

## Book Reviews

### Bad Advice: Bush's Lawyers in the War on Terror<sup>1</sup>

Reviewed by Major Laura R. Kesler\*

*The Bush administration displayed a basic failure to appreciate the best role of its lawyers. Viewing law as an implement of the war on terrorism rather than a set of constraints upon waging it, the administration employed its lawyers as a shock troop of reverse lawfare, not as detached counselors who could anticipate and forestall legal jeopardy. To their own discredit, many of the lawyers accepted, and even gloried in, this perversion of their role.<sup>2</sup>*

#### I. Introduction

Military lawyers face unique, conflicting “imperatives of duty” in their requirement to serve both commanders and the law.<sup>3</sup> On the one hand, judge advocates (JAs) are called on to support commanders and advise them on the legality of proposed courses of action. On the other hand, JAs are required to adhere to distinct ethical standards and the broad spectrum of rules, regulations, statutes, codes, case law, and well-established legal principles that comprise “the law.” The means and ends of military operations and the interests and goals of commanders sometime drastically conflict with the fundamental requirements of ethical advocacy and the rendering of proper legal analysis and advice. In times of perceived crisis, commanders may plan novel actions for which there seem no clear precedents or that sound dubious but potentially lawful under the unique circumstances in which the command is operating. Judge advocates may be forced to navigate alone murky, gray areas of the law and to render sound legal advice to commanders who, in return, may impose significant pressure to find a legal justification to their means or ends.<sup>4</sup> This conflict gives rise to an important question: How should JAs proceed when pressured externally to provide legal support for a commander’s wishes but pressured internally to oppose them based on legal right or conscience?<sup>5</sup>

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<sup>1</sup> HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009).

<sup>2</sup> *Id.* at 285.

<sup>3</sup> *Id.* at 61 (discussing this conflict in relation to executive attorneys who serve both the President and the law).

<sup>4</sup> Lieutenant Colonel (Ret.) Diane Beaver, former Staff Judge Advocate at Guantanamo Bay, claims to have been in just this position when drafting a now-controversial legal opinion authorizing the use of “Category III” interrogation techniques. See, e.g., Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805?printable=true&currentPage=all> (last visited Sept. 7, 2009); Statement of Lieutenant Colonel (Ret.) Beaver Before the U.S. S. Armed Servs. Comm. (June 17, 2008), available at [http://www.fas.org/irp/congress/2008\\_hr/061708beaver.pdf](http://www.fas.org/irp/congress/2008_hr/061708beaver.pdf) (last visited Sept. 7, 2009).

<sup>5</sup> BRUFF, *supra* note 1, at 7 (describing this dilemma in the context of fifteenth and sixteenth century lawyers and their kings).

In *Bad Advice*, Harold H. Bruff answers this question by providing a set of principles designed to help lawyers navigate controversial, uncharted legal waters.<sup>6</sup> In doing so, Bruff examines four key policies developed by the Bush Administration during its war on terror<sup>7</sup> and analyzes them in light of domestic law, customary international law, military law and tradition, and rules of professional responsibility. Though Bruff’s analysis focuses on the relationship between presidents and their executive advisors, the lessons and principles he discusses are applicable and relevant to JAs in their role as command advisors.

#### II. Format, Organization, and Tone

*Bad Advice* is a balanced, extensively-documented<sup>8</sup> account of some of the most controversial decisions ever made in the history of the White House. Relying on both primary and secondary sources, Bruff provides examples of executive legal advisors who acted honorably and admirably,<sup>9</sup> and distinguishes their advocacy from that of the Bush advisors who he contends failed to do so.<sup>10</sup> Bruff uses these distinctions to illustrate how lawyers—government lawyers especially—should execute their professional duties.

Bruff does an excellent job educating readers on the historical events, legal precedents, and the Bush Administration policies that are relevant to his analysis. He does not assume knowledge on the part of the reader and periodically recaps and builds on information from preceding chapters. Bruff’s ability to state his analysis so clearly likely stems from the fact that he is a legal educator, military veteran, experienced author, and seasoned former

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<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 138–80 (NSA surveillance), 181–98 (detention of enemy combatants), 213–25 (military tribunals), 226–63 (interrogation techniques).

