

“The Coalition Transfer of Detained Persons to the United States Military: Trust but Verify?”

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In February 2025 the Secretary of Defense, Peter Hegseth, took the unprecedented step of “firing” the Judge Advocate Generals (the TJAGs) of the Army, Navy and Air Force. It is reported the TJAG incumbents were removed because Secretary Hegseth “has made restoring a “warrior ethos” a core part of his agenda, and rejected what he sees as a softening of the military under diversity efforts and restrictive rules in combat. He said...that he doesn’t want lawyers who are “roadblocks” to decisions he or military commanders make.” This act prompted an concern within the United States that it was an attack on the provision of independent and non-partisan legal advice mandated by statute and a [“war on accountability”](#). As Major-General (Ret'd) Charlie Dunlap, a former Deputy Judge Advocate General for the Air Force, rightly [noted](#) “[m]ilitary lawyers have a unique responsibility in the armed forces in that they serve as decidedly nonpartisan guardians of the rule of law.”

The negative view expressed by this senior political official towards the role traditionally performed by uniformed non-partisan lawyers resonates with an earlier post 9/11 controversy concerning the mistreatment of detainees. A situation where unique interpretations of the law governing detainee treatment by Bush administration political appointees created an adversarial relationship with uniformed lawyers. What should also be considered is that action by the Trump administration to limit the independent advisory role of its JAGs could also have an unanticipated negative effect on coalition operations. During such operations one State ordinarily takes on the main responsibility for handling prisoners of war (POWs) and other detainees; a role often performed by the United States. The issue is the willingness of other States to transfer detainees to the United States military if there is a perception the requirements of international law regarding the treatment of detainees may not be met.

As Israel discovered regarding its post October 7, 2023, Gaza operations what [senior political leaders say](#) concerning their commitment to meeting international legal obligations can have an impact on both potential legal liability and the public perception of State action. This post looks at the potential effect of Secretary Hegseth’s embrace of a “warrior ethos” and his negative attitude towards the role of JAG officers, outlines the previous administration’s conflict with the TJAGs and its resonance with contemporary operations, and explains concerns States are likely to have when considering the transfer of detainees to the United States. It then sets out the present United States position regarding detainee treatment and suggests an approach other States might adopt to comply with their international legal obligations.

Secretary Hegseth's negative view of military lawyers was set out in a 2024 book, and during his testimony before Congress. He [decried](#) "academic rules of engagement which have been tying the hands of our war fighters for too long" and the military lawyers he holds responsible for enforcing them." Derisively [calling](#) those lawyers "jagoffs" he referred to an ROE briefing he received in Iraq by a military lawyer "saying it was "going to get people killed". Further, it is [alleged](#) he sees the *Geneva Conventions* as tying soldier's hands in conflict where the use of force is required and "[lethality](#)" must be emphasized over a concern for public relations.

Further, it is [reported](#) that as a Fox News host he had lobbied for the pardon of two soldiers, and for the reinstatement of a Navy SEAL charged with criminal acts carried out in Iraq. President Trump subsequently [dismissed](#) charges against a Green Beret accused of killing an alleged Afghan bomb maker in his custody; pardoned a former Army officer serving 19 years for ordering soldiers to fire on unarmed Afghan men; and promoted a Navy SEAL convicted of posing with a dead body, but who was acquitted of a murder charge. He had previously [pardoned](#) another officer convicted of murdering a naked and unarmed Afghan detainee. These pardons raise questions concerning the United States commitment to accountability and potentially an [undermining](#) of the "link between discipline, respect for laws of war and military effectiveness."

Secretary Hegseth's view that the "warrior ethos" is inconsistent with what military lawyers bring to the fight is highly problematic. It is not uncommon for the term warrior to be used by military personnel. Unfortunately, it can be applied in a divisive manner. As I have written [elsewhere](#) "warrior" can refer to a soldier, sailor or airman whose occupation is warfare; be used in a poetic sense as a fighter celebrated in epic and romance; or as the fighter of uncivilized peoples. It is crucial leaders using the term clarify the meaning they attach to it. One not leaving the impression extra-legal action is acceptable or excused. Ideally warriors are disciplined military personnel who act under responsible command, are subject to the lawful directions of the State and who operate in a manner consistent with the profession of arms, rather than some romantic or uncivilized notion of a fighter. The divisiveness and confusion associated with the term warrior is evident in two of the cases in which Secretary Hegseth became involved: [1st Lieutenant Lorange](#) and Special Operations Chief [Gallagher](#). These accused were apparently reported by their own subordinates, who were no less qualified to be considered warriors. This raises a question about who the true warriors are?

