the JAG School. By the way, all the other branch service

schools had general officers—virtually all of them had general officers as commandants of their schools. As such, the Army leadership was already very familiar with having brigadier generals in charge of branch schools.

When the JAG retired community learned of this proposed move, several of the more senior ones contacted me with comments like, “What the heck are you doing, have you lost your senses?” They were convinced that any movement of a brigadier general would result in the loss of that position. There was also a little angst among the brigadier generals. They wondered whether being assigned outside the Washington, D.C., area would be perceived as the JAG Corps equivalent to the old Soviet treatment of exiling dissidents to Gorky. They didn’t want to go to Gorky, so I had to convince them that this truly was very important for the JAG Corps and the Army.

I remember briefing General Jack Keane, the Vice Chief of Staff of the Army at the time, about the Legal Center. When I mentioned moving one of our brigadier generals, he turned and commented, “What took you guys so long?” To him, it was obvious.

So we sold the Legal Center on how it was going to enhance legal support to the war fighter, and we were going to do it without growing the JAG Corps and without generating any cost. That was going to be a bit of a challenge.

We secured the Secretary of the Army’s approval in the summer of 2002 and began moving resources, where we could, from other JAG accounts to get us started. We needed something on the ground right away. We couldn’t wait until the permanent positions showed up; we couldn’t wait until the brigadier general moved down here; we needed to get some of this going. So we reached out to the best people we could find who were available and moved them to the Legal Center. These were people who could grow and expand the concept of the Legal Center; people who could leverage the breadth of possibilities for the JAG Corps, turning this institution into the center for strategic thinking, strategic legal thinking, and legal learning for the Army.

The brigadier general new commandant of the Legal Center and School was assigned in the summer of 2003. That’s when we had the official stand-up of the Legal Center and School, but we had the Legal Center going before that official stand-up. More than a year later, the

Department of the Army issued new orders formally recognizing what had already been in existence and had been serving the JAG Corps and the Army.

Looking back on my time as TJAG, I believe this may have been the most important decision and action, in a long-term sense that I made. I believed at that time there was potential for this to be a very significant game changer for the JAG Corps. Today I'm convinced of that.

Turning to the Pentagon's Interrogation Policy and Working Group. In the early days of dealing with detainees—I'm talking about 2001 and early 2002—there was a bifurcated effort to interrogate detainees. On the one side, you had the criminal investigative task force that was charged with gathering evidence for the military commissions. And then you had, on the other side, the interrogation effort with the goal of gaining intelligence, run by the intelligence community, overseen directly by the DoD.

The investigative task force for military commissions was overseen by the Army CID; and we had a much closer tie to what was going on with that group. The intelligence interrogation group reported directly up to the DoD General Counsel's office, and we didn't have close ties with them at all. As I stated, it became clear that trials were not going to happen any time soon. Because of this, the criminal investigative task force took a second seat to anything that was happening. Intelligence was what everybody wanted, and they wanted to squeeze that out of the detainees at Guantánamo.

In late October, early November in 2002, there were some inquiries from Guantánamo about authorizing new techniques of interrogation. This request went from Guantánamo to the Southern Command to the Joint Chiefs of Staff Legal Office. The Joint Chiefs of Staff Legal Adviser staffed the request with service TJAGs.

The tasking from the Joint Chiefs of Staff was very short-fused, and it went to our International Law Division. Our Chief of International Law, Colonel John Ley, and his Deputy, Lieutenant Colonel Greg Baldwin, were the ones who worked this. They worked these issues just about the whole time I was TJAG, and they took a very hard line on interrogation processes and procedure. We should all be thankful that they did. In my opinion, John Ley and Greg Baldwin are unsung heroes. Colonel Ley sent a very strong response back, saying the proposed

techniques were not legal under the Law (neither the UCMJ nor international law). Well, that was the last we heard about it until early December when the Navy General Counsel raised the issue with the DoD General Counsel at a joint meeting of TJAGs and General Counsel.

