NATIONAL DEFENSE UNIVERSITY

NATIONAL WAR COLLEGE

THE STRUGGLE FOR PRIMACY:

BUREAUCRATIC POLITICS, THE GENERAL COUNSELS,

AND THE JUDGE ADVOCATES GENERAL

CORE COURSE 3 RESEARCH PAPER

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INTRODUCTION

On March 3, 1992, then Deputy Secretary of Defense (DEPSECDEF) Donald J. Atwood signed a memorandum[1] (Atwood memorandum) submitted to him by the outgoing DoD General Counsel a few days before the Counsel's departure from the Department. The memorandum purported to clarify some murky aspects of the roles and responsibilities of the DoD General Counsel and the other civilian General Counsels of the Military Departments. In the context of fixing problems the DoD General Counsel had encountered during his tenure, the memorandum probably seemed appropriate to Mr. Atwood. He probably did not expect that the innocuous sounding memorandum would set off a bureaucratic struggle between the DoD uniformed and civilian legal community that would find its way into the arenas of the press and Congress. In the process, months of effort would be chewed-up in bureaucratic politics that would eventually result in a near stalemate, but which would leave a residuum of bruised egos, distrust, and an intensified polarity to an already uneasy working relationship between DoD civilian and military lawyers.

The background leading up to the signing of the Atwood memorandum and its aftermath are a fascinating example of bureaucratic politics and demonstrate how politics have the potential to negatively affect the accomplishment of the military mission at unit level. This paper will explore the environment that produced the memorandum and the actors and actions that eventually led to its rescission. Finally, it will set out some reasons why the kind of events here chronicled are likely to recur. An understanding of the bureaucratic political forces at work in the Atwood memorandum and its aftermath should start with a brief review of the players.[2]

BACKGROUND OF THE ATWOOD MEMORANDUM

A. Roles of the General Counsel and The Judge Advocate Generals

Uniformed lawyer/officers date their history from 1776, when the first Judge Advocate General (TJAG) of the Army was appointed.[3] Traditionally, and later by statutory enactment,

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[1] Deputy Secretary of Defense Donald J. Atwood, MEMORANDUM FOR: SECRETARIES OF THE MILITARY DEPARTMENTS, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services, March 3, 1992.

[2] I served as Executive to the Air Force Judge Advocate General from Jun 91- Aug 93. Any characterizations, opinions and conclusions set out in this paper are strictly my own and are not intended to convey the views of any other person involved with or affected by the events described.

[3] Kurt A. Johnson, "MILITARY DEPARTMENT GENERAL COUNSEL AS "CHIEF LEGAL OFFICERS": Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field," A Thesis Presented to Professor John Norton Moore, University of Virginia, December 1992, 21. The first TJAG of the Navy was appointed in 1855 and of the Air Force in 1948.

the TJAGs focused their attentions on the military criminal justice system.[4] Today, uniformed lawyers serve as judges, prosecutors and defense counsel and as advisors to commanders charged with the responsibility to maintain good order and discipline within their commands. The legal structure to accomplish this mission flows from the President, as Commander-in-Chief, to the Service Secretaries, to the TJAGs. Beginning with criminal courts convened at unit level, a system of review flows up through the command chain to the service TJAG and, depending upon the severity of the sentence or substantive issues of law, through the TJAG to the service appellate courts of military review to the all civilian Court of Military Appeals. A recent law authorizes appeal to the U.S. Supreme Court.

These disciplinary activities have meant the development of a cadre of military lawyers assigned to commanders' staffs at every unit of significant size.[5] The professional relationship between the commander and the unit level judge advocate is crucial to the integrity of the military justice system, as both the judge advocate and commander are required to manage this system without partiality or favoritism.

As the demands and pressures on commanders have multiplied (e.g., labor unions, environmental laws, land use planning, ethical requirements and standards, racial and gender discrimination issues, etc.) the role of the uniformed lawyers has also expanded. Uniformed legal staffs are needed to assist commanders in managing this panoply of concerns that take time away from the basic military mission.[6]

As opposed to their uniformed service counterparts, ". . . the civilian General Counsels are of relatively recent origin -- primarily a phenomenon of post-World War II DoD reorganization."[7] Over the years, a rough parity of responsibilities evolved between the respective legal staffs. While the specifics varied among the services, the TJAGs maintained responsibility for military justice, personal legal assistance for service members, operational law, military administrative law, and claims matters. The General Counsels operations usually retained primacy in legal policy, procurement, real property and international law. Litigation functions varied considerably, with the TJAG handling nearly all civil litigation in the Air Force and that responsibility devolving onto the General Counsel in the Navy. Where there were areas

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[4] The military criminal justice system was, until 1950, unique in its particulars to each service. As the result of concerns arising out of World War II that the existing systems permitted too much command control, and hence disparate results, particularly in sentencing, a Uniform Code of Military Justice, applicable to all services was enacted in that year. Act of May 8, 1950, Pub. L. 506, 81st Cong., 64 Stat. 107.

