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DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART I)

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

MAY 6, 2008

Serial No. 110–97

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
42–212 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
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DEPARTMENT OF JUSTICE TO GUANTANAMO BAY: ADMINISTRATION LAWYERS AND ADMINISTRATION INTERROGATION RULES (PART I)

TUESDAY, MAY 6, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:56 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Davis, Wasserman Schultz, Ellison, Scott, Watt, Cohen, Franks, Pence, Issa, and King.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the Chair is authorized to declare a recess of the hearing.

Today's hearing will begin the Subcommittee's investigation of the role of Administration lawyers in formulating the rules for conducting interrogations. The Subcommittee has been investigating this Administration's interrogation policies and will continue to do so.

The Chair now recognizes himself for 5 minutes for an opening statement. Today's hearing begins our inquiry into the role of Administration in the formulation of our interrogation policies.

We have a distinguished panel of witnesses. Although shrouded in secret, even from Members of Congress who have the requisite security clearances to review it, and who have the constitutional responsibility to legislate and oversee it, the legal opinions issued by Administration lawyers have brought our Nation into international disrepute.

How we got this point, what is the legal basis for these actions, and what are the asserted parameters of these policies, these are the subjects of this first in a series of hearings.

The more information that becomes public, often in the press through leaks rather than through the congressional Committees with the constitutional duty to oversee it, the more disturbing it becomes.

Yet at a recent hearing and in subsequent meetings, we have been told that we may not be privy even on a classified, non-public basis, to those legal opinions. What possible constitutional excuse

there can be for saying that the non-secrecy of legal opinions could jeopardize the national security of the United States is beyond me.

This is totally unacceptable. So today we hear from experts in the field who will discuss what is known, or what the private investigations have been able to discern, and what the law says about that information.

I do not believe that this Administration or any Administration has some independent authority to craft secret law and apply it. I do not believe that this Administration or any Administration is free of the checks and balances in the Constitution.

I believe that we must and will get to the bottom of what has been done in our name, and what is being done. Torture is abhorrent. Whether done by the Taliban or by the Bush Administration, it is alien to our Nation's values, our history and our laws.

Secrecy and stonewalling will not change that. I hope a little sunlight will. I welcome our witnesses. I look forward to their testimony.

I want to reiterate that this is the first in a series of hearings and that we will in subsequent hearings receive testimony from those individuals who played a central role in the formulation and the implementation of these policies.

I yield back the balance of my time. I would now recognize for an opening statement our distinguished Ranking minority Member, the gentleman from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman. Mr. Chairman, the subject of detainee treatment was the subject of over 60 hearings, markups and briefings during the last Congress in the House Armed Services Committee alone, of which I am a Member.

The subject of this hearing is a memorandum that has long since been withdrawn. That memorandum regarded an interrogation program on which Speaker Pelosi was fully briefed in 2002. And at that briefing, no objections were made by Speaker Pelosi or anyone else.

According to the Washington Post, in September 2002, four Members of the Congress met for a first look at a unique CIA program designed to wring vital information from reticent terrorism suspects in U.S. custody.

For more than an hour, the bipartisan group, which included current House Speaker Nancy Pelosi, was given a virtual tour of the CIA's overseas detention sites and the harsh techniques interrogators had devised to try to make their prisoners talk.

Among the techniques described, said two officials present, was waterboarding. On that day, no objections were raised.

Mr. Chairman, let me be clear as I have done so in the past by saying that torture is already, and should be, illegal. I am against torture.

Torture is banned by various provisions of the law, including the 2005 Senate Amendment prohibiting the cruel, inhuman or degrading treatment of anyone in U.S. custody.

But what of severe interrogations? Mr. Chairman, were we not to engage in severe interrogations which could save thousands or even millions of lives, we would have to ask ourselves if we were facilitating the maiming and torture of innocent Americans by letting terrorist suspects conceal their evil plans.

Severe interrogations are rarely used. CIA Director Michael Hayden has confirmed that despite the incessant hysteria by a few, the waterboarding technique, for example, has only been used on three high-level captured terrorists, the very worst of the worst of our terrorist enemies.

Director Hayden suspended the practice of waterboarding by CIA agents in 2006. Before the suspension, he confirmed that his agency waterboarded 9/11 mastermind Khalid Shiekh Mohammed, Abu Zabeda and Abd al-Rahim al-Nashiri, and each for approximately 1 minute.

But who are these people, Mr. Chairman? When the terrorist Zabeda, a logistics chief of al-Qaida, was captured, he and two other men were caught building a bomb. A soldering gun was used to make the bomb was still hot on the table, along with the building plans for a school.

John Kiriaku, a former CIA official involved Zabeda's interrogation, said during a recent interview, "These guys hate us more than they love life. And so you are not going to convince them that because you are a nice guy and they can trust you, and that they have rapport with you that they are going to confess and give you their operations."

The interrogation of Zabeda was a great success, and it led to the discovery of information that led to the capture of terrorists, thwarted terrorist plans and saved innocent American lives.

When a former colleague of Mr. Kiriaku asked Zabeda what he would do if he was released, he responded, "I would kill every American and Jew I could get my hands on."

The results of a total of 3 minutes of severe interrogations of three of the worst of the worst terrorists were of immeasurable benefit to the American people. CIA Director Hayden said that Mohammed and Zabeda provided roughly 25 percent of the information that the CIA had on al-Qaida from all human sources.

Now we just need to kind of back up and thought about that. A full 25 percent of the human intelligence we have received on al-Qaida from just 3 minutes worth of a rarely used interrogation tactic.

Mr. Chairman, I just want to repeat again, as I previously said, torture is banned under Federal law that prohibits the cruel, inhuman or degrading treatment of anyone in U.S. custody. The nonpartisan Congressional Research Service has concluded that "The types of acts that fall within cruel, inhuman or degrading treatment or punishment contained in the McCain Amendment may change over time and may not always be clear. Courts have recognized that circumstances often determine whether conduct, "shocks the conscience and violates a person's due process rights."

Even ultra-liberal Harvard Law School Professor Alan Dershowitz agrees, as he wrote recently in the Wall Street Journal, "Attorney General Mukasey is absolutely correct that the issue of waterboarding cannot be decided in the abstract. A court must examine the nature of the governmental interest at stake and then decide on a case by case basis. In several cases involving actions at least as severe as waterboarding, the courts have found no violations of due process."

Much will be made today of a memorandum regarding severe interrogations authored by John Yoo, a former lawyer at the Office of Legal Counsel. But as Mr. Yoo himself said during a recent interview, "I didn't want the opinion to be vague so that the people who actually have to carry out these things don't have a clear line, because I think that that would be very damaging and unfair to the people who are actually asked to do these things."

These things, Mr. Chairman, are efforts to save thousands of innocent American lives. Now I expect Mr. Yoo's name will be mentioned many times today, but the name of Senator Charles Schumer probably not so many times.

But let us remind ourselves what Senator Schumer of New York said at an extended Judiciary Committee hearing on terror policy on June 8, 2004. And I wonder if they have the—can we start again?

[Recording follows:]

Mr. SCHUMER. We ought to be reasonable about this. I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake.

Take the hypothetical, if we knew that there was a nuclear bomb hidden in an American city, and we believed that some kind of torture, fairly severe, maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most senators, maybe all, would say do what you have to do.

So it is easy to sit back in the armchair and say that torture can never be used. But when you are in the foxhole, it is a very different deal. And I respect, I think we all respect the fact that the President's in the foxhole every day.

[Recording ends.]

Mr. FRANKS. Mr. Chairman, I wish so much that this was all just an academic discussion. But unfortunately, we now live in a post-9/11 world with an enemy whose leader, Osama bin-Laden, has said, "It is our duty to gain nuclear weapons."

Mr. Chairman, I am afraid that one such tragedy will transform this debate in the worst kind of way. Two airplanes hitting two buildings took 3,000 lives and cost this Nation $2 trillion.

If an atomic blast or some other weapon of mass destruction should ever be unleashed on this Nation, it would change our concept of freedom forever. And I just hope that we can transcend the partisanship and maintain our focus on that because there are still hours on the table left when we can prevent such a tragedy, I believe, if we realize that there are ways that we can combine human decency and a vigilant foreign policy an interrogation technique process to protect this country and the concept of freedom for future generations.

And I yield back.

Mr. NADLER. I thank the gentleman. I now yield for an opening statement to the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman and Members of the Committee. This is an important investigation and hearing, and these are areas that, to my knowledge, we have not gone into before.

And while I appreciate Trent Franks' statements, I will note for the record that I have never heard anyone on the other side quote Alan Dershowitz and Senator Schumer in the same breath. And maybe that is a great sign that we are beginning to work across the aisle.

I am going to be looking for somebody on your side to quote, too. And this is a great way to start us off.

But what brings us hear today are a couple of considerations. There are some memos—oh, and by the way, I am glad that Speaker Nancy Pelosi was cited also, but I didn't see what she saw, and that is why we are here, to try to make sure that this Committee, the only Committee in the Congress that has oversight over the Constitution and the Department of Justice, presents a true and accurate picture of what has happened. And that is what we are looking for today is the truth.

There are three memos. One, August 1, 2002, John Yoo and Jay Bybee at the Office of Legal Counsel to White House Counsel Alberto Gonzales, where we examine what is considered by many to be an extremely narrow definition of torture and an assertion that during the war, the President can take any act that he thinks necessary, reminding me of former President Nixon's admonition that if the President does it, it must be legal. And third, this memo was withdrawn by the Department of Justice in 2004.

The second document that I hope will be discussed is dated December 2, 2002, in which Secretary Rumsfeld approved interrogation methods for Guantanamo Bay. Department of Defense Counsel Jim Haynes recommended that he approve it. It included a legal memo or contribution from Diane Beaver, a lawyer at Guantanamo, but was something based perhaps as much on the August 1, 2002 memo that I mentioned as well.

The third memo is dated March 14, 2003, again from John Yoo at the Office of Legal Counsel to Jim Haynes at the Department of Defense, and was very similar—well, it was similar, but maybe even more extreme than the original August 2002 document. It was withdrawn by Jack Goldsmith in December.

Now the questions that I hope will be discussed, what was the role of senior government lawyers such as David Addington and John Yoo in the creation and approval of these interrogation practices? Second, what do the witnesses think about the legal memos on interrogation that the department has released? These memos have been widely criticized.

And by the way, did the lawyers who wrote them violate any of their legal obligations or ethical obligations? And this is quite a bit about lawyers.

I was reading this morning from Jack Goldsmith, himself a former head of the Office of Legal Counsel. And he refers constantly to the many lawyers that were involved in developing the laws that we use to regulate ourselves against torture and terrorism.

And I want people not to mistake the fact that I still recommend to many of the brightest young people that I meet that if they haven't chosen a course of professional activity, become a lawyer. I don't want them to be dismayed by anything that goes on this morning because I still feel that this is a very noble profession, not-

ing that all of the witnesses are themselves members of various bars, as is almost everybody up here with the Committee.

And so I too join warmly in welcoming our witnesses and look forward to an interesting discussion.

That you, Chairman Nadler.

Mr. NADLER. Thank you. In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Mr. ISSA. Mr. Chairman——

Mr. NADLER. [continuing]. Ask questions of our witness, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time. Did someone——

Mr. ISSA. Mr. Chairman, we would ask that regular order be followed, although I think both of us are willing to abbreviate our opening statements.

Mr. NADLER. [OFF MIKE]

Mr. ISSA. We would ask for regular order of alternation, as you have begun, but would agree to abbreviate in order to get onto the witnesses. In other words, we are disagreeing with the unanimous consent, Mr. Chairman.

Mr. NADLER. Well, the objection, first of all, is not timely, since unanimous consent was already approved——

Mr. ISSA. No, it was not approved. Mr. Chairman, it was not approved. We sought recognition.

Mr. NADLER. [continuing]. Let me just say the following. Oh, is that a vote? No, it can't be. Let me just say the following. We have a panel of witnesses, we have a busy morning before us, and the policy that I follow, or try to follow, is to give the opening statement for the Chairman and the Ranking Member, and if the Chairman and Ranking Members of the full Committee are here, to give them that courtesy and to ask all other Members to submit their statements for the record.

If Mr. Smith were here, I would call upon him for an opening statement if he wanted to. But I don't want to start getting into everybody giving opening statements because we will never get to the——

Mr. ISSA. I appreciate that, Mr. Chairman. But the rules of the House, once you go beyond your opening statement, provide for alternating to each Member there. And we did object to the unanimous consent I think for good and reasonable cause. I don't think anyone is planning on making this long——

Mr. NADLER. I am not aware of that. I will move that opening statements be dispensed with at this point and that all Members be permitted to insert opening statements into the——

Mr. ISSA. Mr. Chairman, I object to that. It is not a parliamentary allowed movement in that you have begun regular order, you have alternated.

Mr. NADLER. [continuing]. I over——

Mr. ISSA. I am asking for a recorded vote.

Mr. NADLER. A recorded vote. Let's think about what we are having a vote on.

Mr. ISSA. Perhaps you should check with the parliamentarian for the rules of the House.

Mr. NADLER. We are getting them.

Mr. ISSA. There are people in the audience who demand, Mr. Chairman, there are people in the audience that demand the right of the first amendment, free speech. We ask no less than the rights within the House, consistent with the right of free speech and equal access to the opinion that will be from the day, in addition to those that will be from the witnesses.

Mr. NADLER. Parliamentarian informs us that it is subject to a motion. So the motion is that further opening statements be dispensed with, that Members have the opportunity to submit it for the record. All in favor, say "aye."

[A chorus of ayes.]

Mr. NADLER. Opposed?

Mr. ISSA. Hell no!

Mr. NADLER. The motion is carried.

Mr. ISSA. On that I asked for a recorded vote.

Mr. NADLER. Recorded vote has been requested, the clerk will call the roll. Do we have a clerk? We will have a clerk call the roll in a moment.

The CLERK. Mr. Chairman,

Mr. NADLER. Aye.

The CLERK. Mr. Chairman votes aye.

Mr. Davis.

[No response.]

The CLERK. Ms. Wasserman Schultz.

[No response.]

The CLERK. Ms. Ellison

Mr. ELLISON. Aye.

The CLERK. Mr. Ellison votes aye.

Mr. Conyers.

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers votes aye.

Mr. Scott.

Mr. SCOTT. Aye.

The CLERK. Mr. Scott votes aye.

Mr. Watt.

[No response.]

The CLERK. Mr. Cohen.

[No response.]

The CLERK. Mr. Franks. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks votes no.

Mr. Pence.

[No response.]

The CLERK. Mr. Issa.

Mr. ISSA. No.
The CLERK. Mr. Issa votes no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Jordan.
[No response.]
Okay, Mr. Chairman, I have four voting in the affirmative and three in the negative.
Mr. NADLER. The motion is carried.
Mr. ISSA. Mr. Chairman, a parliamentary inquiry. Is the Chairman of the full Committee a seated Member of this Committee or an ex-officio?
Mr. NADLER. He is a voting Member. And the Ranking Member would have been a voting Member had he been here.
Mr. ISSA. Okay. Mr. Chairman, I would ask only that staff provide us with both of those parliamentary decisions, one that the full Committee Chairman is in fact a voting, seated Member of the Committee——
Mr. NADLER. That is not a parliamentary decision. That is simply the Rules of the Committee, which you have. We will give you a copy if you want.
Mr. ISSA. I don't interpret them that way. But we will check and get back at a later day, and I am reserving a point of order as to the outcome of the vote relative to I do not believe that the——
Mr. NADLER. The gentleman's reservation is noted. How we will get to our witnesses. I want to welcome our distinguished panel of witnesses today.
The first witness is David Rivkin, Jr., who is a partner with the firm Baker Hostetler, where he is a member of the firm's litigation, international and environmental groups. Mr. Rivkin, from 1993 to December 1999 was a member of Hunton & Williams law firm.
Prior to returning to private practice in 1993, Mr. Rivkin was associate executive director and counsel of the President's Council on Competitiveness at the White House. While there, he was responsible for the review and analysis of legal issues related to the regulatory review conducted by the council and the development and implementation of the first President Bush's deregulatory initiatives carried out during 1991-1992.
He simultaneously served as a special assistant for domestic policy to then Vice President Dan Quayle. Mr. Rivkin was associate general counsel to the U.S. Department of Energy 1990 to 1991. Mr. Rivkin served in the office of then Vice President George Bush as legal advisor to the counsel to the President and as deputy director of the Office of Policy Development, U.S. Department of Justice.
Prior to embarking on a legal career, Mr. Rivkin served as a defense and foreign policy analyst, focusing on Soviet affairs, arms control, naval strategy and NATO related issues, and worked as a defense consultant to numerous government agencies and Washington think tanks.
He received his J.D. from Columbia University School of Law in 1985, a BSFS from Georgetown University in 1980, and a M.A. in Soviet affairs from Georgetown University in 1984.

David Luban joined the faculty of Georgetown University Law Center in 1997, coming from the University of Maryland's Institute for Philosophy and Public Policy and its school of law. He received his B.A. from the University of Chicago and Ph.D. in philosophy from Yale University, and taught philosophy at Yale and Kent State University before moving to Maryland.

He has held visiting appointments in law at Harvard, Stanford and Yale law schools and visiting appointments in philosophy at Dartmouth College in the University of Melbourne. In 1982, he was a visiting scholar at the Max Plank Institute in Frankfurt and Hamburg.

In addition, Luban has been a fellow of the Woodrow Wilson International Center for Scholars and held a Guggenheim fellowship. He recently published "Legal Ethics and Human Dignity." He writes on legal ethics, legal theory, international criminal law, just war theory and most recently, U.S. torture policy.

Marjorie Cohn is a professor of law at Thomas Jefferson School of Law, where she has taught since 1991. She currently serves as the President of the National Lawyers Guild and is the author of the recently published "Cowboy Republic: Six Ways the Bush Gang Has Defied the Law."

She has been a criminal defense attorney at the trial and appellate levels for many years and was staff counsel to the California Agricultural Labor Relations Board. Professor Cohn is the U.S. representative to the executive committee of the Association of American Jurists. Professor Cohn received a B.A. from Stanford University and her J.D. from Santa Clara University School of Law.

Philippe Sands is a British lawyer. Since January 2001, he has been professor of law at University College London, where he also directs the Center for International Courts and Tribunals. He has also taught in the United States as a visiting professor of law, first at Boston College Law School 1987 to 1991, and then at New York University Law School in 1992 to 1993.

He has been a practicing member of the English bar and in 2003 was appointed by the Lord Chancellor as the Queen's Counsel. He regularly appears as counsel before the highest British courts, including the Court of Appeal and the House of Lords.

Last month, Vanity Fair magazine published his article "The Green Light" on the role of the Administration's most senior lawyers in developing new interrogation techniques for Guantanamo. The article drew on more detailed material from his book "Torture Team," which has just been released this week.

Before we begin, it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hands to take the oath.

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

Let the record reflect that the witnesses answered in the affirmative. Thank you, and you may be seated.

We will now hear from our—and now I will recognize the first witness, Mr. Rivkin, for 5 minutes.

TESTIMONY OF DAVID B. RIVKIN, JR., PARTNER, BAKER HOSTETLER, LLP

Mr. RIVKIN. Thank you very much, Chairman Nadler, Chairman Conyers, Ranking Member Franks, Members of the Committee. It is a pleasure to appear before you and to make some brief remarks.

Lynching lawyers or punishing lawyers, while popular in other spheres, including Shakespeare, has never appealed much to the legal profession. But it appears that there are a lot of folks willing to make an exception in this area with regard to the lawyers who advise President Bush and his national security team in the aftermath of 9/11.

They have been subject to criticism that, in my view, borders on vilification by a lot of academics, lawyers and pundits. Their legal competence and ethics have been questioned and we even heard some suggestions that they should prosecuted for war crimes.

Now I would submit to you, there is no doubt that many legal positions taken by Administration attorneys laying our fundamental legal architecture in this war that the Administration has adopted outrage activists and legal specialists.

It should be pointed out briefly that in a series of cases beginning with *Hamdi v. Rumsfeld*, which is a 2004 Supreme Court case, the Supreme Court has upheld most of the key tenets of this legal architecture, namely that the United States is engaged in a legally recognized armed conflict, that captured enemy combatants are not ordinary criminal suspects. They can be detained without criminal trial during hostilities and if the time comes, they may be punished with a military rather than a civilian justice system.

The court has, of course, also required that detainees be given access to an administrative hearing to challenge their classification as enemy combatants and reserve some rights for themselves to be involved in this process, although the precise parameters of that role are still being litigated.

Most controversial, of course, have been the Bush Administration's insistence that the Geneva Convention has limited, if any, application to al-Qaida and to—and the Administration's authorization of aggressive interrogation methods, including at least three cases of waterboarding, or simulated drowning.

And in several legal memoranda that Chairman Conyers, particularly the 2002 and 2003 opinions mentioned earlier today, written by Mr. Yoo as deputy assistant attorney general for the Office of Legal Counsel, considered whether such methods can lawfully be used.

These memoranda, some of which remain classified, probably not for long, explore the outer limits that are imposed on the United States by statute, treaties and customary international law.

The goal, clearly, was to find legal means to give United States interrogators the maximum flexibility in interrogations while defining the point at which lawful interrogations ended and lawful torture begins.

Now I realize that a number of the Administration's positions have attracted—I am repeating myself—considerable criticisms. The questions that—and this is not surprising—the questions that the Administration's lawyers sought to address, particularly deal-

ing with interrogation, uncomfortable ones that did not sit well by 21st century sensibilities.

Many of the legal conclusions reached have struck people as being excessively harsh. Some of those conclusions have been watered down and retracted as a result of internal debate.

While I would not defend each and every aspect of the Administration's post September 11 legal policies, I would vigorously defend the merits of the whole exercise of asking difficult legal questions and trying to work through them without frankly not worrying about their reputations or subsequent career.

To me, the fact that this exercise was undertaken attests to the vigor and strength of our democracy, of the Administration's commitment to the rule of law in the most difficult circumstances.

In this regard, I would point out the—by democratic allies have ever engaged in similar circumstances and that is probing and searching legal exegeses.

So I would strongly defend the overarching legal framework chosen by the Administration. I certainly disagree with the proposition that the lawyers can be held accountable, even if they were wrong, with regard to their decisions. I think they acted in good faith. I think the overall legal analysis, while people can disagree with it, does have merits.

To me, the effort to go after the lawyers borders, to put it mildly, on madness. These lawyers were not in any chain of command. They had no theoretical or practical ability to direct actions of anyone who engaged in abusive conduct.

Moreover, if we go too far down this path, what we are doing, with all due respect, is chilling the ability of any future President to obtain candidly legal advice, which unfortunately is in the post-September 11 environment, is essential.

And let's be candid about it. A lot of people claim that the lawyers involved just gleefully and improperly spoke truth to power. I would close by telling you it is a lot safer in a kind political environment and projected political environment to say no to power, to say no to everything because the people who said yes to power have been substantially penalized.

A lot of them have not been confirmed. A lot of them are being threatened with prosecutions. Bar associations are investigating. This is not a comfortable position to be in, and that is not what we want to do as far as inculcating the ability, again, on future Presidents and Administrations to get candid legal advice.

Thank you.

[The prepared statement of Mr. Rivkin follows:]

PREPARED STATEMENT OF DAVID B. RIVKIN, JR.

THE WALL STREET JOURNAL. ONLINE

April 25, 2008

OPINION

The War on Terror Is Not a Crime

By DAVID B. RIVKIN JR. and LEE A. CASEY
April 25, 2008; Page A15

Lynching lawyers, as Shakespeare once suggested, has never appealed much to the legal profession itself – literally or figuratively. But an exception apparently will be made for a group of attorneys who advised President Bush and his national security staff in the aftermath of 9/11. They've been subject to an increasingly determined campaign of public obloquy by law professors, activist lawyers and pundits.

Their legal competence and ethics have been questioned. Suggestions have even been made that they can and should be held criminally responsible for "war crimes," because their legal advice supposedly led to detainee abuses at Abu Ghraib and elsewhere.

The targets of this witch hunt include some of the country's finest legal minds – such as law Prof. John Yoo of the University of California at Berkeley, Judge Jay Bybee of the Ninth Circuit Court of Appeals, and William J. (Jim) Haynes II, former Pentagon general counsel. Others frequently mentioned include former White House Counsel Harriet Miers, former Attorney General Alberto Gonzales, and former Undersecretary of Defense Douglas Feith.

Many positions taken by these attorneys, laying the fundamental legal architecture of the war on terror, outrage international activists and legal specialists. Nevertheless, in a series of cases beginning with *Hamdi v. Rumsfeld* (2004), the U.S. Supreme Court has upheld many of their key positions: that the country is engaged in an armed conflict; that captured enemy combatants can be detained without criminal trial during these hostilities; and that (when the time comes) they may be punished through the military, rather than the civilian, justice system.

The Court has also required that detainees be given an administrative hearing to challenge their enemy-combatant classification, ruled that Congress (not the president alone) must establish any military commission system, and made clear that it will in the future exercise some level of judicial scrutiny over the treatment of detainees held at Guantanamo Bay – although the extent of this role is still being litigated. Overall, the administration has won the critical points necessary to continue the war against al Qaeda.

Most controversial, of course, was the Bush administration's insistence that the Geneva

Conventions have limited, if any, application to al Qaeda and its allies (who themselves reject the "Western" concepts behind those treaties); and the administration's authorization of aggressive interrogation methods, including, in at least three cases, waterboarding or simulated drowning.

Several legal memoranda, particularly 2002 and 2003 opinions written by Mr. Yoo as deputy assistant attorney general for the Office of Legal Counsel, considered whether such methods can lawfully be used. These memoranda, some of which remain classified, explore the limits imposed on the United States by statute, treaties, and customary international law. The goal clearly was to find a legal means to give U.S. interrogators the maximum flexibility, while defining the point at which lawful interrogation ended and unlawful torture began.

Behind this inquiry is a stark fact. In this war on terror, the U.S. must not only attack and defeat enemy forces. It must also anticipate and prevent their deliberate attacks on its civilian population – al Qaeda's preferred target. International law gives the civilian population an indisputable right to that protection.

Lawyers can and do disagree over the administration's conclusions. However, it's now being claimed that the administration's legal advisers can be held responsible for detainee abuses.

This is madness. The lawyers were not in any chain of command, and had no theoretical or practical authority to direct the actions of anyone who engaged in abusive conduct. Those who mouth this argument are engaged in a kind of free association which, if applied across the board, would make legal counsel infinitely culpable.

In truth, the critics' fundamental complaint is that the Bush administration's lawyers measured international law against the U.S. Constitution and domestic statutes. They interpreted the Geneva Conventions, the U.N. Convention forbidding torture, and customary international law, in ways that were often at odds with the prevailing view of international law professors and various activist groups. In doing so, however, they did no more than assert the right of this nation – as is the right of any sovereign nation – to interpret its own international obligations.

But that right is exactly what is denied by many international lawyers inside and outside the academy.

To the extent that international law can be made, it is made through actual state practice – whether in the form of custom, or in the manner states implement treaty obligations. In the areas relevant to the war on terror, there is precious little state practice against the U.S. position, but a very great deal of academic orthodoxy.

For more than 40 years, as part of the post World War II decolonization process, a legal orthodoxy has arisen that supports limiting the ability of nations to use robust armed force against irregular or guerilla fighters. It has also attempted to privilege such guerillas with the rights traditionally reserved to sovereign states. The U.S. has always been skeptical of these notions, and at critical points has flatly refused to be bound by these new rules. Most especially, it refused to join the 1977 Protocol I Additional to the Geneva Conventions,

involving the treatment of guerillas, from which many of the "norms" the U.S. has supposedly violated, are drawn.

The Bush administration acted on this skepticism – insisting on the right of a sovereign nation to determine for itself what international law means. This is at bottom the sin for which its legal advisers will never be forgiven. To the extent they can be punished – or at least harassed – perhaps their successors in government office will be deterred from again challenging the prevailing view, even at the cost of the national interest.

That is why these administration attorneys have become the particular subjects of attack.

Messrs. Rivkin and Casey served in the Justice Department under Presidents Reagan and George H.W. Bush, and were members of the United Nations Subcommission on the Promotion and Protection of Human Rights from 2004-2007.

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Mr. NADLER. And thank you. I now recognize Mr. Luban for 5 minutes.

