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A key behind-the-scenes architect of the Bush administration's first version of the military commissions for terrorism suspects — which the Supreme Court found to unconstitutionally restrict the legal rights of detainees — will take a central Pentagon position dealing with detainee policy for the Obama administration.

William Lietzau, a Marine colonel who currently serves as deputy legal counsel to the National Security Council, is poised to become the Pentagon's new deputy assistant secretary for detainee affairs in the next several weeks. Lietzau, an international law expert described even by his critics as a brilliant and energetic attorney, previously served as a special adviser to Jim Haynes, the top Pentagon lawyer during Donald H. Rumsfeld's tenure, when Rumsfeld and Haynes codified torture and indefinite detention as hallmarks of Bush-era terrorism policy. The position, which is not subject to Senate confirmation, came open late last year, after Phil Carter, the previous deputy assistant secretary for detainee affairs and a favorite of civil libertarians, abruptly resigned.

As the next deputy assistant secretary, Lietzau will be at the center of the Obama administration's decisions about trying the remaining Guantanamo detainees in reformed military commissions or in federal courts. He will also be central to the construction of a post-Guantanamo terrorism-detention policy in an administration that claims to be more committed to the rule of law than its predecessor. Lietzau is said to have gained the confidence of senior administration officials over the past year, particularly as he helped revise the military commissions to include greater process protections for defendants — [even though civil libertarian groups still consider those rules to be unfair](#)

Two senior military lawyers who fought with Haynes over military commissions and interrogations in the Bush administration said they were surprised to hear of Lietzau's impending appointment to the Obama Pentagon. Retired Rear Adm. Don Guter, who served as the Navy's Judge Advocate General from 2000 to 2002, described Lietzau as a close Haynes confidante but not an outspokenly opinionated figure. "If he disagreed with Jim Haynes you'd never know about it," Guter said. "Because of his close association with Haynes I'd be more comfortable if I saw something public [indicating] he'd made a break with those policies."

Retired Army Maj. Gen. Thomas J. Romig also described Lietzau as closely tied to Haynes, [whose role in instituting extreme interrogations at Guantanamo Bay against the wishes of military lawyers cost him Senate confirmation for a federal judgeship](#)

. Romig, the Army's Judge Advocate General during Bush's first term, said that although he did not know specifically what positions Lietzau took on detainee interrogations or if Haynes even consulted him on the issue, "at that time, he was certainly in the bosom of the administration that was running interrogation programs that at the very least were quite troubling, and in many minds were a violation of the laws of war and the Geneva Conventions." Lietzau's expertise in international law — he was

[part of the Clinton administration's delegation to the 1998 Rome conference that wrote the treaty establishing the International Criminal Court](#)

— should have allowed him to know "what was right and wrong with [Bush's] interrogation policies," Romig said.

While Lietzau was close to Haynes, he also became close to retired Marine Gen. Jim Jones, now Obama's national security adviser. The two officers met in Europe a few years after Lietzau had left the commissions, when Jones commanded U.S. military forces on the continent and Lietzau was his staff judge advocate. Lietzau joined the National Security Council last spring at Jones' request.

Lietzau has many advocates in the legal and policy communities. John Bellinger, the former National Security Council and State Department legal adviser during the Bush administration, sparred frequently over detainee treatment with Haynes and David Addington, Dick Cheney's attorney, who took far more extreme positions. But Bellinger, now a partner with the law firm of Arnold & Porter, considered Lietzau a first-rate appointee. "I think Lietzau is an excellent choice who knows the issues and is pragmatic and non-ideological," he said. "I have never seen him to approach terrorism issues or international justice issues in an ideological way.

Similarly, Eugene Fidell, a Yale Law professor and president of the National Institute of Military Justice, called Lietzau's appointment "creative," despite any substantive policy disagreements they had. "The last thing I want is someone to come into the job without the respect of the military bench and bar, which he would have," Fidell said, "and having to start from scratch in understanding the legal environment."

Rosa Brooks, a Pentagon policy official who [criticized the military commissions during the Bush years](#), added that while she couldn't confirm

Lietzau's appointment, "I am a fan of Bill Lietzau's. He's smart, an honest broker, and has both intellectual and moral integrity."