The Navy General Counsel, Alberto Mora, indicated that his Chief of NCIS, like the TV show, said that the Secretary of Defense had authorized some very disturbing interrogation techniques that clearly crossed the line of legality—waterboarding being one of them on the list. He indicated that waterboarding was being held in abeyance—the accompanying legal opinion said it was legal but was being held in abeyance. We learned that, as I said, there had been an opinion, an initial legal opinion from the DoD General Counsel, that all of the techniques were legal. The Navy GC sent a written request to the DoD General Counsel to withdraw the legal opinion and to have the Secretary of Defense withdraw the authorization of the new interrogation techniques. Alberto Mora was the only political appointee who I knew who stood up for the rule of law and did not seek to appease the politicians above him.

In early January of 2003, the DoD General Counsel acquiesced, after talking to the Secretary of Defense, and established a DoD working group to look at interrogation techniques and procedures. DoD had a whole spectrum of techniques running from the normal interrogation procedures in the field manual all the way to the most extreme. Each service had a team of JAGs working on the issues to analyze the proposals from the standpoint of international law, domestic law, and military law.

The Air Force General Counsel was appointed head of this Interrogation Policy Working Group. She, incidentally, had never served in the military and had no background in military or international law but rather was a political appointee. As we reached the end of January and early February of 2003, it was clear that service JAGs were going to take a hard line on this. The enhanced techniques, as they were called, were not legal.

Two other interesting things happened then after we voiced our opinions about this but hadn't put them in writing yet. First, the DoD General Counsel invited the Secretary of Defense to come to speak to the TJAGs and the General Counsel. In that meeting, he told us how important what we were doing was and that it was going to set the standard for interrogation techniques for decades to come as we fought

international terrorism—this new kind of enemy we were fighting. Well, we thought this was a little strange because it assumed we were going to approve some of the proposed enhanced interrogation techniques.

The next thing that happened—and it was within a week of this meeting—we were asked to meet with the Deputy for the Under Secretary of Defense for Policy. The Undersecretary of Defense for Policy had been put in charge of all detainee operations. I can say this because it's been said publicly a number of times, this individual, the senior individual, was the guy who General Tommy Franks, who led the invasion into Iraq, called the dumbest, expletive deleted, guy on the face of the earth. I heard an interview with colonel retired Larry Wilkerson recently; he said the same thing. With this guy heading all detainee operations, it was no wonder we had problems.

His deputy appeared to be in his mid- to early-30s; and we were told he was a lawyer, so we're dealing with a lawyer. Folks, you have to picture this: you have all the service TJAGs and the Staff Judge Advocate to the Marine Corps Commandant in the room. All of us were in our mid-50s; all of us had twenty to thirty-plus years of military service, much of it operational. We were ushered into this room where this politically-appointed kid begins to lecture us about “needing to wake up and smell the coffee, it is time to take the gloves off.”

As I sat through that, I kept watching my Marine counterpart because I thought he was going to rip the guy's head off. We left that meeting with two observations: First, these guys were acting like cowboys. I trust you all know what I mean when I say that. And I hate to say that because I'm from a state, Kansas, that has lots of cowboys. It gives cowboys a bad name. And second, if this message of taking the gloves off was going out to the field, there might be real problems ahead.

The next thing that happened in early February was that the DoD General Counsel told us that there was a highly classified and extremely sensitive opinion from the Office of Legal Counsel, Department of Justice, that we needed to read. It was about the powers of the President in time of war. He reminded us that we couldn't copy it, we couldn't take notes on it, we could just read it, and he emphasized it was binding on us as legal precedent, binding on the federal government. It was written by that same guy I had talked to a year before about military commissions, the “Indian Wars” guy. It was amazing in the breadth and scope of powers it attributed to the President in time of war as the

Commander in Chief. It said the President, in time of war, cannot be constrained by international law or domestic law; in other words, the President in time of war was not bound by law. The actions that he deems necessary as the Commander in Chief were above the law.