TESTIMONY OF DAVID J. LUBAN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. LUBAN. Mr. Chairman, honorable Committee Members, I would like to thank you for inviting me to testimony here today. I am a law professor who specializes in legal ethics, and I expect that that is the reason that I was asked to come and testify.

I want to start by recalling for you an episode from Jack Goldsmith's memoirs. Mr. Goldsmith, as you know, headed Justice Department's Office of Legal Counsel in 2003 and 2004. When he joined the office, he reviewed the well-known memos written by Mr. Yoo that Chairman Conyers referred to earlier.

In the memoirs, he described the August 1, 2002 memo, which was written for civilian interrogators, in a very striking way. He calls it a "golden shield." And what he meant by "golden shield" was that it reassured interrogators that the tactics they were using were legal.

And Mr. Goldsmith found himself in the tough position of withdrawing that golden shield memo and the other for military interrogators, the other golden shield memo. He did not withdraw them because he was politically at odds with Mr. Yoo. He was on the same side as Mr. Yoo. He withdrew them because in his words, they had, "no foundation in prior OLC opinions or in judicial decisions or in any—law."

The golden shield turned out to be made of thin air. Interrogators were mislead and detainees may have suffered cruel and illegal treatment because of these memos. Now specifically, what was it that was wrong with the golden shield?

Well, first, it claimed that inflicting pain isn't illegal unless the pain reaches the level or organ failure or death. It claimed that enforcing laws against authorized interrogators is unconstitutional, and it claimed that you can justify torture as a form of self-defense.

It is easy to see that under these standards, practically anything goes. The trouble was that none of this was actually the law. The golden shield ignored Supreme Court precedents, it misrepresented sources, and it pulled the organ failure definition out of a Medicare statute.

Mr. Chairman and honorable committee Members, when a government lawyer writes a golden shield, it has to meet the gold standard. We should be confident that the lawyer is describing the law as it really is, not the law according to the lawyer's own pet theories, and not the law as the client would like to be, no matter who the client is. Playing the law straight is the lawyer's basic ethical obligation.

I propose two principles for a government lawyer who is writing a legal opinion. First, the opinion should say the same thing that it would even if the lawyer thought that the client wanted just the opposite of what he knows that the client actually wants. That guarantees that you aren't tailoring the opinion to reach some predetermined result.

And second, the opinion should be able to stand the light of day. Now obviously, before opinions are publicized, some will have to

have sensitive intelligence information about sources or whatever redacted out. But there is absolutely no reason for an opinion interpreting the Constitution or a statute to be a state secret.

Now what I am proposing here is nothing novel. Playing the law straight is traditional legal ethics. There is a common misperception that lawyers are always supposed to spin the law in their client's direction. That is simply untrue.

It is true that in a courtroom, lawyers are supposed to argue the interpretation of the law that most favors their client. The lawyer on the other side argues the opposite and the judge who hears that strong case put strongly by both sides can reach a better informed decision.

But matters are completely different when the lawyer is giving a client advice about what the law means. Now there is nobody arguing the other side and there is no judge to sort it out.

That is why legal ethics rules require that a lawyer advise or give an independent and candid opinion of what the law really requires, even if it is not what the client wants to hear. Lawyers sometimes have to say no to clients, and in its prouder days, OLC lawyers have said no to Presidents of the United States.

Government lawyers have an awesome responsibility. OLC opinions bind the entire executive branch. No one elected its lawyers to do secret re-writes of the law, and that is the reason why those lawyers, more than others, have to be faithful to the law. Otherwise, the executive branch is governed by secret law written by activist lawyers instead of by Congress, and its governed by a secret constitution, not the Constitution that was written by the Framers.

Now I don't want to single out only Mr. Yoo's opinions. In my written testimony, I explained that other government lawyers have written opinions on detainee treatment that also fall far short of the gold standard.

I believe this Committee can do a great service by hearing testimony from the lawyers who wrote them and the military and CIA officers who relied on them to sort out the damage that these memos have done.

I thank you.

[The prepared statement of Mr. Luban follows:]

PREPARED STATEMENT OF DAVID LUBAN

Mr. Chairman and Honorable Committee members,

I'd like to thank you for inviting me to testify today. I am not here as an insider with new information to give you. I am a law professor who specializes in legal ethics. I've written textbooks and other books on the subject. As a scholar of legal ethics, I have closely studied the role that government lawyers played in approving harsh interrogations. That is what I am here to testify about.

I want to start with a story. Jack Goldsmith headed the Justice Department's Office of Legal Counsel in 2003 and 2004. Last year, he published his memoirs of that period. At one point, he describes an OLC memo on interrogation written before he joined the Office. He calls it a "golden shield" for interrogators. What he meant by "golden shield" was that interrogators relied on its assurance that the harsh tactics they were using were legal. And Goldsmith found himself in the tough position of withdrawing that Golden Shield as well as a second OLC memo on interrogation.

Goldsmith did not withdraw them because he was a political opponent of John Yoo, the lawyer who wrote them. He was on the same side. He withdrew them because, in his words, they had "no foundation in prior OLC opinions, or in judicial

decisions, or in any other source of law." [1] The "golden shield" turned out to be made of hot air. Interrogators were misled, and detainees may have suffered cruel and illegal treatment because of these memos.

The Golden Shield found that inflicting physical pain isn't illegal unless the pain reaches the level of organ failure or death; that enforcing laws against authorized interrogators is unconstitutional; and that self-defense can include cruelty to helpless detainees. It's easy to see that under these standards, practically anything goes. The trouble was that none of this is really the law. The memo ignored inconvenient Supreme Court precedents, misrepresented sources, and pulled the "organ failure or death" standard out of a Medicare statute on emergency medical conditions.

Mr. Chairman and committee members, when a trusted government lawyer writes a "golden shield," it should meet the gold standard. We should be confident that the lawyer has described the law as it really is. Not the law according to the lawyer's pet theories, and not the law as the client would like it to be, no matter who the client is. Lawyers sometimes have to say "no" to clients, and in its prouder days OLC lawyers have said no to presidents of the United States. Playing it straight is the lawyer's most basic obligation.

I would propose two rules of thumb for a government lawyer writing an opinion on what the law means. First, the opinion should say the same thing it would even if you imagine your client wants the opposite from what you know he wants. That guarantees that you are not tailoring the opinion to reach some predetermined result. Second, the opinion should be able to stand the light of day; otherwise, it's probably wrong. Obviously, before being published, some opinions will have to have sensitive intelligence information redacted out. But there is no reason that an opinion about the meaning of the Constitution or the interpretation of law should be a state secret.

There is a common misperception that lawyers are always supposed to spin the law in favor of their clients. That's simply not true. It *is* true that in a courtroom, lawyers are supposed to argue for the interpretation of law that most favors their client. The lawyer on the other side argues the opposite, and the judge who hears the strongest case from both sides can reach a better decision.

But matters are completely different when a lawyer is giving a client advice about what the law means. Now there is nobody arguing the other side, and no judge to sort it out. For that reason, legal ethics rules require the lawyer-advisor to give an independent and candid opinion of what the law really requires.[2] The ABA emphasizes that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." [3]

This is common sense. Otherwise, clients might go to their lawyers to say, "Give me an opinion that says I can do what I want"—and then duck responsibility by saying, "My lawyer told me it was legal." Then we would have a perfect Teflon circle: the lawyer says "I was just doing what my client instructed" and the client says "I was just doing what my lawyer approved."

Government lawyers have an awesome responsibility. OLC opinions bind the entire executive branch. They have the force of law inside that branch. The idea that unelected lawyers are writing secret legal opinions that spin the law makes a mockery of democratic government. It means the executive branch is governed by a secret constitution—a constitution written by activist lawyers instead of the constitution written by the Framers.

Without getting too deeply into technicalities which, quite frankly, only a lawyer could love, let me summarize in a bit more detail just how spun the torture memos were.[4] First of all, they argue for a near-absolute version of executive power—a version that says the Commander in Chief can override any law in the statute book.[5] The effect of this argument is that a crime is not a crime if the Commander in Chief orders it. Mr. Yoo paints a picture of an imperial commander in chief beyond the law that would have made the Founding Fathers' jaws drop in astonish-

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[1] Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 149 (2007); the reference to the "golden shield" is at page 162.

[2] ABA Model Rules of Professional Conduct, Rule 2.1 (Advisor): "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

[3] ABA Model Rules of Professional Conduct, Rule 2.1, cmt. [1].

[4] Here I am referring to Mr. Yoo's August 1, 2002 memorandum, which went out over Judge Bybee's name, as well as the March 14, 2003 memorandum to Mr. Haynes, which went out over Mr. Yoo's name. The arguments I discuss appear in both memoranda.

[5] The Levin Memorandum did not include this argument, but it also did not withdraw it. And an earlier, published, OLC opinion—presumably still in force—also makes the commander-in-chief override argument.

ment.[6] In making this argument, Mr. Yoo simply ignored Supreme Court precedents reining in the commander in chief.[7] In the same way, arguing for a necessity defense to the crime of torture, he ignored an inconvenient Supreme Court case decided just fifteen months earlier—an opinion that cast doubt on whether necessity defenses actually exist in federal law.[8] And he ignored the Constitution itself: far from granting a "commander-in-chief override" of the laws, the Constitution requires the President to "take care that the laws are faithfully executed."

Second, as I mentioned earlier, he wrenches language from a Medicare statute to explain the legal definition of torture. The Medicare statute lists severe pain as a possible symptom of a medical emergency, and Mr. Yoo flips the statute and uses the language of medical emergency to define severe pain. This was so bizarre that the OLC itself disowned his definition a few months after it became public. It is highly unusual for one OLC opinion to disown an earlier one, and it shows just how far out of the mainstream Mr. Yoo had wandered. This goes beyond the ethical limits for a legal advisor. In fact, even in the courtroom there are limits to spinning the law: ethics rules forbid advocates from making frivolous legal arguments, or failing to disclose adverse legal authority.[9]

But it would be a mistake to focus only on Mr. Yoo. Mr. Levin's replacement memo also takes liberties with the law. In particular, when the Levin Memo discusses the term "severe physical suffering" (which is part of the statutory definition of torture), it states that the suffering must be "prolonged" to be severe—and that requirement simply isn't in the statute at all.[10] Under that definition, of course, waterboarding would not be torture because people break within seconds or minutes. This is a perfect example of a legalistic definition that looks inconspicuous but in reality narrows the definition of torture dramatically. Notice that the quicker a technique breaks the interrogation subject, the less prolonged his suffering will be—so the harsher the tactic, the less likely it is to qualify as "torture." It goes without saying that if Congress had written the statute that way, OLC lawyers would be bound to respect it in their opinion. But it should also go without saying that lawyers ought not to rewrite a statute to include language that is not there.

Rather than continuing to dissect the arguments of these memos and others, I am attaching one of my publications that does so to this written testimony. It is titled "The Torture Lawyers of Washington," and it is a chapter in my book *Legal Ethics and Human Dignity*. My main point is that the torture memos take enormous liberties with the law and reach eccentric conclusions.

The authors may believe their conclusions represent the law as it should be. But the job of a legal opinion is to advise the client on the law as it is. If that dissuades the client from doing something the client wants to do, so be it. In the words of the ABA, "Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and

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[6] My own review of the founding era debates reveals deep concern about possible presidential abuse of the standing army. David Luban, *On the Commander-in-Chief Power,* 60 S. Cal. L. Rev. (forthcoming). Recently, David J. Barron and Martin S. Lederman have exhaustively surveyed historical evidence from the founding of the republic to the present and found no trace of the commander-in-chief override idea until after the Civil War, and very little political or legal precedent for it since then (although the idea won some support within the academy). David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008); Barron & Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History,* 121 Harv. L. Rev. 941 (2008). Their review of the original understanding appears in the first of these article at pages 772–800.

[7] Thus, his opinions do not mention the leading case *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952)(holding that the President's commander-in-chief power did not permit him to seize steel mills during the Korean War); nor do they mention one of the earliest and clearest cases in which Congress constrained the president's commander-in-chief power and the Supreme Court upheld it: *Little v. Barreme,* 6 U.S. 170 (1804)(upholding damages against a naval officer who, who during the undeclared "quasi-war" against France, had followed President Adams's orders to seize ships sailing from French ports, contrary to Congressional restrictions).

[8] *United States v. Oakland Cannabis Buyers' Coop,* 532 U.S. 483, 490 (2001)(expressing doubt that a necessity defense exists in federal criminal law absent a statute providing it).

[9] See ABA Model Rules of Professional Conduct, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Rule 3.3(a)(2) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.")

[10] The torture statute does require that severe *mental* suffering must be prolonged. 18 U.S.C. § 2340(2). But the very fact that Congress included no parallel requirement in the same statute's treatment of physical suffering shows, under ordinary interpretive methods, that it should not be read in.

correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[11] The lawyer's job is emphatically not to enable clients to defy law by interpreting it oddly.

[11] ABA Model Rules of Professional Conduct, Rule 1.6, cmt. [2].

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The torture lawyers of Washington

Revelations of torture and sexual humiliation at Abu Ghraib erupted into the news media at the end of April in 2004, when reporter Seymour Hersh exposed the scandal in *The New Yorker* magazine and CBS News broadcast the notorious photographs. Five weeks later, with the scandal still at the center of media attention, the *Wall Street Journal* and *Washington Post* broke the story of the Bybee Memorandum – the secret "torture memo," written by elite lawyers in the US Department of Justice's Office of Legal Counsel (OLC), which legitimized all but the most extreme techniques of torture, planned out possible criminal defenses to charges of torture, and argued that if the President orders torture it would be unconstitutional to enforce criminal prohibitions against the agents who carry out his commands. (The memo, written to then White House counsel Alberto Gonzales, went out over the signature of OLC head Jay S. Bybee, but apparently much of it was drafted by John Yoo, a law professor working in the OLC at the time. Before the Abu Ghraib revelations, Bybee left OLC to become a federal judge, and Yoo returned to the academy.)

Soon after, more documents about the treatment of War on Terror detainees were released or leaked – a stunning and suffocating cascade of paper that has not stopped, even after two years. When Cambridge University Press published *The Torture Papers* a scant six months after the exposure of the Bybee Memo, it included over 1,000 pages of documents.[1] Even so, *The Torture Papers* was already out of date when it was published. For that matter, so was a follow-up volume published a year later.[2] No doubt a

[1] The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel, eds., Cambridge University Press, 2005). Hereafter: TP.

[2] The Torture Debate in America (Karen J. Greenberg, ed., Cambridge University Press, 2006). Hereafter: The Torture Debate. The second volume contains eight additional memoranda, but does not include such crucial documents as the Schmidt Report on interrogation techniques used in Guantánamo, US Attorney General Alberto Gonzales's written responses to US senators at his confirmation hearings about the legality of cruel, inhuman, or degrading treatment that

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third volume, collected now (November 2006), would also be outdated by the time it was distributed. The reason is simple: the lawyers continue to lawyer away.

In the last chapter, I offered an argument about the jurisprudential and ethical importance of lawyers giving candid, independent advice about the law. This chapter will provide a case study of moral failure. The chapter will help us address some questions left over from the last – questions such as: (1) What does candid, independent advice entail? (2) Given a contentious legal issue, how much leeway does the candid advisor have to slant the law in the client's direction? (3) What is the difference between illicitly slanted advice and advice that is merely wrong?

But in setting out these questions, I don't mean to gloss over the most basic reason for writing about the torture lawyers in a book about legal ethics and human dignity. Torture is among the most fundamental affronts to human dignity, and hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation. We would have to go back to the darkest days of World War II, when Hitler's lawyers laid the legal groundwork for the murder of Soviet POWs and the forced disappearance of political suspects, to find comparably heartless use of legal technicalities (and, as Scott Horton has demonstrated, the legal arguments turn out to be uncomfortably similar to those used by Bush Administration lawyers[3]). The most basic question, then, is whether the torture lawyers were simply doing what lawyers are supposed to do. If so, then so much for the idea that the lawyer's role has any inherent connection with human dignity.

If the law clearly and explicitly permitted or required torture, legal advisors would face a terrible crisis of conscience, forced to choose between resigning, lying to their client about the law, or candidly counseling that the law permits torture. But that was not the torture lawyers' dilemma. Faced with unequivocal legal prohibitions on torture, they had to loophole shamelessly to evade the prohibitions, and they evaded the prohibitions because that was the advice their clients wanted to receive. With only a few exceptions, the torture memos were disingenuous as legal analysis, and in places they were absurd. The fact that their authors include some of the finest intellects in the legal profession makes it worse, because their legal talent rules out any whiff of the "empty head, pure heart" defense. Possibly they believed that, confronted by terrorists, morality actually required them to evade the

falls short of torture, official correspondence surrounding these and other issues, or the responses offered by the US government to the UN's Committee Against Torture in May 2006. Nor does it contain major US legislation enacted while the book was in press, such as the Detainee Treatment Act of 2005; and the Military Commissions Act of 2006.

[3] Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to "A New Kind of Warfare,"* in The Torture Debate, supra note 2, at 136–50.

prohibitions on torture, a position frankly defended by some commentators.[4] But the torture lawyers never admitted anything of the sort. Professor Yoo, for example, continues to maintain the pretense of lawyering as usual, and flatly denies that he was offering morally motivated advice.[5] The issue, then, is not whether lawyers may deceive their clients about the law in order to manipulate the clients into doing the right thing by the lawyer's lights. Although that is an interesting and important question, the torture memoranda raise a different one: whether lawyers may spin their legal advice because they know spun advice is what their clients want.[6]

To grasp just how spun the advice was, it will be necessary to dwell on legal details to a greater extent than in other chapters in this book,

[4] See, e.g., Charles Krauthammer, *It's Time to Be Honest About Doing Terrible Things*, The Weekly Standard, December 5, 2005; David Gelernter, *When Torture Is the Only Option*, L.A. Times, November 11, 2005; Jean Bethke Elshtain, *Reflections on the Problem of "Dirty Hands,"* in Torture: A Collection (Sanford Levinson ed., 2004), at 87–88. In Elshtain's words, "Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person ... To condemn outright ... coercive interrogation, is to lapse into a legalistic version of pietistic rigorism in which one's own moral purity is ranked above other goods. This is also a form of moral laziness." Ibid.

[5] In an interview, Professor Yoo said: "At the Justice Department, I think it's very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don't want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They'll say, 'Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.' And actually I think at the Justice Department and this office, there's a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially ... I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue." *Frontline Interview With John Yoo* (October 18, 2005), available at <www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>. "'The worst thing you could do, now that people are critical of your views, is to run and hide. I agree with the work I did. I have an obligation to explain it,' Yoo said from his Berkeley office. 'I'm one of the few people who is willing to defend decisions I made in government.'" Peter Slevin, *Scholar Stands By Earlier Writings Sanctioning Torture, Eavesdropping*, Wash. Post, December 26, 2005, A3. Discussing the torture memo, Yoo adds, "The lawyer's job is to say, 'This is what the law says, and this is what you can't do.'" Ibid. In other words, it is lawyering as usual, not unusual lawyering for moral purposes. (Oddly enough, however, when the US Supreme Court rejected Yoo's argument that the Geneva Conventions do not protect Al Qaeda captives, Professor Yoo complained that "What the court is doing is attempting to suppress creative thinking." Adam Liptak, *The Court Enters The War, Loudly*, N.Y. Times, July 2, 2006, section 4, at 1. Obviously, to call arguments "creative thinking" implies legal novelty, the antithesis of the straightforward "this is what the law says" that Yoo had previously used to describe his work.)

[6] This chapter therefore overlaps with another essay I wrote on torture and the torture lawyers: David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Virginia L. Rev. 1425 (2005). The latter essay was reprinted in expanded form in The Torture Debate, supra note 2, 35–83. In a few parts of this chapter, I draw on the earlier paper.

even though the technicalities are of no lasting interest. The devil lies in the details, and without the details we cannot study the devil. Only the details permit us to discuss the difference between a memo that "gets the law wrong," but argues within acceptable legal parameters, and one that cannot be understood as anything more than providing political cover for a client's position. And that is the most fundamental distinction this chapter considers.

The background

To understand the work of the torture lawyers, it is crucial to understand two pieces of legal background: the worldwide criminalization of torture, and the overall movement of legal thought by the United States government in the wake of September 11, 2001.

Governments have tortured people, often with unimaginable cruelty, for as long as history has been recorded. By comparison with the millennia-long "festival of cruelty" (Nietzsche), efforts to ban torture are of recent vintage. The eighteenth-century penologist Beccaria (widely read and admired by Americans in the 18th century) was among the first to denounce torture, both as a form of punishment and as a method for extracting confessions; and European states legally abolished torture in the nineteenth century.[7] Legal abolition did not necessarily mean real abolition: Germany practiced torture throughout the Third Reich, France tortured terrorists and revolutionaries in Algeria during the 1950s and 1960s, and the United Kingdom engaged in "cruel and degrading" treatment of IRA suspects until the European Court of Human Rights ordered it to stop in 1977. The phenomenon is worldwide: states abolish and criminalize torture, but scores of states, including democracies, engage in it anyway. Nevertheless, the legal abolition of torture marked a crucial step toward whatever practical abolition has followed; and it drove underground whatever torture persists in a great many states.

The post-World War II human rights revolution contributed to the legal abolition of torture. The Nuremberg trials declared torture inflicted in attacks on civilian populations to be a crime against humanity, and the 1949 Geneva Conventions not only banned the torture of captives in international armed conflicts, they declared torture to be a "grave breach" of the Conventions, which parties are required to criminalize. Alongside Geneva's anti-torture rules for international armed conflicts, Article 3 of Geneva (called "common Article 3" because it appears in all four Geneva Conventions) prohibits mistreating captives in armed conflicts "not of an international character" – paradigmatically, civil wars, which throughout history have

[7] See the opening chapters of Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977).

provoked savage repressions.[8] Common Article 3 is particularly remarkable because prohibitions on what sovereign states can do within their own territory in times of crisis are few and far between. And US law classifies the torture and cruel treatment forbidden by common Article 3, along with grave breaches of Geneva, as war crimes carrying a potential death sentence.[9] In addition, the United States, together with almost 150 other states, has ratified the International Covenant on Civil and Political Rights, which flatly prohibits torture and inhumane treatment.[10]

[8] The Nuremberg Charter did not in those terms declare torture a crime against humanity; but torture fell under the rubric of "inhumane acts" in the list of crimes against humanity found in Article 6(c); furthermore, Allied Control Council Law No. 10, the occupying powers' domestic-law version of the Nuremberg Charter used in other postwar trials, did name torture (along with rape and imprisonment) as a crime against humanity. The Third and Fourth Geneva Conventions include "torture or inhuman treatment" among the so-called "grave breaches" that must be criminalized: see Geneva Convention III (on the rights of POWs), articles 129–30, and Geneva Convention IV (on the rights of civilians), articles 146–47. Article 3 common to all four Geneva Conventions prohibits "mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment."

[9] 18 U.S.C. § 2441. Until the Military Commissions Act of 2006 (MCA), this section declared all violations of common Article 3 to be war crimes. The MCA decriminalized humiliating and degrading treatment, along with the practice of subjecting detainees to sentences and punishments resulting from unfair trials – both common Article 3 violations, but now no longer federal war crimes. Indeed, the MCA retroactively decriminalizes these violations back to 1997. The reason for decriminalizing these two Article 3 violations is, unfortunately, rather obvious. The MCA establishes military commissions to try detainees, and apparently its drafters wanted to insulate those who establish and serve on the commissions from potential criminal liability if a federal court ever finds the commissions unfair. (Decriminalizing the subjection of detainees to unfair trials is a noteworthy step, because the United States convicted and punished Japanese officers after World War II for illegitimately stripping downed US airmen of Geneva Convention status, trying them unfairly, and executing them. See *Trial of Lieutenant-General Shigeru Sawada and Three Others, United States Military Commission, Shanghai* (1946), in 5 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 1 (1948).) And, as we shall see below, US interrogators employed humiliation tactics in interrogating Guantanamo detainees. After the US Supreme Court found that common Article 3 applies to detainees in the War on Terror, the awkward result was that, without retroactive decriminalization, all those who engaged in humiliation tactics, together with officials who authorized the use of such tactics, were federal war criminals.

[10] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Article 7. The United States, however, does not believe that the ICCPR applies outside US jurisdiction, or during armed conflicts. For a careful argument defending this point of view, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation*, 99 A.J.I.L. 119 (2005). For the alternative point of view, see United Nations Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 21 April 2004*, CCPR/C/74/CRP.4/Rev.6. (General Comments).

The most decisive step in the legal prohibition of torture took place in 1987, when the international Convention Against Torture (CAT) entered into force. Today, 144 states have joined CAT, and another 74 have signed. Several features of CAT turn out to be particularly important for understanding the work of the torture lawyers. First, CAT provides a legal definition of official torture as the intentional infliction of severe physical or mental pain or suffering on someone, under official auspices or instigation (Article 1). This was the definition that the Bybee Memo had to loophole its way around. CAT requires its parties to take effective steps to prevent torture on territories within their jurisdiction (Article 2(1)), and forbids them from extraditing, expelling, or returning people to countries where they are likely to face torture (Article 3). Parties must criminalize torture (Article 4), create jurisdiction to try foreign torturers in their custody (Article 5), and create the means for torture victims to obtain compensation (Article 14). A party must also "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Article 16) – a requirement that the torture lawyers loopholed with tenacious ingenuity.

Strikingly, CAT holds that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (Article 2(2)). What makes this article striking, of course, is its rejection of the most common excuse states offer when they torture: dire emergency. Article 2(2) commits the parties to CAT to the understanding that the prohibition on torture is not merely a fair-weather prohibition. It holds in times of storm and stress, and by ratifying the Convention, states agree to forgo torture even in "new paradigm" wars.[11] With the worldwide adoption of CAT, torture became an international crime.

The United States signed CAT in 1988, and the Senate ratified it in 1994. However, the Senate attached declarations and reservations to CAT, including a declaration that none of its substantive articles is self-executing. That means the articles do not take effect within the United States until Congress

[11] Stunningly, however, in May 2006 the US State Department's legal advisor informed the United Nations Committee Against Torture that the United States has never understood CAT to apply during armed conflicts. *Opening Remarks by John B. Bellinger III, Legal Advisor, US Dep't. of State, Geneva, May 5, 2006*, available at <www.us-mission.ch/Press2006/0505BellingerOpenCAT.html>. He based this view on statements made by US representatives at the negotiations that created the CAT. The United States was apparently worried that CAT would displace international humanitarian law, including the Geneva Conventions. However, the Senate did not include this limitation among the reservations, declarations, and understandings it attached to CAT at ratification, so these isolated statements from the legislative history have no legal significance. This is particularly important given that US law currently maintains that international humanitarian law does not apply to the War on Terror, and so there is nothing for CAT to displace.

implements them with appropriate legislation. Congress did implement several of the articles. Most significantly, it passed a pair of criminal statutes, defining torture along the lines laid down by CAT and making torture outside the United States a serious federal felony.[12]

What about torture within the United States? Long before CAT, US domestic law outlawed torture, although not by name. The US Constitution forbids cruel and unusual punishment, and the Supreme Court held that official conduct that "shocks the conscience" violates the constitutional guarantee of due process of law.[13] Ordinary criminal prohibitions on assault and mayhem straightforwardly prohibit torture, and US military law contains parallel prohibitions. When foreign victims sued their home-state torturers in US courts, the courts found no difficulty in denouncing "the dastardly and totally inhuman act of torture."[14] If police investigators sometimes continue to give suspects the third degree in the back rooms of station houses, no one prior to the torture memos doubted that this broke the law; the 1997 torture of Abner Louima by New York City police officers led to a thirty-year sentence for the ringleader. If US agents abroad engaged in torture, nobody admitted it; and when federal agents allegedly tortured a criminal suspect while bringing him to the United States, the court held that he could not be tried if the allegations were true – a rare exception to the longstanding rule of the US courts that people brought for trial illegally can still stand trial.[15]

This is not to say that, when it comes to torture, the United States was squeaky clean. In 1996, the Pentagon admitted that the School of the Americas, in Fort Benning, Georgia – a US-run training school for Latin American military forces – had for years used instructional manuals that advocated torture; and there have been many allegations over the years of US "black ops" involving torture.[16] Nevertheless, until the torture lawyers began making the legal world safe for brutal interrogations, the United States was one of the leading campaigners in the worldwide effort to place torture beyond the pale of permissibility. Afterward, although the US government insists it has not backed down an iota in rejecting torture, the protestations ring hollow, and everyone understands that US officials can proclaim them only because the torture lawyers have twisted words like "torture," "cruel, inhuman, and degrading," and "humane" until they no longer mean what they say.[17]

[12] 18 U.S.C. §§ 2340–2340A. [13] Rochin v. California, 345 U.S. 165, 172 (1952).

