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EXECUTIVE POWER IN WARTIME

INTRODUCTORY REMARKS BY DAVID SLOSS

The topic for this panel is executive power in wartime. The central question the panelists will address is whether the President, as commander in chief, has the constitutional power to authorize violations of the international legal rules regulating the conduct of warfare (jus in bello). There is no need for me to remind this audience about the timeliness of this topic. In debating these issues, though, there is a risk that the discussion will become quite abstract. So, before turning this over to our distinguished panelists, I wanted to give the audience a concrete picture to ground the discussion.

On April 16, 2003, Secretary of Defense Rumsfeld approved a set of twenty-four “counter-resistance techniques” to be used for interrogations of detainees held at Guantanamo Bay, Cuba. To the best of this author’s knowledge, internal government documents regulating the interrogation of prisoners in Iraq have not been publicly released. For the purposes of the following hypothetical case, though, let us assume that the techniques approved for use in Guantanamo were also approved for use in Iraq. One of the approved techniques is called “fear up harsh.” This technique does not involve any physical contact, but it does entail the use of unspecified methods to “significantly increase[e] the fear level in a detainee.”

Imagine that you are a U.S. soldier. You have just received orders to deploy to Iraq as part of a military intelligence unit. Your unit has received explicit orders that authorize the use of the twenty-four techniques approved by Secretary Rumsfeld. The time is fall 2003—after the invasion of Iraq, but before the transfer of authority to the new Iraqi government. Accordingly, the United States is an occupying power under the terms of the Fourth Geneva Convention (the “Civilian Convention”). During your military training, you were taught that the Geneva Conventions are binding law, which you are required to obey. Based upon your study of the Geneva Conventions, you know two things. First, all Iraqi nationals who are detained by U.S. forces are protected under the Civilian Convention, unless they are covered by one of the other three Geneva Conventions. Second, Article 31 of the Civilian Convention states: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” Clearly, the use of “fear up harsh” goes well beyond what is permissible under Article 31.

For the U.S. soldier deployed in Iraq, I submit, the central question raised by this panel is not merely of academic interest. If the President has the constitutional power to authorize violations of the laws of war, then the soldier has a legal duty under domestic law to obey his orders, notwithstanding the Geneva Conventions. (In theory, the soldier might incur international criminal liability for following orders in these circumstances, but his actions...
would be lawful under domestic law). If the President lacks the power to authorize violations of the laws of war, then the soldier has a legal duty to comply with the Geneva Conventions, despite contrary orders from his superiors, because the Conventions are the "Law of the Land" under the Supremacy Clause. Thus, U.S. soldiers deployed in Iraq have a pressing need to know whether the President has the constitutional power to authorize violations of the laws of war.

THE CINC AUTHORITY AND THE LAWS OF WAR

by Robert J. Delahunty*

The question of the President's constitutional authority as commander in chief (CINC) to authorize violations of the rules of war came into sharp relief with the Justice Department's release of the Office of Legal Counsel (OLC)'s August 1, 2002 memorandum addressing the federal statutory prohibition against torture. Although neither the federal statutes nor the Convention Against Torture (CAT) can strictly be regarded as rules of war (they apply in peacetime as well), OLC staked out a position that bears directly on whether the President as CINC may authorize violations of international rules of jus in bello. OLC issued a second opinion on December 30, 2004, withdrawing its earlier memorandum and declining to opine about the scope of the CINC authority on the grounds that "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." OLC's silence may reflect either an appreciation of the difficulty of the issue or a merely prudential judgment about the current political scene. As a near fifteen-year veteran of OLC who served there during the last three administrations and who had no part in preparing either of the two memos in question, I offer the following views on the bounds of the President's authority.

The most obvious starting-place might seem to be Justice Robert Jackson's famous tripartite analysis in the Steel Seizure Case. If Jackson's analysis holds true, then it would seem that the CINC would not have the constitutional authority to order violations of the torture statutes (or, likely, of the CAT). For in ordering such actions, the President would be "tak[ing] measures incompatible with the expressed ... will of Congress," with the result that "his power [would be] at its lowest ebb." Is the answer that simple? No. Jackson starts us out on the wrong foot. A sounder framework is provided by the little-known opinion of an earlier and less eminent lawyer, Attorney General Wickersham: an opinion dealing, not with so dramatic an event as the seizure of the nation's steel industry, but with the mundane question of the location of a floating dry dock.

The question Wickersham considered was whether the Navy was legally required to locate the dock at Algiers, Louisiana, when a statutory provision dictated that it be stationed there. In Wickersham's view, the dock's location was subject to the concurrent jurisdiction of the

6 U.S. CONST. art. VI, cl. 2.
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3 Id. at 637 (Jackson, J., concurring).