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Bad Advice or Bad Laws - Allocating Responsibility between Lawyers and Laws in the Context of National Security Policymaking

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BAD ADVICE OR BAD LAWS? ALLOCATING RESPONSIBILITY BETWEEN LAWYERS AND LAWS IN THE CONTEXT OF NATIONAL SECURITY POLICYMAKING

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Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (U. Press Kan. 2009). Pp. 403. $34.95.

I. INTRODUCTION

Much ink has been spilled with respect to post-9/11 counterterrorism practices, including an increasingly vast literature regarding the legality of those practices. By and large, this "legality literature" concerns itself with descriptive and normative questions focused on the constitutional, statutory, international, and other legal materials themselves, as well as the judicial opinions that interpret these materials in a litigation setting and then, in turn, become part of the relevant law. Such inquiries unquestionably are important. But were we to focus exclusively on them, we might miss important aspects of the manner in which these materials actually function as both a restraint on and an enabler of policy. Most notably, we might miss the crucial mediating role that government lawyers play when they advise their clients regarding the nature of these materials and the likely legal consequences of proposed courses of action. It is no exaggeration to say that one cannot fully grasp the salience of law to the formation of public policy national security related or otherwise without understanding this mediating function.

The significance of the mediation function has in fact become more widely appreciated in recent years, precisely because of the central role that lawyers played in the formation of the Bush administration's most controversial practices. One need only think of the sprawling and often passionate array of articles, books, blog posts, and even lawsuits centered upon the work that Professor John Yoo performed during his time at the Department of Justice's Office of Legal Counsel ("OLC") between 2001 and 2003, or that of David Addington regarding his tenure as Vice President Richard "Dick" Cheney's top lawyer throughout the Bush administration's tenure. Notwithstanding the increasing volume of this substrand of the legality literature, however, instances of

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dispassionate analysis that genuinely advance our understanding of the lawyer's mediating function remain few and far between.

From this point of view, Professor Harold Bruff has made an exceedingly valuable contribution with *Bad Advice: Bush's Lawyers in the War on Terror*.[1] Bruff has a well-deserved reputation as a leading scholar of the separation of powers, known not only for his acumen and experience - he served as an attorney-advisor in OLC in the 1970s before embarking on an academic career that includes a recently concluded stint as the dean of the law school at the University of Colorado at Boulder but also for his fairness and intellectual rigor. One needs only a few moments with *Bad Advice* to appreciate that it lives up to those high standards.

Bruff's core argument in *Bad Advice* is not specific to national security affairs, though it is an argument with special significance in that and other high-stakes settings. At bottom, Bruff contends that government lawyers acting in their internal advisory capacity should conform to a professional norm of "detachment," which in practical terms means ensuring that policymakers understand the relative strengths and weaknesses of the competing legal positions at issue even in the face of intense pressure to tell them only what they might prefer to hear. In support of this larger normative claim, Bruff offers a descriptive account in two phases, with part one of the book providing a broad historical survey of the role of executive legal advisors and part two providing a close parsing of key post-9/11 legal controversies. The thrust of the latter descriptive account failure by key Bush administration attorneys to conform to the detachment norm in the months and years after 9/11 resulted in a parade of bad legal advice, advice that enabled an array of policy mistakes that in turn produced a host of terrible consequences.

Bruff's normative claim is persuasive, at least at a general level. That is to say, he is quite right to emphasize the centrality of the norms of professional responsibility in understanding the mediating function of government attorneys and still more so in identifying the detachment principle as perhaps the most important of these norms. Without detached advice, policymakers are in no position to judge the most likely legal consequences of a contemplated course of action, and hence in no position to weigh those odds and consequences in comparison with other values.

More interesting questions arise when we turn to Bruff's descriptive account. As an initial matter, it is implicit in Bruff's project that legal advice actually matters, that government lawyers have more than a *de minimus* capacity to constrain the range of options policymakers are willing to consider in a given situation. But is this in fact the case? More specifically, is this the case in the context of real or perceived emergencies? The question obviously matters a great deal. If government lawyers lack the capacity to restrain policymakers via legal advice, either generally or just in the emergency context, we must then ask whether it is worth the candle to debate the norms that should govern the provision of such advice or to assess the merits of the advice they rendered in particular historical instances. *Bad Advice*, from this perspective, is an occasion to revisit the ongoing debate regarding the relevance of law as a constraint on government action

1. Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (U. Press Kan. 2009).

during real or perceived emergencies. Because this is a topic treated in some depth by many of the other books and reviews involved in this symposium, I will focus my attention in this review on a distinct descriptive concern, one that is specific to the post-9/11 events recounted in *Bad Advice*.