[14] Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980).

[15] U.S. v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

[16] See, e.g., Dana Priest, *US Instructed Latins on Executions, Torture*, Wash. Post, September 21, 1996; Alfred W. McCoy, A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror (2006); Jennifer Harbury, Truth, Torture, and the American Way: The History and Consequences of US Involvement in Torture (2005).

[17] I discuss some of these redefinitions in David Luban, *Torture, American-Style*, Wash. Post, November 27, 2005, B1. At his confirmation hearing, Attorney General Gonzales redefined

The result

In the War on Terror, CIA techniques for interrogating high-value captives reportedly include waterboarding, a centuries-old torture technique of near-drowning. Tactics also include "Long Time Standing" ("Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours"), and "The Cold Cell" ("The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.")[18] All these techniques surely induce the "severe suffering" that the law defines as torture. Consider Long Time Standing. In 1956, the CIA commissioned two Cornell Medical Center researchers to study Soviet interrogation techniques. They concluded: "The KGB simply made victims stand for eighteen to twenty-four hours – producing 'excruciating pain' as ankles double in size, skin becomes 'tense and intensely painful,' blisters erupt oozing 'watery serum,' heart rates soar, kidneys shut down, and delusions deepen."[19]

"cruel, inhuman, and degrading" treatment so that conduct outside US borders does not count. He also defined "humane" treatment as involving nothing more than providing detainees with food, clothing, shelter, and medical care; consistent with this view, the Army's Schmidt Report concluded that intensive sleep deprivation, blasting detainees with ear-splitting rock music, threatening them with dogs, and humiliating them sexually "did not rise to the level of being inhumane treatment." *Army Regulation 15-6 Final Report: Investigation of FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* [hereafter: Schmidt Report], at 1, available at <www.defenselink.mil/news/Jul2005/d20050714report.pdf>. Legal obligations were defined so narrowly that US officials could truthfully say that the United States complies with its legal obligations, simply because it hardly has any to comply with.

[18] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, November 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>. At least one Afghani captive reportedly died of hypothermia in a CIA-run detention facility after being soaked with water and shackled to a wall overnight. Bob Drogin, *Abuse Brings Deaths of Captives Into Focus*, L.A. Times, May 16, 2004. The US government has never officially acknowledged which techniques it uses. However, in a September 2006 speech, President Bush for the first time admitted that the CIA held high-value detainees in secret sites, and interrogated them using "an alternative set of procedures," which he described as "tough ... and safe ... and lawful ... and necessary." Office of the Press Secretary, The White House, *President Discusses Creation of Millitary Commissions to Try Suspected Terrorists*, September 6, 2006, available at <www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. Subsequently, the government argued that revelation of the techniques could cause "exceptionally grave damage" to national security – so much so, that detainees should not be permitted to tell their own civilian lawyers what was done to them. Declaration of Marilyn A. Dorn, Information Review Officer, CIA, in Majid Khan v. George W. Bush, U.S. Dist. Court, District of Columbia, Civil Action 06-CV-1690, October 26, 2006, available at <http://balkin.blogspot.com/khan.dorn.aff.pdf>; Respondents' Memorandum in Opposition to Petitioner's Motion for Emergency Access to Counsel and Entry of Amended, Protective Order, in Khan v. Bush, available at <http://balkin.blogspot.com/khan.doj.brief.pdf>.

[19] Quoted in Alfred W. McCoy, *Cruel Science: CIA Torture & US Foreign Policy*, 19 New England J. Pub. Pol. 209, 219 (2005).

More important, perhaps, than authorizations of specific tactics are open-ended, tough-sounding directives that incite abuse without explicitly approving it, such as a 2003 email from headquarters to interrogators in Iraq: "The gloves are coming off, gentlemen, regarding these detainees. Col. Boltz has made it clear we want these individuals broken."[20] In response, a military interrogator named Lewis Welshofer accidentally smothered an uncooperative Iraqi general to death in a sleeping bag – a technique that he claimed his commanding officer approved. Welshofer was convicted of negligent homicide, for which he received a slap on the wrist: a written reprimand, two months' restriction to base, and forfeiture of $6,000 in pay. The commanding officer who approved the sleeping-bag interrogation suffered no adverse consequences.[21] Similarly, Manadel Jamadi, a suspected bombmaker, whose ice-packed body was photographed at Abu Ghraib next to a grinning soldier, was seized and roughed up by Navy SEALS in Iraq, then turned over to the CIA for questioning. At some point, either the SEALS or the CIA interrogator broke Jamadi's ribs; then he was hooded and hung by his wrists twisted behind his back until he died. The CIA operative has still not been charged two years after Jamadi's death. And the SEAL leader was acquitted, exulting afterward that "what makes this country great is that there is a system in place and it works."[22] It worked as well in another notorious case of prisoner abuse, when two young Afghanis

> were found dead within days of each other, hanging by their shackled wrists in isolation cells at the [US military] prison in Bagram, north of Kabul. An Army investigation showed they were treated harshly by interrogators, deprived of sleep for days, and struck so often in the legs by guards that a coroner compared the injuries to being run over by a bus.[23]

The investigation stalled because "officers and soldiers at Bagram differed over what specific guidelines, if any, applied," an ambiguity that "confounded the Army's criminal investigation for months and ... gave the accused soldiers a defense ..."[24]

In addition to harsh interrogations by its own personnel, the United States has engaged in so-called "extraordinary renditions," where detainees are sent to other countries for interrogation by local authorities of sinister reputation.

[20] CBS News, *Death of a General*, April 9, 2006, available at <www.cbsnews.com/stories/2006/04/06/60minutes/main1476781_page2.shtml>.

[21] Ibid. See also David R. Irvine, *The Demise of Military Accountability*, Salt Lake Tribune, January 29, 2006.

[22] Jane Mayer, *A Deadly Interrogation*, The New Yorker, November 14, 2005; John McChesney, *The Death of an Iraqi Prisoner*, NPR's All Things Considered, October 27, 2005, available at <www.npr.org/templates/story/story.php?storyId=4977986>; Seth Hettena, *Navy SEAL Acquitted of Abusing Iraqi Prisoner Who Later Died*, Associated Press, May 28, 2005, available at <www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2005/05/27/state/n171730D65.DTL>.

[23] Tim Golden, *Years After 2 Afghans Died, Abuse Case Falters*, N.Y. Times, February 13, 2006.

[24] Ibid. at A11.

The practice, nicknamed "outsourcing torture," has existed since the Clinton administration, but accelerated dramatically in the War on Terror.[25] Several detainees, seized by mistake, rendered, and later released, describe torture inflicted on them.[26] In May 2006, the State Department's legal advisor made explicit what observers had long surmised: that US lawyers believe the Torture Convention's ban on returning people to states where they face torture does not cover cases where the person is rendered from a country other than the United States.[27]

Thus, "We don't torture" comes with an asterisked proviso: "It depends who you mean by 'we,' and it depends what you mean by 'torture.' " Likewise, "The United States obeys its legal obligations" comes with the unspoken qualification "... which is easy because we hardly have any." The provisos are the torture lawyers' handiwork. They allow politicians to profess great respect for law and human rights, while operating without the fetters that their noble words suggest.

How did we get there?

[25] Jane Mayer, *Outsourcing Torture*, The New Yorker, February 5, 2004. See also an interview with Michael Scheuer, an ex-CIA officer who helped develop the program: *"Die CIA hat das Recht, jedes Gesetz zu brechen": Darf der US-Geheimdienst mutmassliche Terroristen entführen? Michael Scheuer, ein Hauptverantwortlicher, gibt erstmals Antworten*, Die Zeit (Hamburg), December 28, 2005, available at <www.zeit.de/2006/01/M__Scheuer?page=5>. An English translation is available at <www.counterpunch.org/kleinc01072006.html>.

An investigation has revealed, perhaps unsurprisingly, that several European countries whose governments expressed shock at revelations that their bases and airports formed part of the secret CIA rendition network actually were colluding with the United States. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, Draft report by Dick Marty, June 7, 2006, available at <http://assembly.coe.int/Main.asp?Link=/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.htm>.

[26] The best-known is Maher Arar. See Mayer, *Outsourcing Torture*, supra note 25; Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"*, 20 Georgetown Imm. L. J. 213 (2006). Another was Khaled El-Masri, a German cab driver seized while on holiday in Macedonia, turned over to US agents, and held for months in Afghanistan. See *Extraordinary Rendition*, Harper's Mag., February 2006, at 21–24 (excerpting El-Masri's statement). His was a case of mistaken identity, which created a sensation in Germany after he was released. US courts refused to hear lawsuits filed by Arar and El-Masri, on the astonishing basis that revealing "state secrets" about gross government misconduct could embarrass the United States and therefore be bad for national security. Arar v. Ashcroft, 414 F.Supp.2d 250, 281–83 (E.D.N.Y. 2006); El-Masri v. Tenet, E.D. Va., Case 1:05cv1417 (memorandum opinion of Ellis, J., May 12, 2006). Another rendition victim, Laid Saidi, claims that his US captors transported him to Afghanistan, hung him by his wrists for five days, and released him only after sixteen months, Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in US Hands*, N.Y. Times, July 7, 2006 available at <www.nytimes.com/2006/07/07world/africa/07algeria.html?_r=1&oref=slogin>.

[27] List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America 32–37 (2006), available at <www.us-mission.ch/Press2006/CAT-May5.pdf>.

The post-9/11 legal response

The torture lawyers went into overdrive in the wake of the September 11 attacks, producing a flood of documents in a remarkably short time. As an article in the *New York Times* explains,

> The administration's legal approach to terrorism began to emerge in the first turbulent days after Sept. 11, as the officials in charge of key agencies exhorted their aides to confront Al Qaeda's threat with bold imagination.
>
> "Legally, the watchword became 'forward-leaning,' " said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.' "
>
> The challenge resounded among young lawyers who were settling into important posts at the White House, the Justice Department and other agencies.[28]

As an example of "forward-leaning" legal strategy, the article cites an OLC memorandum by John Yoo on how to overcome constitutional objections to the use of military force against terrorists within the US, for example "to raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed or injured by exchanges of fire."[29] Yoo wrote the memo just ten days after September 11. The article explains that "lawyers in the administration took the same 'forward-leaning' approach to making plans for the terrorists they thought would be captured."[30]

Related to the "forward-leaning" strategy is what Ron Suskind refers to as "the Cheney Doctrine" or "the one percent doctrine," allegedly formulated by the US Vice-President in November 2001. In Suskind's words, "If there was even a one percent chance of terrorists getting a weapon of mass destruction ... the United States must now act as if it were a certainty."[31] "It's not about our analysis, or finding a preponderance of evidence," Suskind quotes Cheney as saying. "It's about our response."[32] Suskind asserts that the Cheney Doctrine formed the guiding principle in the War on Terror. It carries far-reaching implications for the interrogation of captives: if even a minute chance of catastrophe must be treated as a certainty, every interrogation becomes a ticking time-bomb case – and

[28] Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. Times, October 24, 2004, A1, at A12. The lawyers were political conservatives, mostly veterans of the Federalist Society and clerkships with Justices Scalia and Thomas, and Judge Laurence Silberman. Some sources for the article stated that their "strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism," such as strengthening executive power and halting US submission to international law. Ibid.

[29] Ibid. This memo has not yet been released or leaked. [30] Ibid.

[31] Ron Suskind, The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11 62 (2006).

[32] Ibid.

ticking time-bomb cases are the one situation where many people who otherwise balk at torture reluctantly accept that breaking the taboo is morally justified.

The most crucial portions of the "forward-leaning" strategy – which included not only interrogation issues but military tribunals and the applicability of the Geneva Conventions as well – were formulated in near-total secrecy by a small group of like-minded Administration lawyers, intentionally excluding anticipated dissenters in the State Department and the JAG Corps.[33] Indeed, when the chief JAG officers of the four military services learned of the Bybee Memo months after the fact, they responded with forceful criticism and barbed reminders that "OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion."[34] The chief Air Force JAG reminded the Secretary of the Air Force that "the use of the more extreme interrogation techniques simply is not how the US armed forces have operated in recent history. We have taken the legal and moral 'high road' in the conduct of our military operations regardless of how others may operate."[35] (This, by the way, is exactly the kind of moral reminder that a good lawyer ought to give clients.) Nevertheless, where in past administrations OLC weighed in only after relevant federal agencies had addressed legal questions, now the OLC "frequently had a first and final say."[36] The Bush Administration took pains to bypass legal advice it did not want to hear, and Vice President Dick Cheney's lead counsel, David Addington, was particularly suspicious that JAGs are too independent.[37] In 2006 it emerged that Defense Secretary Donald Rumsfeld had quietly signed off on a torture-permissive working group report without ever notifying officials who objected to it (and who were in the working group), including Navy general counsel Alberto Mora. Mora had argued for months against cruel or degrading interrogation techniques. He thought he had won his argument when Defense Department general counsel William Haynes wrote a US Senator that the military would not use abusive tactics. But Haynes, who had previously approved intimidation with dogs, forced

[33] Golden, *After Terror, a Secret Rewriting of Military Law*, supra note 28, at 12–13.

[34] Memorandum from Brigadier General Kevin M. Sankuhler (USMC) for the General Counsel of the Air Force, February 27, 2003, reprinted in The Torture Debate, supra note 2, at 383.

[35] Memorandum from Major General Jack L. Rives for the Secretary of the Air Force, February 5, 2003, reprinted in The Torture Debate, supra note 2, at 378.

[36] Golden, *After Terror, a Secret Rewriting of Military Law*, supra note 28, at 13.

[37] Chitra Ragavan, *Cheney's Guy*, US News & World Report, May 29, 2006, available at <www.usnews.com/usnews/news/articles/060529/29addington.htm>. According to Ragavan, Addington has been the most powerful and influential of the torture lawyers, a view confirmed by many sources in Jane Mayer's detailed article on Addington: Jane Mayer, *The Hidden Power*, The New Yorker, July 6, 2006, available at <www.newyorker.com/fact/content/articles/060703fa_fact 1>.

nudity, and sleep deprivation, outmaneuvered Mora.[38] In the words of reporter Jane Mayer, "Legal critics within the Administration had been allowed to think that they were engaged in a meaningful process; but their deliberations appeared to have been largely an academic exercise, or, worse, a charade."[39] Nor did Abu Ghraib change the Bush Administration's desire to keep politically independent JAG officers out of the advisory loop. In response to Abu Ghraib, the US Congress enacted legislation that prohibited Defense Department officials from interfering with JAG officers offering independent legal advice.[40] But although President Bush signed the legislation, his signing statement implied that the executive branch would not abide by these prohibitions.[41]

The post-9/11 OLC used the catastrophe to advance an extraordinarily militant version of executive supremacy – an agenda that, even before 9/11, had preoccupied Yoo, Cheney, and Addington.[42] Just two weeks after 9/11, a Yoo memorandum concluded "that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001." No statute, he added, "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."[43] This bold assertion prefigures the Bybee Memo, because it clearly implies that the decision whether to torture would be "for the President alone to make." The conclusion reappeared in one of the Bybee Memo's most controversial sections, which argued that the criminal laws

[38] Mora's battle is described in Jane Mayer, *Annals of the Pentagon: The Memo*, The New Yorker, February 27, 2006, available at <www.newyorker.com/fact/content/articles/060227fa_fact>. Haynes's approval is in TP, supra note 1, at 237; the list of techniques he recommended is in TP, at 227–28.

[39] Mayer, *The Memo*, supra note 38. The working group report is in TP, supra note 1, at 241–359.

[40] 10 U.S.C. §§ 3037, 5046, 5148, and 8037.

[41] Statement on signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, October 28, 2004, available at <www.highbeam.com/library/docfree.asp?DOCID=1G1:125646055&ctrlInfo=Round19%3AMode19b%3ADocG%3AResult&ao=>. On Bush's use of signing statements, see Charlie Savage, *Bush Challenges Hundreds of Laws*, Boston Globe, April 30, 2006, available at <www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/?>.

[42] In an article about Addington, Chitra Ragavan writes, "The 9/11 attacks became the crucible for the administration's commitment to restoring presidential power and prerogative." Ragavan, supra note 37. Mayer likewise emphasizes that Addington and his boss Dick Cheney both believe that the presidency had been wrongly weakened from the Nixon administration on. Mayer, *The Hidden Power*, supra note 37.

[43] Memorandum from John C. Yoo to Timothy Flanigan, Deputy Counsel to the President, September 25, 2001, reprinted in TP, supra note 1, at 24.

against torture could not be enforced against interrogators authorized by the President.[44]

One of the first steps the Administration took was to strip Geneva Convention protections from Al Qaeda and Taliban captives (a position eventually rejected by the Supreme Court in June 2006, when the Court held that common Article 3 of Geneva applies in the War on Terror and therefore protects even Al Qaeda captives).[45] In January 2002, OLC concluded that the President has unilateral authority to suspend the Geneva Conventions, and that customary international law (which incorporates Geneva protections) has no purchase on US domestic law – a deeply controversial position favored by some conservative academics but never accepted by mainstream lawyers or the Supreme Court.[46] In any event, two memos argued, the Geneva Conventions do not apply to Al Qaeda or the Taliban, because Al Qaeda is not a state and the Taliban were unlawful combatants. The President quickly adopted this position.[47] However, the President added, because "our Nation has been and will continue to be a strong supporter of Geneva and its principles ... the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[48] Critics quickly noticed that this order applies only to the armed forces, not the CIA, and that the phrase "consistent with military necessity" creates a loophole for harsh interrogation. The carefully crafted phrasing, which makes the document superficially appear more protective of detainees than it actually is, was more handiwork of the White House torture lawyers. A few months later, Attorney General Gonzales qualified the protection even more dramatically when he stated that "humane" treatment of detainees need consist of nothing more than providing them food, clothing, shelter, and medical care.[49]

Stripping away Geneva protections from the detainees was crucial to all the further work of the torture lawyers. It was essential that as few

[44] Memorandum from Jay S. Bybee to Alberto R. Gonzales, August 1, 2002 [henceforth: Bybee Memo], reprinted in TP, supra note 1, at 204.

[45] Hamdan v. Rumsfeld, 2006 Lexis 5185 (June 29, 2006), at *124–9.

[46] Memorandum from Bybee to Gonzales, January 22, 2002, reprinted in TP, supra note 1, at 91, 93, 112–13.

[47] Ibid.; memorandum from Bybee to Gonzales, February 7, 2002, in TP, supra note 1, at 136; Memorandum from President Bush to the Vice-President and other officials, February 7, 2002, in TP, supra note 1, at 134–35.

[48] Ibid. at 135.

[49] "The President said – for example on March 31, 2003 – that he expects detainees to be treated humanely. As you know, the term 'humanely' has no precise legal definition. As a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care." Written response of Alberto R. Gonzales to questions posed by Senator Edward M. Kennedy, question #15, January 2005.

detainees as possible be classified as prisoners of war under the Third Geneva Convention, because POW status protects them not only from torture but from all forms of coercive questioning. Indeed, Article 17 provides that "prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Stripping away common Article 3 protections against torture and humiliation was equally essential if harsh interrogators were to avoid war crimes charges: as we have seen, violations of common Article 3, like grave breaches of the Geneva Conventions, were war crimes under federal law. Bybee and Yoo argued that because the global war on terror (the "GWOT") is international, common Article 3 does not apply, because Article 3 is limited to armed conflicts "not of an international character."[50] (This is the interpretation the Supreme Court eventually rejected in June 2006.) These early opinions set the stage for the torture memos that followed.

The Bybee Torture Memo

Unquestionably, the Bybee Memo is the most notorious of the memos and advisory opinions dealing with abuse of detainees. According to John Yoo, the memo was written because the CIA wanted guidance on how far it could go interrogating high-value Al Qaeda detainees; the United States had already captured Abu Zubaydah, believed by some to be a top Al Qaeda leader.[51] Apparently, the CIA wanted to go quite far. Abu Zubaydah's captors reportedly withheld pain medication from him – he was wounded when he was captured – and the CIA wanted to know whether it would be illegal to waterboard him.[52] Evidently, eager as CIA interrogators might have been to

[50] Memorandum from Jay S. Bybee to Alberto Gonzales and William Haynes II, January 22, 2002, TP, supra note 1, at 85–89.

[51] Yoo interview on Frontline, supra note 5.

[52] Don Van Natta *et al.*, *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. Times, March 9, 2003, at A1; Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. Times, January 13, 2005, A1, A16. Suskind reports that Zubaydah received first-rate medical care, but quotes a CIA official who said, "He received the finest medical attention on the planet. We got him in very good health, so we could start to torture him." Suskind, supra note 31, at 100. Suskind also describes "[CIA Director George] Tenet's months of pressure on his legal team" to permit harsh interrogation. Ibid. at 100–1. See also Dana Priest, *Covert CIA Program Withstands New Furor*, Wash. Post, December 30, 2005, at A1 (describing aggressive positions taken by CIA lawyers). The Zubaydah interrogation, however, proved disappointing: Zubaydah proved not to be a big fish – an FBI specialist on Al Qaeda described him as a meet-and-greet guy, "Joe Louis in the lobby of Caesar's Palace, shaking hands." Suskind, at 100. Furthermore, he was insane. Ibid. at 95–96, 100. Eventually, he revealed the name of dirty-bomb suspect Jose Padilla – but only after harsh interrogation had stopped and interrogators switched to a different tactic, arguing religion with Zubaydah. Ibid. at 116–17. Suskind's account contradicts President Bush's assertion that

take the gloves off, they were unwilling to do so without a legal opinion to back them up. OLC did not disappoint. But it would be a mistake to suppose that OLC was acting on its own: lawyers and other officials in the White House, the Vice-President's office, and the National Security Council also vetted the torture memo.[53]

The Bybee Memo provided maximum reassurance of impunity to nervous interrogators. It concluded that inflicting physical pain does not count as torture until the pain reaches the level associated with organ failure or death; that inflicting mental pain is lawful unless the interrogator specifically intends it to last months or years beyond the interrogation; that utilizing techniques known to be painful is not torture unless the interrogator specifically intends the pain to be equivalent to the pain accompanying organ failure or death; that enforcing criminal laws against Presidentially authorized torturers would be unconstitutional; that self-defense includes torturing helpless detainees in the name of national defense; and that torture in the name of national security may be legally justifiable as the lesser evil, through the doctrine of necessity.

These conclusions range from the doubtful to the loony. Some can be supported by conventional, if debatable, legal arguments. These include the analysis of mental torture, which has some support in the language of the statute, and the discussion of specific intent, where OLC seizes on one of two standard readings of the doctrine but, quoting authorities quite selectively, ignores the other.

Others, however, have the mad logic of the Queen of Hearts' arguments with Alice. The analysis of self-defense, for example, inverts a doctrine permitting last-resort defensive violence against assailants into a rationale for waterboarding bound and helpless prisoners. OLC cites no conventional legal authority for this inversion, for the simple reason that there is none. Although OLC claimed to base its analysis on the teachings of "leading scholarly commentators" (again: "some commentators"), in fact there is only one such commentator, and OLC flatly misrepresents what he says.[54] Although

"alternative interrogation procedures" were "necessary" to break Zubaydah. Bush speech, supra note 18.

[53] Dana Priest, *CIA Puts Harsh Tactics on Hold*, Wash. Post, June 27, 2004, A1.

[54] The commentator is Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989). Here is what OLC says: "Leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the anti-torture statute] would be justified under the doctrine of self-defense." TP, supra note 1, at 211, citing to Moore. And here is what Moore actually says on the page OLC cites: "*The literal law of self-defense is not available to justify their torture.* But the principle uncovered as the moral basis of the defense may be applicable" (emphasis added). OLC states that "the doctrine of self-defense" would justify torture, where Moore says, quite literally, the opposite. Note also the difference between OLC's assertive "would be justified" and Moore's cautious "may be applicable."

Professors Eric Posner and Adrian Vermeule quickly published a *Wall Street Journal* op-ed describing the Memo's arguments as "standard lawyerly fare, routine stuff,"[55] theirs was a distinctly minority view that seemed plainly to be an exercise in political damage control.[56] By ordinary lawyerly standards, the Bybee Memo was, in Peter Brooks's words, "textual interpretation run amok – less 'lawyering as usual' than the work of some bizarre literary deconstructionist."[57] Even the OLC – after Jack Goldsmith (a sometimes co-author of Professor Posner) took over from Jay Bybee – did not regard the Bybee Memo as standard lawyerly fare. In an unusual move, it publicly repudiated the Memo a few months after it was leaked.

This is not the place to offer a detailed analysis of the Bybee Memo (which I have done elsewhere).[58] To illustrate its eccentricity, I will pick just two examples: the organ-failure definition of "severe pain," and one curious portion of its discussion of the necessity defense.

The amazing fact about the organ-failure definition is that Yoo and his co-authors based it on a Medicare statute that has nothing whatsoever to do with torture. The statute defines an emergency medical condition as one in which someone experiences symptoms that "a prudent lay person ... could reasonably expect" might indicate "serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." The statute specifies that severe pain is one such symptom. In an exquisite exercise of legal formalism run amok, the Memo infers that pain is severe only if it is at the level indicating an emergency medical condition. The authors solemnly cite a

[55] Eric Posner & Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall St. J., July 6, 2004.

[56] The Bybee Memorandum provoked a flurry of commentary, almost entirely negative. Along with my own paper *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate, supra note 2, see, e.g., Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 Geo. J. Legal Ethics 557 (2005); Richard B. Bilder & Detlev A. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 A.J.I.L. 689 (2004); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Security L. & Pol'y 455 (2005); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in The Torture Debate, supra note 2, at 241; Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. Colo. L. Rev. 1 (2006); Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L. J. 1213 (2005); Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 Geo. J. Legal Ethics 225 (2006); Jeremy Waldron, *Torture and the Common Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681 (2005); Ruth Wedgwood & R. James Woolsey, *Law and Torture*, Wall St. J., June 28, 2004; W. Bradley Wendell, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67 (2005).

[57] Peter Brooks, *The Plain Meaning of Torture?*, Slate, February 9, 2005, available at <www.slate.com/id/2113314>.

[58] I offer a detailed analysis of the Memo in *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate, supra note 2, at 55–68.

Supreme Court decision to show that Congress's use of a phrase in one statute should be used to interpret its meaning in another. Months later, when OLC withdrew the Bybee Memo and substituted the Levin Memo, the substitute memo rejected this argument and pointed out the obvious: that the Medicare statute was a definition of an emergency medical condition, not of severe pain, and the difference in context precludes treating it as an implicit definition of severe pain.[59] The organ-failure definition, perhaps more than any other portion of the Bybee Memo, involved lawyering that cannot be taken seriously. It seems obvious that OLC lawyers simply did an electronic search of the phrase "severe pain" in the United States Code and came up with the healthcare statutes (the only ones other than torture-related statutes in the entire Code to employ the phrase). Then they decided to see how clever they could get. The result is a parody of legal analysis.

The discussion of the necessity defense is bizarre for a different reason. Looked at dispassionately, necessity offers the strongest defense of torture on normative grounds. The necessity defense justifies otherwise criminal conduct undertaken to prevent a greater evil, and in extreme cases it is at least thinkable that torture might be the lesser evil.[60]

However, the Bybee Memo's authors were not content to argue for the possibility of the necessity defense. They also threw in an argument that even though the necessity defense is available to torturers, it would not necessarily be available in cases of abortion to save a woman's life.[61] At this point, the

[59] Levin Memo, in The Torture Debate, supra note 2, at 367–68, note 17.

[60] I should also note, however, that the claim that the necessity defense is available for the crime of torture runs flatly contrary to the official opinion of the United States government in its 1999 report to the UN Committee Against Torture, a fact that the Bybee Memo chooses not to mention: "US law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a 'state of public emergency') or on orders from a superior officer or public authority." Available at <www.state.gov/www/global/human_ rights/torture_intro.html>. The Memo also ignores a Supreme Court opinion decided just three months earlier asserting that it is an "open question" whether the necessity defense is ever available for a federal crime without the statute specifically making it available (and the Court's language suggests that the answer might turn out to be no). United States v. Oakland Caunabis Buyers' Coop, 532 U.S. 483, 490 (2001). I am grateful to Marty Lederman for calling these documents to my attention.