Additionally, it said, anyone who acted in furtherance of the Commander in Chief's actions and decisions would be immune from prosecution. This is what really got us fired up. Soldiers who tortured or abused prisoners or detainees or used any of the enhanced interrogation technique under the authority of the President would be immune from prosecution. Two very big problems with this: First, it is questionable if there's any court in the United States or internationally or under military law that would buy that as a defense. I think the answer is absolutely no. We all knew from history that the defense of superior orders was not a defense if the individual otherwise knew the acts would be illegal. It's not a defense to illegal orders. The second problem is if we as a country allowed this to happen, we'd have just lowered the bar on the standard of treatment for our own Soldiers, sailors, airmen, and marines if captured in some other country in the future war.

Each TJAG submitted a very strong dissent to the opinion of the Office of Legal Counsel. Our opinions were classified Secret and were not declassified until late 2004 or early 2005 when a bipartisan group of senators, John Warner, John McCain, Lindsey Graham, and Carl Levin, demanded that they be declassified and released at the peril of not getting any more confirmations. After we submitted our written opinions, we were told by the DoD General Counsel that the Secretary of Defense had considered our opinions and decided to withdraw the working-group report. A year-and-a-half later, we learned the report had not been withdrawn and that our objections were nowhere to be seen on the report. Furthermore, we learned that the report had shown up at Guantánamo and other locations.

Turning to the role and independence of TJAG and the JAG Corps. There were several, really four, related issues. The first two happened in early 2003; and that was the attempt to change the selection process for TJAG and the assistant, now called the Deputy TJAG, and the subsequent attempt to civilianize the majority of the Army JAG Corps.

In January 2003, as we were beginning this process of the Interrogation Working Group, I received a strange phone call. It was from the Chief of GOMO. GOMO is the General Officer Management

Office. He said he had received a proposed legislative change for the Army statute governing the selection process for TJAG and The Assistant Judge Advocate General. He said the action did not appear to have been staffed through TJAG. He wanted to make sure we knew about it because he knew once it got to the Chief of Staff of the Army, I was going to be summoned and asked about it. I said, "I haven't seen it, send it to me." You can imagine how we felt.

We looked at this thing, and it was either a major oversight on somebody's part or an attempt to slip it by us. When we received the proposed action, it was clear the change would weaken the board-selection process, requiring the selection board to select at least three people for each position, not in priority order. Then the Secretary of the Army would select from that group, whomever he or she wanted. Now, that may sound innocuous, it may sound like no big deal, but in the tenor of the times there was a clear chance that the positions could be politicized. Looking at it from the most problematic standpoint, nothing would stop the general counsel or the Secretary of the Army from interviewing all three of these individuals, six for the two different positions, with a view to finding who's the most cooperative, who's the most pliant of the candidates.

This was already happening at the DoD level with the candidates for Lieutenant General. They were being interviewed by the Secretary of Defense. This had never been done before, at least according to wisdom of the time. The Secretary of Defense required the services to send multiple candidates to be interviewed for each position. The joke among those going up for these interviews was they had to do their orals with the Secretary of Defense—the equivalent of an academic defense of a dissertation. I heard that many of the interview questions involved their views and opinions on things that could be characterized as political.

Word about these interviews had gotten out as they had been reported in the newspapers. When I was visiting the United Kingdom, several senior British officers asked me what I thought about the Secretary of the Defense's attempt to politicize the Army's senior officer corps. Because of what was happening, I knew there was a risk, and a potential danger for the JAG Corps.

The first thing I did is have our Ad Law lay out the pros and cons of the current procedures and proposed change. I also sought the opinions of the brigadier generals. They all thought it was a bad idea, particularly

those who were in the working group and challenging positions proposed by the DoD.