The primary descriptive claim in *Bad Advice* is that Bush administration lawyers on multiple occasions failed to comport with the norm of detachment by presenting interpretations of the Constitution, statutes, and treaties that did not fairly inform policymakers of the prevailing or majority interpretations of those materials. Certainly that claim is consistent with conventional wisdom. But consider the possibility that conventional wisdom overestimates the clarity, scope, and content of the underlying legal materials themselves. That is, consider the possibility that the post-9/11 problem was not so much one of bad legal advice as bad, or at least, inadequate laws. If that is the case, the pressing task *ought* to be an assessment of whether the law should be reformed to address these gaps, and we should be particularly alert to the possibility of being distracted from that task by the temptations of the bad advice narrative.[2]

II. A THUMBNAIL SKETCH OF PART I: PROFESSIONAL NORMS AND INSTITUTIONAL FEATURES

I will return to the tension between the "bad advice" and "bad law" narratives shortly. Before doing so, however, a thumbnail sketch of part one of the book is in order.

Bad Advice proceeds in two parts. Part one is foundational, in multiple senses. First, it arms the reader with a host of historical and institutional details - some familiar, some rather eclectic, and all interesting and relevant - regarding the internal advisory function of government lawyers. Second, it provides further context by reviewing key episodes in the unending struggle over the distribution of power among the branches of the federal government in the context of national security affairs. And third, it deftly weaves into these parallel historical narratives a partially descriptive and partially normative case for emphasizing certain norms of professional conduct in these settings, including, in particular, the aforementioned norm of detachment. Integrating these disparate threads into a coherent whole could not have been easy, yet Bruff manages to make the narrative not merely coherent but downright enjoyable.

The first chapter sets the tone for all that follows. Here we find a pithy, learned, and sympathetic portrayal of the "dilemma of the executive advisor," understood as the tension between the advisor's desire to facilitate the client's policy goals and the sometimes inconsistent obligation to give advice to the client that may make it impossible, or at least difficult, to achieve those goals.[3] To make the point, Bruff starts not with examples from U.S. history, but rather with entertaining, apt, and contrasting illustrations taken from Shakespeare's *Henry V* (the Archbishop of Canterbury's advice

2. The bad advice narrative is not necessarily inconsistent with the bad law narrative. Even if the laws on close inspection prove to be less clear, broad, or restrictive as some commonly assume, a lawyer alert to that gap would still fail to comport with the norm of detachment if he or she failed to fairly inform policymakers of that gap and its potential consequences. With limited exceptions noted below, however, Bruff does not appear to be contending that Bush administration lawyers committed this particular error, but rather that they repeatedly misstated or failed to properly describe the underlying law itself.

3. Bruff, *supra* n. 1, at 7.

to the King to the effect that the latter may plausibly lay claim to the French throne) and Bolt's *A Man for All Seasons* (Sir Thomas More's refusal to take the oath endorsing the King's sovereignty over spiritual affairs in England).[4] Most readers will be hooked at this point; Bruff manages in just a few pages to establish that the book will be entertaining and learned. At the same time, the examples illustrate two important points. First, that legal advice can and should be assessed not only with respect to whether a particular legal position is "right," but also whether it can be made in "good conscience."[5] That is to say, the legal advisor's task is not an amoral one or one that should be silent with respect to the policy wisdom of contemplated courses of action. Second, the examples provide an occasion for Bruff to offer a sympathetic lens through which to consider the remainder of the scenarios discussed in the book: few persons are "saints" capable of the self-abnegation arguably attributable to Sir Thomas More's example, he notes, and it behooves us to bear this in mind in judging others and in developing norms of behavior for such advisors.[6]