[61] Bybee Memo, in TP, supra note 1, at 209. In addition to its blatant political pandering, the argument is also garbled to the point of incoherence. When Congress enacted the US anti-torture statutes, it broadened CAT's definition of torture. Whereas CAT defines torture as the infliction of severe pain for reasons such as interrogation, intimidation, punishment, or discrimination, the US statute drops these reasons and bans torture regardless of why it is inflicted. Congress decided that all torture is criminal, not just torture for certain reasons. In other words, Congress evidently concluded that nothing can justify torture. OLC reads the Congressional emendation of CAT's language in the opposite way, concluding that "Congress has not explicitly made a determination of values vis-à-vis torture." This sentence is opaque

partisan political nature of the document becomes too obvious to ignore. It is the moment when the clock strikes thirteen. Opposition to abortion was an article of faith in the Ashcroft Justice Department, and apparently the OLC lawyers decided to try for a "two-fer" – not only providing a necessity defense for torture, but throwing in a clever hip-check to forestall any possibility that their handiwork might be commandeered to justify life-saving abortions if a legislature ever voted to outlaw them. Even abortion opponents are likely to balk at the thought that torture might be a lesser evil than abortion to save a mother's life. But this was the conclusion that the OLC aimed to preserve.

The Levin Memo

But Bybee's is not the only torture memo that deserves similar judgments. On the eve of Alberto Gonzales's confirmation hearing as Attorney General, the Justice Department abruptly withdrew the Bybee Memo and replaced it with another OLC opinion, the Levin Memo.[62] OLC lawyer Daniel Levin vehemently denounced torture, retracted Bybee's specific intent analysis, rejected the "organ failure" definition of severe pain, and no longer argued that it would be unconstitutional to prosecute Presidentially authorized torturers. In all these respects, the Levin Memo sounded more moderate than Bybee, and perhaps restored a measure of credibility to the OLC. Furthermore, the Levin Memo does not indulge in stretched, bizarre, or sophistical arguments – with one striking exception I shall note shortly.

Read closely, however, the Levin Memo makes only minimum cosmetic changes to the bits of Bybee that drew the worst publicity. Levin does not point out the weaknesses in Bybee's criminal-defense arguments; he simply never discusses possible defenses to criminal charges of torture.[63] The memo likewise ducks the presidential-power question rather than changing Bybee's answer. And, although Levin explicitly contradicts Bybee's conclusion that pain must be excruciating to be severe, every one of the Memo's illustrations of "severe pain" is, in fact, excruciating: "severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers ... cutting off ... fingers, pulling out ... fingernails" and similar atrocities.[64] These

and clumsy; it is hard to speak clearly when you are fudging. The next sentence is even worse, bordering on gibberish: "In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense."

[62] It is reproduced in The Torture Debate, supra note 2, at 361.

[63] He does say that "there is no exception under the statute permitting torture to be used for a 'good reason.'" Ibid. at 376. This might be read to suggest that the defenses of necessity and self-defense are unavailable, but the context suggests otherwise.

[64] Ibid. at 369.

barbaric illustrations are the only operational guidance Levin has to offer on how to tell when pain is "severe," and they obviously suggest that milder techniques are not torture. While Levin's legal reasoning marks a return to normalcy, the opinion provides ample cover for interrogators who "merely" waterboard detainees or deprive them of sleep for weeks. Indeed, Levin specifically states that he has "reviewed this Office's prior opinions addressing issues involving treatment of detainees and do[es] not believe that any of their conclusions would be different under the standards set forth in this memorandum."[65] This includes another, still secret, August 2002 OLC opinion on specific interrogation techniques used by the CIA, believed to include waterboarding.[66]

Indeed, at one point the Levin Memo indulges in the kind of frivolous statutory interpretation that was the hallmark of the Bybee Memo it replaced – and that is a carefully crafted paragraph that reads a nonexistent word into the torture statute which would render it inapplicable to waterboarding.[67] Recall that the torture statutes define torture to include both severe physical pain and severe physical suffering. Waterboarding, by duplicating the experiences of drowning, would presumably fall under the "suffering" prong of this definition rather than the "pain" prong. And the suffering must indeed be severe: according to CIA sources, Khalid Sheikh Mohammed, the architect of 9/11, "won the admiration of interrogators when he was able to last between two and two-and-a-half minutes before begging to confess"; CIA agents who underwent waterboarding all broke in less than fifteen seconds.[68]

Enter the Levin Memo, which concludes that "to constitute torture, '*severe* physical suffering' would have to be a condition of some extended

[65] Ibid. at 362, note 8.

[66] See *Opening Statement of Senator Carl Levin at the Personnel Subcommittee Hearing on Military Commissions, Detainees and Interrogation Procedures*, July 14, 2005, available at <www.senate.gov/~levin/newsroom/release.cfm?id=240601> (referring to a second, still secret, Bybee memorandum). Bush Administration officials also stated that Michael Chertoff, then head of the Justice Department's Criminal Division, consulted on the second Bybee memorandum, which reportedly permitted waterboarding. David Johnston, Neil Lewis & Douglas Jehl, *Security Nominee Gave Advice to the C.I.A. on Torture Laws*, N.Y. Times, January 29, 2005, available at <www.nytimes.com/2005/01/29/politics/29home.html?page-wan-ted=1&ei=5090&en=8b261a9df1338e4a&ex=1264741200&partner=rssuserland>.

[67] I am grateful to Marty Lederman for pointing out the connection between this portion of the Levin Memo and waterboarding. See Lederman, *Yes, It's a No-Brainer: Waterboarding Is Torture*, Balkinization, October 28, 2006, available at <http://balkin.blogspot.com/2006/10/yes-its-no-brainer-waterboarding-is.html>.

[68] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>. On the treatment of KSM, see James Risen, State of War: The Secret History of the CIA and the Bush Administration 32–33 (2006). Risen asserts that CIA agents inflicted hundreds of abuses each week on KSM, and quotes one source who said that it was the accumulation of so many abuses that made the interrogation program torture.

duration or persistence as well as intensity."[69] That would exclude any technique that breaks victims in a matter of seconds or minutes, such as waterboarding. But in fact, the torture statute contains no mention whatever of "extended duration or persistence." This is especially striking because the statute does state that *mental* pain and suffering must be "prolonged" to count as torture – but it never says that physical pain or suffering must be prolonged. The authors of the Levin Memo simply made up the duration requirement out of whole cloth.

The Beaver Memo

Next consider the memorandum written for the Defense Department by LTC Diane Beaver (a JAG legal advisor at Guantánamo), on the legality of specific interrogation techniques. Like the Bybee Memo, Beaver's was written to respond to a specific request by interrogators who were having a hard time "breaking" a high-value Al Qaeda detainee; it was then forwarded to the Pentagon. In this case, the detainee was Mohammed Al-Kahtani (or Qahtani), one of the so-called "twentieth hijackers" who tried but failed to participate in 9/11. Kahtani was detained at Guantánamo, and in 2002 a series of requests went from Guantánamo to Washington for approval of harsh interrogation techniques.[70] Eventually, Kahtani was subjected to a wide variety of sexual humiliations, intensive sleep deprivation (20-hour-a-day interrogations for 48 out of 54 days, interrupted only when Kahtani's pulse-rate plummeted), and months of isolation. He was shot up with three-and-a-half bags of intravenous fluid and forced to urinate on himself; leashed and made to do dog tricks; threatened with working dogs (a technique specifically approved by Defense Secretary Donald Rumsfeld, who closely followed the interrogation of Kahtani[71]); straddled by a female interrogator who taunted him about the deaths of other Al Qaeda members; made to wear a thong on his head and a bra; stripped naked in front of women; and bombarded with ear-splitting "futility music" (the Army's term) by Metallica and Britney Spears.[72] A subsequent US Army report concluded that none of these

[69] The Torture Debate, supra note 2, at 371. [70] TP, supra note 1, at 223–28.

[71] Michael Scherer & Mark Benjamin, *What Rumsfeld Knew*, Salon.com, April 14, 2006, available at <www.salon.com/news/feature/2006/04/14/rummy/index_np.html>. This article is based on an Army inspector-general's report Salon obtained through the Freedom of Information Act.

[72] These techniques (and the Army's judgment that they were approved) are described in the Army's own report, the so-called Schmidt Report, supra note 17. Most of this report remains classified, but a thirty-page summary has been released and is available at <www.defenselink.mil/news/Jul2005/d20050714report.pdf>. See also Adam Zagorin *et al.*, *Inside the Interrogation of Detainee 063*, and *Excerpts from an Interrogation Log*, both in Time Mag., June 20, 2005. The forced urination is described in the latter articles but not in the Schmidt Report.

techniques is "inhumane."[73] (Nor is "futility music" the most bizarre Guantánamo tactic: FBI agents have reported seeing interrogators force detainees to watch homosexual porn movies.[74])

Some of these techniques, including the dog threats, leading detainees around on a leash, placing women's underwear on detainees' heads and forced nudity, migrated to Abu Ghraib, where soldiers memorialized them in photos that soon became notorious throughout the world. In General Randall Schmidt's words, "Just for the lack of a camera, it would sure look like Abu Ghraib."[75] Compelling evidence suggests that the migration resulted when the Guantánamo commander, General Geoffrey Miller, was sent to Iraq to "Gitmoize" intelligence operations there (although Miller denies it).[76] If so, the implications are enormous: it would mean that Abu Ghraib does not represent merely the spontaneous crimes of low-level sadists, but rather the unauthorized spillover of techniques deliberately exported from Guantánamo to Iraq as a high-level policy decision.[77] That would imply a direct causal pathway connecting the advice of the torture lawyers to the Abu Ghraib abuses via General Miller. (A former State Department official traces the policy back to Cheney's then general counsel David Addington.[78])

Beaver labeled her memorandum a "legal brief" on counter-resistance strategies, and a brief rather than an impartial legal analysis is indeed what she wrote. Beaver rightly observes that interrogations must meet US constitutional standards under the Eighth Amendment. To identify these

[73] Schmidt Report, supra note 17.

[74] See documents obtained under the Freedom of Information Act by the ACLU, available at <www.aclu.org/torturefoia>.

[75] Quoted in Michael Scherer & Mark Benjamin, supra note 71.

[76] Janice Karpinski, the commander of the Military Police unit implicated in the Abu Ghraib abuses, claims that General Miller told her his job was to "GTMO-ize" or "Gitmoize" Abu Ghraib; Miller denies he ever used that phrase. Mark Benjamin, *Not So Fast, General*, Salon.com, March 7, 2006, available at <www.salon.com/news/feature/2006/03/07/major_general/index_np.html>. However, the mandate Miller received from Rumsfeld was to replicate his Gitmo intelligence successes in Iraq. John Barry *et al. The Roots of Torture*, Newsweek, May 24, 2004; see also Josh White, *Army General Advocated Using Dogs at Abu Ghraib, Officer Testifies*, Wash. Post, July 28, 2005, at A18 (testimony by top MP operations officer at Abu Ghraib that Miller "was sent over by the secretary of defense to take their interrogation techniques they used at Guantánamo Bay and incorporate them into Iraq"). The Fay-Jones Report on Abu Ghraib likewise concludes that it is possible that interrogation techniques had migrated from Guantánamo to Abu Ghraib. TP, supra note 1, at 1004. And Donald Rumsfeld briefed Miller on the Department of Defense's working group report on interrogation techniques. Mayer, *The Memo*, supra note 38. According to one released detainee, inmates received the worst treatment during Miller's command at Guantánamo. Michelle Norris, *Leaving Guantánamo: Enduring a Harsh Stay*, NPR's All Things Considered, May 22, 2006.

[77] For analysis along these lines, see Mark Danner, Torture and Truth (2004).

[78] *Former Powell Aide Links Cheney's Office to Abuse Directives*, Int'l Herald-Tribune, November 3, 2005.

standards, she analyzes the 1992 Supreme Court decision *Hudson v. McMillian*.[79] *Hudson* addressed the question whether mistreatment of prisoners must cause serious injury to violate the constitutional prohibition on cruel and unusual punishment, and its answer is no: even minor injuries can violate the Eighth Amendment if guards inflict them for no good reason. (A good reason would consist of subduing a violent inmate.) Beaver's analysis of the case virtually flips it upside down, and the message she draws from *Hudson* is that mistreatment is unconstitutional only if there is no "good faith legitimate governmental interest" at stake and the interrogator acted "maliciously or sadistically for the very purpose of causing harm."[80] Obviously, any interrogation technique, no matter how brutal, passes this test if the interrogator's sole purpose is to extract intelligence. Beaver inverted a Supreme Court decision designed to broaden the protections of prisoners and read it to narrow them dramatically.

And indeed, Beaver proceeded to legitimize every proposed technique, including "the use of a wet towel to induce the misperception of suffocation" – a version of waterboarding. Oddly, Beaver adds that "The use of physical contact with the detainee ... will technically constitute an assault," but immediately goes on to "recommend that the proposed methods of interrogation be approved."[81] In other words, her memo on the legality of interrogation techniques concludes by recommending government approval of a felony.

The Draft Article 49 Opinion

After Jay Bybee's departure, Jack Goldsmith, a distinguished University of Chicago law professor (now a Harvard law professor), took over the leadership of OLC. Goldsmith took several courageous stands against Administration hard-liners, stands for which he reportedly had to withstand the fury of David Addington, Cheney's volcanic general counsel, regarded by many as the hardest of hard-liners.[82] As early as December 2003, before the Abu Ghraib scandal and the leak of the Bybee Memo, Goldsmith advised the government not to rely on a March 2003 memo by John Yoo that had directly influenced the Defense Department's working group on interrogation.[83] And it was under Goldsmith's leadership that OLC

[79] 503 U.S. 1 (1992). [80] TP, supra note 1, at 232. [81] Ibid. at 235.

[82] Daniel Kleidman, Stuart Taylor, Jr., & Evan Thomas, *Palace Revolt*, Newsweek, Feb. 6, 2006. On David Addington's role, see Ragavan, supra note 37, and Mayer, *The Hidden Power*, supra note 37.

[83] In February 2005, OLC formally retracted this latter Yoo memorandum. OLC letter from Daniel Levin to William J. Haynes II, February 5, 2005, regarding the Yoo memorandum of March 14, 2003. So far as I know, this letter is unpublished, but I have a PDF of the signed letter; and a link to the PDF may be found in Marty Lederman's blog at http://balkin.blogspot.

repudiated the Bybee Memo. Some regard Goldsmith as an unsung hero in the torture debates.

Nevertheless, Goldsmith too drafted a memorandum that exemplifies the kind of loophole legalism I object to in the other memoranda. (Let me emphasize, however, that Goldsmith's draft was never given final approval, and that could indicate that Goldsmith thought better of it.) Written in March 2004, it concerned the question of whether detainees in Iraq could be temporarily sent out of the country for interrogation, despite plain language in Article 49 of the Fourth Geneva Convention stating:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.[84]

Goldsmith divided the memo into two sections, one on whether Article 49 would prevent US authorities from deporting illegal aliens in Iraq "pursuant to local immigration law," and one on whether removing protected civilians from Iraq for interrogation violates Article 49.

In answer to the first question, Goldsmith contends that the drafters of Article 49 could not have meant to ban the removal of illegal aliens under an occupied state's immigration law. That conclusion sounds uncontroversial. But we shouldn't forget that during World War II, the removal of illegal aliens under an occupied state's immigration law included deporting stateless Jewish refugees from Vichy France to death camps in the East. The Vichy

com/2005/09/silver-linings-or-strange-but-true.html>, which also provides a useful chronology and analysis. The March 14, 2003 Yoo memorandum has not been released or leaked. Levin's letter mentions that twenty-four interrogation techniques are still approved; the implication is that the Yoo memorandum okayed techniques that OLC no longer approves.

[84] The *Washington Post* reports that Goldsmith had written an opinion five months earlier concluding that a ghost detainee named Rashul could not be removed from Iraq. By that time the CIA had already spirited Rashul away to Afghanistan, and after Goldsmith's opinion they quickly returned him to Iraq. According to an intelligence source, "That case started the CIA yammering to Justice to get a better memo." Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, Wash. Post, October 24, 2004, A1, A21. However, Professor Goldsmith has informed me that this account is seriously defective: there was no previous memo on the topic, and he did not give in to any pressure. (Private e-mail communications, August 27 and 29, 2006.) The CIA's deputy inspector general "told others she was offended that the CIA's general counsel had worked to secure a secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations without notice to the International Committee of the Red Cross – because the Geneva Conventions prohibit such practices." R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, Wash. Post, May 14, 2006. Priest's article states that even though the draft was never released, the CIA relied on it to remove a dozen Iraqis from the country. However, other sources assert that the dozen detainees were not Iraqis. Douglas Jehl, *The Conflict in Iraq: Prisoners; U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. Times, October 26, 2004.

government and the German occupation authorities made a point of beginning with stateless Jews, in order to fit the deportations under the rubrics of immigration law.[85] It's a little hard to believe that the drafters of Article 49 were oblivious to the Nazis' studied policy of using immigration law to facilitate the deportation of Jews to Auschwitz.[86] In this matter, a little historical sense would perhaps have given some moral clarity to the role of OLC in approving the removal of "illegal aliens" from Iraq. Goldsmith's argument would have legalized the deportation of Anne Frank.

For that matter, Goldsmith never questions whether forcible removal by US forces of foreign captives taken in Iraq actually *does* accord with Iraqi immigration law. It doesn't sound terribly likely, unless some conscientious American lawyer hastily rewrote Iraqi immigration law. Without the unarticulated premise that the US interest in Article 49 is nothing more than learning its implications for immigration enforcement, this portion of the memo has no point – unless, perhaps, "enforcement of immigration law" is the legal hook on which rendition of foreign insurgents hangs.

Goldsmith then turns to the question of whether Article 49 forbids sending Iraqi captives outside the country for interrogation, to which his answer is no. First he argues that "transfer" and "deportation" both imply permanent or at least long-term uprooting, not temporary removal for interrogation. To show this, he quotes authorities who indicate that uprooting and resettling people violates Article 49.[87] However, none of his sources suggests that resettlements are the *only* forcible transfers or deportations that violate Article 49, and so this argument by itself amounts to very little.

To show that Article 49 permits temporary transfers, Goldsmith argues that reading Article 49 to forbid all forcible transfers is inconsistent with Article 24, which says that occupiers must facilitate the reception of youthful war orphans in a neutral state.[88] If Article 24 permits occupiers to evacuate war orphans, he reasons, then Article 49 cannot possibly mean to forbid *all* forcible transfers, such as sending Iraqi nationals to Afghanistan for interrogation.

Unsurprisingly, no commentator before Goldsmith ever noticed an "inconsistency" between the duty to evacuate war orphans and the obligation not to deport or forcibly transfer captives. No one would reasonably describe

[85] This was the accord between Vichy and the Nazis of July 4, 1942, described in Michael R. Marrus & Robert O. Paxton, Vichy France and the Jews 249 (1981).

[85] Indeed, embedded in a footnote, Goldsmith quotes a Norwegian delegate "regarding the plight of 'ex-German Jews denationalized by the German Government who found themselves in territories subsequently occupied by the German Army'" TP, supra note 1, at 376 note 11. The trouble is that Goldsmith's sole point in including this quotation is to buttress his argument that deportation implies denationalization. He overlooks the more important point: the horrific history of using immigration law as a fig leaf for something far more sinister.

[87] TP, supra note, 1, at 376. [88] TP, at 376–77.

parents sending their child to safety as a "forcible transfer" or "deportation." Nor, therefore, is it a forcible transfer or deportation when a child is moved out of harm's way by responsible adults acting *in loco parentis*. The authorities acting *in loco parentis*, not the child, are the responsible decision-maker, so long as they are aiming at the child's well-being. Goldsmith's analogy between captives sent to be interrogated and children sent to safety boggles the mind – and that analogy is the sole basis of his argument that if Geneva doesn't forbid the latter it doesn't forbid the former. Like the Bybee Memo's organ-failure definition of "severe pain," this is legal formalism divorced from sense.

A second argument dispenses more senseless formalism. Goldsmith turns to two other Geneva articles, one protecting impressed laborers and the other protecting people detained for crimes. Among their protections, both articles prohibit such people from being sent abroad. According to Goldsmith, if Article 49 really meant to forbid any and all temporary removals out of state, these two articles would become redundant, and therefore "meaningless and inoperative."[89]

The short response is: no, they wouldn't. The two articles say, in effect, that Article 49's protection against forcible removal applies even to persons detained for a crime or lawfully impressed into labor. The articles ward off potential misreadings of Article 49 that find implied exceptions to it for impressed laborers or accused criminals. In that way, the two articles strengthen and clarify Article 49 – and unsurprisingly, that is precisely how the Red Cross's official commentary to the Geneva Conventions explains the relationship among the three articles.[90]

Goldsmith rejects the commentary's explanation because Article 49 must not be read to make the other articles superfluous.[91] Evidently, he believes that the anti-redundancy canon articulated in a 1933 US Supreme Court opinion trumps all other rules of treaty interpretation. However, the canons of treaty interpretation explicitly recognized in the international law of treaties emphasize "good faith [interpretation] in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[92] – the very form of interpretation so conspicuously absent from Goldsmith's memo. The anti-redundancy canon

[89] TP, at 378–79. According to Article 51, impressed laborers can be compelled to work "only in the occupied territory where the persons whose services have been requisitioned are," and Article 76 requires that people accused or convicted of offenses can be detained only in the occupied country.

[90] 4 Jean S. Pictet, Commentary on the Geneva Conventions of 12 August 1949 279, 298, 363 (1958).

[91] He rejects the commentary's construction in TP, supra note 1, at 379 note 13.

[92] Vienna Convention on the Law of Treaties, Articles 31 and 32. Although the United States is not a party to the Vienna Convention, it accepts its sections on treaty interpretation as

he relies on appears nowhere in the Vienna Convention, not even its article on supplementary means of interpretation.

Finally, Goldsmith observes that a separate clause of Article 49 forbids occupying powers from deporting or transferring its own civilians *into* occupied territory. Presumably (he argues), that prohibition does not prevent the occupier from bringing civilian contractors or NGOs in for the short term. Hence, in this latter clause the words "transfer" and "deport" do not encompass short-term transfers and deportations. Thus, these words do not encompass short-term transfers of persons out of the country either, because "there is a strong presumption that the same words will bear the same meaning throughout the same treaty."[93]

Perhaps so, although the only legal authority Goldsmith cites for this "strong presumption" is a US Supreme Court dictum saying something different.[94] In opinions Goldsmith does not cite, the Court recognizes that in the interpretation of federal statutes, the same-words-same-meaning "presumption ... is not rigid and readily yields" to good reasons for distinguishing meanings in different contexts.[95] But even if there were a rigid same-words-same-meaning presumption, it hardly follows that words with the same meaning coincide in every respect. If a building code specifies safety requirements for "the cellar of a house" in one paragraph, obviously in that paragraph the word "house" refers only to houses with cellars. But it would be absurd to suppose that in other clauses of the code, dealing with other issues, the word "house" likewise refers only to houses with cellars. The word's core meaning covers both houses with cellars and houses with none. In precisely the same way, the fact that in one paragraph of the Fourth Geneva Convention the word "transfer" can refer only to long-term transfers implies nothing about its referent in a very different context. The word's core meaning – moving people from one place to another – covers both long-term and short-term transfers. Tellingly, Goldsmith fails to mention the Red Cross Commentary's observation that in the paragraph prohibiting occupiers from transferring or deporting their own civilians into occupied territory "the

customary international law. Restatement (Third) of the Foreign Relations Law of the United States, §325.

[93] TP, supra note 1, at 377.

[94] Air France v. Saks, 470 U.S. 392, 398 (1985). In the passage Goldsmith cites, the Court says that different words in a treaty presumptively refer to different things. That is the logical converse of Goldsmith's principle, and neither implies the other. For good reason, then, Goldsmith cites this case with a "cf." Presumably, if better authority existed, he would have cited it.

[95] General Dynamics Land Systems v. Cline, 540 U.S. 581, 595–98 (2004). For an even stronger statement to the same effect, see the unanimous opinion in Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1997).

meaning of the words 'transfer' and 'deport' is rather different from that in which they are used in the other paragraphs of Article 49."[96]

I describe these admittedly arcane details of Goldsmith's memo because I have heard scholars who despise the Bybee Memo hold up Goldsmith's as the gold standard of what a pro-Administration OLC memo ought to look like. It is no such thing. Like the Bybee Memo, it reaches a preordained conclusion by kabbalistic textual manipulations. The basic recipe in both memos is the same: lean heavily on "structural" canons of construction, take unrelated bits of law having to do with very different problems, read them side by side as though a legislator had intended to link them, and spin out "consequences," "interpretations," and "contradictions." Where Bybee and Yoo interpret "severe" in the torture statute by looking at a Medicare statute, Goldsmith combines a treaty clause dealing with forcible transfer and a different clause dealing with war orphans to generate an imaginary contradiction. Neither memo writer asks the most basic interpretive question: *What is the point of this law?* To ask that question would have been fatal, because the object of both documents is to protect individuals in the clutches of their enemies, and here the captors – OLC's "client" – wanted to unprotect them. Unmooring a law from its point leaves only the formal techniques of textual manipulation to interpret it.

At one point, however, Goldsmith pushes back against detainee abuse. In a final footnote at the end of his draft, Goldsmith warns that some removals of prisoners might indeed violate Article 49 and constitute war crimes.[97] He also includes a reminder that a prisoner transferred out of Iraq for interrogation does not lose "protected person" benefits. These are important warnings, and they buttress reports of Goldsmith's admirably anodyne role in resisting "the program" (as executive branch officials chillingly refer to their detention, interrogation, and rendition policies).

But then why not say specifically that those benefits include those of Article 31: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties"? Is it because a memo that explicitly said, "On the contrary, we believe he would ordinarily retain his Article 31 right against any form of coercive interrogation" would defeat the purpose of removing prisoners from Iraq? Why bury his vague warning in a footnote at the end of the memorandum? Why not quote Article 31 *in the text*, and point out that no form of coercive interrogation is permitted under Geneva IV?

[96] 4 Pictet, supra note 90, at 283. Pictet is pointing to the difference between transferring people into a country and transferring people out, but that does not matter, because the point is that the meaning of words (especially nontechnical terms like "transfer") can shift from context to context.

[97] TP, supra note 1, at 379–80, note 14.

It seems to me that the most charitable interpretation is that Goldsmith was working among hard-liners, and could subvert abusive interrogation only in a subtle and inconspicuous way. That may be the best an OLC lawyer could hope for. (Indeed, perhaps OLC never adopted his draft memo because even subtle and inconspicuous subversion was more than OLC's clients could stomach.) But a huge potential for self-deception exists in this strategy. To bury a warning risks its dismissal. And to say, in effect, "You can forcibly remove detainees from Iraq for interrogation, but it's up to you to make sure that the interrogation does not include coercion," comes awfully close to Tom Lehrer's Wernher von Braun (" 'Once the rockets are up, who cares where they come down? That's not my department,' says Wernher von Braun").

Cruel, inhuman, or degrading treament

Interrogation techniques such as sexual humiliation don't fall under the legal definition of torture, or under most people's informal understanding of what torture is. They do, however, constitute degrading treatment, one of the three subcategories of the "cruel, inhuman or degrading treatment" banned by CAT. (Jurists abbreviate the treaty phrase "cruel, inhuman or degrading treatment or punishment which does not amount to torture" by the acronym "CID.") So do many other forms of "torture lite." Arguably, the legality of CID matters more for US interrogation practices than the torture statutes do.

As we have seen, the torture convention obligates parties to "undertake to prevent" CID, but it does not require criminalizing CID, and the United States has never made CID a crime. To be sure, CID violates common Article 3 of the Geneva Conventions, and that made it a US war crime. But, in 2006 the US Congress decriminalized humiliating and degrading treatment of detainees.