At my next meeting with the General Counsel, he didn't raise anything about it, so I raised it with him. I told him I was surprised, especially since we had not been asked for our opinion or at least given a heads up about it. He acted surprised at my bringing it up, but he quickly got over it and said that was going to be the Army position and that was that. I told him I didn't agree with him and we'll see. The meeting ended.

At my meeting with the Chief of Staff, I gave him the history of the selection process. I gave him the pros and cons of both, and he asked me what I recommended. I recommend not changing the process. I started to tell him why. He stopped me and said, "because it could politicize the legal advice he relied upon." The Chief indicated that he was not inclined to support the change.

He told GOMO that he wasn't going to support the change. They then informed the General Counsel's Office that the Chief wasn't going to support it. This was the middle to the end of February. Not more than a handful of days later, I was summoned to the Army General Counsel's Office.

What I am about to describe could only be described as a surreal experience. Without going into the full details of the conversation, the General Counsel said I did not support him on the proposed change of the TJAG and TAJAG the selection process, so he was going to limit my authority. He stated that he was going to take down the uniformed JAG Corps by 1,000 spaces; we were at the time about 1,480. He was going to civilianize those positions and move those civilian attorney positions under him, directly under him. He said the JAG Corps would be limited to doing its statutory duty of military justice and maybe some operational law. He indicated that the Secretary of the Army currently had a special assistant who was charged with finding uniformed staff positions that could be civilianized so those positions could go to the war fighters; and he, the GC, was going to present a gift to this individual. Well, I tried to reason with him. I said TJAG had a statutory role to give independent legal advice to the Army leadership. I further argued that if Congress wanted to change it during the Goldwater-Nichols reorganization in 1986, they could have subordinated TJAG to the general counsel, but Congress did not. It fell on deaf ears. He went on to say that on any

legal matters in the Army, TJAG had to follow the General Counsel's lead, regardless of the issue. He said that the Army was going to become like the Navy where there were fewer uniformed lawyers and a large number of civilian lawyers who were under the GC.

He stated that his goal was to complete this conversion by the 1st of October; we were now at the end of February. I knew pretty well that wouldn't happen that quickly; but if the Secretary of the Army supported it, we were going to be in deep trouble. As I left the meeting, I had visions of the JAG Corps being decimated for what were really petty, silly, wrong-headed reasons.

After discussing it with the JAG Corps leadership, I sent an e-mail to the Chief, the Vice, and the Army G1 apprising them of this proposed action. This was the first of several e-mails back and forth with the Chief on this subject that occurred from February through June. The Chief and the Vice were immediately supportive of the JAG Corps. The Chief engaged the Secretary of the Army. And it appeared, because of where we were in preparing for the Iraq war, that this wasn't going to be on the fast track, that some of it might happen, but the Army was very busy, and it probably wasn't going to happen right away.

This meeting with the General Counsel occurred one week before I signed the memo challenging the interrogation working groups, specifically challenging and questioning the legal opinion that justified the proposed enhanced interrogation techniques. We'd been voicing our concerns since the beginning, in January. Both of these initiatives—changing the selection process and civilianizing the JAG Corps—were launched during a time when we were vigorously challenging what the DoD was trying to do in the way of changing the law. Was there a connection? I don't know. But it became even more curious at about the same time, the Air Force General Counsel convinced the Secretary of the Air Force to republish an Air Force order that she had drafted, that subordinated the Air Force TJAG to the Air Force General Counsel for all purposes except UCMJ. Sound a little familiar? And even in the area of the UCMJ, the Air Force General Counsel could become involved in, examine, or review any case that she wanted. You can imagine the Air Force wasn't very happy about this.

Back to the Army. Two things happened that brought this whole process to a screeching halt. First, it was when the war in Iraq kicked off. JAGs were suddenly deploying. In addition, at every field and

operational level, JAGs were in demand, and they were very busy helping soldiers to deploy. Because of all of this, nobody was thinking about cutting JAG positions at that time. The second thing that happened was in April, the end of April. The Secretary of the Army was fired by the Secretary of Defense. This caused the whole plan with the special assistant who was looking at civilianizing positions to be shelved until the new Secretary of the Army came on board.