[5] For example, in the Air Force, every Wing level command will have a least one judge advocate assigned.

[6] The separate issue of who is the military lawyer's client is beyond the scope of this paper, but for the purpose of this discussion, the judge advocate acts as legal counsel to the commander.

[7] Johnson, 1.

of overlap, occasional friction periodically triggered discussions to iron out "who does what" in specific instances. These discussions led to the periodic issuance of Department Secretarial Orders setting out the duties and responsibilities of the General Counsel and the TJAGs.[8] This natural tension between the two entities intensified over the years as the General Counsels increasingly sought to dominate non-military justice areas of the legal practice. These bureaucratic skirmishes were confined to Department Headquarters level, due mainly to the small size of the General Counsel's offices in relation to the numbers of uniformed lawyers providing legal advice to commanders in the field and to the military staffs in Washington.[9] Over time however, these skirmishes intensified as the General Counsel's, drawn as they are primarily from private practice, cast a covetous eye on the vast legal resource represented by the uniformed lawyers. That the TJAGs retained great autonomy in recruiting, training, managing and functionally supervising this great reservoir of lawyers rankled the General Counsels, who saw the opportunity for tremendous prestige in operating the world's largest "law firm." What could not be overcome, however determined the General Counsels might be to do so administratively, was the TJAGs' statutory role in the military justice arena. In 1991, this determination took on greater force as the DoD General Counsel sought to reshape the DoD legal landscape through legislation.

B. Legislative Effort to Revise the Relationship Between the Players.

In 1988, at the urging of the DoD General Counsel, and over the opposition of the service TJAGs, Congress designated the DoD General Counsel as the "chief legal officer" of the DoD.[10] Similar statutory designation was not given to the service General Counsels, although service regulations issued by the respective Secretaries attempted to convey that status.[11] None of these regulatory efforts met the DoD General Counsel's desires however, because none could convey the ultimate prize, executive authority over all legal resources. A head-on effort would be required.

In its proposed draft Defense Authorization Act for fiscal 1992 and 1993, DoD included

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[8] See e.g., Department of the Air Force, Secretary of the Air Force Order 111.1, Functions and Duties of the General Counsel (7 Aug 1985) and Headquarters DA, Gen. Orders No. 17, Assignment of Functions, Responsibilities, and Duties Within the Office, Secretary of the Army, para. 9, (28 May 1991).

[9] Whereas the assorted General Counsel's offices total perhaps 150 lawyers, the combined services number of uniformed and civilian attorneys is near 4500.

[10] 10 U.S.C. 139(b) (1988): "The General Counsel is the chief legal officer of the Department of Defense. He shall perform such functions as the Secretary of Defense may prescribe." Interestingly, no statute defines "chief legal officer" and its obligations, authorities or responsibilities.

[11] E.g., the Army administratively designated the General Counsel the Department's "chief legal officer" by an Army General Order in 1975.

language that would have increased the powers of the General Counsels. Most important among them was the statutory designation of the service General Counsels as the "chief legal officers" of their military departments. The rationale offered by DoD was that the changes would ". . . enhance consistency, efficiency and accountability in the provision of legal services . . . ," provide ". . . a single attorney who is the arbiter of a legal issue . . ." and establish ". . . sound organizational alignment and accountability."[12] More importantly, the changes were said to ". . . advance . . . the constitutional balance of civilian authority within the Department of Defense. . ." and ". . . enhance the quality of legal services provided within the military departments." However, no explanation was offered as to how the designation "chief legal officer" would accomplish these ends or why it was needed.