Lietzau was the first prosecutor for the military commissions established in 2001 — an official Pentagon release [called](#) him "instrumental" to the military commissions' "preparations" — and served in that role until 2003. Yet during that time, the commissions did not bring charges against a single detainee, a fact that raised eyebrows among his colleagues. "I have to believe in his position Lietzau was being used by Jim Haynes as a sounding board or adviser on all international law issues," Romig said, "because he was not doing much as chief prosecutor."

In a valedictory May 2003 press briefing, Lietzau described his role as "really the process portion of setting up military commissions." That process, established by Rumsfeld, his deputy Paul Wolfowitz and Haynes, departed significantly from the military's courts-martial system, restricting a defendant's right to a public trial and allowing for hearsay to be admissible, although Lietzau pushed for defendants to retain the presumption of innocence. At the briefing, a reporter asked Lietzau if the commissions provided a defendant with a defense comparable to the normal military justice system, and he replied that the commission's rules "were drafted to accommodate that kind of flexibility that would be needed." But five years after their creation, a 5-4 majority of the Supreme Court [ruled that the commissions were unconstitutional](#), improperly established by the administration and providing defendants with insufficient due process rights. In 2006, Congress passed a law authorizing a new version of the commissions although the Supreme Court in [2008 found problems with the process rights of the new commissions as well](#)

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One senator who voted against the 2006 Military Commissions Act was Barack Obama. Last May [at the National Archives](#), in one of Obama's most important national security speeches as president, Obama criticized "the flawed commissions of the last seven years" and said his embrace of a reformed version of the commissions would bring them "in line with the rule of law." Some in the administration believe Lietzau is, however ironically, the man for the job. A senior administration official who would not speak on the record because Lietzau's appointment has not been announced said that the colonel "believes the rule of law is a fundamental part of our effort in the fight against al-Qaeda" and that Lietzau's long experience with both the military commissions and international law provides the administration with "value added as we work with Congress" on a "durable" legal infrastructure for terrorism detainees.

At times Lietzau has expressed surprise about the Bush administration's terrorism decisions. During a talk he gave at Harvard shortly after 9/11, he said he doubted that the administration

would seek to try anyone in a military commission; months later he was helping design them. And in an article for a book on terrorism and international law published in 2002, Lietzau averred that President Bush's assurance that the military treat detainees in the "spirit" of Geneva Conventions ensured that detainees "will continue to be treated humanely." Over the next several years, dozens and perhaps hundreds of people detained by the U.S. in Guantanamo, Afghanistan, Iraq and elsewhere were tortured — activities President Obama expressly forbid during his first week in office by issuing an executive order restricting interrogation techniques to those listed in the Army's field manual.

Lietzau was a deputy to Haynes during the winter of 2002 and spring of 2003, when Haynes presided over an internal Pentagon debate resulting in the modified adoption for Guantanamo of "enhanced interrogation" techniques authorized for the CIA to use on senior-level al-Qaeda detainees. A Senate Armed Services Committee investigation from 2008 [determined that Haynes was a powerful bureaucratic force pressing for harsher detainee treatment](#)

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the committee that Lietzau was present at a key 2002 meeting in which participants expressed "some frustration with the quantity and quality of information being obtained" at Guantanamo, although Shiffrin did not attribute any substantive position to Lietzau. And no source for this piece had knowledge of Lietzau having anything to do with torture.

It is unclear what exactly Lietzau's appointment signifies in terms of concrete policy decisions or shifts. An email to Defense Secretary Gates' spokesman, Geoff Morrell, went unreturned. But Bellinger predicted Lietzau would "adopt a balanced approach between the security needs of the country and military and the need to address worldwide concerns that we do not have an appropriate legal framework or legal policies." The senior administration official said Lietzau was "bound and determined to make sure, whether it's in three years or seven, when he walks away from this job, there is a durable legal infrastructure" to handle terrorism detainees justly.

Both Guter and Romig, the former senior military JAGs who clashed with Lietzau's old boss, Haynes, independently described Lietzau as intellectually "flexible" and willing to faithfully implement the policies of his bosses. "The guy is smart, so he can figure out what the Supreme Court has said" about the due process rights to which detainees are entitled, but "it troubles me the guy can go from one end of spectrum to the other, arguably," Romig said. "It's very curious they would take somebody to run [policy on] detainees who was in the position he was in seven or eight years ago."