You would have thought this would put a stop to all of this; but if you had thought that, you would have been wrong. The Army General Counsel decided to take his proposals on the road to tell Army JAGs and civilian attorneys what he was going to do. I learned about this because we started getting lots of e-mail; I still have some of these. One JAG colonel who e-mailed me said, after explaining what the General Counsel had said, if the JAG Corps doesn't take this seriously, we're going to get rolled.

The biggest venue for one of these talks was the Army Materiel Command Annual Conference. The Army General Counsel laid out his plan. He said the former Secretary of the Army had supported it, supported the concept and the execution, and that the person rumored to become the new Army Secretary was none other than the sitting Air Force Secretary. It seemed that the Secretary of Defense wanted somebody in the Army job who could reign in the Army leadership. It wasn't just the JAG Corps; it was the rest of the Army leadership too. This was the same Air Force Secretary who signed the order to subordinate the Air Force JAG Corps. The Army General Counsel was absolutely giddy about this; he couldn't wait.

Well, these chats that the Army General Counsel was having on visits to the field really started to take a strange turn. Again, I learned this from e-mails from the field. He would address the captains in the audience and tell them that if they wanted to stay on active duty and make it a career, they might make colonel; and if they were really, really lucky, they might make two stars; or they could be like him, spend five years in the Army JAG Corps, get out, go into business, make some money, and then come back as the Army General Counsel as a four-star lawyer; four stars always beat two stars he would say. This was a reference to a protocol equivalent that is afforded certain civilian positions. The GC often mentioned to me that he was a four-star.

I was concerned that this was going to have an effect on our retention of captains as this word spread that the Army was going to be downsized. The implication was that there was going to be no future in the Army JAG Corps for promotions, etc. So I raised this with the Chief of Staff of the Army, and he raised it with the Acting Secretary of the Army. I later learned that the Acting Secretary of the Army had told the Army General Counsel to knock it off, but he continued to do it for a couple more months, still thinking there was going to be a new Secretary of the Army to come in who would support what he wanted to do.

The *Army Times* published an article about the Army General Counsel's plan with supporting comments from an unnamed DoD official. The *Legal Times* published an article about both the Army and the Air Force General Counsel's attempts to subordinate and diminish the authority of TJAGs and the roles of the JAG Corps. The rumor of the Air Force Secretary coming to the Army never happened. So for eighteen months, we had a former infantry officer as the Acting Secretary of the Army. His name was Les Brownlee, and he was a straight shooter. And he really appreciated the Army JAG Corps for what it did for the Army. By September the plan to civilianize was dead.

A final note on this bizarre chapter occurred in November/December of 2007. The Bush Administration was winding down. The Obama Administration had been elected; they were putting together their team. I was settling into my deanship in Kansas when I received an e-mail from Charlie Savage, a Pulitzer prizing-winning reporter for the *Boston Globe* at the time, now with the *New York Times*. He wanted to get my opinion on a draft DoD instruction that the DoD General Counsel was trying to get approved. The new instruction would have required that—there are two elements of this—appointment or promotion for any judge advocate at O6 or below had to have coordination with the service General Counsel before it went forward. And for those promotions above O-6, flag or general officers, coordination had to be done with the DoD General Counsel before it could move forward.

Well, this was already being done for legal sufficiency of the promotion board process. It was being also done for any background checks that needed to be done for issues that would cause concern in the confirmation process. So since this was already being done, what was the intent of this language? Why would the JAGs be the only ones singled out, the only branch of the Army singled out for this? Given what we had been through, the answer was pretty clear. I told Charlie

what I thought of it, and I gave him the names of several other retirees he could get in touch with. I was also in touch with the Army leadership and told them what I was doing and learned what they were doing. Long and short of it is, because there was such an outcry both in the media and internally, the DoD General Counsel dropped the proposal and the General Counsel was gone in a month.