<sup>8</sup> See *id.* at 299–68 (68 pages of notes) and 369–95 (27-page bibliography).

<sup>9</sup> See *id.* at 297 (Robert Jackson), 81 (Warren Christopher), and 122, 211, and 284 (Jack Goldsmith).

<sup>10</sup> Most notably, John Yoo, David Addington, William J. Haynes II, and Alberto Gonzales. See *id.* at 119–24.

government attorney—factors which also make him uniquely qualified to write this book.<sup>11</sup>

*Bad Advice* is well organized, with information divided into two primary sections. Part I focuses on the past, providing an historical analysis of the relationship between presidents and their attorneys general and the creation of executive legal offices, such as the Office of Legal Counsel. This section illustrates the norms for presidential interaction with lawyers both internal and external to the Executive Branch. Readers should pay close attention to discussion of key legal cases presented in Part I, as these provide background for Bruff's subsequent analysis of current events in later chapters of the book. Part II focuses on contemporary issues, describing in great detail the Bush Administration's decisions and policies in four key areas: surveillance by the National Security Agency, indefinite detention of enemy combatants, the use of military commissions, and the use of controversial interrogation techniques.<sup>12</sup> Bruff provides extensive analysis of how these decisions were shaped by Bush's executive attorneys, especially John Yoo,<sup>13</sup> David Addington,<sup>14</sup> William J. Haynes II,<sup>15</sup> and Alberto Gonzalez.<sup>16</sup> Bruff criticizes these attorneys for refusing to seriously consider the advice and concerns of experienced military lawyers and federal law enforcement officers, and for providing superficial, incorrect legal opinions.<sup>17</sup> To a lesser degree, Bruff criticizes Bush as well, for intentionally surrounding himself with only the most zealot "yes men" in the War on Terror.<sup>18</sup> Included in Part II are detailed descriptions of the evidence Bruff relies on in making his assertions.<sup>19</sup>

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<sup>11</sup> See Faculty Profile, U. COLO. L. SCH., <http://lawweb.colorado.edu/profiles/>

profile.jsp?id=8 (last visited Sept. 28, 2010). Bruff is a Professor of Law at the University of Colorado at Boulder. He previously served as a lieutenant in the U.S. Coast Guard Reserve and as a senior attorney and advisor to the Department of Justice and the White House. He is the author of numerous books and articles concerning the executive branch and separation of powers.

<sup>12</sup> BRUFF, *supra* note 1, at 138–80, 181–98, 213–25, 226–63.

<sup>13</sup> *Id.* at 122, 125, 205, 239, 250–52, 271–72, 296.

<sup>14</sup> *Id.* at 119, 125, 295.

<sup>15</sup> *Id.* at 119–20, 214, 273–74.

<sup>16</sup> *Id.* at 121, 208–09, 240, 260, 295.

<sup>17</sup> *Id.* at 272, 273–74, 276, 278 (discussing protests lodged by the FBI and military lawyers), 283 (noting Bush's lawyers "ignored the voices of experience and the counsel of caution and arrogantly propounded overbroad theories of executive power that provided fertile ground for scandal").

<sup>18</sup> See *id.* at 116–25. For example, John Yoo was referred to within the Administration as "Dr. Yes." *Id.* at 125.

<sup>19</sup> *E.g.*, *id.* at 79–83 (Office of Legal Counsel guidelines), 106–07, 134–37, 239–52, 268–72 (John Yoo's memos and information from his autobiography), 272 (FBI "war crimes file").

### III. Usefulness and Relevance to Military Lawyers and Commanders

Many aspects of the relationship between a president and his executive advisors mirror those found in relationships between commanders and their legal advisors. Executive and military advisors alike are often called on to evaluate the legality of critical and time-sensitive courses of action. They can be subject to intense pressure from their clients to help them "get to yes." Evaluations and career advancement for both can be tied to their ability to support their clients and help them reach their desired ends.<sup>20</sup> *Bad Advice* provides lawyers with strategies for dealing with these realities and illustrates how "getting to yes" may have unexpected, disastrous consequences.