The narrative in part one proceeds to employ the right-and-conscience principle as a lens through which to consider a host of scenarios in which government lawyers faced dilemmas of conscience in the context of highly sensitive policy decisions.[7] Taken together, these examples provide substantial support for Bruff's conclusions regarding the desirability of a professional responsibility norm involving attention both to *legal right* and to *good conscience*, addressed with at least a degree of self-aware detachment on the part of the lawyer. But what really makes part one notable is the manner in which Bruff goes on to describe the relationship between professional norms in the abstract and the real-world institutional features through which executive branch lawyers must actually carry out their advisory functions.[8]

Two institutions within the executive branch, both of them twentieth-century innovations, play the central role in this story. First, the OLC has emerged over time as an institutional solution to the mismatch between the limited time available to the attorney general to generate internally dispositive legal advice for the rest of the executive branch and the increasing number of occasions for seeking such advice that resulted from the twentieth-century expansion of the federal government.[9] OLC possesses substantial decision-making bandwidth as a result of its relatively large staff of "career" attorneys (who not only tend to have sterling credentials, but who also function as repeat players familiar with recurring issues confronting the executive branch) combined with a top tier of political appointees (who frequently possess even more remarkable credentials).[10] Because it wields authority to provide the last word on such disputes (short of litigation or overruling by the attorney general or the president), and because such disputes are unlikely in any event to emerge in a public setting (still less likely to give rise to litigation), OLC has come to play a formidable, court-like role. Part

4. Bruff, *supra* n. 1, at 7-14.
5. *Id.* at 10.
6. *Id.* at 14.
7. *Id.* at 17-60.
8. *Id.* at 63-71.
9. Bruff, *supra* n. 1, at 67.
10. *Id.*

two of the book, with its survey of the development of key post-9/11 legal controversies, amply testifies to this.

And yet, the story of institutional influence is more complicated than that, as Bruff correctly observes. OLC, he points out, is not the only significant institutional player when it comes to the internal provision of legal advice to the executive branch. Another institution in more recent years has grown in size and influence, and, if anything, has grown still more in the period since Bruff wrote *Bad Advice* the Office of the White House Counsel.[11] Bruff describes the emergence of the White House counsel as an alternative source of legal advice for the president, correctly identifying the practical influence of the counsel as being commensurate with that person's personal relationship with the president rather than any institutional features.[12] The Counsel's Office in this sense enjoys an unusual mix of independence and dependence, with both benefits and costs. Its independence from the institutional structure of the Justice Department increases the prospect that the president will receive a range of legal advice rather than simply one perspective, which can be useful in some circumstances. Its near total dependence on the president's favor, however, calls into question the extent to which the Counsel's Office can adhere to Bruff's norm of detachment, providing unwelcome legal advice when such advice needs to be delivered.

This feature of the institutional position of the Counsel's Office, incidentally, is only partially on display in Part two of *Bad Advice*, which attributes the provision of bad legal advice in the post-9/11 period more to OLC lawyers and to David Addington (a lawyer for and later chief of staff to the vice president).[13] As Bruff tells the story, those lawyers dominated Alberto Gonzales, the White House Counsel, by dint of their relative expertise in various aspects of national security law.[14] From that perspective, the bad advice narrative does little to draw attention to risks associated with an increasingly influential White House Counsel's Office. But it would be a mistake to assume there are no such risks. The example of David Addington is a testament to the profound impact a lawyer with the right relationships may have on the formation of legal policy despite lacking formal institutional authority to do so. None of which is to say that steps should be taken to weaken the White House Counsel. Rather, the lesson is to be mindful of the need to preserve OLC's institutional position (and, by extension, that of the attorney general) at a time when the less independent White House Counsel's Office if anything appears to be growing in size and influence. Bruff accordingly does important work in Part one when he draws attention not just to the existence of these two institutions, but also to the relative balance of authority between them.

III. AN ASSESSMENT OF PART II: BAD ADVICE OR BAD LAW?

Part two of *Bad Advice* builds on this foundation to present a scathing critique of the legal advice provided by a small group of executive branch lawyers in connection with the development of post-9/11 counterterrorism policies, including issues of military

11. *Id.* at 66.
12. *Id.*
13. *Id.* at 119-124.
14. Bruff, *supra* n. 1, at 125.

detention, habeas jurisdiction, war crime prosecution before military commissions, interrogation standards, and surveillance. Bruff's treatment of each subtopic is meticulous and painstaking, and though he condemns some of the conclusions the government lawyers reached both on their merits and for lack of adherence to the norm of detachment, he also approves of a few and finds others to have been within the realm of legitimate disagreement.[15] The net impression is of a well-informed and scrupulously fair minded interlocutor, calibrating his criticisms advisedly.