Congress adopted only one of the several proposals submitted: that relating to the pay of the General Counsels. It is not clear from the record available that Congress expressly rejected the DoD General Counsel's proposal to make the General Counsels "chief legal officers," eligible for delegation of executive authority from the Secretaries. It is clear however, that the TJAGs opposed the proposed language because they believed the functions of legal counsel, including the General Counsels were advisory, not executive. Furthermore, each was concerned that such a move was designed to integrate the offices of the General Counsels and the TJAGs, thus interjecting the General Counsels into the military justice process and attenuating the crucial commander/counsel relationship.[13] Rebuffed by Congress and embarrassed by the TJAGs' opposition to his legislation, the DoD General Counsel sought to leave his legacy by making one last move.

THE ATWOOD MEMORANDUM

On March 3, 1992, then DEPSECDEF Atwood, responding to the urgings of the outgoing DoD General Counsel, signed what became known as the Atwood memorandum. The preamble of the document asserted:

> "Among the chief duties of the secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer . . . The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments . . ."

[12] Memorandum from DoD General Counsel to Chairman, Senate Comm.on Armed Services, 3 Jul 91.
[13] Army Judge Advocate General Memorandum for General Counsel, Department of Defense, 13 Jun 91.

The memorandum then set out six directives, stating in part:[14]

> "(1) The General Counsels . . . shall be the chief legal officers of their respective departments, responsible to the authorities of the Secretaries . . . *and the General Counsel of the Department of Defense.*
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> . . .
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> (3) Civilian *and military* personnel performing legal duties shall be subject to the authority of the General Counsel of that Military Department, with respect to the performance of those duties. . .
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> (4) The General Counsels . . . shall assure that civilian *and military* personnel performing legal duties . . . comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.
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> (5) The legal opinions of the General Counsels . . . shall be the controlling legal opinions of their respective Departments . . ."

The memorandum was accompanied by a separate explanatory writing from the DoD General Counsel Terrence O'Donnell[15] noting that though his position was statutorily designated as a chief legal officer, those of the service General Counsels were not. The writing asserted that DEPSECDEF had the authority to ". . . provide for the General Counsels . . . to serve as the chief legal officers of their respective Military Departments."[16] The O'Donnell memorandum claimed the action proposed would

> ". . . strengthen the ability of the DoD overall and especially the Military Departments to execute the laws faithfully and effectively. In particular, *the memorandum will provide the Military Department General Counsels authority over Judge Advocate Generals within their respective departments*, while preserving the statutory roles of the Judge Advocates General."

The O'Donnell memorandum went on to state that the action proposed was consistent with Administration policy, citing the Office of Management and Budget's clearance of the failed legislative proposal above described. The memorandum neglected to mention Congress' failure to enact the "chief legal officer" provisions and instead cited Congress' positive action on the General Counsel pay provisions as evidence of the importance of the roles of the Military Department General Counsels.

Mr. Atwood signed the memorandum the same day and the TJAGs were informed of the action in a meeting with the General Counsels on March 4, 1992. A few days later, the DoD

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[14] *Italicized* language reflects this writer's emphasis and is not contained in the original documents.

[15] memorandum For the Deputy Secretary of Defense From the General Counsel of the Department of Defense, Subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services, March 3, 1992. (Hereinafter O'Donnell memorandum).

[16] To construe the statutory provisions cited as authority for this proposition requires a strained interpretation of the cited laws. See 10 U.S.C. 113, 3011, 5011, 8011 and DOD Directive 5105.2 Tab 3.

General Counsel left office. It seems clear now that neither the DoD General Counsel or the DoD General Counsel designate, Mr. David S. Addington[17] realized that various forces, acting for different reasons, might combine to thwart the Atwood memorandum's aims.

THE ATWOOD MEMORANDUM AFTERMATH

A. Reaction of The Judge Advocate Generals.

Almost immediately, the service TJAGs, joined by their Chief's of Staff, registered protests directly with their Service Secretaries.[18] A brief review of the TJAGs' key points in their protests to the Atwood Memorandum illustrates the serious miscalculations made by the DoD General Counsel in having it promulgated.

(a) Creation of a stovepiped legal organization. In passing the National Security Act of 1947,[19] Congress recognized that ensuring the independence of judge advocates was essential to remedying the perception that military justice was far too subject to command control (or command influence).[20] For this reason, Congress directed that the JAGs' be appointed by the President and confirmed by the Senate, to a four year term in the statutory grade of permanent major general.[21] Were the JAGs to be the subordinates of the General Counsel, this independent role set by Congress could be thwarted to the political will of the DoD General Counsel.