The requirement to "undertake to prevent" CID nevertheless remains an international legal obligation of the United States; and, while the duties it entails are vague, the obligation surely rules out deliberately engaging in CID. However, at his confirmation hearing for Attorney General, Alberto Gonzales offered a startling legal theory about why that obligation does not apply. When the US Senate ratified the torture convention, Gonzales explained, it added the reservation that CID means the cruel, inhuman, or degrading treatment forbidden by the Constitution's Eighth Amendment ban on cruel and unusual punishments and Fifth Amendment ban on conduct that shocks the conscience. But the Eighth Amendment applies only to punishment, and the Supreme Court has held, in other unrelated contexts, that the Fifth Amendment does not protect aliens outside US territory. Therefore, in Gonzales's words, "the Department of Justice has concluded that ... there is no legal prohibition under the CAT of cruel, inhuman or degrading treatment

with respect to aliens overseas." He reiterated the argument in written responses to senatorial questions.[98]

The argument is startling because it seems obvious that the Senate's reservation intended nothing of the sort. Before Gonzales's argument muddied the waters, it was perfectly clear that the Senate's reservation aimed to define CAT's concept of CID by using the substantive standards embodied in the constitutional rights, not to tie CAT to their jurisdictional reach. After Gonzales's testimony, three Democratic senators wrote an incredulous letter to the Justice Department requesting all legal opinions on the subject within three days. Justice ignored the request until two months later, after Gonzales was safely confirmed as Attorney General. Eventually the Department responded in a three-page letter, which refused to release OLC opinions but cited legal authority to back up Gonzales, most prominently some 1990 comments to the Senate by Abraham Sofaer, the State Department's legal advisor during debate over the ratification of CAT.[99] Like Gonzales, Sofaer had emphasized that "we would limit our obligations under this Convention to the proscriptions already covered in our own Constitution." If constitutional rights against CID do not apply to aliens abroad, then CAT's ban on CID cannot apply abroad.

But this was not at all what he or the Senate meant, according to Sofaer. In a letter to Senator Patrick Leahy disavowing the Gonzales interpretation, Sofaer explained that the purpose of the reservation was to ensure that the same standards for CID would apply outside the United States as apply inside – just the opposite of Gonzales's conclusion.[100] The point was to define CID, not to create a gaping geographical loophole.[101] Apparently, however, the Administration desperately wanted the geographical loophole. When Senator John McCain (a Vietnam torture victim) introduced legislation to close the loophole, the administration lobbied against it fiercely, threatening to veto major legislation rather than accede to banning CID by US forces abroad. When McCain's law nevertheless swept the Congress with veto-proof majorities, the Administration extracted a concession: federal

[98] Gonzales's oral response, quoted in a letter to John Ashcroft from Senators Patrick Leahy, Russell Feingold, and Dianne Feinstein, January 25, 2005. Written response to Senator Richard J. Durbin, question 1. PDF of both documents in my possession.

[99] Letter from William Moschella to Patrick Leahy, April 4, 2005, at 3. PDF in my possession.

[100] Letter from Abraham D. Sofaer to Patrick Leahy, January 21, 2005. PDF in my possession. Sofaer reiterated his views in an op-ed a few months later: Sofaer, *No Exceptions*, Wall St. J., November 26, 2005, at A11.

[101] It appears that the reservation was partly a response to the fact that some states declare corporal punishment to be CID, while the United States does not. It may also have been a response to a controversial European Court of Human Rights decision that had declared prolonged imprisonment in a US death row to be cruel and degrading. David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States*, 15 Nova L. Rev. 449, 461–62 (1991).

courts could no longer hear Guantánamo cases. CID might be illegal, but its Guantánamo victims would no longer have any recourse against it. And, as the final touch, President Bush attached a signing statement to McCain's CID ban implying a constitutional right to ignore it.

What's wrong with the torture memos?

Frivolity and indeterminacy

Kingman Brewster, asked what his years as a Harvard law professor had taught him, replied, "That every proposition is arguable."[102]

But not every proposition is arguable well, and not every argument is a good one. Law recognizes a category of frivolous arguments and positions, and it should. My claim is that arguments like the "organ-failure" definition of torture, Beaver's reading of *Hudson v. McMillian*, and Goldsmith's "contradiction" between Geneva's articles about war orphans and deportation are not just wrong but frivolous.

What makes an argument frivolous? Let me approach this question through what is, I hope, a straightforward example (unrelated to the torture memos), drawn from a 1989 case. Sue Vaccaro, a slightly built woman, attempted to use the first-class lavatory while traveling coach class with her husband on a cross-country flight. John Wellington Stephens, a large male first-class passenger, assaulted her. Stephens called her a "chink slut and a whore," told her she was too dirty to use the first-class washroom, and shoved her against a bulkhead. Vaccaro sued Stephens, and he counterclaimed, asserting that his ticket gave him a license to the first-class lavatory, and Vaccaro had trespassed on it. This harmed him, his counsel argued, because the donnybrook spoiled Stephens's flight. The judge punished his law firm for frivolous argument, and it may be hard to find a lawyer outside the firm who would disagree. The court of appeals wrote:

> To engage in a temper tantrum is not to suffer actual damage at the hands of a trespasser ... The federal district court is a very hospitable court but it is not yet hospitable to entertaining law suits against people who have the misfortune to engage in argument with irascible first class passengers ... The idea that if you sat in the wrong seat at a symphony, a play, a baseball game or a football game and did not get out instantly when the proper ticket holder appeared you could be sued in a federal court is not an attractive notion. It is not merely unattractive. It takes no account of the state of the law ... Rule 11 is not meant to discourage creative lawyering. It is meant to discourage pettifoggery. The state of the law, whether it is evolving or fixed in well-nigh permanent form, is important in making the distinction between the plausible and the silly.[103]

[102] Alex Beam, *Greed on Trial*, in Legal Ethics: Law Stories 291 (Deborah L. Rhode & David Luban eds., 2005).

[103] Vaccaro v. Stephens, 1989 U.S. App. LEXIS 5864; 14 Fed. R. Serv. 3d (Callaghan) 60, *9–12 (9th Cir. 1989).

No formula or algorithm exists for sorting out the plausible-but-wrong arguments from the silly, any more than an algorithm can distinguish jokes that are almost funny from jokes that aren't funny at all. But a theory of frivolity is unnecessary. As the philosopher Sidney Morgenbesser once wrote, to explain why a man slipped on a banana peel you do not need a general theory of slipping.[104] Legal plausibility is a matter for case-by-case judgment by the interpretive community, and the judgment will be grounded in specific arguments like those the court of appeals offered in *Vaccaro v. Stephens* and – more to the point – those I have offered here about the "analyses" contained in the torture memos.

Picture a bell curve representing the number of trained lawyers who find any given legal argument plausible. Some arguments are so recognizably mainstream that virtually all lawyers would agree that they are plausible. Those arguments lie under the fat part of the bell curve. Calling an argument plausible doesn't mean accepting it: readers of judicial opinions often find both the majority and the dissenting arguments plausible, and situate both within the fat part of the bell curve.

Moving further out on the bell curve, we find the kind of arguments that lawyers euphemistically call "creative" (or where one might say, "Nice try!"). Litigators resort to creative arguments when unfavorable law leaves them no better option than the brief-writer's equivalent of a Hail Mary pass. The argument is too much of a stretch to be genuinely credible, but it offers a novel way to think about the law, and someday the interpretive community might get there. At the moment, though, it lies outside the fat part of the bell curve, although not far out on the arms.

Frivolous arguments, on the other hand, *are* far out. Superficially, they make lawyer-like "moves," but they take such broad liberties with legal text, policy, and sense that only someone far removed from the mainstream would take them seriously. In the definition of federal judge Frank Easterbrook, "99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable."[105] Easterbrook's numbers may be too high, and in any case the numerical imagery is only a figure of speech, because nobody is actually out there surveying lawyers.[106]

[104] Sidney Morgenbesser, *Scientific Explanation*, 14 Int'l. Encyclopedia Soc. Sci. 122 (David Sills ed., 1968).

[105] Quoted in Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?* 24 Osgoode Hall L. Rev. 353, 375 (1987).

[106] Tax lawyers have long familiarity with numerical imagery to determine when a tax preparer can take an aggressive position without disclosing it. According to federal regulations, the preparer cannot do so unless "the position has approximately a one in three, or greater, likelihood of being sustained on its merits." 10 C.F.R. §10.34(d)(1). This regulation derives from a 1985 ABA ethics opinion replacing an earlier opinion according to which tax lawyers could take any position for which a reasonable basis could be found. "Doubtless there were some tax

But the idea should be clear: the legal mainstream defines the concept of plausibility.

It might be objected that legal arguments should be judged on their merits, not on how mainstream lawyers might vote about their merits. Judging arguments by their popularity seems like a category mistake.

That may be true in fields where truths are obscure and only the deep thinkers can discern them. But law is different. Law is not written for geniuses, and it is not written by geniuses. Legal texts are instruments of governance, and as such they must be as obvious and demotic as possible, capable of daily use by millions of people with no time or taste for riddles. Even when great judges with subtle, Promethean minds write opinions, their opinions had better contain no secret teachings, no buried allusions, no symbolism, no allegory, no thematic subtleties that need Harold Bloom or Leo Strauss to tease them out. Richard Posner once described legal texts as "essentially mediocre."[107] Both words are precisely right; but Posner forgot to add that when it comes to law, "essentially mediocre" is a compliment. Within a rule-of-law regime, rules must offer clear-cut guidance to average intelligences, and that makes essential mediocrity virtually a defining characteristic of law. Law does its job properly when it is all surface and no depth and what you see is exactly what you get.[108] That is why it makes no

practitioners who intended 'reasonable basis' to set a relatively high standard of tax reporting. Some have continued to apply such a standard. To more, however, if not most tax practitioners, the ethical standard set by 'reasonable basis' had become a low one. To many it had come to permit any colorable claim to be put forth; to permit almost any words that could be strung together to be used to support a tax return position. Such a standard has now been rejected by the ABA Committee . . . A position having only a 5% or 10% likelihood of success, if litigated, should not meet the new standard. A position having a likelihood of success closely approaching one-third should meet the standard." *Report of the Special Task Force on Formal Opinion 85–352*, 39 Tax Law. 635 (1986). Because of the infrequency of tax audits, tax preparation is perhaps the paradigm case where the system depends on the honor of lawyers to give advice based on legal positions that are not frivolous. There are significant parallels between the tax advisor's role and the role of the equally unaccountable OLC.

[107] Richard A. Posner, Overcoming Law 91 (1995).

[108] Legal theorists might balk at this claim, pointing to the phenomenon of "acoustic separation" between the rules of conduct known by the hoi polloi and the more intricate rules of decision employed by officials. Meir Dan-Cohen, who introduced the concept of acoustic separation, pointed out that broad knowledge of available criminal defenses (for example, duress or necessity) would create perverse incentives for people to abuse those defenses. Hence it is better to keep decision rules and conduct rules acoustically separated, meaning that primary actors should not necessarily become aware of the more lenient decision rules officials actually use. Acoustic separation, with selective transmission of the law to different audiences, might actually be a useful strategy for lawmakers to adopt. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984). The concept of acoustic separation is an interesting and useful one. In my opinion, however, legal theorists invoke the concept of acoustic separation more often than it warrants. Descriptively, the phenomenon of law intentionally tailored for acoustic separation seems like a marginal part

sense to suppose that the plausibility of legal arguments could deviate systematically from what the interpretive community thinks about their plausibility. What could it deviate to? In law, by design, there is no hidden there there.[109]

Although the interpretive community defines the bounds of the reasonable, there remains plenty of room for interpretive disagreement within those bounds.[110] Law, we must remember, emerges from political processes, and it

of the legal enterprise. Normatively, there is real danger behind the idea that some law is too dangerous for ordinary mortals to know and should be left to the experts. It presupposes the superior rectitude of experts, and therefore it underrates the perverse incentives for experts to shield their own abuses from accountability. Dan-Cohen, I should add, does not make this mistake: for him, "the option of selective transmission is not an attractive one, and the sight of law tainted by duplicity and concealment is not pretty." Ibid. at 673. Furthermore: by suggesting that society might be better off if people don't know the law too well, the doctrine of acoustic separation rationalizes a system where legal services are unaffordable by tens of millions of people, and only the wealthy can buy their way around acoustic separation.

[109] The thesis I am defending is that there are no truths about what law means or requires outside the range of views that the interpretive community finds plausible. This is a weak thesis, grounded in the specific functions of law, not a general metaphysical claim that interpretive communities constitute the meaning of the objects they concern themselves with. The latter is the view of relativists like Stanley Fish, *Anti-Professionalism*, 7 Cardozo L. Rev. 645 (1986). I've criticized his view in *Fish v. Fish or, Some Realism About Idealism*, 7 Cardozo L. Rev. 693 (1986), on two grounds: first, that interpretive communities could play the role Fish ascribes to them only if they meet internal political conditions of reciprocity and freedom; and second, that the vaporous concept of "constituting" meaning buys into a metaphysical contrast between idealism and realism that we would do well to abandon.

In the present chapter, I am fishing in shallower waters. Regardless of who is right about realist, idealist, and pragmatist conceptions of inquiry and truth *in general*, it seems to me we should all agree that law contains no truths hidden from the citizens it governs and the lawyers who help them understand it.

[110] To be sure, Ronald Dworkin has argued that legal questions have a single, unique right answer, namely that answer that displays the sources of law in the morally best light. Determining which answer that is may be something that only Judge Hercules (Dworkin's hypothetical über-jurist) can do. Ronald Dworkin, Law's Empire 52–53 (1986); Dworkin, *"Natural" Law Revisited*, 34 U. Fla. L. Rev. 165, 169–70 (1982); Ronald Dworkin, *Hard Cases*, in Taking Rights Seriously 81, 105–23 (1978); Dworkin, *No Right Answer?* in Law, Morality and Society: Essays in Honour of H. L. A. Hart 58 (P. M. S. Hacker & J. Raz eds., 1977). However, given the lack of a decision procedure or verification procedure about which people with conflicting good-faith moral views can agree (to say nothing of the unreality of Judge Hercules), it is hard to see why a Dworkinian "right answer" is anything more than a *Ding an sich*, an "as-if," that anchors a theory of objectivity without serving the basic function of law, namely governing a community. I discuss some of the perplexities raised by the possibility of a right answer that lacks a verification procedure in Luban, *The Coiled Serpent of Authority: Reason, Authority, and Law in a Talmudic Tale*, 79 Chi.-Kent L. Rev. 1253 (2004).

Lacking a decision procedure does not doom us to radical indeterminacy in which anything goes. Even if we cannot settle which of several competing answers is right, we can rule out answers that are obviously wrong. To illustrate with Fred Schauer's example, "That I am

typically represents the compromise, or vector sum, of competing social forces. Compromise whittles down sharp edges, and legal standards without sharp edges are bound to generate interpretive disagreements. It is worth taking a moment to see why.

Some ambiguity in law results because drafters finessed a ticklish political issue with strategic, diplomatic doublespeak. To take a famous and blatant example, the UN Security Council helped end the Six Days War with a resolution issued in two official languages, English and French. The French version requires the Israelis to withdraw from all the occupied territory, while the English requires them to withdraw only from some.[111] The reason for splitting the difference is obvious: it stopped the shooting and postponed the hardest question to another day. (Unsurprisingly, for forty years Israelis have cited the English version and Arabs the French.) Likewise, US Congressional staffers admit that ambiguity in statutes often results because "we know that if we answer a certain question, we will lose one side or the other."[112]

Although strategic ambiguity is the most obvious way that politics creates legal indeterminacy, it is not the only way. Other ambiguities enter through legislative log-rolling and mutual concessions. Political give-and-take generates statutes that qualify or soften requirements, attach escape clauses to bright-line rules, or balance clauses favoring one contending interest group with clauses favoring others. None of these provisions need be unclear in itself, but taken together they generate multiple interpretive possibilities. That is because jurists interpret statutory language in the light of its purpose, and when the statute itself reflects cross-purposes, its requirements can be viewed differently depending on which purpose the interpreter deems most vital. An interpreter who views the escape clauses and qualifications as important expressions of legislative purpose will stretch them to borderline or doubtful cases; another, who views the unqualified rules as the key, will interpret those rules strictly and find very few exceptions. Needless to say, judges' moral and political outlooks influence their understanding of legislative purpose: it's easier to grasp purposes you agree with than purposes you don't. Every

unsure whether rafts and floating motorized automobiles are 'boats' does not dispel my confidence that rowboats and dories most clearly are boats, and that steam locomotives, hamburgers, and elephants equally clearly are not." Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 422 (1985).

[111] UN Security Council Resolution 242 (1967). The English version calls for "withdrawal of Israeli forces from territories occupied in the recent conflict" ("territories," not "the territories," where "the" was dropped as the result of a US amendment to the British-proposed text), while the French version calls for "retrait des forces armées israéliennes des territoires occupés lors du récent conflit."

[112] Quoted in Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. Rev. 575, 596 (2002). On the deliberate use of ambiguity, see ibid. at 594–97, 614–19.

political fault line in a legal text automatically becomes an interpretive fault line as well.

Even judicially created doctrines reflect the push and pull of many outlooks. A court creates a legal doctrine that neatly resolves the case before it. Later, another court faces a case in which applying that doctrine would yield an obviously wrong outcome; so the court carves out an exception and identifies a counter-principle governing the exception. Subsequent courts decide whether the principle or counter-principle applies to a new case by judging whether the facts of the new case more closely resemble those of the original case or the exception – and typically, some facts in the new case will resemble each. Which analogy seems most compelling will depend on judges' varying senses of fairness. Over the course of centuries, lines of judicial authority elaborate both the principles and counter-principles into the architecture of the common law. As a result, legal doctrine resembles a multigenerational compromise, with principles and counter-principles that roughly track the political fault lines of different stages of evolving society.

The result is indeterminacy in legal doctrine, a familiar theme in the writings of the legal realists and critical legal studies. But it is indeterminacy of a special and limited sort – moderate, not global, indeterminacy. Indeterminacy attains its maximum along fault lines where the law most strongly reflects a political compromise. Where political conflict was unimportant to the shape a legal text assumed, indeterminacy may be minimal or nonexistent. Brewster was wrong: *not* every proposition is arguable. Lawyers desperate for an argument will try to conjure up an indeterminacy where little or none exists, but they will have a hard time doing so honestly. The torture memos testify to that.

The ethics of legal opinions

Let me summarize. I have been suggesting that crucial arguments in the torture memos are frivolous. However, I have also insisted that no bright-line test of frivolity exists beyond whether an interpretive community accepts specific objections showing that the arguments are baseless or absurd. You know it when you see it.

In that case, why can't the torture lawyers simply reply that their interpretive community sees it differently from the interpretive community of liberal cosmopolitan lawyers? One answer, perhaps the strongest, is the moral certainty that they would have reached the opposite conclusion if the Administration wanted the opposite conclusion. The evidence shows that all these memos were written under pressure from officials determined to use harsh tactics – officials who consciously bypassed ordinary channels and looked to lawyers sharing their aims. An interpretive community that contours its interpretations to the party line is not engaged in good-faith interpretation.

In the case of the torture memos, the giveaway is the violation of craft values common to all legal interpretive communities. This is clearest in the Bybee Memo, but the preceding discussion reveals similar problems in the other documents. What makes the Bybee Memo frivolous by conventional legal standards is that in its most controversial sections, it barely goes through the motions of standard legal argument. Instead of addressing the obvious counter-arguments, it ignores them; its citation of conventional legal authority is, for obvious reasons, sparse; it fails to mention directly adverse authority; and when it does cite conventional sources of law, it employs them in unconventional ways, and not always honestly.

The other memos are less transparent about it, but they too discard the project of providing an analysis of the law as mainstream lawyers and judges understand it. Instead, they provide aggressive advocacy briefs to give those who order or engage in brutal interrogation legal cover.

One might ask what is wrong with writing advocacy briefs. Aren't lawyers supposed to spin the law to their clients' advantage? The traditional answer for courtroom advocates is yes. The aim is to persuade the judge or jury, not to write a treatise. To be sure, even courtroom advocates should not indulge in frivolous or dishonest argument. But, as Judge Easterbrook's formula indicated, the standards of frivolity leave plenty of room for pro-client spin.

But the torture memos are not briefs. They are legal advice, and in traditional legal ethics they answer to a different standard: not persuasiveness on the client's behalf but candor and independence.[113] As I suggested in the last chapter, perhaps the most fundamental rule of thumb for legal advice is that the lawyer's analysis of the law should be more or less the same as it would be if the client wanted the opposite result from the one the lawyer knows he wants.

Other rules of thumb follow from this. First, a legal opinion ought to lay out in terms intelligible to the client the chief legal arguments bearing on the issue, those contrary to the client's preferred outcome as well as those favoring it. Unlike a brief, which aims to minimize the opposing arguments and exaggerate the strength of its own, the opinion should evaluate the arguments as objectively as possible. Second, opinions must treat legal authority honestly. (Briefs should as well.) No funny stuff: if the lawyer cites a source, the reader should not have to double-check whether it really says what the lawyer says it says, or whether the lawyer has wrenched a quotation out of context to flip its meaning. And adverse sources may not simply be ignored. Just as litigation rules require lawyers to divulge directly adverse law to courts, an honest legal opinion does not simply sweep it under the rug and hope nobody notices.

[113] See ABA Model Rules of Professional Conduct 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

Finally, an honest opinion explains where its conclusion fits on the bell curve. While it is entirely proper for an opinion writer to favor a nonstandard view of the law, she must make clear that it *is* a nonstandard view of the law. She cannot write an opinion advancing a marginal view of the law with a brief-writer's swaggering self-confidence that the law will sustain no view other than hers.

An example might help. It is only fair to use an argument in one of John Yoo's OLC memos that fulfills these requirements. A memo of January 22, 2002 (which went out over Bybee's signature) argues, among other things, that common Article 3 of the Geneva Conventions does not apply to the US conflict with Al Qaeda. That is because Article 3 applies only to "armed conflicts not of an international character." By this phrase, Yoo argues, the framers of Geneva had in mind only civil wars, like the Spanish and Chinese civil wars.[114] That would plainly exclude the conflict with Al Qaeda.

There is nothing frivolous about this argument; indeed, it is quite forceful. But there is also a powerful reply to it. In legal terminology, "international" means "among nation-states," as in the phrase "international law." An international armed conflict is a conflict among nation-states, and therefore an armed conflict "not of an international character" would be *any* armed conflict not among nation-states, not only civil wars. (This, eventually, was the interpretation adopted by the US Supreme Court in its June 2006 *Hamdan* opinion.) In that case, the conflict with Al Qaeda would be classified as an armed conflict not of an international (i.e., state-against-state) character – and therefore common Article 3 would apply to it and protect even Al Qaeda captives. That conclusion would harmonize with the most obvious purpose of Article 3: protecting at least the most basic human rights of all captives, whether or not they qualify for the more extended protections Geneva offers to POWs and protected civilians in wars among nation-states. If, as a matter of policy, Article 3 aims to protect basic human rights in nonstandard wars, it would be irrational to protect human rights only in civil wars rather than all armed conflicts. Most international lawyers believe that human rights instruments should be interpreted in a broad, gap-filling way, precisely because of the importance of human rights.

The virtue of Yoo's opinion is that he explicitly discusses all this. He sketches the evolution of the law of armed conflict in the twentieth century, acknowledging that in recent years international law "gives central place to individual human rights" and "blurs the distinction between international and internal armed conflicts."[115] He cites one of the principal cases illustrating this view, the Yugoslav Tribunal's *Tadic* decision; and in a footnote he refers to other authorities taking the same view. In response, he emphasizes that the

[114] TP, supra note 1, at 86–87.
[115] Ibid. at 88.

Geneva framers were thinking principally about protecting rights in civil wars, and argues that to interpret Article 3 more broadly "is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements."[116] In other words, where most international lawyers treat human rights instruments like a "living" constitution, Yoo treats them like contracts. I think this gives him the weaker side of the argument – and, obviously, the Supreme Court rejected his position – but that is not the point. The point is that he does a respectable job of sketching out the legal landscape, making it clear that his own analysis runs contrary to that of most international lawyers, and representing their positions honestly.[117] That is the kind of candid advice a lawyer can legitimately provide the client, even if it deviates from mainstream views.[118]

The lawyer as absolver

But what happens when the client wants cover, not candid advice? – when the client comes to the lawyer and says, in effect, "Give me an opinion that lets me do what I want to do"?

Lawyers have a word for a legal opinion that does this. It is called a CYA memorandum – Cover Your Ass. Without the memorandum, the client who wants to push the legal envelope is on his own. But with a CYA memo in hand, he can insist that he cleared it with the lawyers first, and that way he can duck responsibility. That appears to be the project of the torture memos.

Notice that this diagnosis differs from Anthony Lewis's judgment that the Bybee Memo "read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."[119] The torture memos are not advice about how to stay out of prison; instead, they reassure their clients that they

[116] Ibid.

[117] Not entirely: he neglects to mention that the drafters of the Geneva Conventions explicitly *rejected* an Australian motion to limit Article 3 to civil wars. Special Committee Seventh Report at Vol. II B, p. 121. They also rejected other, similar efforts that would have had the same effect. See *Hamdan*, 2006 US Lexis 5185, *128.

[118] This portion of Yoo's opinion contrasts sharply with another section of the same opinion, arguing that the Geneva Conventions don't protect Taliban fighters because under the Taliban Afghanistan was a failed state. Here, Yoo was back in Bybee Memo form. His draft opinion drew an outraged response from the State Department's legal advisor, who pointed out that "failed state" is not a legal concept; that so many states are failed states that Yoo's no-treaties-with-failed-states argument would greatly complicate US foreign relations; that if the Taliban have no rights under Geneva they have no obligations either, and therefore don't have to apply Geneva to any Americans they capture; and that Yoo's argument would annul every treaty with Afghanistan on every subject. Memo from William Howard Taft IV to John Yoo, January 11, 2002, available at <www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf>. The "failed-state" argument quietly disappeared.

[119] Anthony Lewis, *Making Torture Legal*, N.Y. Review of Books, July 15, 2004.

are not going to prison. They are opinion letters blessing or koshering conduct for the twin purposes of all CYA memos: reassuring cautious lower-level employees that they can follow orders without getting into trouble, and allowing wrongdoers to duck responsibility. The fact that they emerge from the Justice Department – the prosecutor of federal crime – makes the reassurance nearly perfect.

When they write CYA memos, lawyers cross the fatal line from legal advisor to moral or legal accomplice. Obviously, it happens all the time. Journalist Martin Mayer, writing about the 1980s savings-and-loan collapse, quoted a source who said that for half a million dollars you could buy a legal opinion saying anything you wanted from any big law firm in Manhattan.[120] In the Enron case, we saw lawyers writing opinion letters that approved the creation of illegal Special Purpose Entities, even though they knew that they were skating on thin ice. I am arguing that this is unethical. In white-collar criminal cases, some courts in some contexts will accept a defense of good-faith reliance on the advice of counsel, and presumably that defense is the prize the client seeks from the lawyer. But when the client tells the lawyer what advice he wants, the good faith vanishes, and under the criminal law of accomplice liability, both lawyer and client should go down.[121]

Giving the client skewed advice because the client wants it is a different role from either advocate or advisor. I call it the Lawyer As Absolver, or, less nicely, the Lawyer As Indulgence Seller. Luther began the Reformation in part because the popes were selling papal dispensations to violate law, along with indulgences sparing sinners the flames of hell or a few years of purgatory. Rodrigo Borgia once brokered a papal dispensation for a French count to sleep with his own sister. It was a good career move: Rodrigo later became Pope Alexander VI.[122] Jay Bybee had to settle for the Ninth Circuit Court of Appeals.

It is important to see why the role of Absolver, unlike the roles of Advocate and Advisor, is illegitimate. The courtroom advocate's biased presentation will be countered by the adversary in a public hearing. The advisor's presentation will not. In the courtroom, the adversary is supposed to check the advocate's excesses. In the lawyer's office, advising the client, the lawyer is supposed to check the client's excesses. Conflating the two roles moves the lawyer out of the limited role-based immunity that advocates enjoy into the world of the indulgence seller.

[120] Martin Mayer, The Greatest-Ever Bank Robbery: The Collapse of the Savings and Loan Industry 20 (Collier Books 1992).

[121] The lawyer who okays unlawful conduct by the client has also harmed the client, and therefore been a bad fiduciary of the client. But, both as a matter of law and morality, that is a distinct ethical violation from becoming the client's accomplice.

[122] Ivan Cloulas, The Borgias 38 (Gilda Roberts trans., 1989).

In short: if you are writing a brief, call it a brief, not an opinion. If it is an opinion, it must not be a brief. If you write a brief but call it an opinion, you have done wrong.

Government lawyers

Some might reply that in the real world outside the academy, legal opinions by government offices *are* briefs. When the State Department issues an opinion vindicating a military action by the US government, everyone understands that this is a public statement of the government's position, not an independent legal assessment. To suppose otherwise is naive.