Several aspects of the critique are quite persuasive. Bruff reserves his sharpest criticism, for example, for the recurring claim by lawyers in the post-9/11 period to the effect that the president as commander-in-chief simply is not subject to restraints imposed by statutory or international law sources.[16] More specifically, Bruff condemns the exponents of this view for failing to acknowledge to policymakers its decidedly minority status and the foreseeable prospect that positions premised on this view would not withstand legal challenge.[17] Bruff convincingly attributes this posture to the larger project, strongly associated with Vice President Cheney and David Addington, of enhancing executive discretion to act in national security and foreign affairs a project which proponents viewed as an exercise in restoration and which opponents viewed as an exercise in usurpation.[18]

Another point of recurring concern for Bruff involves the use of war as a lens through which to consider the legality of various counterterrorism policies, such as warrantless electronic surveillance or military detention with little or no procedural safeguards.[19] To be sure, Bruff does not dispute that there are at least some grounds for applying a war model to such questions. His objection, rather, is that government lawyers in at least some instances accepted the war premise uncritically, building from it as if discussing a conventional armed conflict scenario in which the relevance of the war model would not be a subject of serious dispute.[20] On this view, these lawyers had an obligation at least to warn policymakers of the prospect that some observers including some judges would not accept that premise uncritically and to describe the legal implications should the war model instead be implied in modified fashion or simply rejected outright.[21] This is a notable theme of Bruff's treatment of the warrantless surveillance issue for example.[22]

A third major line of criticism involves the manner in which government lawyers repeatedly employed the canon of constitutional avoidance in connection with the internal legal advice they rendered.[23] Pursuant to that canon, one should avoid statutory interpretations that would give rise to difficult constitutional questions, when possible to

15. *Id.* at 184.
16. *Id.* at 132-137.
17. *Id.* at 137.
18. *Id.* at 136.
19. Bruff, *supra* n. 1, at 126-130.
20. *Id.* at 185.
21. *Id.* at 184-185.
22. *See id.* at 163-164, 170-171.
23. *Id. at* 102, 110-111, 162-163, 174, 245-246.

do so.[24] Bruff observes that there is a substantial difference between invocation of this canon by a judge in the transparent, adversarial context of litigation, as compared to the closed-door, intraexecutive process of generating OLC opinions.[25] In the latter setting, he concludes, invocation of the canon misleadingly conveys to policymakers a sense that the robust view of executive branch prerogative in military and foreign affairs will not be challenged, and that statutory restraints truly will not restrain executive discretion.[26]

The bad advice narrative in these respects is on relatively firm ground. The narrative is less persuasive in relation to a series of more specific issues, however, notwithstanding Bruff's evident commitment to assessing the issues evenhandedly.

One such area of concern involves the Geneva Convention status of detainees held by the U.S. military. Famously - or notoriously, depending on one's point of view - OLC determined in early 2002 that neither al Qaeda nor Taliban detainees were protected in any meaningful sense by the Geneva Conventions of 1949. Bruff questions the sufficiency of OLC's advice on this topic in several respects.

One line of criticism concerns OLC's treatment of the jurisdictional "triggers" associated with the Geneva Conventions i.e., whether the relevant armed conflict satisfied the terms of either Common Article 2 or Common Article 3 of the Conventions. Common Article 2 requires the existence of at least one High Contracting Party to the Conventions on each side of the conflict, in which case the main body of rules associated with the Conventions becomes applicable.[27] OLC reasoned that al Qaeda was not a High Contracting Party and hence could not be the object of an international armed conflict for purposes of Common Article 2.[28] As to the Taliban, however, the analysis was more difficult. The State of Afghanistan is a High Contracting Party to the Geneva Conventions, and, thus, conflict between the United States and the Taliban would satisfy the Common Article 2 trigger *if* the Taliban counted as the government of the State of Afghanistan. Neither the United States nor almost any other country in the world had ever recognized them as such, however, leading OLC to conclude that Common Article 2 would not be satisfied in that context either.[29]

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24. Bruff, *supra* n. 1, at 110.