(b) Diminution of Secretarial Authority. Since the Atwood memorandum was prepared and signed without coordination of the Service Secretaries, Chiefs of Staff or the TJAGs, there was no opportunity for a formal process to explore the rationale for making the changes and to determine whether the changes would in fact result in the stated end.[22] The Service Secretaries found themselves in the anomalous position of being obliged to support the DEPSECDEF while finding their own authority over legal resources within their Departments diminished, at least to

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[17] Mr. Addison, who had been serving as Deputy General Counsel of the Department of Defense, had concurred on the O'Donnell memorandum.

[18] See e.g., Air Force Deputy Judge Advocate General's memorandum for Secretary of the Air Force, dated 10 March 1992; Navy Judge Advocate General memorandum for the Secretary of the Navy, 10 March 1992 and Army Judge Advocate General memorandum Thru the Chief of Staff, Army For the Secretary of the Army, 12 March 1992.

[19] Act of July 26, 1947, 61 Stat. 495.

[20] Colonel Cecil W. Williams, "The Judge Advocate General and the Department: Duties and Responsibilities," The JAG Reporter, Vol 39, 1977, p 75.

[21] Williams, 76. See e.g., 10 U.S.C. 8072(a).

[22] It was this "in the dead of night" quality that aroused immediate suspicion both in the Pentagon and in Congress, particularly in view of Congressional inaction on the prior legislative proposal. Abrogation of the staff process virtually assured there would be no supporters among those excluded from crafting the action. Surely if, as the O'Donnell memorandum claimed, it was within the Secretary's statutory authority to make the changes by directive, there would have been no purpose behind seeking legislative amendment of the Appropriations Act.

the extent that the use of those resources would conflict with the will of the DoD General Counsel.[23]

(c) Interference With Commander/Counsel Relationships. From the judge advocate perspective, the most immediate and serious concern was the potential for General Counsel interference with the close working relationships forged between commanders and the judge advocates who serve them. Operational commanders must be able to trust and actively seek the advice of their staff judge advocates, even though the judge advocates are frequently required to advise against a commander's proposed course of action. Clearly, it would be difficult enough for a commander to accept a negative answer from a member of his own "team," let alone from an outsider not in his chain of command who might well be viewed as politicized.[24]

(d) Ignoring the Organizational Framework Established by Congress. In passing the Goldwater-Nichols Act,[25] Congress sought consolidation of functions and streamlining wherever possible. On the issue of integration of legal staffs, Congress expressly rejected full integration of the military and civilian legal staffs. Congress' conclusion was that the ". . . continued existence of separate military headquarters staffs ensure that defense decision making is assisted by independent and well-developed military perspectives."[26] The Army JAG, commenting on the earlier legislative proposal reported that:

> ". . . On the issue of separate military and civilian legal staffs within the Military Departments, all the Defense officials who testified on the point, including all the Military Department Secretaries, supported the creation of a statutory position of General Counsel . . . but, at the same time, were emphatic about the need for a separate military legal advisor with direct access to the Secretary."[27]

Then Secretary of the Army, J.O. Marsh, testifying on the Goldwater-Nichols Act, stated: ". . . I disagree with having the General Counsel directly supervise the Judge Advocate General . . . It is important that those two posts remain separate."[28] Here, the Goldwater-Nichols Act would be

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[23] Not only was this a difficult political problem for the Secretaries, but there was the serious practical legal question whether the authority of the Secretaries, the General Counsels and the Judge Advocates General could be altered in this way. Under 10 U.S.C. 125, SECDEF cannot substantially transfer, reassign or abolish a function vested by law in an official.

[24] One may well ask whether the judge advocate in the field can be expected to provide independent advice in the face of the commander's desires. He is professionally obliged to do so and is given the protection of law to consult directly through higher levels of judge advocate authority up to and including the Judge Advocate General without resort to normal command chain requirements. See 10 U.S.C. 806.

[25] Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992.

[26] H.R. Conf. Rep. No. 824, 99th Cong. 2d Sess. 151 (1986).

[27] Army Judge Advocate General memorandum for the General Counsel, Department of Defense, Subject: Proposed Legislation Relating to the General Counsels of the Military Departments, 13 Jun 91.

[28] Hearings Before the Senate Committee on Armed Services, 99th Cong., 1st Sess. 585, 592 (1985).

thwarted by the imposition of the General Counsels between the Judge Advocates General and the Service Secretaries.[29]

If the DoD General Counsel or General Counsel designate believed the TJAGs would not protest the Atwood memorandum, they were mistaken.[30] This process might seem less cynical if one could conclude that the TJAGs arguments were found persuasive against the Atwood memorandum, but that was not the case. In fact, the TJAGs' protests were the least of the General Counsel designate's worries.