In that case, however, why keep up the charade? Consider, for example, a pair of documents authored by the British Attorney General, Lord Peter Goldsmith. The first was a confidential legal memorandum to Tony Blair on the legality of the Iraq war, dated March 7, 2003, less than two weeks before the war began. The memo consisted of thirteen densely packed pages, and in my view it is a model of what such an opinion should be. It carefully and judiciously dissects all the pro and con arguments, which were closely balanced, consisting largely of interpretive debates over the meaning of characteristically soapy UN Security Council resolutions. Goldsmith concluded that, while in his opinion obtaining a second Security Council resolution authorizing the use of force "is the safest legal course," a reasonable argument can be made that existing resolutions would suffice to justify the war.[123] It was a cautious go-ahead to Blair, larded with substantial misgivings and caveats. If Blair's request to Goldsmith was to give him the strongest argument available for the legality of the war, Goldsmith replied in the best way he could: he articulated the argument Blair wanted, advised him that it was reasonable, but also made it clear that the argument did not represent his own view of how the law should best be read. This represents the limit to which an honest legal advisor can tailor his opinion to the wishes of his client. Goldsmith's office wrote a sophisticated, honest document.

Ten days later – three days before the bombing began – Lord Goldsmith presented the same issue to Parliament, and now all the misgivings were gone. In place of thirty-one subtle paragraphs of analysis, the "opinion" to Parliament consists of nine terse, conclusory paragraphs with no nuance and no hint of doubt.[124] In place of the confidential memorandum's conclusion that the meaning of a Security Council resolution was "unclear," Goldsmith's public statement expressed no doubts whatever. It was pure vindication of the course of action to which Blair was irrevocably committed.

[123] Goldsmith memo, paragraphs 27–28. Available at <www.comw.org/warreport/fulltext/0303goldsmith.html>.

[124] Hansard, 17 March 2003, column 515W.

Two years later, Goldsmith told the House of Lords that his public statement was "my own genuinely held, independent view," and that allegations "that I was leant on to give that view ... are wholly unfounded."[125] Unfortunately for Lord Goldsmith, the confidential memorandum leaked a few weeks later, and readers could see for themselves what his genuinely held, independent view actually had been. The kerfluffle that followed fanned public suspicion about the decision to go to war, and weakened Blair in the next election.

It is obvious why Lord Goldsmith gave Parliament the unqualified opinion he did. The war was about to begin, the government was committed to it, and it was deeply controversial. An opinion laden with doubts would have had devastating repercussions for the government's policy and its relationship with the United States. Knowing this, Goldsmith wrote a brief, just as the realists think he should. But realists should notice that when he had to defend it two years later, Goldsmith continued to pretend that it was something else – a backhanded acknowledgment of the principle I am proposing: *If you write a brief but call it an opinion, you have done wrong.* In his second, brief-like opinion, he did wrong.

This is doubly true for the OLC, because in modern practice its opinions bind the executive branch.[126] That makes them quasi-judicial in character. In the preceding chapter, I argued that legal advice from lawyers to clients is always "jurisgenerative" and quasi-judicial, but obviously, written opinions binding entire departments of the government are judicial in a more direct way. As such, the obligation of impartiality built into the legal advisor's ethical role is reinforced by the obligation of impartiality incumbent on a judge. Two additional factors make the obligation more weighty still. First, some of the opinions were secret. Insulated from outside criticism and alternative points of view, written under pressure from powerful officials and, perhaps, from hair-raising intelligence about Al Qaeda's intentions, they were memos from the bunker. Recognizing a professional obligation to provide impartial analysis represented an essential tether to reality. Finally, the OLC is charged by statute with helping the executive discharge its constitutional obligation to "take care that the laws be faithfully executed." Fidelity to the law, not to the Administration, requires impartiality.

[125] Hansard, 1 March 2005, column 112, available at <www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds05/text/50301-03.htm>.

[126] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318–20 (2000). I am grateful to Dawn Johnsen, Marty Lederman, and Nina Pillard for illuminating email discussions of OLC's role and ethics. For Lederman's view, see *Chalk on the Spikes: What is the Proper Role of Executive Branch Lawyers, Anyway?*, available at <http://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html>.

In December, 2004, nineteen former lawyers in the OLC drafted a set of principles for the office reaffirming its commitment to this standard conception of the independent legal advisor. Apparently, this is not how the Bush Adminstration's OLC conceives of its job, for none of its lawyers was willing to sign.[127]

Conclusion

I drafted this chapter before the United States Supreme Court rebuffed the Bush administration's detainee policies in *Hamdan v. Rumsfeld*. Among other significant holdings, *Hamdan* found that common Article 3 of the Geneva Conventions applies to detainees in the war on terror. Article 3 forbids torture and humiliating or degrading treatment – an awkward holding, because, as we have seen, high-level officials, including the Secretary of Defense and possibly the Vice-President or even the President, had authorized such treatment for high-value detainees. Worse, federal law declared violations of common Article 3 to be war crimes. *Hamdan* pushed administration lawyers into overdrive, and they produced a bill, the Military Commissions Act of 2006, to respond to the Court. After intense negotiations with moderate Republican Senators, the final bill was approved by Congress and signed into law in October 2006.

The bill responded to *Hamdan*'s challenge in a drastic way. It stripped federal courts of habeas corpus jurisdiction over Guantánamo, defined "unlawful enemy combatants" broadly, prohibited detainees from arguing for Geneva Convention rights, retroactively decriminalized humiliating and degrading treatment, declared that federal courts could not use international law to interpret war crimes provisions, vested interpretive authority over Geneva in the President, allowed coerced evidence to be admitted, gave the government the power to shut down revelation of exactly what techniques were used to obtain such coerced evidence, and defined criminally cruel treatment in a deeply convoluted way. For example, the bill distinguishes between "severe pain," the hallmark of torture, and merely "serious" pain, the hallmark of cruel treatment short of torture – but it then defines "serious" pain as "extreme" pain. Such bizarre legalisms call the Bybee Memo to mind, of course, and they should. This bill (the worst piece of legislation I can recall from my own lifetime) was clearly inspired by the style of legal thinking perfected by the torture lawyers. In effect, the torture lawyers helped to define a "new normal," without which the Military Commissions Act would not exist.

[127] The statement of principles was published as *Guidelines for the President's Legal Advisors*, 81 Ind. L.J. 1345 (2006).

This chapter chronicles a legal train wreck. The lawyers did not cause it, but they facilitated it. As a consequence, enmity toward the United States has undoubtedly increased in much of the world. Sadly and ironically, the net effect on US intelligence gathering may be just the opposite of what the lawyers hoped, as potential sources who might have come willingly to the Americans turn away out of anger or fear that they might find themselves in Guantánamo or Bagram facing pitiless interrogators.

This is also a chapter on the legal ethics of opinion-writing. I have focused on what Fuller might have called the procedural side of the subject: the requirements of honesty, objectivity, and non-frivolous argument, regardless of the subject-matter on which lawyers tender their advice. But that does not mean the subject-matter is irrelevant. It is one thing for boy-wonder lawyers to loophole tax laws and write opinions legitimizing financial shenanigans. It is another thing entirely to loophole laws against torture and cruelty. Lawyers should approach laws defending basic human dignity with fear and trembling.[128]

To be sure, honest opinion-writing will only get you so far. Law can be cruel, and then an honest legal opinion will reflect its cruelty. In the centuries when the evidence law required torture, no lawyer could honestly have advised that the law prohibited it. Honest opinion-writing by no means guarantees that lawyers will be on the side of human dignity.

The fact remains, however, that rule-of-law societies generally prohibit torture and CID, practices that fit more comfortably with despotism and absolutism. For that reason, lawyers in rule-of-law societies will seldom find it easy to craft an honest legal argument for cruelty. Like the torture lawyers of Washington, they will find themselves compelled to betray their craft. Of course, they may think of it as creative lawyering or cleverness, not betrayal. I have little doubt that only intelligent, well-educated lawyers could write these memos, larded as they are with sophisticated-looking tricks of statutory interpretation. But there is such a thing as being too clever for your own good.[129]

[128] I thank Christopher Kutz for emphasizing this point to me. Jeremy Waldron makes the same point in *Torture and the Common Law*, supra note 56.

[129] I owe special thanks to Lynne Henderson and Marty Lederman for comments and suggestions on this chapter. I do not wish to attribute any of my views or errors to them, however. (In particular, I know that Lederman disagrees with my discussion of the OLC draft memo on Article 49 of the Fourth Geneva Convention.) In addition, Jack Goldsmith raised important objections to my analysis of his Article 49 draft memo – fewer than he would have wished to raise, because his confidentiality obligations made it impossible for him to go into details. I have made some revisions based on these objections. I am grateful to him for his generosity, fairness, and objectivity in responding to my polemical comments. Obviously, remaining mistakes in my analysis are mine alone, not his – nor those of Sandy Levinson, who also offered helpful comments on an earlier draft.

Mr. NADLER. I thank you, and now I recognize Ms. Cohn for 5 minutes.

TESTIMONY OF MARJORIE COHN, PROFESSOR OF LAW, THOMAS JEFFERSON SCHOOL OF LAW, PRESIDENT, NATIONAL LAWYERS GUILD

Ms. COHN. Thank you, Mr. Chairman. It is an honor and a privilege to testify on this critical issue. What does torture have in common with genocide, slavery, and wars of aggression? They are all "jus cogens"; that is Latin for "higher law," or compelling law.

This means that no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a jus cogens prohibition.

The United States has always prohibited torture in our Constitution, laws, executive statements, judicial decisions and treaties. When the U.S. ratifies a treaty, it becomes part of American law under the Supremacy Clause of the Constitution.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment says, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture."

Whether someone is a POW or not, he must always be treated humanely. There are no gaps in the Geneva Convention.

The U.S. War Crimes Act and 18 USC Sections 818 and 3231 punish torture, willfully causing great suffering or serious injury to body and health, and inhuman, humiliating or degrading treatment. The torture statute criminalizes the commission, attempt or conspiracy to commit torture outside the United States.

The Constitution gives Congress the power to make laws, and the President the duty to enforce them. Yet President Bush, relying on memos by lawyers, including John Yoo, announced the Geneva Conventions did not apply to alleged Taliban and al-Qaida members, but torture and inhumane treatment are never allowed under our laws.

Justice Department lawyers wrote memos at the request of Bush officials to insulate them from prosecution for torture. In memos dated August 1, 2002 and March 14, 2003, John Yoo wrote the DOJ would not enforce U.S. laws against torture, assault, maiming and stalking in the detention and interrogation of enemy combatants.

What does the maiming statute prohibit? It prohibits someone with the intent to torture, maim or disfigure, to cut, bite or slit the nose, ear or lip, or cut out or disable the tongue or put out or destroy an eye, or cut off or disable a limb, or any member of another person, or throw or pour upon another person any scalding water, corrosive acid, or caustic substance.

John Yoo said, "Just because the statute says, that doesn't mean you have to do it." That is a quote.

In a debate with Notre Dame Professor Doug Cassel, You said there is no treaty that prohibits the President from torturing someone by crushing the testicles of the person's child. It depends on the President's motive, Yoo said, not withstanding the absolutely prohibition on torture.

John Yoo twisted the law and redefined torture much more narrowly than both the torture convention and the U.S. torture statute. Under Yoo's definition, you have to nearly kill the person to constitute torture.

Yoo wrote that self-defense or necessity could be defenses to war crimes prosecutions, notwithstanding the torture convention's absolute prohibition on torture in all circumstances.

After the August 1, 2002 memo was made public, the DOJ knew it was indefensible. It was withdrawn as of June 1, 2004, and a new opinion, dated December 30, 2004, specifically rejected Yoo's definition of torture and admitted that a defendant's motives to protect national security won't shield him from prosecution.

The rescission of the prior memo is an admission by the DOJ that the legal reasoning in it was wrong. But for the 22 months it was in effect, it sanctioned and caused the torture of myriad prisoners. Moreover, as has been stated, the March 14, 2003 memo was later withdrawn by Jack Goldsmith.

Yoo and other DOJ lawyers were part of a common plan to violate U.S. and international laws outlawing torture. It was reasonably foreseeable their advice would result in great physical or mental harm or death to many detainees. Indeed, more than 100 have died, many from torture.

Yoo admitted recently that he knew interrogators would take action based on what he advised. Dick Cheney, Condolezza Rice, Donald Rumsfeld, Colin Powell, George Tenet and John Ashcroft met in the White House and micromanaged the torture by approving specific torture techniques such as waterboarding, which, contrary to what the Republican Congressman said, I believe it was Mr. Franks, constitutes torture. And that is widely known. It has been a standard torture technique. It has been considered torture since the Spanish Inquisition.

Bush admitted he knew and approved of the actions of this Committee, this National Security Council principals committee. They are all liable under the War Crimes Act and the torture statute. Under the doctrine of command responsibility enshrined in our law, commanders all the way up the chain of command to the commander-in-chief are liable for war crimes if they knew or should have known they would be committed by their subordinates and they did nothing to stop or prevent it.

The Bush officials ordered the torture after seeking legal cover from their lawyers. The President can no more order the commission of torture than he can order the commission of genocide, or establish a system of slavery, or wage a war of aggression.

A select Committee of Congress should launch an immediate and thorough investigation of the circumstances under which torture was authorized and rationalized. The high officials of our government and the lawyers who advise them should be investigated and prosecuted by a special prosecutor independent of the Justice Department for their role in misusing the rule of law and legal analysis to justify torture and other crimes in flagrant violation of our laws.

Thank you very much.

[The prepared statement of Ms. Cohn follows:]

PREPARED STATEMENT OF MARJORIE COHN

What does torture have in common with genocide, slavery, and wars of aggression? They are all *jus cogens. Jus cogens* is Latin for "higher law" or "compelling law." This means that no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a j*us cogens* prohibition.

The United States has always prohibited the use of torture in our Constitution, laws executive statements and judicial decisions. We have ratified three treaties that all outlaw torture and cruel, inhuman or degrading treatment or punishment. When the United States ratifies a treaty, it becomes part of the Supreme Law of the Land under the Supremacy Clause of the Constitution.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, says, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."

Whether someone is a POW or not, he must always be treated humanely; there are no gaps in the Geneva Conventions. He must be protected against torture, mutilation, cruel treatment, and outrages upon personal dignity, particularly humiliating and degrading treatment under, Common Article 3. In *Hamdan v. Rumsfeld,* the Supreme Court rejected the Bush administration's argument that Common Article 3 doesn't cover the prisoners at Guantµnamo. Justice Kennedy wrote that violations of Common Article 3 are war crimes.

We have federal laws that criminalize torture.

The War Crimes Act punishes any *grave breach* of the Geneva Conventions, as well as any violation of Common Article 3. That includes torture, willfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

The Torture Statute provides for life in prison, or even the death penalty if the victim dies, for anyone who commits, attempts, or conspires to commit torture outside the United States.

The U.S. Army Field Manual's provisions governing intelligence interrogations prohibit the "use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." Brainwashing, mental torture, or any other form of mental coercion, including the use of drugs, are also prohibited.

Military personnel who mistreat prisoners can be prosecuted by court-martial under provisions of the Uniform Code of Military Justice. These include conspiracy, cruelty and maltreatment, murder, manslaughter, maiming, sodomy, and assault.

In *Filartiga v. Peña-Irala,* the Second Circuit declared the prohibition against torture is universal, obligatory, specific and definable. Since then, every U.S. circuit court has reaffirmed that torture violates universal and customary international law. In the Paquete Habana, the Supreme Court held that customary international law is part of U.S. law.

The Constitution gives Congress the power to make the laws and the President the duty to carry them out. Yet on February 7, 2002, President Bush, relying on memos by lawyers including John Yoo, announced that the Geneva Conventions did not apply to alleged Taliban and Al Qaeda members. Bush said, however, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity,* in a manner consistent with the principles of Geneva." But torture is *never* allowed under our laws.

Lawyers in the Department of Justice's Office of Legal Counsel wrote memos at the request of high-ranking government officials in order to insulate them from future prosecution for subjecting detainees to torture. In memos dated August 1, 2002 and March 18, 2003, former Deputy Assistant Attorney General John Yoo (Jay Bybee, now a federal judge, signed the 2002 memo), advised the Bush administration that the Department of Justice would not enforce the U.S. criminal laws against torture, assault, maiming and stalking, in the detention and interrogation of enemy combatants.

The federal maiming statute makes it a crime for someone "with the intent to torture, maim, or disfigure" to "cut, bite, or slit the nose, ear or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person." It further prohibits individuals from "throwing or pouring upon another person any scalding water, corrosive acid, or caustic substance" with like intent.

Yoo said in an interview in *Esquire* that "just because the statute says—that doesn't mean you have to do it." In a debate with Notre Dame Professor Doug Cassell, Yoo said there is no treaty that prohibits the President from torturing someone by crushing the testicles of the person's child. In Yoo's view, it depends on

the President's motive, notwithstanding the absolute prohibition against torture in *all* circumstances.

The Torture Convention defines torture as the intentional infliction of severe physical or mental pain or suffering. The U.S. attached an "understanding" to its ratification of the Torture Convention, which added the requirement that the torturer "specifically" intend to inflict the severe physical or mental pain or suffering. This is a distinction without a difference for three reasons. First, under well-established principles of criminal law, a person specifically intends to cause a result when he either consciously desires that result or when he knows the result is practically certain to follow. Second, unlike a "reservation" to a treaty provision, an "understanding" cannot change an international legal obligation. Third, under the Vienna Convention on the Law of Treaties, an "understanding" that violates the object and purpose of a treaty is void. The claim that treatment of prisoners which would amount to torture under the Torture Convention does not constitute torture under the U.S. "understanding" violates the object and purpose of the Convention, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The U.S. "understanding" that adds the specific intent requirement is embodied in the U.S. Torture Statute.

Nevertheless, Yoo twisted the law and redefined torture much more narrowly than the definitions in the Convention Against Torture and the Torture Statute. Under Yoo's definition, the victim must experience intense pain or suffering equivalent to pain associated with serious physical injury so severe that death, organ failure or permanent damage resulting in loss of significant body functions will likely result.

Yoo wrote that self-defense or necessity could be used as a defense to war crimes prosecutions for torture, notwithstanding the Torture Convention's *absolute* prohibition against torture in *all* circumstances. There can be no justification for torture.

After the exposure of the atrocities at Abu Ghraib and the publication of the August 1, 2002 memo, the Department of Justice knew the memo could not be legally defended. That memo was withdrawn as of June 1, 2004. A new opinion, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, and admits that a defendant's motives to protect national security will not shield him from a torture prosecution. The rescission of the August 2002 memo constitutes an admission by the Justice Department that the legal reasoning in that memo was wrong. But for 22 months, the it was in effect, which sanctioned and led to the torture of prisoners in U.S. custody.

John Yoo admitted the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism." Yoo and other Department of Justice lawyers, including Jay Bybee , David Addington, William Haynes and Alberto Gonzalez, were part of a common plan to violate U.S. and international laws outlawing torture. It was reasonably foreseeable that the advice they gave would result in great physical or mental harm or death to many detainees. Indeed, more than 100 have died, many from torture.

ABC News reported last month that the National Security Council Principals Committee consisting of Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. Bush admitted, "yes, I'm aware our national security team met on this issue. And I approved."

These top U.S. officials are liable for war crimes under the U.S. War Crimes Act and torture under the Torture Statute. They ordered the torture that was carried out by the interrogators. Under the doctrine of command responsibility, used at Nuremberg and enshrined in the Army Field Manual, commanders, all the way up the chain of command to the commander in chief, can be liable for war crimes if they knew or should have known their subordinates would commit them, and they did nothing to stop or prevent it. The Bush officials ordered the torture after seeking legal cover from their lawyers.

But Yoo and the other Justice Department lawyers who wrote the enabling memos are also liable for the same offenses. They were an integral part of a criminal conspiracy to violate our criminal laws. Yoo admitted in an *Esquire* interview last month that he knew interrogators would take action based on what he advised.

The President can no more order the commission of torture than he can order the commission of genocide, or establish a system of slavery, or wage a war of aggression.

A Select Committee of Congress should launch an immediate and thorough investigation of the circumstances under which torture was authorized and rationalized. The high officials of our government and their lawyers who advised them should be

investigated and prosecuted by a Special Prosecutor, independent of the Justice Department, for their crimes. John Yoo, Jay Byee, and David Addington should be subjected to particular scrutiny because of the seriousness of their roles in misusing the rule of law and legal analysis to justify torture and other crimes in flagrant violation of domestic and international law.

ATTACHMENT

WHITE PAPER ON THE LAW OF TORTURE AND HOLDING ACCOUNTABLE THOSE WHO ARE COMPLICIT FOR APPROVING TORTURE OF PERSONS IN U.S. CUSTODY

National Lawyers Guild
International Association of Democratic Lawyers

This paper provides the background to the legal issues underpinning the call by the National Lawyers Guild (NLG) to prosecute and dismiss from their jobs persons like then Deputy Assistant Attorney General John Choon Yoo,1 then Assistant Attorney General Jay Bybee2 and others who participated in the drafting of memoranda claimed to be based on sound legal precedent that authorized others to commit acts of torture or other cruel, inhuman or degrading treatment[3] on behalf of the U.S. government. The memoranda were written at the request of high ranking U.S. officials in order to insulate them from the risk of future prosecution for subjecting detainees in U.S. custody to torture. By logical extension, this paper explains why all those who approved the use of torture and committed, whether ordering or approving it or giving purported legal advice to justify it, are subject to prosecution under international and U.S. domestic law.

The prohibition of torture is a *jus cogens* norm and the United States has consistently prohibited the use of torture through its Constitution, laws, executive statements and judicial decisions and by ratifying international treaties that prohibit it. The prohibition against torture applies to all persons in U.S. custody in times of peace, armed conflict, or state of emergency. In other words, the prohibition is absolute. However, the purported legal memoranda drafted by government lawyers purposely or recklessly misconstrued and/or ignored *jus cogens*, customary international law, and various U.S. treaty obligations in order to justify the unjustifiable in claiming that clearly unlawful interrogation "techniques" were lawful.

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[1] Yoo is currently a Professor of Law at the Boalt Hall School of Law, University of California, Berkeley. The NLG is not advocating that Yoo be dismissed for enaging in lawful First Amendment Speech as a Professor of Law. On the contrary, the Guild is calling for Yoo's prosecution, disbarment, and dismissal for his actions as Deputy Assistant Attorney General.

[2] Bybee is currently a federal judge on the United States Court of Appeals for the Ninth Circuit.

[3] What is commonly referred to as the Convention Against Torture, as well as other treaties to which the U.S. is a party, in fact includes prohibition against torture and other cruel, inhuman or degrading treatment or punishment. The term "torture" will be generally used in this paper, but no discussion of the prohibitions should be limited to it.

I. THE PROHIBITION AGAINST TORTURE IS A *JUS COGENS* NORM.

The prohibition against torture is a *jus cogens* norm[4]. ***Jus cogens*** are defined as norms "accepted and recognized by the international community of states as a whole ... from which no derogation is permitted..."5 In international criminal law, the legal duties that arise in connection with crimes designated as violations of *jus cogens* norms include the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunities up to and including those enjoyed by Heads of State, the non-applicability of the defense of "obedience to superior orders" and universal jurisdiction over perpetrators of such crimes. Other *jus cogens* norms include the prohibitions against slavery, genocide, and wars of aggression. *Jus cogens* norms, like customary international law norms, are legally binding. No affirmative executive act may undercut the force of these prohibitions nor may a legislature pass legalize crimes designated as violating *jus cogens* norms or immunizing from prosecution those responsible. *Jus cogens* norms differ from norms which have attained the status of customary international law by dint of their universal and non-derogable character.

While legal scholars often differ as to what specific acts can be defined as being subject to *jus cogens* norms, it is beyond dispute that the prohibition against torture has attained that status.6 The right to be free from torture and other cruel and inhuman treatment was recognized in Article 5 of the Universal Declaration of Human Rights (1948). It is contained in Article 7 the International Covenant on Civil and Political Rights and Article 5(2) of the American Convention on Human Rights. Torture is also outlawed under the Rome Statute which created the International Criminal Court (ICC). The U.S. Army Field Manual 34-52 makes clear that techniques of interrogation are to be established under the rules laid out by The Hague and Geneva Conventions. FM 34-52 is unambiguous in its prohibition on the use of torture and any other force in interrogation of prisoners.

Article 17 of the 1949 Geneva Convention III prohibits physical or mental torture and any other coercive action against prisoners of war, and Article 130 classifies violation of Article 17 as a grave breach of the Geneva Conventions. The Fourth Geneva Convention prohibits an

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[4] See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; see also Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[5] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 698-99 (1969).

[6] See *Siderman de Blake v. The Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of ***jus cogens.***").

occupying power from torturing protected persons (Article 32) or engaging in all other "measures of brutality" (Article 283). Common Article 3 (that is, Article 3 in each of the conventions) prohibits torture as well as humiliating and degrading treatment against those who are taking no active part in hostilities, members of armed forces who have laid down their arms, or those who are *hors de combat*.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention or CAT) codified the prohibitions against torture into specific rules. The Convention "prohibits torture and other acts of cruel, inhuman, or degrading treatment or punishment." It criminalizes torture and seeks to end impunity for any torturer by denying him all possible refuge. The Convention is categorical: "No exceptional circumstances whatsoever, whether a state of war, or a threat or war, internal political instability or any other public emergency, may be invoked as a justification for torture."

The prohibition against torture has attained *jus cogens* status. This means we must examine the actions of Yoo and the others who sought to provide legal cover for acts in violation of the prohibition, through a lens which acknowledges that they violated a norm which the world has universally declared to be part of the highest and most compelling law. Because it is a *jus cog*ens norm, no world leader has the right to resort to torture, nor may a legislature attempt to legalize it, nor may an official of the government use it. Indeed, if the rule of law is to have real meaning, it demands severe consequences for anyone who transgresses.

II. THE CONVENTION AGAINST TORTURE, THE TORTURE STATUTE, AND THE WAR CRIMES ACT

As noted above, one of the instruments which helped confer *jus cogens* status on torture was the ratification by the U.S. of the International Covenant on Civil and Political Rights (ICCPR)7 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.8 The U.N. General Assembly adopted the Convention against Torture in 1984 to strengthen existing prohibitions against torture and other cruel, inhuman, or degrading treatment.9 On October 21, 1994, the United States ratified Convention against Torture, which expressly prohibits torture under all circumstances. The 1999 decision by the House of Lords to

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[7] International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992)

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 8, S. Treaty Doc. No. 100-20, (1988), 1465 U.N.T.S. 85 G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 (1984).

[9] See J. Herman Burgers & Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1 (1988).

extradite Augusto Pinochet for prosecution for promoting and condoning acts of torture committed during his regime was based in part on the existence of the Convention and its contribution to the recognition of torture as a *jus cogens* norm.10

Torture is defined in Article 1 of the Convention as:

1. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Under Article 2:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

As a ratified convention, the CAT is a treaty which, through Article VI, Section 2 of the United States Constitution (Supremacy clause), is "the Supreme Law of the Land" in domestic U.S. law. Pursuant to the dictates of the CAT, Congress criminalized torture for actions outside the United States.[11] The language of the Torture Statute tracks to a large degree the language of

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[10] *Regina v. Bartle*, 2 W.L.R. 827 (H.L.) (March 24, 1999).

[11] 18 U.S.C. §§ 2340-2340A.

§2340 provides in full:

As used in this chapter--

the Torture Convention and punishes conspiracy to commit torture as well as torture itself. While the U.S. included various "understandings[12] along with its ratification of the Convention, international law does not permit such "understandings" to undercut the force and language of the Convention.[13] While the Torture Statute covers acts committed outside the United States (as

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(1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

§2340A provides in full:

(a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

[12] "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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 procedures calculated to disrupt profoundly the senses or personality." S. Exec. Rep. No. 101-30, at 36 (1990).

[13]"Understandings" differ from "reservations." An "understanding" cannot change an international legal obligation under the Convention. Under international law, where there is

opposed to the CAT, which is not ~~site~~ specific as to the place the torture occurs), the opinions sought from Yoo and the others in 2002 address actions taken by U.S. officials outside the United States, in the various "black sites" as well as bases in Afghanistan and Guantánamo. At that time, the administration argued that Guantánamo was outside of the United States and beyond the reach of any U.S. court.[14]

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conflict between international obligation and domestic law, international law will govern. See P. Sands, *Lawless World: America and the Making and Breaking of Global Rules - From FDR's Atlantic Charter to George W. Bush's Illegal War*, p. 213, Penguin Books (2006). While Yoo in his Commentary in UC Berkeley Point of View dated January 5, 2005, claimed that the Senate in ratification narrowed the definition of torture in the convention in these "understandings" and the criminal statutes, this is not true. Section 2 of Article 1 of the CAT does not prohibit national legislation which would give wider protection. It is clear that the Convention would not tolerate national legislation which would give less protection.