25. *Id.* at 174.

26. *Id.*

27. *Geneva Convention Relative to the Treatment of Prisoners of War* art. 2 (Aug. 12, 1949), http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument.

28. Bruff concedes that it "is plausible as a reading of the text" to say that al Qaeda is not a High Contracting Party and hence that Common Article 2 is not satisfied as to it. Bruff, *supra* n. 1, at 204. But he nonetheless contends that there is "some tension" between taking that position and nonetheless asserting belligerent rights vis-à-vis al Qaeda. *Id.* This does not seem to follow. Common Article 2 does not purport to be coextensive with all circumstances in which a state may resort to armed force. As noted above, Common Article 2 requires that there be a High Contracting Party on each side of the conflict, and also states that one need not comply with Convention obligations even in the midst of a qualifying international armed conflict if dealing with detainees who were members of a force that was not party to the Convention and which does not otherwise "accept[] and appl[y] the provisions" of the Convention. *See Geneva Convention Relative to the Treatment of Prisoners of War, supra* n. 27, at art. 2.

29. Ultimately, the president rejected this aspect of OLC's advice, concluding that the United States would assume for this purpose that the Taliban did indeed constitute the government of Afghanistan, thus satisfying the Common Article 2 trigger at least insofar as the conflict with the Taliban was concerned. *See* Memo. from George W. Bush, U.S. Pres., to Richard "Dick" Cheney, U.S. V.P. et al., *Humane Treatment of Taliban and al Qaeda Detainees* ¶2 (Feb. 7, 2002) (available at http://www.gwu.edu/~nsarchiv/-NSAEBB/NSAEBB127/02.02.07.pdf).

These conclusions left open the possibility that the conflict with al Qaeda and the Taliban might still satisfy the jurisdictional trigger contained in Common Article 3, which is often described as a "miniconvention" because it provides a short, self-contained list of humanitarian protections applicable in "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[30] OLC described the distinct schools of thought with respect to whether Common Article 3 should be read as a catch-all provision applicable in *all* situations of armed conflict beyond the scope of Common Article 2 or, instead, as a provision applicable *only* to situations of intrastate armed conflict in the nature of, say, civil war or insurgency. OLC opted for the latter interpretation and, noting the transnational aspects of the conflict with al Qaeda and the Taliban, concluded as a result that Common Article 3 did not apply to them either.[31]

Was this analysis of Common Articles 2 and 3 a violation of the norms of professional responsibility? Or was it instead a debatable but nonetheless legitimate assessment of a set of treaty provisions that proves on close inspection to be less comprehensive, or at least less clear, than some might prefer? Bruff appears to take the former view in relation to OLC's decision to interpret Common Article 3 narrowly, emphasizing that "[t]here were at the time . widely accepted arguments that [Common Article 3] is meant to be a catchall covering all unconventional conflicts."[32] No doubt there were many such arguments at the time, and of course the Supreme Court, in its 2006 decision *Hamdan v. Rumsfeld*, ultimately did adopt the catchall reading.[33] But there were at least some good-faith arguments at the time that favored the narrower reading. The official commentary published by the International Committee of the Red Cross, for example, makes plain the notion that Common Article 3 was meant to extend baseline aspects of the international laws of war for the first time to the context of armed conflict between a government and armed entities challenging the state's authority in its own borders.[34] In any event, the important point is that OLC's memorandum on this issue did describe and engage with both perspectives, before endorsing the narrower reading.

From this perspective, OLC's advice was not professionally incompetent. Suggesting that it was, moreover, tends to distract us from the important task of determining whether the Conventions themselves require reform. In particular, it tends to distract us from considering the possibility that the jurisdictional triggers in Common

30. *Geneva Convention Relative to the Treatment of Prisoners of War*, *supra* n. 27, at art. 3. "To borrow the phrase of one of the delegates, Article 3 is like a 'Convention in miniature'" Jean de Preux, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War* 34 (Jean S. Pictet ed., A.P. de Heney trans., Intl. Comm. Red Cross 1960) (available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf).