B. Non-Governmental Actors.

Just over two weeks after the Atwood memorandum was issued, the first press inquiry was made by the Federal Times[31] seeking the reasons for the Atwood memorandum and requesting specific examples of what prompted the memorandum and ". . . how long the problems have been going on."[32] Though primarily a publication of interest inside the federal government, the press inquiries set off an immediate DoD "spin control" exercise wherein the answers suggested that the memorandum's only purpose was to make clear the "final" and "controlling" nature of the General Counsel opinions. No doubt there was some discomfiture in the DoD General Counsel's office when the publication Inside the Navy ran as its headline "Civilian Lawyers Take Over Pentagon's Legal Operations: JAG Corps Demoted."[33]

On April 20, 1992, the Chairman of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice (the Section) wrote a letter to the Secretary of Defense.[34] It advised SECDEF of the Section's interest in the matter and of its opinion that the Atwood memorandum violated the statutory framework established by Congress for General

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[29] For a thorough discussion of why the Atwood memorandum violated the provisions of the Goldwater-Nichols Act, see Kurt A . Johnson, supra ,at note 2.

[30] The General Counsel could well have believed that the Atwood memorandum could succeed quietly, without much protest from the JAGs due to some unusual circumstances existing at the time. The Navy JAG was then under severe pressure over the conduct of the Navy's investigation into the Tailhook scandal (and which ultimately resulted in his premature retirement). The Army JAG Corps then had just recently emerged from under a cloud related to allegations of impropriety in judge advocate promotions. These allegations had resulted in one JAG designee never being confirmed as the Judge Advocate General and the then serving JAG having experienced a long delay in confirmation. The Air Force JAG's office then had undergone a dramatic reorganization and might be too distracted to mount much resistance. The DoD General Counsel may have underestimated the TJAGs bureaucratic survival instinct.

[31] Directorate For Defense Information OSD News Division, Query From Sonya Nelson, Federal Times Magazine, March 20, 1992.

[32] The Atwood memorandum's implied criticism of uniformed judge advocates, while barely mentioning them, was perhaps more transparent than was believed by the DoD General Counsel.

[33] Inside the Navy, March 24,1992, 19-20.

[34] Letter of Thomas M. Susman, Section Chair, Section of Administrative Law and Regulatory Practice, American Bar Association, to The Honorable Richard B. Cheney, Secretary of Defense, April 20, 1992.

Counsels and the TJAGs of the Military Departments. The letter strongly urged suspension of implementation of the Atwood memorandum ". . . until all interested parties, including the appropriate committees of Congress and the ABA, have had a full opportunity to provide the Department of Defense with their views on the legal and policy effects of that memorandum." It also warned of the need for statutory changes to legally implement the policy and offered the ABA's expertise in the matter, including testimony before Congressional committees.[35] The letter indicated copies were being forwarded to the Chairs of the House and Senate Committees on Armed Services.

THE DoD GENERAL COUNSEL CONFIRMATION PROCESS

With the Atwood memorandum under attack by the TJAGs, Chiefs of Staff and, to some extent, by the Service Secretaries,[36] media inquiries questioning the method, timing and effect of the memorandum, and professional legal organizations of considerable standing lobbying both the SECDEF and Congress, it was little wonder that Congress would weigh in heavily on the issue. Within days of the issuance of the Atwood memorandum, Senate Armed Services Committee (SASC) staffers, many with prior experience in DoD, either in the office of DoD General Counsel, Service General Counsel offices or as active or reserve judge advocates, requested the TJAGs come to Capitol Hill to discuss the Atwood memorandum and its potential effects on existing relationships and authorities. It was soon clear that SASC staffers were displeased by the Atwood memorandum's casual dismissal of the previous summer's legislative process and that the confirmation process for the DoD General Counsel designate would be the battleground on which this issue would be fought.

If there was any doubt about the SASC's concerned view of the Atwood memorandum, it was quickly erased when the SASC Chairman, Senator Nunn, requested that the nominee answer extensive written questions, more than one-third of which pertained directly to the Atwood

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[35] Id. The ABA has long been an active player in legal matters within the federal government and particularly in the Department of Defense. The ABA has no fewer than six different committees and sections which maintain interest in and monitor issues related to military and civilian law practice in the services. Other legal professional organizations such as the Federal Bar Association and the Judge Advocates Association also registered their protests to the precipitate action and its disregard for the existing statutory framework.