Related to these two were the issues of the independence of the JAG Corps and the TJAGs for legal advice and the issue of making the TJAG a three-star. All of these attempts to control the JAG Corps caused a lot of controversy in the media, caused letters and e-mails to Congress. We were unofficially contacted by staffers from the Senate Armed Services Committee who were concerned that the intent of the statute enabling our ability to give independent legal advice was being harmed; and they wanted our take on it. This was after all the intent of TJAG statute. The statute, 10 U.S.C. Section 3037, says that TJAG—this is the Army statute—serves as a legal advisor for the Secretary of the Army and all other officers and agencies of the Department of the Army. It goes on to say, TJAG shall direct the members of the JAG Corps in the performance of their duties. Those were two provisions that none of the other TJAGs had in their statute.

The Army general counsel's statute merely said that there will be a civilian general counsel appointed and the Army general counsel shall perform such functions as the Secretary of the Army may prescribe. There was nothing in the statute that subordinated TJAGs to the General Counsel; but Secretary Army Order No. 1, Section 10, establishes the General Counsel as the Chief Legal Officer of the Department of the Army.

This position of superiority in the Army was first established in a General Order in 1975. It lays out a number of responsibilities for the general counsel, some of which are clearly separate. Originally, the general counsel was going to run the business aspect of the Army, but this General Order moved it over into some of the operational side, a lot of the operational side. It said such things as the general counsel will provide technical supervision and technical guidance to all Department of the Army attorneys and legal officers, and it would supervise administering Department of the Army legal services. Sounds like there might be a conflict with the statute here.

It would not take a genius to figure out who wrote all of these provisions: someone in the General Counsel's office. It's a little self-serving if your boss has these powers, you've got them too. Each Secretary of the Army is given a slate of General Orders to be republished. That is often done without much change. The General Order, by the way, lists that the Army JAG Corps is in the same category as the legal offices of the Army Materiel Command and the Army Corps of Engineers, which are very small legal offices. This is just silly. They don't advise the Secretary of the Army or the Chief of Staff of the Army. They don't oversee legal advice and operations spread across the full scope and breadth of the Army. They are focused in their narrow functional areas.

They are both supervised by a two-star equivalent civilian attorneys. And you have a General Counsel Office with a four-star, a three-star, and a couple of two-star equivalents. Well, there's an inequity here that is obvious to a blind man. The Senate Armed Services Committee decided that TJAGs needed more statutory protection.

So in 2004 the Senate passed an Amendment to section 3037 making TJAG a three-star. In the Conference Committee, where differences are ironed out between the House and Senate, the provision elevating TJAG to three-star was removed, and the language changed from "TJAG will be appointed in the regular grade of major general" to: "shall not hold a grade lower than Major General," giving the Army the option; if they wanted to raise the rank of TJAG, they could.

It added, "no officer employee of the Department of Defense may interfere with the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army Chief or the Chief of Staff of the Army or members of the Army leadership and Judge Advocates assigned or attached in the field performing duty with military units; no one shall interfere with their ability to give independent legal advice to commanders." Everyone thought that this would be enough to satisfy those concerned without elevating TJAG. Well, they were wrong.

In 2005, the Senate again passed an amendment elevating TJAG to three-star. Again in Conference Committee, the language was removed. On both occasions, either the Secretary of Defense or his General Counsel went directly to the Chairman of the House Armed Services Committee and requested that the language be removed; changing the

rank was not going to happen. This continued as long as the House was controlled by that party.

Following the change in the control of the House in 2006, the 2007 National Defense Authorization Act changed the TJAG's grade to lieutenant general. It was passed and sent to the President. The President signed it in January 2008. And the Army's first Lieutenant General TJAG was confirmed in December 2008 and promoted that same month, Lieutenant General Scott Black.