31. Bruff, *supra* n. 1, at 203. OLC's analysis did not end there, it also went on to address the outcome should Common Article 2 be applicable to some or all aspects of the conflict after all. In that circumstance, the question would arise whether al Qaeda or Taliban detainees qualified for prisoner of war ("POW") status. OLC determined that they would not, reasoning that neither organization could satisfy the four conditions of lawful belligerency specified in Article 4(a)(2) of the Third Geneva Convention as prerequisites to POW status for members of irregular armed groups not incorporated into a state's armed forces. *Geneva Convention Relative to the Treatment of Prisoners of War*, *supra* n. 27, at art. 4(a)(2).

32. Bruff, *supra* n. 1, at 203.

33. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

34. de Preux, *supra* n. 30, at 27-37.

Articles 2 and 3 are too narrow, or at least too ambiguous, and should be revised and expanded.

Two other aspects of OLC's treatment of Geneva Convention issues give rise to a similar concern. One concerns OLC's treatment of Articles 4 and 5 of the Third Convention. Article 4 specifies the criteria that must be met in order for a person captured in connection with an international armed conflict to qualify for prisoner of war ("POW") status. The members of a state's regular armed forces, for example, are entitled to POW status upon capture.[35] And even members of an irregular armed group such as an unincorporated militia may obtain POW status under Article 4, provided that

> such militias or volunteer corps, including such organized resistance movements, fulfil [sic] the following conditions:
> (a) That of being commanded by a person responsible for his subordinates;
> (b) That of having a fixed distinctive sign recognizable at a distance;
> (c) That of carrying arms openly;
> (d) That of conducting their operations in accordance with the laws and customs of war.[36]

Article 5, in turn, provides that:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[37]

Article 5, in short, requires states to provide some degree of process – at least something more formal than a drumhead determination in the field by the capturing unit - before denying POW status to a person who engaged in a belligerent act in connection with an international armed conflict.

Bruff concludes that "[o]n its face, Article 5 appears to have been applicable to the detainees," that OLC failed to address this topic, and that this omission facilitated a decision by the Bush administration to "simply ignore[] this provision."[38] There are several problems with that assessment, however. First, OLC in a separate memorandum did deal directly with the question of whether the Article 5 rule applied to at least the Taliban detainees. In a February 7, 2002, memorandum from Assistant Attorney General Jay Bybee to White House Counsel Alberto Gonzales, titled *Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949*, OLC concluded that no Taliban fighter possibly could qualify for POW status pursuant to Article 4 because the Taliban collectively failed to comply with several of the conditions of lawful belligerency specified above, and, thus, that no individual Article 5 hearings ever would be

35. *Geneva Convention Relative to the Treatment of Prisoners of War, supra* n. 30, at art. 4(a)(1).
36. *Id.* at art. 4(a)(2).
37. *Id.* at art. 5.
38. Bruff, *supra* n. 1, at 202.

warranted.[39] This analysis is itself subject to some debate,[40] but the important point is that OLC did not actually disregard the issue. Second, the conclusion that Article 5 applies "on its face" to these detainees runs up against an insurmountable problem insofar as the relevant jurisdictional framework is that of Common Article 3 rather than Common Article 2. Simply put, there is no such thing as POW status in a Common Article 3 setting; POW status and the obligation to employ competent tribunals pursuant to Article 5 only come into play where the Common Article 2 trigger has been satisfied.

Third, and most significantly, Article 5 itself is curiously limited in an important respect. It assumes that the detainee did in fact commit a belligerent act, and asks only whether the person did so while entitled to POW status (in which case the act most likely was privileged) or not (in which case the detainee most likely can be prosecuted criminally in addition to being detained). What Article 5 does *not* do is require the detaining power to provide any particular process to a person who denies that they committed any belligerent act in the first place or that they are part of the enemy's forces. That, of course, is the most pressing question that arises in connection with the use of military detention in a conflict involving a clandestine, nonstate organization such as al Qaeda or an insurgent group such as the Taliban, and it is a question that has generated endless debate in American domestic law in connection with the availability and scope of habeas corpus review for Guantanamo and other detainees. Somehow, however, we have had little debate regarding the desirability of amending Article 5 (or Common Article 3) to address this pressing issue. Focusing on whether OLC adequately addressed the POW-determination aspect of Article 5 to some extent perpetuates this misallocation of our attention.