*Bad Advice* also provides basic information on the law of war that may be useful to military readers. Three chapters<sup>21</sup> are devoted to analysis of Bush's legal decisions in light of customary international law, the Geneva Conventions, military law and culture, and various military regulations, to include the Uniform Code of Military Justice, Army Field Manual 34-52,<sup>22</sup> and "SERE"<sup>23</sup> guidelines. Bruff introduces readers to the concepts of lawfare<sup>24</sup> and reverse lawfare,<sup>25</sup> and discusses how Bush's advisers used reverse lawfare to evade applicable laws, rules, and regulations.<sup>26</sup>

### IV. Guiding Principles

In the book's introduction, Bruff sets out to provide principles that are designed to help guide and constrain executive advisors and that are "simple enough to be mastered as an everyday guide in a busy world."<sup>27</sup> Despite this claim, *Bad Advice* contains no clear list of guidelines. Instead, Bruff weaves lessons throughout the book, articulating various principles as they arise in his analysis. The fact that readers are left to glean these principles on their own is a potential weakness in an otherwise outstanding legal reference. Nevertheless, *Bad Advice* is instructive, pertinent, and relevant to military lawyers and commanders alike.

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<sup>20</sup> *Id.* at 61–64.

<sup>21</sup> *Id.* at 199–12, 227–63, 264–83.

<sup>22</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) (formerly Field Manual 34-52).

<sup>23</sup> BRUFF, *supra* note 1, at 232. SERE stands for "survive, evade, resist, escape." FM 2-22.3, *supra* note 22, at glossary-10.

<sup>24</sup> BRUFF, *supra* note 1, at 132–33.

<sup>25</sup> *Id.* at 134 ("The administration's primary tactic in reverse lawfare was to deny the applicability of potentially restrictive sources of law . . . in advance of operations.")

<sup>26</sup> *Id.* (asserting that the Bush Administration's use of reverse lawfare was fundamentally inconsistent with the rule of law).

<sup>27</sup> *Id.* at 3.

The most well-developed and recurring principle is captured in the title of Part I of the book: “Right and Conscience.”<sup>28</sup> Bruff suggests that legal advice should not only be technically right, but also conscionable.<sup>29</sup> “[This] calls for an assessment of technical legal right, together with the adviser’s assurance that the claim can be advanced in good conscience.”<sup>30</sup> *Bad Advice* contains numerous examples of the application of this principle,<sup>31</sup> and its importance is discussed in nearly every chapter of the book.

A closely related principle is that lawyers should provide the advice a client *needs* to hear, rather than the advice he *wants* to hear.<sup>32</sup> Bruff provides examples of violations of this principle<sup>33</sup> and points out that, while such advice can be unwelcome and may be ignored, “a good (and brave) counselor [will find] a way to provide it.”<sup>34</sup> Bruff contends Bush’s lawyers violated this principle repeatedly by providing only the advice Bush wanted to hear, not the advice he needed to hear,<sup>35</sup> which lead to disastrous results.<sup>36</sup>

Two other key principles Bruff articulates are the importance of maintaining sympathetic detachment from a client<sup>37</sup> and the benefits of cultivating a sense of self-awareness.<sup>38</sup> These principles are important to military practitioners because their relationships with commanders are, in some respects, more personal than relationships between others types of attorneys and their clients.<sup>39</sup> These personal aspects subject commander–JA relationships to

“the vagaries of human nature,”<sup>40</sup> which JAs must guard against.

Integral to the principles of right, conscience, sympathetic detachment, and self awareness are two additional principles—the need for integrity and candor.<sup>41</sup> These last two concepts are not only guiding principles, they are obligations,<sup>42</sup> and they are imperative to a lawyer’s ability to provide honest assessment and analysis. Candor requires that lawyers provide a complete analysis of relevant issues and precedent, rather than limited, superficial analysis designed to get a client to “yes.”<sup>43</sup> Lawyers must include discussion of contrary law and precedent in their opinions, and analysis of the same. Bruff directly links candor to conscience, stating, “[A]n important element of good conscience in forming legal opinions is consideration of contrary viewpoints and precedents.”<sup>44</sup> Bruff examines the concepts of integrity and candor in the context of Bush’s closest legal advisors, discussing these advisors’ failure to fully and properly reveal and discuss legal authority contrary to their position and Bush’s.<sup>45</sup> “The resulting lack of candor and even of self-awareness fit the administration’s style, but not the lawyers’ responsibilities. It protected neither the clients nor, in the end, the lawyers themselves.”<sup>46</sup>

