



JAA PRESIDENT TESTIFIES BEFORE REVIEW PANEL

On June 28, 2005, Lt Col Brett D. Barkey, USMCR, President of the Judge Advocates Association, testified before the Defense Department's Independent Review Panel to Study the Relationships between Military Department General Counsels and Judge Advocates General.

Congress mandated creation of the Panel in the National Defense Authorization Act for Fiscal Year 2005. The Panel consists of seven civilians who have expertise in military law or the functioning of military departments. The panel is to conduct a study of the historical relationships between the service general counsels and judge advocates general. The Panel will make written recommendations to improve those relationships and to enhance the legal support the military departments receive. The Panel held a public meeting at the Hilton Crystal City in Arlington, Virginia, on June 28 and 29, 2005.

An excerpt of Lt Col Barkey's testimony follows. The testimony of National Institute of Military Justice President Eugene Fidell can be found at www.nimj.org/documents/GC-TJAG.pdf

Good afternoon, I'm Brett Barkey, President of the Judge Advocates Association. Established in 1943, our mission, in part, is to serve as a voice for military lawyers and to advocate for legal improvements. Our membership includes many distinguished flag and general officers, including former Judge Advocates General, as

well as talented young active and reserve military lawyers who have served so nobly in Iraq, Afghanistan and around the world. As an example of our endeavors on behalf of the military legal community, I'd ask your permission to include a copy of an amicus brief we filed in a recent Supreme Court case highlighting the critical importance of having equal access to law schools to recruit judge advocates.

The Judge Advocates Association wants to urge, in the strongest possible terms, that the senior military leader of each military service have direct access to both the Service Secretary and the Service Chief. This access should not be subject to the approval, review or "filtering" of a civilian general counsel. The General Counsel should, of course, have the same access to the Service Chief and the Service Secretary.

Just as the Goldwater-Nichols Act reaffirmed the independence of the Chairman of the Joint Chiefs of Staff in his role as military advisor to the President, Congress last year appropriately confirmed the independence of the Judge Advocates General and the SJA to CMC as they provide military legal advice. The Goldwater-Nichols Act ensures that the President receives military advice directly from the Chairman without the filter of the Secretary of Defense. The Chairman in turn receives advice from the Service Chiefs. Both the Chairman and the Service Chiefs require unfiltered, independent military legal advice as they execute these responsibilities.

In addition to advising the Chairman, the Service Chiefs may also exercise their prerogative to raise matters directly to the Service Secretary or the President. Here again the Service Chiefs require independent military legal advice unfiltered by a civilian general counsel. Of course, the Service Secretary will likely solicit the input of the general counsel before making a decision.

In our view, Congress can and should go further in protecting the independence of the Judge Advocates General and the SJA to CMC by requiring the military departments to eliminate the "chief legal officer of the department" language where it appears in a department's regulations or directives. While that language is commonly found in the statutes organizing other federal departments, including my own Department of the Treasury, it is inappropriate for the military departments because of the special role the armed forces and military leaders play, particularly as they advise the civilian leadership about military operations.

The purpose of such provisions is apparently to identify the individual responsible for settling legal positions for a department. However, having the general counsel "settle all legal matters" is ill-advised for defense issues, including decisions about the exercise of military power. In those matters, leaders need to have a full discussion of legal risks (along with all the other operational risks) of a particular military option. Leaders should not be presented a "settled legal position" of the Department during the analysis of military options, but rather should have a full discussion that includes independent military legal analysis. Of course, once the appropriate civilian authority makes a decision, unless patently illegal, military members will faithfully execute that decision, fully respectful the principle of civilian control of the military.

It is our view that the Judge Advocates General should exercise the lead role in their military departments regarding the administration of military justice; the organizing, training and equipping of judge advocates and military paralegals; and provision of legal advice in relation to military operations -- "operational law." The role of the Judge Advocates General in military justice is well settled and reflected in the Uniform Code of Military Justice. The

organizing, training and equipping of military lawyers and paralegals also seems uncontroversial. The subject of "operational law" bears merits additional discussion as it seems to encompass an ever expanding array of legal subjects commanders confront in military operations, such as contracting, fiscal law, claims, acquisition law, and the law of armed conflict.