A final point relating to Bruff's criticism of OLC in connection with Geneva issues: Bruff concludes that the Fourth Geneva Convention "appears to provide residual protections to anyone" not eligible for POW status in the context of an international armed conflict.[41] This misses an exception that in a conventional armed conflict would be minor, but which proves to be major in the context of transnational armed conflict involving a nonstate actor the membership of which is not defined by citizenship. According to Article 4 of the Fourth Convention, 'protected person' under that treaty does not extend to "[n]ationals of a neutral State who find themselves in the territory of a belligerent State," nor to "nationals of a co-belligerent State."[42] This exception obviously contemplated a conventional state-versus-state armed conflict of the kind typified by the Second World War. It maps onto the post-9/11 capture and detention of suspected members of al Qaeda and the Taliban in strange ways given the "neutral" or even "co-belligerent" citizenship of many of those individuals. In that respect, the Article 4 exception seems a good candidate for revision, or at least reconsideration, but we are

39. *See* Memo. from Jay S. Bybee, Asst. Atty. Gen., to Alberto Gonzales, White House Counsel, *Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949* at 7-8 (Feb. 7, 2002) (available at http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf).

40. *See* Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 716-732 (2006) (examining the arguments relevant to application of Article 4 to Taliban and al Qaeda members).

41. Bruff, *supra* n. 1, at 203.

42. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* art. 4 (Aug. 12, 1949), http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument.

less likely to have that conversation if we too quickly criticize OLC for failing in 2002 to advance a more sweeping interpretation of the Fourth Convention's scope of application.

The Geneva Conventions are not the only legal materials at risk of getting too much of a free pass when we frame our analysis of post-9/11 controversies in terms of the bad advice narrative. The same concern arises in connection with at least two other important areas of international and domestic law: those pertaining to extraordinary rendition and to interrogation.

Rendition, in this setting, refers to a policy whereby the United States seizes a person and transfers him across international borders into the custody of another state, often, though not always, the detainee's own country of origin or citizenship. The practice existed prior to the 9/11 attacks, but attracted relatively little attention at the time. Eventually it became the subject of intense controversy, however, based on allegations that the United States engaged in rendition as a means to, in effect, outsource torture or lesser forms of prisoner abuse.[43] From a legal perspective, the practice of rendition raises a host of issues, including compliance with the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). CAT Article 3 specifically provides that "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[44]

Bruff concludes that "it is hard to believe" that OLC's arguments reconciling the rendition program with Article 3 were "very persuasive."[45] But there are many reasons why CAT Article 3 has not played a significant role to date in limiting the U.S. government's reliance on rendition, and these reasons cannot be so readily dismissed. First, in the course of consenting to ratification of CAT, the Senate adopted an understanding of "substantial grounds" equating that phrase with a "more likely than not" standard of evidence,[46] and thereby making it relatively difficult to establish an Article 3 violation (the U.S. government's position is that it will not carry out a transfer where the risk of torture rises to the more likely than not standard). Second, the Senate also ratified CAT subject to the condition that various articles, including Article 3, shall be "non-self-executing."[47] Congress did not act to execute Article 3 until 1997, and even then did so in only a limited way. A bill initially proposed in the Senate would have directly carried forward the Article 3 prohibition into statutory form,[48] but the law as actually enacted merely called for appropriate agencies to promulgate regulations implementing the Article 3 concept something that neither the Department of Defense nor the Central Intelligence Agency ever have done.[49] Third, the government ordinarily obtains "diplomatic assurances" from receiving states to the effect that the receiving state

43. *See* Bruff, *supra* n. 1, at 233.

44. *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. III(1) (Dec. 10, 1984), 1465 U.N.T.S. 113.

45. Bruff, *supra* n. 1, at 235.

46. Sen. Exec. Rep. 101-30 at 36 (Aug. 30, 1990).

47. *Id.*

48. *See* Sen. 903, 105th Cong. § 1606 (June 16, 1997); 143 Cong. Rec. 11116 (1997).