It has been [suggested](#) that Secretary Hegseth's negative view of military lawyers arose in part out of confusion regarding their role in the development of Rules of Engagement (ROE). His perception of JAG responsibility may have resulted from a military lawyer having provided the briefing on ROE in Iraq. In the Canadian Armed Forces ROE are seen as "commander's business" and traditionally briefed by the chain of command. Regardless, a proper understanding of ROE is essential when serving at the strategic level, whether in uniform or as a civilian leader such as a Secretary of Defense.

The previous Bush administration conflict between political officials and uniformed military lawyers resulted from several problematic decisions. The post 9/11 period [saw](#) the United States deny prisoner of war status to Taliban detainees on a group basis. Further, detention facilities were created at Guantanamo Bay in seeking to avoid comprehensive United States legal oversight regarding the status and treatment of its prisoners; and there was an unsuccessful attempt to defend the position in United States courts that the *Geneva Conventions* did not apply to what were called “unlawful enemy combatants”.

As was [noted](#) in 2005 by a future Army Deputy JAG and Air Force General Counsel the Bush administration appeared determined not to apply the *Geneva Conventions* and wanted to avoid putting “US interrogation agents at risk of prosecution, because any “outrages against personal dignity,” as prohibited by common Article 3 of the Conventions, could be domestically prosecuted as a war crime.” The United States Secretary of Defense, Donald Rumsfeld, was of the view the *Conventions* were not designed to deal with groups like Al Qaeda and the Taliban, and the White House Counsel referred to some of their provisions as being “quaint”. Ultimately, detainee abuse was exposed at [Bagram](#), Afghanistan and [Abu Ghraib](#), Iraq. The CIA used “black sites” to abusively interrogate detainees with “enhanced interrogation techniques” and other measures. Activities that a 2014 bi-partisan United States Senate Committee [report](#) referred to as torture.

The treatment of detainees was directly impacted by the “[Torture Memoranda](#)”, which included a Department of Justice [Memorandum](#) from John Yoo of the Office of Legal Counsel that addressed “the legal standards governing military interrogations of alien unlawful combatants held outside the United States.” The opinion stated that under United States law torture would only encompass extreme acts, and actions inconsistent with the *Torture Convention* could be justified under international law as State self-defence. Further, the United States President could suspend or terminate that *Convention*, and he would have the authority to override customary international law as a matter of domestic law.

The TJAGs were at the forefront of [expressing](#) opposition to instituting torture and other excesses. After leaving office John Yoo coauthored a law review [article](#) criticizing military lawyers for challenging civilian control of the military. He outlined that contrary to the administration position “JAGs” argued the *Geneva Conventions* applied to the armed conflict with al Qaeda; the Taliban could be afforded prisoner of war status; they opposed setting up special military courts to try suspects; and relied on the “unwritten, vague and decentralized” rules of international customary law, which incorporated *Additional Protocol I* provisions that the United States had refused to ratify.

In hindsight Professor Yoo suggested that the Bush administration could have narrowed military legal officer autonomy; restricted their representation of al Qaeda suspects to the military commissions; reduced the budget and numbers of military lawyers; removed, demoted, or transferred JAGs resisting civilian policy choices; and increased civilian monitoring to

military justice policy. It is [reported](#) that in 2008 the General Counsel of the Department of Defense attempted to gain influence over the promotion of JAG lawyers. While that attempt was unsuccessful the present Administration appears to be trying to exert greater control over the advice provided by its military lawyers. It is not clear what this means in terms of future interpretations of international legal obligations regarding the treatment of detainees.

This might be dismissed as simply an internal American dispute regarding governance. However, potential Coalition partners have an obligation to not transfer detainees to another State if they are in danger of being mistreated. For example, under the [Third Geneva Convention](#) a State can only transfer prisoners of war (POWs) upon having “satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” POWs [must at all times be treated humanely](#) and may not be subjected to physical or mental torture to secure information, or be [“threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”](#) There is also a continuing obligation for the transferring State to taking effective steps to correct a situation where the *Conventions* are not applied, and if necessary, request the return of the POWs.

Numerous States such as Canada take the position that both treaty and customary international humanitarian law protect a detainee from torture and abuse during international and non-international armed conflict. Further, the [Torture Convention](#) requires States not only to take action to prevent torture (Article 2), but also any “cruel, inhuman or degrading treatment or punishment” (Article 16). Canada takes its obligations seriously. In Afghanistan it applied the [position](#) that all detainees however categorized would be treated “in accordance with the standards set out in the Third Geneva Convention.” In 1994 a soldier was [court martialed](#) for torturing and killing a Somali detainee, an officer was [convicted](#) in 2001 under the civilian justice system for torturing another service member during an unauthorized exercise, and another officer was [convicted](#) by court martial in 2010 for killing an unarmed and wounded Taliban fighter. Importantly, in 2008 the Supreme Court of Canada ruled in the [Khadr Case](#) that interviews conducted by Canadian officials in Guantanamo Bay occurred where “the regime providing for the detention and trial of Mr. Khadr...constituted a clear violation of fundamental human rights protected by international law.”