Why was elevating TJAG to Lieutenant General so important? Well, there are a bevy of reasons. I had the opportunity to lay some of these out for a congressionally appointed review panel that was charged—this was in 2005—with studying the relationship between the military department GCs and TJAGs. This was known as the 574 Panel. I have no idea what the other 573 were.

So I gave them some background on this. The Judge Advocate General had been elevated from Brigadier to Major General in the early 20th Century. At that time the rest of the Army, the rest of the Army staff, were one-stars. Currently, virtually all of the primary and special staff are three-stars; their deputies are two-stars. In the four years I was TJAG, I witnessed four positions go from two-star to three-star because the Army was trying to upgrade them. They were the Chief of the Army Reserve, the Chief of the Army Guard, the Army Budget Officer, and the Assistant Chief of Staff for Installation Management—all elevated to three-star. The staff officer I worked most closely with in my four years was the Inspector General. He was a three-star, and his position had been that for several decades.

The military, as we know, is a rank-conscious organization. I saw after 9/11 that there would be three-star level meetings, and TJAG may or may not be invited and may or may not even know about them. That was the key, knowing about them. If we knew about them and thought it was something we needed to attend, we generally could force our way in, but why should we have to force our way in? So at times we didn't have a presence at the table. The higher one's rank is, the more difficult it becomes to ignore that person.

It even made a difference in some of the little things. If you wanted to get a helicopter out of the national Capitol region to go somewhere, if you were a three-star, you could just order it up, sign the justification; if

you were a two-star, you had to go to the Director of the Army Staff to get that. Not a big deal, but it is one indication. Another one, again not a big deal, but if we, the JAG Corps, wanted to reserve the Hall of Heroes for a ceremony, we had to have a three-star approve that because we couldn't do that on our own. So we'd go to the three-star equivalent in the Army General Counsel's Office, and he would authorize it. The bottom line, however, is if it is important to have independent non-political legal advice from uniformed lawyers, then making TJAGs three-stars was essential.

Now in a moment, I'm going to open it up for questions. Many of the issues I've mentioned today remain unresolved; that means they could occur again. The issue of the Army General Counsel possibly moving to control TJAG and the JAG Corps is still out there. That language in the General Order is still there. The interrogation policy on enhanced interrogation techniques has never been declared illegal; it should have been. There was an opportunity to address it when there was an internal Department of Justice Office of Professional Responsibility investigation of the authors of the "torture memos." The investigation report initially found that the authors had "committed intentional professional misconduct" and recommended referral of the report to their State Bar Associations for possible disbarment. In a final review of the report, a senior Department of Justice official changed "intentional professional misconduct" to "exercised poor judgment," thus avoiding referral to their State Bar Associations. The change, I believe was ill-advised and unfortunate.

So, paraphrasing the old saying, "The price for freedom or the price for independence," the ability to give independent legal advice, "is eternal vigilance." And it may fall on one of your shoulders someday that you will have to stand up and protect the JAG Corps and protect what is the statutory intent for the role of the JAG Corps.

I want you to know that you are members of two of the most distinguished and honorable professions in the world: the United States military and JAG Corps. Judge Advocates and our paralegals are known and respected across our country. I encounter this all the time in my travels. Even law professors recognize that JAG lawyers are the epitome of what good lawyers should be. That hasn't always been the case in the past.

Enjoy this time you are in uniform, as it will go by quickly. Once you are off active duty and out of the uniform, it will never be the same. You won't have the same sense of camaraderie and shared purpose—it will never be quite the same.

I will tell you that whenever you decide to leave the military service, your skills and experience will make you invaluable wherever you decide to go. I hope for both you and our great JAG Corps that departure is a long time from now. God bless you and thank you for your service, and God bless this great experiment that we call the United States of America.

Again, thank you for inviting us back. It's great to be back at the home of our great JAG Corps.