[36] In implementing the Atwood memorandum within their services (over the objections of their respective JAGs) the Navy and Air Force Secretaries took pains to make clear they wanted no divided loyalties on the part of their General Counsels and no change in reporting and supervisory relationships among the uniformed lawyers. They therefore referred to the authorities and responsibility conveyed to the General Counsels by the Atwood memorandum as "oversight authorities." See e.g., Secretary of the Navy memorandum For General Counsel, Judge Advocate General, Subject: Legal Services, 27 March 1992.

memorandum.[37] The DoD General Counsel designate's answers to Senator Nun's questions concerning the Atwood memorandum continued the retreat begun in the earlier press inquiry responses.[38] Key answers were the nominee's assertions that the Atwood memorandum ". . . was not intended to and did not enlarge or diminish the authority of the General Counsel of the Department of Defense. . ." and that it ". . . does not provide a basis for the General Counsel of a Military Department to direct the Judge Advocate General to perform (his) responsibilities in a particular manner. . ." Nor, according to the nominee, did the Atwood memorandum constrain the TJAGs from providing advice as they saw fit to the Service Secretaries. [39] Two events then sealed the fate of the Atwood memorandum. In his Senate confirmation hearing, Mr. Addington was forced by Senator Nunn to agree to seek revision of the Atwood memorandum to conform to his written responses to the SASC's pre-confirmation questions:

> "Sen Nunn: Can you assure the Committee that you will recommend to the Deputy Secretary a revision of that March 3 memorandum to ensure there is no conflict between that memorandum and the answers you provided to the Committee?
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> Mr. Addington: Yes, Senator, I have already discussed that with Deputy Secretary Atwood." [40]

Any remaining question as to the Senate's intent in the matter was answered by the inclusion of language in the SASC's version of the FY 1993 National Defense Authorization bill directing rescission of the Atwood memorandum:

> "Sec 910. DELIVERY OF LEGAL SERVICES WITHIN THE DEPARTMENT OF DEFENSE. Not later than 10 days after the date of the enactment of this Act, the Secretary of Defense shall rescind or revise the memorandum of the Deputy Secretary of Defense entitled 'Ensuring Execution of the Laws and Effective Delivery of Legal Services,' dated March 3, 1992."[41]

Mr. Addington was confirmed by the Senate on August 11, 1992. On August 14, 1992, then Acting Secretary of Defense Atwood issued a superseding memorandum, setting out the Service

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[37] Letter to David Addington from Senator Sam Nunn, June 15, 1992, with attached Questions for David Addington Nominee to be General Counsel of the Department of Defense.
[38] Letter of Mr. Davis S. Addington to The Honorable Sam Nunn, June 19,1992, forwarding Answers to Questions for David Addington, Nominee to be General Counsel of the Department of Defense.
[39] Id. at answers to sub-questions 30e, 30h and 30k.
[40] U.S. Senate Committee on Armed Services, Transcript of "Nomination of David S. Addington to be General Counsel of the Department of Defense, et al., Senate Hearing 102-983, p302 , July 1, 1992).
[41] Senate Bill 3114, 102d Cong., 2d Session, Sect. 910 (1992).

Secretaries' obligation to ensure that their General Counsels were the chief legal officers of their departments, whose opinions were the controlling legal opinions of the department. The Secretaries were further directed to implement the superseding memorandum ". . . in a manner consistent with statutes relating to the Judge Advocates General of the Military Departments."[42]

Thereafter the Conference Committee on National Defense Authorization Act for FY 1993 removed the above cited Section 910 that had been added by the SASC:

> "The Conferees agree that the information contained in Mr. Addington's June 19 response contained important clarifying information that necessitated revision of the Deputy Secretary's March 3 memorandum. In view of the Deputy Secretary's August 14 memorandum . . . legislation is not necessary at this time. The Armed Services Committees . . . will continue to monitor this situation closely . . ."[43]

LESSONS IN BUREAUCRATIC POLITICS

What reasons can be found for this exercise in bureaucratic politics? Has the issue been laid to rest or is it merely dormant? The Atwood memorandum episode may, in part, be summed up by the observation of Graham Allison:

> ". . . formal governmental decisions are usually only way-stations along the path to action and the opportunity for slippage between decision and action is much larger than most analysts have recognized. For, after a decision, the game expands, bringing in more players with more diverse preferences and more independent power."[44]

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[42] Acting Secretary of Defense Donald J. Atwood, memorandum For the Secretaries of the Military Departments, Subject:Effective Execution of the Law and Delivery of Legal Services, August 14, 1992.
[43] Conferees Report to Accompany H.R. 5006, National Defense Authorization Act for Fiscal Year 1993, 102d Cong., 2d Sess., Report 102-966, p746, October 1, 1992.
[44] Allison, Graham T., ESSENCE OF DECISION Explaining the Cuban Missile Crisis, Harper Collins Publishers, 1971, 172-173.

Allison's general observation suggests that there may be more to follow in this area. There are good reasons to believe that will be the case between the General Counsels and the TJAGs. First, the natural tension between offices with similar roles and responsibilities, but with significantly different points of view, has not been resolved. This difference in point of view is not cosmetic. It is fundamental, because the two entities operate on entirely different leadership models. The civilian General Counsels are drawn from private law firms wherein competitiveness and secrecy are prized attributes. Team building and cooperation, the stock in trade of the military officer, are the exception in the law firm environment. The law firm model does not and cannot work well in the military environment which depends for its survival on teamwork. That simple feature alone, if unrecognized, poses a danger, not only to the military legal community but to national security itself. That is because good order and discipline among the troops, based on a credible, fair, unpoliticized justice system, more than guns, ships, tanks and aircraft, distinguishes a ready, capable, and trustworthy military force from a dangerous armed rabble. It is a failure of leadership, military and civilian, not to have recognized this fact heretofore. The consequence of failure to find common ground for a definitive understanding between them, led the DoD General Counsel to attempt to exercise political power to inappropriately subordinate the military legal system under the stewardship of The Judge Advocate Generals to the civilian General Counsels of the Military Departments and ultimately to the DoD General Counsel. The rubric of "civilian control of the military" is a simplistic device used to mask a failure to come to grips with the difference in cultures represented by the two legal communities. Unfortunately, there is little evidence to suggest those cultural differences are being addressed or recognized. They will continue to plague any effort at accommodation.

In issuing the Atwood memorandum, the DoD General Counsel may have miscalculated that it was an auspicious time for such an action, possibly believing that the service Judge Advocates General could not or would not protest a "takeover." Further, the DoD General Counsel perhaps underestimated the amount of interest that existed outside the DoD, in the media and professional legal organizations.

There was obviously a misunderstanding by the DoD General Counsel that Congress would be very interested in the Atwood memorandum, and feel that DoD was attempting an "end run" around its determination not to act on the earlier legislative proposal. While that Congressional interest will likely remain strong, DoD might actually be able to persuade

Congress that legislative changes are necessary, based on sound analysis and reasoning. A major reason for the failure to achieve the "chief legal officer" language was the simple absence of any evidence that the changes were necessary. If DoD were to articulate reasons for the changes based on something more than the ego gratification inherent in controlling a massive legal enterprise, it might well succeed.

A major mistake that might not be made again involved timing the Atwood Memorandum in such a way that Congress could hold DoD's nominee to be DoD General Counsel hostage in the confirmation process until satisfied that its organizational plan for the DoD was restored. The failure to perceive the vulnerability of the DoD General Counsel nominee in the confirmation process and the leverage that process added to the effort to force rescission of the offending memorandum is not likely to be made again. Any proposal will probably fail if it is seen as being directly counter to the intent of the Goldwater-Nichols Act's focus on separating administrative oversight and control from operational control. Here, Congress could only consider the Atwood Memorandum a "thumb in the eye" after Goldwater-Nichols confirmed Congress' satisfaction with the respective roles played by the General Counsels and The Judge Advocates General.

CONCLUSION

The DoD General Counsel's rational calculus of the need for and effect of the Atwood memorandum was flawed because it failed to consider the interests of a diverse group of other actors in relation to the end sought by the memorandum. A complex mix of factors and forces, combined to jeopardize the DoD General Counsel designate's confirmation and force the rescission of the Atwood memorandum. In the future, the failure of civilian appointees to appreciate the role of uniformed judge advocates coupled with the as yet unaddressed profound cultural gulf between the Services' and DoD legal communities make this scenario likely to be repeated. The issue however, transcends lines on organization charts to the basic premise of U.S military power: a ready, capable and disciplined force.