## V. Conclusion

Because legal advice begets action,<sup>47</sup> it has the potential to cause devastating consequences to both military commanders<sup>48</sup> and to our country.<sup>49</sup> When rendered appropriately and correctly, it also has the potential to

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<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 368. The question of conscience is not whether a lawyer likes or agrees with the law. The question is whether “the lawyer’s professional conscience [is] sufficiently satisfied with the answer [of legality] to allow him or her to” sign off on it “in the expectation that it will someday be made available for all to see.” *Id.*; see also U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6(f) (1 May 1992) [hereinafter AR 27-26] (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.”).

<sup>30</sup> BRUFF, *supra* note 1, at 8.

<sup>31</sup> See *id.* at 212, 224, 252, 271.

<sup>32</sup> *Id.* at 8, 287.

<sup>33</sup> See *id.* at 8–9.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 287.

<sup>36</sup> *Id.* at 283 (describing recent detainee-related events as a “blot on our history” and blaming Bush’s legal advisors, claiming, “[T]hey ignored the voices of experience and the counsel of caution and arrogantly propounded overbroad theories of executive power that provided fertile ground for scandal.”).

<sup>37</sup> *Id.* at 82 (discussing the concept of sympathetic detachment).

<sup>38</sup> *Id.* at 286.

<sup>39</sup> Judge advocates deploy with commanders and may share meals and quarters with them. See also FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI, at x (2001).

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<sup>40</sup> BRUFF, *supra* note 1, at 13 (discussing this in the context of relationships between presidents and their executive advisors).

<sup>41</sup> *Id.*

<sup>42</sup> See AR 27-26, *supra* note 29, para. 6(c) (requiring military attorneys to execute their duties with diligence and honesty). See also *id.* cmt. to r. 2.1 (discussing a lawyer’s duty to give candid advice regardless of the fact it might be “unpalatable” to the client).

<sup>43</sup> BRUFF, *supra* note 1, at 250, 269–72, 285, 295.

<sup>44</sup> *Id.* at 287.

<sup>45</sup> *Id.* at 284–87.

<sup>46</sup> *Id.* at 285.

<sup>47</sup> *Id.* at 264–83. An entire chapter is devoted to this concept.

<sup>48</sup> Consider Brigadier Janis Karpinski and Colonel Thomas Pappas, who were relieved from command at Abu Ghraib for events they claim were in compliance with policy and legal guidance in place at the time. Simera Simone, *Abu Ghraib Head Finds Vindication in Newly Released Memos*, CNN.COM (Apr. 22, 2009), available at <http://www.cnn.com/2009/US/04/22/us.torture.karpinski/>; BRUFF, *supra* note 1, at 280–81; Major General Anthony Taguba, Army Regulation 15-6 Investigation of the 800th Military Police Brigade (3 Mar 2004), available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> (last visited Sept. 8, 2010).

<sup>49</sup> BRUFF, *supra* note 1, at 296 (quoting a senior Justice Department lawyer’s opinion that “[i]t will take fifty years to undo the damage” John Yoo did to the White House).

“confer legitimacy on . . . actions.”<sup>50</sup> For these reasons, it is imperative that military practitioners have a “yardstick” in place before rendering legal advice on murky legal scenarios. The higher the stakes or the more complicated the scenario, the more important this yardstick becomes.

*Bad Advice* is a helpful guide for military lawyers because it provides historical examples of government advisors who acted wisely, highlights recent examples of government advisors who reportedly acted recklessly<sup>51</sup> and

caused terrible damage,<sup>52</sup> and provides principles to help steer lawyers through uncertain legal issues. *Bad Advice* is likewise a helpful tool for commanders because it illustrates the importance of creating a balanced, experienced advisory team and describes the professional qualities commanders should demand from and look for in their advisors.

The examples, lessons, and principles presented in *Bad Advice* comprise a treatise from which military practitioners, advisors, and commanders alike can benefit.

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<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.* at 292.

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<sup>52</sup> *Id.* at 296.