Significantly, in 2005 the Canadian military [ceased](#) transferring detainees to the United States because of concerns about the Bush Administration treatment of detainees handing them over instead to Afghanistan. It did not [reinstate](#) transfers to the United States until 2011. In 2008 [litigation](#) arising from Afghanistan Canada indicated the transfer of detainees should only take place if there is “no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.” A similar standard is likely to be applied by States when considering any transfers to the United States in a Coalition environment.

The United States has taken significant steps in the intervening years to ensure treatment of detained persons accords with international law. In 2014 it was [acknowledged](#) the *Torture Convention* has extra-territorial application. [Section 1045](#) of the 2016 *National Defense Authorization Act* (NDAA) was enacted restricting all interrogation to techniques incorporated into the [Army Field Manual 2-22.3](#) (essentially making the military doctrine binding as domestic law) and requiring the International Committee of the Red Cross (ICRC) be notified of, and given prompt access to, any individual detained in any armed conflict.

Further, Department of Defense directive, [D 2310.01E](#), requires that all detainees be treated humanely and protected against torture and threats or acts of mistreatment or violence. It also acknowledges the international obligation that other States must not transfer detainees to the custody of another country where they might be tortured. The standards governing detainee treatment are identified as being established in Common Article 3 to the *Geneva Conventions* and based on the principles of Articles 4-6 of *Additional Protocol II* and Article 75 of *Additional Protocol I*. The [DOD Law of War Manual](#) expressly states that “interrogations must be carried out in a manner consistent with the requirements for humane treatment, including the prohibitions against torture, cruelty, degrading treatment, and acts or threats of violence.” These provisions were in effect throughout the first Trump administration.

Notwithstanding these provisions Secretary Hegseth’s negative attitude towards the TJAGs, his focus on privileging a “warrior ethos” and lethality over potential legal restraints, and the previous Trump Administration’s pardoning of military personnel charged or convicted of war crimes involving the killing of detainees and civilians cannot be ignored. It can also be recalled that in February 2016 then Presidential candidate Donald Trump [indicated](#) he “absolutely would authorize something beyond waterboarding” to deal with terrorists.

It is not known if President Trump would act in the future to override the United States treaty or customary international legal obligations regarding the treatment of detainees. However, the potential remains for legal interpretations to be applied that alter interrogation techniques in the *Army Field Manual* in a manner inconsistent international law. It is also not clear if the President might assert Congress may not constrain the authority of the Commander in Chief regarding how interrogation methods should evolve. It is notable paragraph 7 of Executive Order 14215 provides that no executive branch employee (which includes “a member of a uniformed service”) acting in an official capacity can advance a legal interpretation as the position of the United States that contravenes the President’s or Attorney General’s opinion on a matter of law unless authorized to do so. On its face this provision appears to be problematic should a military lawyer seek to challenge a change in approach regarding detainee treatment as occurred under the Bush administration.

The United States frequently embraces the notion of [exceptionalism](#) and a degree of freedom from widely recognized international standards that may resonate with a domestic

audience. However, this does not affect the requirement of other nations have to meet their international legal obligations.

It would be prudent for Coalition States to adopt the Reagan era approach of “trust but verify”. They should ensure prior to any transfer that the United States will treat detained persons humanely and in accordance with the generally understood requirements of international humanitarian treaty and customary law regardless of how the conflict is characterized.

Confirmation could be sought that:

- a) The treatment of detainees will be governed by provisions of the 2016 NDAA, the DOD Directive 2310.01E, and the DOD Law of War Manual;
- b) Any interrogation will be governed by Army Field Manual 2-22.3, or such substantially equivalent to the process applied by other Agencies as provided for under the 2016 NDAA;
- c) The ICRC will be notified of the location of detainees and be provided prompt access if requested;
- d) When asked the transferring State will be notified of the location of transferred detainees;
- e) Notification will be provided of “any material change in circumstances of the detainee including any instance of alleged mistreatment”;
- f) If concerns are raised about the treatment of detainees the United States will investigate, inform the transferring State of the outcome of the investigation, and outline what corrective action has been taken if required; and
- g) If requested the transferred detainee will be returned to the custody of the transferring State.