Moreover, "understandings" that violate the object and purpose of a treaty are void, according to the Vienna Convention on the Law of Treaties. The claim that treatment of prisoners that would amount to torture under CAT does not constitute torture under the U.S. "understanding" violates the object and purpose of CAT, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[14]Actions taken by military personnel or any other person, who commit or have committed torture, would be covered by the War Crimes Act, 18 U.S.C. §2441 et. seq. which states: "Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death. Subsection (b) provides that the circumstances are that "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." In 18 U.S.C. §2441(b) "war crime" is defined as follows:

As used in this section the term 'war crime' means any conduct-

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict ....

III. THE UNITED STATES PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT

The U.S. Court of Appeals for the Second Circuit has declared more than 25 years ago that the prohibition against torture is universal, obligatory, specific, and definable.[15] Since then, every U.S. circuit court has held that torture violates universal and well-established customary international law, with the Eleventh Circuit finding that official torture is now prohibited by the law of nations, including U.S. law.16

IN 2004, Congress declared that "the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States" here or abroad. Congress also affirmed the requirement that "no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." Congress reiterated "the policy of the United States to . . . investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States."[17]

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[15] *Filartiga v. Peña-Irala*, 630 F. 2d 876 (2nd Cir. 1980)

[16] *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996). See also e.g. *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (noting that torture is prohibited by "universally accepted norms of international law") (quoting *Filartiga); Hilao v. Marcos: In re Estate of Ferdinand Marcos*, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) (declaring that torture is a specific, universal, and obligatory norm of international law); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status."); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (holding that torture is a well-recognized violation of customary international law and U.S. law), overruled on other grounds by *Aldana v. Del Monte Fresh Produce*, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (declaring that international and U.S. law prohibit torture); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (recognizing that international and U.S. law prohibit torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass.1995) (declaring that torture is a well-recognized violation of customary international and U.S. law); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (imposing civil liability for acts of torture).

[17] Sense of Congress and Policy Concerning Persons Detained by the United States, Pub. L. No. 108-375, 118 Stat. 1811, § 1091 (a)(1)(6), (a)(8), (b)(2) (Oct. 28, 2004).

IV. BUSH'S ORDER AND THE TORTURE MEMOS

"A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called terrorist and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush administration in 2002."[18]

On February 7, 2002, President Bush announced that Geneva's Common Article 3 did not apply to alleged Taliban and Al Qaeda members. Bush said, however, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity,* in a manner consistent with the principles of Geneva." But the Torture Convention and *jus cogens* absolutely prohibit torture in *all* circumstances.

In the summer of 2002, the Pentagon sought advice on whether the army was bound by the Field Manual in interrogating prisoners at Guantánamo. An advisory memo written by Colonel Diane Beaver, a U.S. Army lawyer tried to find a way around the Field Manual constraints on interrogation.[19]

Her advisory opinion concluded that international obligations are irrelevant and that because the detainees were not prisoners of war the Geneva Conventions did not apply. Before Colonel Beaver issued her opinion, the Justice Department was providing advice on whether interrogation techniques which were assumed to be legal under U.S. law could nonetheless expose the U.S. to prosecution at the ICC[20] or violate the CAT.[21]

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[18] J. Paust: *Beyond the Law: The Bush Administration's Unlawful Responses to the 'War' on Terror*, Cambridge Univ. Press (2007).

[19]Colonel Beaver was relying on Bush's executive order of February 7, 2002, which stated that the detainees at Guantánamo were not prisoners of war and therefore allegedly not covered under the Geneva Conventions.

[20]Although the United States has not ratified the Rome Statute, violations of the statute in countries which have ratified it could subject persons within the territory to prosecution.

[21]It is now known from the chronology provided by Philippe Sands in his recent *Vanity Fair* article entitled "Green Light" that the lawyers for the President, Vice President and Secretary of Defense, to wit: Addington, Haynes, Gonzales, Yoo and Bybee, met in Guantánamo to discuss the use of various interrogation techniques which were being proposed to be used on various detainees.

There are many lawyers in the Office of Legal Counsel, the Justice Department and elsewhere cognizant of the legal, indeed, constitutional obligations the U.S. has under ratified treaties. The administration, however, turned to political appointees, including the Deputy Assistant Attorney General John Yoo and then Assistant Attorney General Jay Bybee for these opinions.

On January 9, 2002, Yoo submitted a memorandum opinion titled "Application of Treaties and Laws to al Qaeda and Taliban Detainees." Co-authored with Special Counsel Robert J. Delahunty, the memo purported to address "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan."

This memo argued that the President was not bound by international laws in the war on terror. It stated that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al-Qaeda and the Taliban." The memo found it proper to deny the protections of international laws to detainees and to exempt from liability those who denied such protections.

Yoo also authored a memorandum opinion dated August 1, 2002, titled "Standards of Conduct for Interrogation under 18 U.S.C. ss. 2340-2340A." This opinion was addressed to Alberto Gonzales from Jay Bybee, but was in fact drafted by Yoo.

In the August 1, 2002 memo, Yoo/Bybee changed the definition of torture contained in U.S. law and the CAT, limiting it to those acts inflicting pain of equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. This definition is much narrower than our laws provide in the CAT and the Torture Statute.

Recently, a March 14, 2003 Yoo memorandum opinion has surfaced entitled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States." This 81-page memo again reiterates that the President is not bound by federal laws. "Such criminal statutes, if

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It is also now known from recent news reports that there were meetings at the White House in which the specific interrogation/torture techniques to be applied to various detainees were discussed and approved.

ABC News reported last month that Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. When asked, Bush admitted, "yes, I'm aware our national security team met on this issue. And I approved."

they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution's grant of the Commander in Chief power solely to the President." Yoo states the President is not bound by laws that prohibit torture, assault, maiming, stalking, and war crimes. The opinion applies the restrictions imposed by treaties against torture to circumstances leading to death.

This memo does not recognize the prohibition of torture as a *jus cogens* norm, but declares that customary international law is not federal law and that the President is free to override it at his discretion. Yet in *Paquete Habana*, the Supreme Court held that customary international law is part of the laws of the United States that must be ascertained and applied by the judiciary.[22] In 1984, Justice O'Connor wrote that power "delegated by Congress to the Executive Branch" and a relevant congressional-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law."[23]

And finally, the memo suggests several defenses (military necessity and self defense) for those brought up on criminal charges for violating laws during interrogations, notwithstanding the *jus cogens* norm, the Geneva Conventions' clear command that military necessity does not justify the treatment Geneva prohibits, and CAT's absolute prohibition on torture.

V. THE AUGUST 2002 TORTURE MEMO IS WITHDRAWN

Many scholars have opined on the legal deficiencies of the Yoo et. al "torture memos."[24] Referring to the discussion of *jus cogens* above, there is no legal basis for the claim that the President is not bound by the law against torture. No one, not a lawyer or Congress, has the authority to re-write the definition of torture contained in the CAT to allow for interrogation techniques which clearly would amount to torture under the CAT's definition. The "war on terror" does not give the executive branch the ability to disregard the Geneva Conventions and commit war crimes.[25]

After the exposure of the atrocities at Abu Ghraib, and the existence of the August 1, 2002 memo was revealed, the Department of Justice knew that the Yoo memos could not be

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[22] 175 U.S. 677 (1900).

[23] TransWorldAirlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984)(O'Connor, J.).

[24]See e.g. Sands, *Lawless World*, *supra*, n. 13; M. Cohn, *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law*, PoliPointPress (2007); J. Paust, *supra* n. 18 at 1. In addition, both Steven Gillers of NYU Law School and Scott Horton, adjunct professor at Columbia University Law School, have provided various commentaries.

[25]Indeed, the UN Convention on Suppression of Terrorist Bombings of 1997, treats "terrorists" as criminals, whose punishments are subject to criminal law of the country at issue.

legally defended. The August 2002 memorandum opinion was withdrawn as of June 1, 2004. A new opinion was written. This memo, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, stating: "Under the language adopted by Congress in sections 2340-2340A, to constitute 'torture,' the conduct in question must have been 'specifically intended to inflict severe physical or mental pain or suffering.'" The memo separately considers the components of this key phrase: (1) the meaning of "severe;"[26] (2) the meaning of "severe physical pain or suffering;" (3) the meaning of "severe mental pain or suffering;" and (4) the meaning of "specifically intended."

With respect to "specific intent" to torture, the Levin memo does concur with LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted) who states: "With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

VI. HAMDAN V RUMSFELD

On June 29, 2006 the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld*,[27] that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Yoo and others. Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.'"

Four months after *Hamdan*, President Bush signed into law the Military Commissions Act[28] which was passed to address the issues in *Hamdan*, and also attempted to create a new

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[26]It cites cases where treatment was considered severe enough to qualify as torture: *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998).

[27] 548 U.S. 557,126 S. Ct. 2749 (2006).

[28] Pub. L. No. 109-326, 120 Stat. 2600 (10/17/06)

legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001 and December 30, 2005.[29]

VII. CAN ANY OF THOSE WHO WERE INVOLVED IN ANY WAY IN DECIDING TO TORTURE AVOID PROSECUTION?

Professor Sands, an eminent international lawyer, in his book, *Lawless World*, stated: "What do you do as an international lawyer when your client asks you to advise on the international rules prohibiting torture? Do you start with the rules and ask how an international court – or your allies – might address the issue and reach a balanced conclusion? Or do you focus on the narrower issues of the relevance, applicability, and enforceability of the international rules in the national context, and reach a conclusion that you know – if you ask yourself the question – no international court would accept? Let me put it another way. Do you advise, or do you provide legal cover?"[30]

This paper agrees with Sands' conclusion that giving political cover makes a lawyer complicit in the decision to torture.[31] It is the National Lawyers Guild's view that there can be no two opinions on whether those who are involved in the decision to torture must be held accountable both under the War Crimes Act and the Torture Statute. 18 U.S.C. §2340A

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[29]While we would argue that attempts to immunize those complicit in torture from civil or criminal liability is not permitted in the context of the violation of a *jus cogens* norm, the language in the Military Commissions Act creating this legal defense is not a blanket grant of immunity, as pointed out by Houston Law Center Professor Jordan Paust. §8(b) provides that: "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)" the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions is revised where, under § 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person ... did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." It does not "provide immunity from prosecution for any criminal offense by the proper authorities." The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. See, e.g., J. Paust, et al., *International Criminal Law: Cases and Materials*, 3rd Ed. at 51-78, 100-114, Carolina Academic Press (2007).

Furthermore, there can be no immunity, including Head of State immunity, for violation of a *jus cogens* norm. There is no statute of limitations for a *jus cogens* crime and there is universal jurisdiction over those accused of violating *jus cogens* norms.

[30] Sands, *supra*, n. 13, p. 205.

[31] *Id.*, p. 208.

specifically applies to persons who conspire to commit torture. Yoo and other lawyers who were involved in providing the opinions which were used to justify the use of torture are just as complicit as those who imposed the torture itself and must be held accountable as all the others who are complicit must be held accountable.

The Yoo/Bybee memos were either prospective, for the purpose of advising the executive of the limits (or lack thereof) of its authority, or retrospective, for the purpose of addressing already approved of actions. Although they purport to be the former, it now appears they were written after the program of what the administration euphemistically refers to as "enhanced interrogation techniques" began. Regardless, there are only two conclusions one can draw from the memos. The first is that their purpose was not to give the client (assuming *arguendo* the Justice Department' client is the President and not the people) a full understanding of the legal issues, but to give legal cover to an already decided upon, potentially criminal, policy. The second is that the drafters did their best to present all possible conclusions and consequences, in which case the advice given fell so far below the requisite standard of care as to constitute legal malpractice. No one, and certainly not the NLG, has accused Yoo of being that incompetent.

Yoo and Bybee et al. counseled that there were no laws which protected from torture the detainees held at black sites, in prisons in Afghanistan or the Guantánamo concentration camp. They defined torture as only those actions which caused sufficient pain as to cause organ failure and or death. These memos "green lighted" torture and many detainees were subjected to these techniques including, it has been estimated, more than 100 who died from their treatment. They knew, or should have known, that a direct result of their counsel would be the use of interrogation techniques against certain allegedly recalcitrant detainees which would amount to torture. Or they knew it was already going on and they were doing their best to justify it. Regardless, they are part of the conspiracy to commit torture. The "torture memos" written by the DOJ lawyers, and "presidential and other authorizations, directives, and findings substantially facilitated the effectuation of a common, unifying plan to use coercive interrogation and that use of authorized coercive interrogation tactics were either known or substantially foreseeable consequences."[32] John Yoo admitted that the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[33]

Some have criticized the NLG for targeting lawyers who were "merely fulfilling their duty by giving advice." It should be emphasized that the NLG is not only targeting the lawyers. It has called for the impeachment of the president and vice president and has continually called for prosecution of all those (not just the few lower-ranking enlisted people) responsible for these crimes. However, the lawyers cannot be permitted to hide under the cover of fulfilling their professional responsibilities.

Taking their actions to their logical absurdity, we ask what if South African lawyers were requested to give an opinion about beating and killing Steven Biko and provided a memo saying

[32] J. Paust, *International Crimes Within the White House*, 10 N.Y. City L. Rev. 339, 345 (2007).
[33] Id. at 344.

it was legal because of the security needs of the state. Obviously, no tribunal hearing that case would say they were "merely" giving advice. At a minimum, it would be expected that the advice would include the warning that police could be prosecuted for such actions even if certain defenses could be concocted.

The NLG is intimately familiar with these challenges. When we advise protesters, we are painfully aware of the potential consequences to both the protesters and ourselves if we counsel them to break the law on the grounds that their right to free speech supercedes criminal laws. We are careful to advise them both of the defenses that may be available to them and of the likelihood of prosecution and conviction. Yoo's and Bybee's advice provided only the former. Most of the clients we advise engage in non-violent protest such as sit-ins and none has committed a violation of international criminal law.

Nor does the attorney-client privilege extend to keeping silent about planned criminal action, particularly when the planned action is really heinous. Even conceding Yoo and his co-conspirators actually believed their position was correct, no competent lawyer could have believed it unassailable. Giving real advice necessarily meant advising of the risks as well as the arguments favoring torture. And, it should be noted, their incredibly narrow definition of torture completely ignored the prohibition against other cruel, inhuman or degrading treatment or punishment, which would be obvious to anyone who chose to read even the full name of the Convention Against Torture. It is impossible to believe this was the result of incompetence, leaving only the conclusion that they were willing participants in a conspiracy to violate a *jus cogens* norm. Professor Yoo and Judge Bybee, as well as the other lawyers who provided cover for illegal torture, are not protected by their right to free speech or academic freedom. They were not expressing their unsupportable legal opinions in scholarly journals or in classrooms. They were asked to justify what the administration wanted to do and they willingly did it, knowing the inevitable results.

The prosecution of Josef Altstoetter and fifteen other lawyers, who were tried in Germany before a U.S. military tribunal and many were convicted of committing international crimes through the performance of their legal functions established the principle that lawyers and judges in Nazi Germany bore a particular responsibility for the regime's crimes. But it is not just that case that should expose Yoo and his cohorts to liability for his advice. Their memos were not for the purpose of advocacy. If they were defending the President in an impeachment case, or before the International Criminal Court, they would be free to argue their novel, if not bizarre, positions. But they cannot divorce themselves from the consequences of their advice and cannot be permitted immunity or impunity. The loss of their professional status would be a small price to pay for the commission of war crimes.

Mr. NADLER. Thank you, and now the Chair recognizes Mr. Sands for 5 minutes.

TESTIMONY OF PHILIPPE SANDS, PROFESSOR OF LAW, UNIVERSITY COLLEGE LONDON, BARRISTER, MATRIX CHAMBERS

Mr. SANDS. Mr. Chairman, honorable Members of the Committee, it is my privilege an honor to appear before this Committee to address your questions on the subject of Administration lawyers and interrogation rules.

As professor of law at University College of London and as a practicing member of the English bar, it may be said that I appear before you as an outsider. I hope that you will bear in mind that I am from a country that is both a friend and an ally of the United States, and one that shares this country's abiding respect for the rule of law.

I am also from a country which was on the front line of terror in the 1970's and the 1980's, a period I personally remember.

I have come to know America very well over more than two decades since I was first a visiting scholar at Harvard Law School and then taught over more than 15 years at Boston College Law School and then New York University Law School. I am married to an American, I am deeply proud of the fact that my three children share British and American nationality.

Last month I published an article in Vanity Fair magazine, "The Green Light," a copy of which is attached to my statement. It contains material drawn from my new book, "Torture Team," that is published this month by Palgrave Macmillan. The article, and in more detail, the book, tell an unhappy story—the circumstances in which the United States military, not the CIA, was allowed by the hand of Secretary of Defense Donald Rumsfeld to abandon President Lincoln's famous disposition of 1863 that "military necessity does not admit of cruelty."

On the 2nd of December 2002, Secretary Rumsfeld authorized the use of new and aggressive techniques of interrogation on detainee 063. It is by now a famous memorandum, the one in which he wrote, "I stand for 8 to 10 hours a day, why is standing limited for 4 hours?"

Approval was recommended by Mr. Rumsfeld's general counsel, William J. Haynes, II. The memo became public in June 2004 as the Administration argued that the appalling pictures of abuse at Abu Ghraib were unconnected to Administration policy.

My book tells the story of that memo, the circumstances in which it came to be written, the circumstances in which is came to be rescinded. To write the book, I journeyed around America. I met with as many of the people who were directly involved as I possibly could. And I met with a very great number.

I was treated with respect and with hospitality for which I remain very grateful. Over hundreds of hours I conversed or debated with many of those most deeply involved in that memo's life.

They included, for example, the combatants' commander and his lawyer at Guantanamo, Major General Dunleavey and Lieutenant Colonel Beaver; The commander of United States Southern Command in Miami, General Hill; the Chairman of the Joint Chiefs of

Staff, General Myers; the Undersecretary of Defense Mr. Feith; the General Counsel of the Navy Mr. Mora; and the Deputy Assistant Attorney General at DOJ Mr. Yoo.

And I met twice with Mr. Rumfeld's general counsel at the Department of Defense, Mr. Haynes, who along with Mr. Addington, took a central role on the key issues.

From these and many other exchanges, I pieced together what I believe to be a far truer account than which has been presented by the Administration. I met men and women of integrity and decency and professionalism, obviously doing the very best they could in difficult circumstances. Sadly, not everyone I met fell into that category.

From these conversations, it became clear to me that the Administration has spun a narrative that is false. It claims that the impetus for the new interrogation techniques came from the bottom up. That is not true. The abuse was a result of pressures and actions driven from the very highest levels of the Administration.

The Administration claims that it simply followed the law. My investigation indicated that driven by ideology, the Administration consciously sought legal advice to set aside international constraints on detainee interrogations.

The Administration relied on a small number of political appointees, lawyers with no real background in military law, with extreme views on executive power and, frankly, with an abiding contempt for international rules like the Geneva Convention.

These are rules that the United States has done more than any country to promote and put in place. As a result of these actions by the Administration, war crimes were committed. I have no doubt than Common Article III of the Geneva Conventions was violated, alongside with various provisions of the 1984 Convention prohibiting torture.

The specter of war crimes was raised by the United States Supreme Court by Justice Anthony Kennedy in the 2006 judgment in the case of *Hamdan v. Rumsfeld*, a case on which I noted Mr. Rivkin was conspicuously silent. That judgment corrected the illegality of President Bush's determination that none of the detainees at Guantanamo had any rights under Geneva.

Mr. Chairman, honorable Members of the Committee, the story I uncovered is an unhappy one. It points to the early and direct involvement of those at the highest levels of government, often through their lawyers, the individual on whom I largely focused.

In June 2004, after the scandal of Abu Ghraib broke, and the first of August 2002 Bybee/Yoo torture memo became public, Mr. Gonzales and Mr. Haynes appeared before the media to claim that the Bush Administration had not authorized such abuse.

Contrary to the impression given by the Administration, repeated by Mr. Haynes when he appeared before the Senate Committee on the Judiciary in July 2006, his involvement and that of Secretary Rumsfeld began well before that stated in the official version.

Mr. Haynes had visited Guantanamo together with Mr. Gonzales and Mr. Addington, discussed interrogations, perhaps even viewed an interrogation or more, and then recommended that the U.S. military should abandon its tradition of restraint.

My conclusion on the basis of large numbers of interviews and documents is that this is not only a story of crime, it is also a story of cover-up to protect the most senior members of the Administration from the consequences of the illegality that has stained this country's reputation.

Mr. Chairman, no country has done more to promote the international rule of law than the United States. Uncovering the truth is a first step in restoring this country's necessary global leadership role, in undoing the damage caused, and in providing a secure and effective basis for responding to the very real threat of international terrorism.

I can put it no better, sir, than George Kennan, the great American diplomat. In 1947, he wrote an anonymous telex that issued this warning in relation to a perceived Soviet threat. "We must have courage and self-confidence to cling to our own methods and conceptions of human society. The greatest danger that can befall us is that we shall allow ourselves to become like those with whom we are coping."

I thank you, sir, Members of the Committee, for allowing me the opportunity to make this brief introductory statement.

[The prepared statement of Mr. Sands follows:]

PREPARED STATEMENT OF PHILIPPE SANDS

Mr. Chairman, Honourable Members of the Committee, it is my privilege and honour to appear before this Committee to address your questions on the subject of *Administration Lawyers and Administration Interrogation Rules*. As Professor of Law at the University of London, and as a practising member of the English Bar, it may be said that I appear before you as an outsider. I hope you will bear in mind that I am from a country that is friend and ally, one that shares this country's abiding respect for the rule of law. I have come to know America well over more than two decades, since I was a visiting scholar at Harvard Law School in the early 1980's, and then teaching at Boston College Law School and New York University Law School. I am married to an American. I am proud of the fact that my three children share American and British nationality.

Last month I published an article in Vanity Fair, The *Green Light*, a copy of which is attached. It contains material drawn from my new book—Torture Team—that is published this month by Palgrave Macmillan. The article and—in more detail—the book tell an unhappy story: the circumstances in which the United States military was allowed, by the hand of Secretary of Defense Donald Rumsfeld, to abandon President Lincoln's famous disposition of 1863, that "military necessity does not admit of cruelty". On December 2nd, 2002, Secretary Rumsfeld authorised the use of new and aggressive techniques of interrogation on Detainee 063. It is by now a famous memo, the one in which he wrote: "I stand for 8–10 hours a day. Why is standing limited to 4 hours?" Approval was recommended by his General Counsel, William J Haynes II. The memo became public in June 2004, as the Administration argued that the horrible pictures of abuse at Abu Ghraib were unconnected to Administration policy.

My book tells the story of that memo. The circumstances in which it came to be written, and then rescinded. To write the book I journeyed around America, meeting with as many of the people who were directly involved as possible. I met with a great number, and was treated with a respect and hospitality for which I remain very grateful. Over hundreds of hours I conversed or debated with many of those most deeply involved. They included: the combatant commander and his lawyer at Guantanamo (Major General Dunlavey and Lieutenant Colonel Beaver); the Commander of US Southern Command (General Hill); the Chairman of the Joint Chiefs of Staff (General Myers); the Undersecretary of Defense (Mr Feith); the General Counsel of the Navy (Mr Mora); and the Deputy Assistant Attorney General at DoJ (Mr Yoo). I met twice with Mr Rumsfeld's General Counsel at DoD (Mr Haynes), who along with Mr Addington took a central role on the key decisions. From these and many other exchanges I pieced together what I believe to be a truer account than that which has been presented by the Administration. I met men and women

of integrity and decency and professionalism, obviously doing the best they could in difficult circumstances. Not everyone, however, fell into that category.

From these conversations it became clear to me that the Administration has spun a narrative that is false, claiming that the impetus for the new interrogation techniques came from the bottom-up. That is not true: the abuse was a result of pressures and actions driven from the highest levels of government. The Administration claims that it simply followed the law. My investigation indicated that—driven by ideology—the Administration consciously sought legal advice to set aside international constraints on detainee interrogations. The Administration relied on a small number of political appointees, lawyers with no real background in military law, with extreme views on executive power, and with an abiding contempt for international rules like the Geneva Conventions. These are rules that the United States has done more to promote and put in place than maybe any other country. As result, under international law war crimes were committed: I have no doubt that Common Article 3 of the Geneva Conventions was violated, alongside provisions of the 1984 Convention prohibiting Torture. The spectre of war crimes was raised by US Supreme Court Justice Anthony Kennedy, in the 2006 judgment in Hamdan v Rumsfeld. That judgment corrected the illegality of President Bush's determination that none of the detainees at Guantanamo had any rights under Geneva.

Mr Chairman, Honourable Members of the Committee, the story I uncovered is an unhappy one. It points to the early and direct involvement of those at the highest levels of government, often through their lawyers, the individuals on whom I largely focused. In June 2004, after the scandal of Abu Ghraib broke, and the August 1, 2002 Bybee Torture Memo became public, Mr Gonzalez and Mr Haynes appeared before the media to claim that the Bush Administration had not authorized such abuse. Contrary to the impression given by the Administration, repeated by Mr Haynes when he appeared before the Senate Judiciary Committee in July 2006, his involvement (and that of Secretary Rumsfeld) began well before that stated in the official version. Mr. Haynes had visited Guantanamo, together with Mr Gonzales and Mr Addington, discussed interrogations, and then recommended that the U.S. military abandon its tradition of restraint. My conclusion, on the basis of interviews and documents, is that this is a story not only of crime but also of cover-up, to protect the most senior members of the Administration from the consequences of the illegality that has stained America's reputation.

Mr Chairman, no country has done more to promote the international rule of law than the United States. Uncovering the truth is a first step in restoring this country's necessary, leadership role; in undoing the damage caused; and providing a secure and effective basis for responding to the very real threat of terrorism. I can put it no better than George Kennan, the great American diplomat. In 1947 he wrote a telex that issued this warning in relation to a perceived Soviet threat: "[W]e must have courage and self-confidence to cling to our own methods and conceptions of human society. [T]he greatest danger that can befall us . . . is that we shall allow ourselves to become like those with whom we are coping."

I thank you for allowing me the opportunity to make this brief introductory statement.

ATTACHMENT

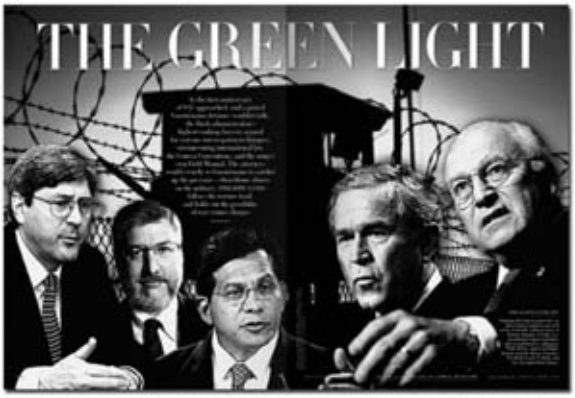
VANITY FAIR

THE WHITE HOUSE

The Green Light

As the first anniversary of 9/11 approached, and a prized Guantánamo detainee wouldn't talk, the Bush administration's highest-ranking lawyers argued for extreme interrogation techniques, circumventing international law, the Geneva Conventions, and the army's own Field Manual. The attorneys would even fly to Guantánamo to ratchet up the pressure—then blame abuses on the military. Philippe Sands follows the torture trail, and holds out the possibility of war crimes charges.

by PHILIPPE SANDS May 2008



Changing the long-accepted rules on interrogation required concerted action. From left: Undersecretary of Defense Douglas J. Feith, then vice-presidential counsel David S. Addington, then White House counsel Alberto Gonzales, President George W. Bush, and Vice President Dick Cheney. *Photo illustration by Chris Mueller.*

The abuse, rising to the level of torture, of those captured and detained in the war on terror is a defining feature of the presidency of George W. Bush. Its military beginnings, however, lie not in Abu Ghraib, as is commonly thought, or in the "rendition" of prisoners to other countries for questioning, but in the treatment of the very first prisoners at Guantánamo. Starting in late 2002 a detainee bearing the number 063 was tortured over a period of more than seven weeks. In his story lies the answer to a crucial question: How was the decision made to let the U.S. military start using coercive interrogations at Guantánamo?