49. *See* Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-2822 (1998), codified in relevant part in the notes following 8 U.S.C. § 1231 (2006).

will not abuse the transferee, which when credited as reliable by the State Department, give rise to difficult questions regarding the circumstances in which a court plausibly could reject that conclusion as unjustifiable.[50] And fourth, the U.S. government's position is that Article 3 obligations in any event apply only to transfers from U.S. territory, not transfers that occur overseas.[51]

Taken together, these arguments make it difficult to establish the illegality of any particular rendition. OLC in relying on such arguments would not have misstated or distorted the existing law, on this view, but rather would have illustrated just how limited the existing law turns out to be on this important topic. Indeed, if any institution should bear blame for constructing rules that create the legal space for extraordinary rendition to occur, Congress would seem as likely a candidate as any. And yet we do not hear much about the need for new legislation to more carefully constrain this practice.

Finally, there is the matter of torture or abuse committed against persons in U.S. custody. Bruff is singularly unimpressed with the quality of OLC's work when it comes to its analysis of the Torture Act, for reasons that by now have become very familiar.[52] And for good reason, bearing in mind the bizarre attempt in the so-called "torture memo" to equate the Torture Act's definition of "severe pain and suffering" with the level of pain associated with death or major organ failure.[53] But here too our focus on the quality of the lawyering distracts from a focus on the quality of the laws themselves.

Careful consideration of the language of the Torture Act suggests that many of the most controversial aspects of post-9/11 interrogation practices would not have violated the statute even had OLC adopted a more temperate view of the meaning of torture and the relevant defenses to such a charge. The problem lies in the remarkably stilted definition of "severe mental pain or suffering" contained in the statute - i.e., the aspect of the statute most likely to be implicated by such practices as exploitation of phobias or sleep deprivation. According to the definition contained at 18 U.S.C. § 2340(2), it is not enough to show that a person purposefully or knowingly inflicted severe mental pain or suffering on a detainee. Under § 2340(2), this would only be a crime if the perpetrator achieved this result through one of the following means:

> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other

50. *See* Chesney, *supra* n. 40, at 694-700.

51. *See e.g. Operational Law Handbook* 54 (Derek I. Grimes ed., JAG Leg. Ctr. & Sch. 2005) (stating that human rights law treaties do not bind U.S. forces outside the territory of the U.S. because "the United States interprets [them] to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community").

52. Bruff, *supra* n. 1, at 239-247.

53. Memo from Jay S. Bybee, Asst. Atty. Gen., to Alberto Gonzales, White House Counsel, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A* at 5-6 (Aug. 1, 2002) (available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf).

procedures calculated to disrupt profoundly the senses or personality . . . .[54]

This is a remarkably narrow list of means through which one might purposefully or knowingly inflict severe mental pain and suffering on someone, leaving all other pathways to purposefully or knowingly achieving that same result uncriminalized. But why should there be any "means" criterion here in the first place? As a matter of policy, would we not want to criminalize all knowing or purposeful infliction of such pain and suffering, regardless of the means used to inflict it? This is a terribly important question, yet we are not talking about this in the long-running national debate over torture. Might it be that we shy away from this question lest we appear to be endorsing the legality of torture as the law currently stands? That would be an understandable sentiment, but hardly a desirable outcome.

IV. CONCLUSION

In the final analysis, *Bad Advice* has two overarching virtues. The book as a whole is an exceptionally useful reminder of the importance of professional responsibility norms especially that of detachment in the often conflicted context of internal executive branch legal advice, and the bad advice narrative itself is a powerful lens through which to understand how lawyers used the advice-giving process as a means by which to facilitate policymakers' pursuit of legally-problematic policies. But the bad advice narrative also is dangerous in a subtle way. By drawing our attention to the possible inadequacy of the lawyers, it distracts us from the possible inadequacy of the laws themselves. Indeed, by making us wary of appearing to endorse what many perceive to be shoddy lawyering, the bad advice narrative actively discourages us from critically assessing the underlying legal materials. This is most unfortunate for, as recounted above, many of these instruments suffer from unexpectedly significant problems of clarity, scope, and content; in some of the most controversial post-9/11 policy disputes, it remains far from clear that the problem was bad advice rather than bad laws.[55]

54. 18 U.S.C. § 2340(2) (2006).

55. I leave it to the other authors and reviewers associated with this symposium to discuss whether the law genuinely plays a constraining role even when conditions of clarity, scope, and content are satisfied and corresponding legal advice is given in the spirit of the detachment norm.

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