Operational law should be the particular province of the Judge Advocates General and the SJA to CMC for several reasons. First, military commanders need and want their legal advisors with them, including when they deploy and execute operations. In such environments, these legal advisors are going to be military -- judge advocates -- because judge advocates bring soldiering skills in addition to their legal acumen. As you know, military legal professionals have not infrequently been engaged directly in combat operations in Iraq, and they are regretfully counted among the casualties. Second, to provide legal advice about military operations requires an intimate understanding of such operations, including a specific understanding of weapon systems, military organizations, and the troops. Judge Advocates provide that depth of knowledge. Outside of those areas, it is our position that there is no fixed division of legal tasks that should be applied across all military departments. Rather, the Service Secretaries ought to assign such tasks in the manner that best fits the culture and organization of their particular departments.

Regarding the relationship of headquarters elements, such as the Office of the General Counsel and the Office of the Judge Advocate General, to the field, we would observe that the provision of legal advice to local commanders tends to be decentralized as a practical matter. It would simply be ineffective to attempt to centralize the provision of such services by

requiring headquarters approval over any but the most critical legal issues.

I can relate a personal experience to illustrate this. For several months prior to the invasion of Iraq, I was detailed to the DoD General Counsel's office where I worked on legal authorities related to the possible occupation of Iraq. In the course of my work, the Department developed several positions that we presented as legal positions of the Department to other departments and to the National Security Council. One of those positions was a nuanced and well-researched position, if I do say so myself, about the authority of the occupation government under the laws of war -- yet that position appeared at to differ, at least superficially, from what the most widely available hornbooks said.

I then had the opportunity to deploy to Iraq as a deputy legal advisor to the head of the Office of Reconstruction and Humanitarian Assistance. In theater, I had a chance to interact with lawyers at every echelon from U.S. Central Command to young captains and lieutenants advising battalion commanders. At every level, I pitched what I believed to be the Department's "settled" legal position on the subject, but found commanders and their lawyers very skeptical. Commanders trusted their own judge advocates, with whom they had deployed and shared hardships, and distrusted me, a Pentagon product they did not know. Commanders were also very sensitive to their own personal responsibility, and potential legal liability, under the laws of war -- in that area they were especially reliant on their own judge advocates. At the time, I was frustrated that I faced arguments about my position from these commanders and their judge advocates. I naively thought that simply delivering the position of the Department of Defense's General Counsel, the department's chief legal officer, would have ended the discussion. But it did not, and I now realize that the debate about the

position was important, and that each commander needed to have the debate aired before he or she decided to accept the position - - again because the commander bore potential individual legal liability.

What was most regrettable about all this, in my view, was that the debates were taking place as combat operations were underway -- with commanders and their judge advocates pressed with their duties. The debate and discussion were necessary, but should have taken place long before operations commenced.

I want to close with a recommendation that the Judge Advocates General and SJA to CMC be elevated in grade. While we believe the Judge Advocates General and the SJS to CMC have been effective at their present grades, we also believe it is critical for Congress and society to signal the importance they attach to the rule of law and to the military legal leaders responsible for enforcing it and for advising senior military and civilian leaders about it. Recent events have reinforced that respect for the rule of law merits attention that is at least equal to other operational concerns. That equal importance can be symbolized when the Service Secretary receives an action briefing and the senior military lawyer is a lieutenant general or vice admiral (or major general in the case of the SJA to CMC) and is the same grade as the senior "operator" (such as the Deputy Chief of Staff for Operations). These elevations should not count against staffing limitations for general or flag officers of their grades.

Thank you for inviting the Judge Advocates Association to participate in this important discussion. ■