The Bush administration has always taken refuge behind a "trickle up" explanation: that is, the decision was generated by military commanders and interrogators on the ground. This explanation is false. The origins lie in actions taken at the very highest levels of the administration—by some of the most senior personal advisers to the president, the vice president, and the secretary of defense. At the heart of the matter stand several political appointees—lawyers—who, it can be argued, broke their ethical codes of conduct and took themselves into a zone of international criminality, where formal investigation is now a very real option. This is the story of how the torture at Guantánamo began, and how it spread.

"Crying. Angry. Yelled for Allah."

One day last summer I sat in a garden in London with Dr. Abigail Seltzer, a psychiatrist who specializes in trauma victims. She divides her time between Great Britain's National Health Service, where she works extensively with asylum seekers and other refugees, and the Medical Foundation for the Care of Victims of Torture. It was uncharacteristically warm, and we took refuge in the shade of some birches. On a table before us were three documents. The first was a November 2002 "action memo" written by William J. (Jim) Haynes II, the general counsel of the U.S. Department of Defense, to his boss, Donald Rumsfeld; the document is sometimes referred to as the Haynes Memo. Haynes recommended that Rumsfeld give "blanket approval" to 15 out of 18 proposed techniques of aggressive interrogation. Rumsfeld duly did so, on December 2, 2002, signing his name firmly next to the word "Approved." Under his signature he also scrawled a few words that refer to the length of time a detainee can be forced to stand during interrogation: "I stand for 8–10 hours a day. Why is standing limited to 4 hours?"

The second document on the table listed the 18 proposed techniques of interrogation, all of which went against long-standing U.S. military practice as presented in the Army Field Manual. The 15 approved techniques included certain forms of physical contact and also techniques intended to humiliate and to impose sensory deprivation. They permitted the use of stress positions, isolation, hooding, 20-hour interrogations, and nudity. Haynes and Rumsfeld explicitly did not rule out the future use of three other techniques, one of which was waterboarding, the application of a wet towel and water to induce the perception of drowning.

The third document was an internal log that detailed the interrogation at Guantánamo of a man identified only as Detainee 063, whom we now know to be Mohammed al-Qahtani, allegedly a member of the 9/11 conspiracy and the so-called 20th hijacker. According to this log, the interrogation commenced on November 23, 2002, and continued until well into January. The techniques described by the log as having been used in the interrogation of Detainee 063 include all 15 approved by Rumsfeld.

"Was the detainee abused? Was he tortured?," I asked Seltzer. Cruelty, humiliation, and the use of torture on detainees have long been prohibited by international law, including the Geneva Conventions and their Common Article 3. This total ban was reinforced in 1984 with the adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which criminalizes torture and complicity in torture.

A careful and fastidious practitioner, Seltzer declined to give a straight yes or no answer. In her view the definition of torture is essentially a legal matter, which will turn on a particular set of facts. She explained that there is no such thing as a medical definition of torture, and that a doctor must look for pathology, the abnormal functioning of the body or the mind. We reviewed the definition of torture, as set out in the 1984 Convention, which is binding on 145 countries, including the United States. Torture includes "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."

Seltzer had gone through the interrogation log, making notations. She used four different colors to highlight moments that struck her as noteworthy, and the grim document now looked bizarrely festive. Yellow indicated episodes of abusive treatment. Pink showed where the detainee's rights were respected—where he was fed or given a break, or allowed to sleep. Green indicated the many instances of medical involvement, where al-Qahtani was given an enema or was hospitalized suffering from hypothermia. Finally, blue identified what Seltzer termed "expressions of distress."

We talked about the methods of interrogation. "In terms of their effects," she said, "I suspect that the individual techniques are less important than the fact that they were used over an extended period of time, and that several appear to be used together: in other words, the cumulative effect." Detainee 063 was subjected to systematic sleep deprivation. He was shackled and cuffed; at times, head restraints were used. He was compelled to listen to threats to his family. The interrogation leveraged his sensitivities as a Muslim: he was shown pictures of scantily clad models, was touched by a female interrogator, was made to stand naked, and was forcibly shaved. He was denied the right to pray. A psychiatrist

who witnessed the interrogation of Detainee 063 reported the use of dogs, intended to intimidate "by getting the dogs close to him and then having the dogs bark or act aggressively on command." The temperature was changed, and 063 was subjected to extreme cold. Intravenous tubes were forced into his body, to provide nourishment when he would not eat or drink.

We went through the marked-up document slowly, pausing at each blue mark. Detainee 063's reactions were recorded with regularity. I'll string some of them together to convey the impression:

Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable. Moaning. Began crying hard spontaneously. Crying and praying. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Dizzy. Forgetting things. Angry. Upset. Yelled for Allah.

The blue highlights went on and on.

Urinated on himself. Began to cry. Asked God for forgiveness. Cried. Cried. Became violent. Began to cry. Broke down and cried. Began to pray and openly cried. Cried out to Allah several times. Trembled uncontrollably.

Was Detainee 063 subjected to severe mental pain or suffering? Torture is not a medical concept, Seltzer reminded me. "That said," she went on, "over the period of 54 days there is enough evidence of distress to indicate that it would be very surprising indeed if it had not reached the threshold of severe mental pain." She thought about the matter a little more and then presented it a different way: "If you put 12 clinicians in a room and asked them about this interrogation log, you might get different views about the effect and long-term consequences of these interrogation techniques. But I doubt that any one of them would claim that this individual had not suffered severe mental distress at the time of his interrogation, and possibly also severe physical distress."

The Authorized Version

The story of the Bush administration's descent down this path began to emerge on June 22, 2004. The administration was struggling to respond to the Abu Ghraib scandal, which had broken a couple of months earlier with the broadcast of photographs that revealed sickening abuse at the prison outside Baghdad. The big legal guns were wheeled out. Alberto Gonzales and Jim Haynes stepped into a conference room at the Eisenhower Executive Office Building, next to the White House. Gonzales was President Bush's White House counsel and would eventually become attorney general. Haynes, as Rumsfeld's general counsel, was the most senior lawyer in the Pentagon, a position he would retain until a month ago, when he resigned—"returning to private life," as a press release stated. Gonzales and Haynes were joined by a third lawyer, Daniel Dell'Orto, a career official at the Pentagon. Their task was to steady the beat and make it clear that the events at Abu Ghraib were the actions of a few bad eggs and had nothing to do with the broader policies of the administration.

Gonzales and Haynes spoke from a carefully prepared script. They released a thick folder of documents, segmented by lawyerly tabs. These documents were being made public for the first time, a clear indication of the gravity of the political crisis. Among the documents were the Haynes Memo and the list of 18 techniques that Seltzer and I would later review. The log detailing the interrogation of Detainee 063 was not released; it would be leaked to the press two years later.

For two hours Gonzales and Haynes laid out the administration's narrative. Al-Qaeda was a different kind of enemy, deadly and shadowy. It targeted civilians and didn't follow the Geneva Conventions or any other international rules. Nevertheless, the officials explained, the administration had acted

judiciously, even as it moved away from a purely law-enforcement strategy to one that marshaled "all elements of national power." The authorized version had four basic parts.

The famous Haynes Memo, recommending enhanced "counter-resistance" techniques, as signed and annotated with a jocular comment by Rumsfeld. Enlarge this.

First, the administration had moved reasonably—with care and deliberation, and always within the limits of the law. In February 2002 the president had determined, in accordance with established legal principles, that none of the detainees at Guantánamo could rely on any of the protections granted by Geneva, even Common Article 3. This presidential order was the lead document, at Tab A. The administration's point was this: agree with it or not, the decision on Geneva concealed no hidden agenda; rather, it simply reflected a clear-eyed reading of the actual provisions. The administration, in other words, was doing nothing more than trying to proceed by the book. The law was the law.

Relating to this was a second document, one that had been the subject of media speculation for some weeks. The authors of this document, a legal opinion dated August 1, 2002, were two lawyers in the Justice Department's Office of Legal Counsel: Jay Bybee, who is now a federal judge, and John Yoo, who now teaches law at Berkeley. Later it would become known that they were assisted in the drafting by David Addington, then the vice president's lawyer and now his chief of staff. The Yoo-Bybee Memo declared that physical torture occurred only when the pain was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and that mental torture required "suffering not just at the moment of infliction but ... lasting psychological harm." Interrogations that did not reach these thresholds—far less stringent than those set by international law—were allowed. Although findings that issue from the Office of Legal Counsel at Justice typically carry great weight, at the press conference Gonzales went out of his way to decouple the Yoo-Bybee Memo from anything that might have taken place at Guantánamo. The two lawyers had been asked, in effect, to stargaze, he said. Their memo simply explored "the limits of the legal landscape." It included "irrelevant and unnecessary" discussion and never made it into the hands of the president or of soldiers in the field. The memo did not, said Gonzales, "reflect the policies that the administration ultimately adopted."

Defense Secretary Donald Rumsfeld (with General Richard Myers) before questioning by the Senate about the Abu Ghraib abuses, May 2004. *By Gary Hershorn/Reuters/Corbis.*

The second element of the administration's narrative dealt with the specific source of the new interrogation techniques. Where had the initiative come from? The administration pointed to the military commander at Guantánamo, Major General Michael E. Dunlavey. Haynes would later describe him to the Senate Judiciary Committee, during his failed confirmation hearings for a judgeship in 2006, as "an aggressive major general." The techniques were not imposed or encouraged by Washington, which had merely reacted to a request from below. They came as a result of the identification locally of "key people" at Guantánamo, including "a guy named al-Qahtani." This man, Detainee 063, had proved able to resist the traditional non-coercive techniques of interrogation spelled out in the Army Field Manual, and as the first anniversary of 9/11 approached, an intelligence spike pointed to the possibility of new attacks. "And so it is concluded at Guantánamo," Dell'Orto emphasized, reconstructing the event, "that it may be time to inquire as to whether there may be more flexibility in the type of techniques we use on him." A request was sent from Guantánamo on October 11, 2002, to the head of the U.S. Southern Command (SouthCom), General James T. Hill. Hill in turn forwarded Dunlavey's request to General Richard Myers, the chairman of the Joint Chiefs of Staff. Ultimately, Rumsfeld approved "all but three of the requested techniques." The official version was clear: Haynes and Rumsfeld were just processing a request coming up the chain from Guantánamo.

The third element of the administration's account concerned the legal justification for the new interrogation techniques. This, too, the administration said, had originated in Guantánamo. It was not the result of legal positions taken by

politically appointed lawyers in the upper echelons of the administration, and certainly not the Justice Department. The relevant document, also dated October 11, was in the bundle released by Gonzales, a legal memo prepared by Lieutenant Colonel Diane Beaver, the staff judge advocate at Guantánamo. That document—described pointedly by Dell'Orto as a "multi-page, single-spaced legal review"—sought to provide legal authority for all the interrogation techniques. No other legal memo was cited as bearing on aggressive interrogations. The finger of responsibility was intended to point at Diane Beaver.

The fourth and final element of the administration's official narrative was to make clear that decisions relating to Guantánamo had no bearing on events at Abu Ghraib and elsewhere. Gonzales wanted to "set the record straight" about this. The administration's actions were inconsistent with torture. The abuses at Abu Ghraib were unauthorized and unconnected to the administration's policies.

Gonzales and Haynes laid out their case with considerable care. The only flaw was that every element of the argument contained untruths.

The real story, pieced together from many hours of interviews with most of the people involved in the decisions about interrogation, goes something like this: The Geneva decision was not a case of following the logic of the law but rather was designed to give effect to a prior decision to take the gloves off and allow coercive interrogation; it deliberately created a legal black hole into which the detainees were meant to fall. The new interrogation techniques did not arise spontaneously from the field but came about as a direct result of intense pressure and input from Rumsfeld's office. The Yoo-Bybee Memo was not simply some theoretical document, an academic exercise in blue-sky hypothesizing, but rather played a crucial role in giving those at the top the confidence to put pressure on those at the bottom. And the practices employed at Guantánamo led to abuses at Abu Ghraib.

The fingerprints of the most senior lawyers in the administration were all over the design and implementation of the abusive interrogation policies. Addington, Bybee, Gonzales, Haynes, and Yoo became, in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse.

Killing Geneva

In the early days of 2002, as the number of al-Qaeda and Taliban fighters captured in Afghanistan began to swell, the No. 3 official at the Pentagon was Douglas J. Feith. As undersecretary of defense for policy, he stood directly below Paul Wolfowitz and Donald Rumsfeld. Feith's job was to provide advice across a wide range of issues, and the issues came to include advice on the Geneva Conventions and the conduct of military interrogations.

I sat down with Feith not long after he left the government. He was teaching at the school of foreign service at Georgetown University, occupying a small, eighth-floor office lined with books on international law. He greeted me with a smile, his impish face supporting a mop of graying hair that seemed somehow at odds with his 54 years. Over the course of his career Feith has elicited a range of reactions. General Tommy Franks, who led the invasion of Iraq, once called Feith "the fucking stupidest guy on the face of the earth." Rumsfeld, in contrast, saw him as an "intellectual engine." In manner he is the Energizer Bunny, making it hard to get a word in edgewise. After many false starts Feith provided an account of the president's decision on Geneva, including his own contribution as one of its principal architects.

"This was something I played a major role in," he began, in a tone of evident pride. With the war in Afghanistan under way, lawyers in Washington understood that they needed a uniform view on the constraints, if any, imposed by Geneva. Addington, Haynes, and Gonzales all objected to Geneva. Indeed, Haynes in December 2001 told the CentCom admiral in charge of detainees in Afghanistan "to 'take the gloves off' and ask whatever he wanted" in the questioning of John Walker Lindh. (Lindh, a young American who had become a Muslim and had recently been captured in northern Afghanistan, bore the designation Detainee 001.)

A month later, the administration was struggling to adopt a position. On January 9, John Yoo and Robert Delahunty, at the Justice Department, prepared an opinion for Haynes. They concluded that the president wasn't bound by traditional international-law prohibitions. This encountered strong opposition from Colin Powell and his counsel, William H. Taft IV, at the State Department, as well as from the TJAGs—the military lawyers in the office of the judge advocate general—who wanted to maintain a strong U.S. commitment to Geneva and the rules that were part of customary law. On January 25, Alberto Gonzales put his name to a memo to the president supporting Haynes and Rumsfeld over Powell and Taft. This memo, which is believed to have been written by Addington, presented a "new paradigm" and described Geneva's "strict limitations on questioning of enemy prisoners" as "obsolete." Addington was particularly distrustful of the military lawyers. "Don't bring the TJAGs into the process—they aren't reliable," he was once overheard to say.

Feith took up the story. He had gone to see Rumsfeld about the issue, accompanied by Myers. As they reached Rumsfeld's office, Myers turned to Feith and said, "We have to support the Geneva Conventions If Rumsfeld doesn't go along with this, I'm going to contradict them in front of the president." Feith was surprised by this uncharacteristically robust statement, and by the way Myers referred to the secretary bluntly as "Rumsfeld."

Douglas Feith had a long-standing intellectual interest in Geneva, and for many years had opposed legal protections for terrorists under international law. He referred me to an article he had written in 1985, in *The National Interest*, setting out his basic view. Geneva provided incentives to play by the rules; those who chose not to follow the rules, he argued, shouldn't be allowed to rely on them, or else the whole Geneva structure would collapse. The only way to protect Geneva, in other words, was sometimes to limit its scope. To uphold Geneva's protections, you might have to cast them aside.

But that way of thinking didn't square with the Geneva system itself, which was based on two principles: combatants who behaved according to its standards received P.O.W. status and special protections, and everyone else received the more limited but still significant protections of Common Article 3. Feith described how, as he and Myers spoke with Rumsfeld, he jumped protectively in front of the general. He reprised his "little speech" for me. "There is no country in the world that has a larger interest in promoting respect for the Geneva Conventions as law than the United States," he told Rumsfeld, according to his own account, "and there is no institution in the U.S. government that has a stronger interest than the Pentagon." So Geneva had to be followed? "Obeying the Geneva Conventions is not optional," Feith replied. "The Geneva Convention is a treaty in force. It is as much part of the supreme law of the United States as a statute." Myers jumped in. "I agree completely with what Doug said and furthermore it is our military culture It's not even a matter of whether it is reciprocated—it's a matter of who we are."

Feith was animated as he relived this moment. I remained puzzled. How had the administration gone from a commitment to Geneva, as suggested by the meeting with Rumsfeld, to the president's declaration that none of the detainees had any rights under Geneva? It all turns on what you mean by "promoting respect" for Geneva, Feith explained. Geneva didn't apply at all to al-Qaeda fighters, because they weren't part of a state and therefore couldn't claim rights under a treaty that was binding only on states. Geneva did apply to the Taliban, but by Geneva's own terms Taliban fighters weren't entitled to P.O.W. status, because they hadn't worn uniforms or insignia. That would still leave the safety net provided by the rules reflected in Common Article 3— but detainees could not rely on this either, on the theory that its provisions applied only to "armed conflict not of an international character," which the administration interpreted to mean civil war. This was new. In reaching this conclusion, the Bush administration simply abandoned all legal and customary precedent that regards Common Article 3 as a minimal bill of rights for everyone.

In the administration's account there was no connection between the decision on Geneva and the new interrogation rules later approved by Rumsfeld for Detainee 063; its position on Geneva was dictated purely by the law itself. I asked Feith, just to be clear: Didn't the administration's approach mean that Geneva's constraints on interrogation couldn't be invoked by *anyone* at Guantánamo? "Oh yes, sure," he shot back. Was that the intended result?, I asked. "Absolutely," he replied. I asked again: Under the Geneva Conventions, no one at Guantánamo was entitled to any protection? "That's

the point," Feith reiterated. As he saw it, either you were a detainee to whom Geneva didn't apply or you were a detainee to whom Geneva applied but whose rights you couldn't invoke. What was the difference for the purpose of interrogation?, I asked. Feith answered with a certain satisfaction, "It turns out, none. But that's the point."

That indeed was the point. The principled legal arguments were a fig leaf. The real reason for the Geneva decision, as Feith now made explicit, was the desire to interrogate these detainees with as few constraints as possible. Feith thought he'd found a clever way to do this, which on the one hand upheld Geneva as a matter of law—the speech he made to Myers and Rumsfeld—and on the other pulled the rug out from under it as a matter of reality. Feith's argument was so clever that Myers continued to believe Geneva's protections remained in force—he was "well and truly hoodwinked," one seasoned observer of military affairs later told me.

Feith's argument prevailed. On February 7, 2002, President Bush signed a memorandum that turned Guantánamo into a Geneva-free zone. As a matter of policy, the detainees would be handled humanely, but only to the extent appropriate and consistent with military necessity. "The president said 'humane treatment,' " Feith told me, inflecting the term sourly, "and I thought that was O.K. Perfectly fine phrase that needs to be fleshed out, but it's a fine phrase—'humane treatment.' " The Common Article 3 restrictions on torture or "outrages upon personal dignity" were gone.

"This year I was really a player," Feith said, thinking back on 2002 and relishing the memory. I asked him whether, in the end, he was at all concerned that the Geneva decision might have diminished America's moral authority. He was not. "The problem with moral authority," he said, was "people who should know better, like yourself, siding with the assholes, to put it crudely."

"I Was on a Timeline"

As the traditional constraints on aggressive interrogation were removed, Rumsfeld wanted the right man to take charge of Joint Task Force 170, which oversaw military interrogations at Guantánamo. Two weeks after the decision on Geneva he found that man in Michael Dunlavey. Dunlavey was a judge in the Court of Common Pleas in Erie, Pennsylvania, a Vietnam veteran, and a major general in the reserves with a strong background in intelligence.

Dunlavey met one-on-one with Rumsfeld at the end of February. They both liked what they saw. When I met Dunlavey, now back at his office in Erie, he described that initial meeting: "He evaluated me. He wanted to know who I was. He was very focused on the need to get intelligence. He wanted to make sure that the moment was not lost." Dunlavey was a strong and abrasive personality ("a tyrant," one former JAG told me), but he was also a cautious man, alert to the nuances of instruction from above. Succinctly, Dunlavey described the mission Rumsfeld had given him. "He wanted me to 'maximize the intelligence production.' No one ever said to me, 'The gloves are off.' But I didn't need to talk about the Geneva Conventions. It was clear that they didn't apply." Rumsfeld told Dunlavey to report directly to him. To the suggestion that Dunlavey report to SouthCom, Dunlavey heard Rumsfeld say, "I don't care who he is under. He works for me."

He arrived at Guantánamo at the beginning of March. Planeloads of detainees were being delivered on a daily basis, though Dunlavey soon concluded that half of them had no intelligence value. He reported this to Rumsfeld, who referred the matter to Feith. Feith, Dunlavey said, resisted the idea of repatriating any detainees whatsoever. (Feith says he made a series of interagency proposals to repatriate detainees.)

Dunlavey described Feith to me as one of his main points of contact. Feith, for his part, had told me that he knew nothing about any specific interrogation issues until the Haynes Memo suddenly landed on his desk. But that couldn't be right—in the memo itself Haynes had written, "I have discussed this with the Deputy, Doug Feith and General Myers." I read the sentence aloud. Feith looked at me. His only response was to tell me that I had mispronounced his name. "It's Fythe," he said. "Not Faith."

In June, the focus settled on Detainee 063, Mohammed al-Qahtani, a Saudi national who had been refused entry to the

United States just before 9/11 and was captured a few months later in Afghanistan. Dunlavey described to me the enormous pressure he came under—from Washington, from the top—to find out what al-Qahtani knew. The message, he said, was: "Are you doing everything humanly possible to get this information?" He received a famous Rumsfeld "snowflake," a memo designed to prod the recipient into action. "I've got a short fuse on this to get it up the chain," Dunlavey told me, "I was on a timeline." Dunlavey held eye contact for more than a comfortable moment. He said, "This guy may have been the key to the survival of the U.S."

The interrogation of al-Qahtani relied at first on long-established F.B.I. and military techniques, procedures sanctioned by the Field Manual and based largely on building rapport. This yielded nothing. On August 8, al-Qahtani was placed in an isolation facility to separate him from the general detainee population. Pressure from Washington continued to mount. How high up did it go?, I asked Dunlavey. "It must have been all the way to the White House," he replied.

Meanwhile, unbeknownst to Dunlavey and the others at Guantánamo, interrogation issues had arisen in other quarters. In March 2002 a man named Abu Zubaydah, a high-ranking al-Qaeda official, was captured in Pakistan. C.I.A. director George Tenet wanted to interrogate him aggressively but worried about the risk of criminal prosecution. He had to await the completion of legal opinions by the Justice Department, a task that had been entrusted by Alberto Gonzales to Jay Bybee and John Yoo. "It took until August to get clear guidance on what Agency officers could legally do," Tenet later wrote. The "clear guidance" came on August 1, 2002, in memos written by Bybee and Yoo, with input from Addington. The first memo was addressed to Gonzales, redefining torture and abandoning the definition set by the 1984 torture convention. This was the Yoo-Bybee Memo made public by Gonzales nearly two years later, in the wake of Abu Ghraib. Nothing in the memo suggested that its use was limited to the C.I.A.; it referred broadly to "the conduct of interrogations outside of the United States." Gonzales would later contend that this policy memo did "not reflect the policies the administration ultimately adopted," but in fact it gave carte blanche to all the interrogation techniques later recommended by Haynes and approved by Rumsfeld. The second memo, requested by John Rizzo, a senior lawyer at the C.I.A., has never been made public. It spells out the specific techniques in detail. Dunlavey and his subordinates at Guantánamo never saw these memos and were not aware of their contents.

The lawyers in Washington were playing a double game. They wanted maximum pressure applied during interrogations, but didn't want to be seen as the ones applying it—they wanted distance and deniability. They also wanted legal cover for themselves. A key question is whether Haynes and Rumsfeld had knowledge of the content of these memos before they approved the new interrogation techniques for al-Qahtani. If they did, then the administration's official narrative—that the pressure for new techniques, and the legal support for them, originated on the ground at Guantánamo, from the "aggressive major general" and his staff lawyer—becomes difficult to sustain. More crucially, that knowledge is a link in the causal chain that connects the keyboards of Feith and Yoo to the interrogations of Guantánamo.

When did Haynes learn that the Justice Department had signed off on aggressive interrogation? All indications are that well before Haynes wrote his memo he knew what the Justice Department had advised the C.I.A. on interrogations and believed that he had legal cover to do what he wanted. Everyone in the upper echelons of the chain of decision-making that I spoke with, including Feith, General Myers, and General Tom Hill (the commander of SouthCom), confirmed to me that they believed at the time that Haynes had consulted Justice Department lawyers. Moreover, Haynes was a close friend of Bybee's. "Jim was tied at the hip with Jay Bybee," Thomas Romig, the army's former judge advocate general, told me. "He would quote him the whole time." Later, when asked during Senate hearings about his knowledge of the Yoo-Bybee Memo, Haynes would variously testify that he had not sought the memo, had not shaped its content, and did not possess a copy of it—but he carefully refrained from saying that he was unaware of its contents. Haynes, with whom I met on two occasions, will not speak on the record about this subject.

The Glassy-Eyed Men

As the first anniversary of 9/11 approached, Joint Task Force 170 was on notice to deliver results. But the task force was

not the only actor at Guantánamo. The C.I.A. had people there looking for recruits among the detainees. The Defense Intelligence Agency (D.I.A.) was interrogating detainees through its HUMINT (human intelligence) Augmentation Teams. The F.B.I. was carrying out its own traditional non-aggressive interrogations.

The source of the various new techniques has been the stuff of speculation. In the administration's official account, as noted, everything trickled up from the ground at Guantánamo. When I suggested to Mike Dunlavey that the administration's trickle-up line was counter-intuitive, he didn't disabuse me. "It's possible," he said, in a tone at once mischievous and unforthcoming, "that someone was sent to my task force and came up with these great ideas." One F.B.I. special agent remembers an occasion, before any new techniques had been officially sanctioned, when military interrogators set out to question al-Qahtani for 24 hours straight—employing a variation on a method that would later appear in the Haynes Memo. When the agent objected, he said he was told that the plan had been approved by "the secretary," meaning Rumsfeld.

Diane Beaver, Dunlavey's staff judge advocate, was the lawyer who would later be asked to sign off on the new interrogation techniques. When the administration made public the list, it was Beaver's legal advice the administration invoked. Diane Beaver gave me the fullest account of the process by which the new interrogation techniques emerged. In our lengthy conversations, which began in the autumn of 2006, she seemed coiled up—mistreated, hung out to dry. Before becoming a military lawyer Beaver had been a military police officer; once, while stationed in Germany, she had visited the courtroom where the Nuremberg trials took place. She was working as a lawyer for the Pentagon when the hijacked airplane hit on 9/11, and decided to remain in the army to help as she could. That decision landed her in Guantánamo.

It was clear to me that Beaver believed Washington was directly involved in the interrogations. Her account confirmed what Dunlavey had intimated, and what others have told me—that Washington's views were being fed into the process by people physically present at Guantánamo. D.I.A. personnel were among them. Later allegations would suggest a role for three C.I.A. psychologists.

During September a series of brainstorming meetings were held at Guantánamo to discuss new techniques. Some of the meetings were led by Beaver. "I kept minutes. I got everyone together. I invited. I facilitated," she told me. The sessions included representatives of the D.I.A. and the C.I.A. Ideas came from all over. Some derived from personal training experiences, including a military program known as SERE (Survival, Evasion, Resistance, and Escape), designed to help soldiers persevere in the event of capture. Had SERE been, in effect, reverse-engineered to provide some of the 18 techniques? Both Dunlavey and Beaver told me that SERE provided inspiration, contradicting the administration's denials that it had. Indeed, several Guantánamo personnel, including a psychologist and a psychiatrist, traveled to Fort Bragg, SERE's home, for a briefing.

Ideas arose from other sources. The first year of Fox TV's dramatic series *24* came to a conclusion in spring 2002, and the second year of the series began that fall. An inescapable message of the program is that torture works. "We saw it on cable," Beaver recalled. "People had already seen the first series. It was hugely popular." Jack Bauer had many friends at Guantánamo, Beaver added. "He gave people lots of ideas."

The brainstorming meetings inspired animated discussion. "Who has the glassy eyes?," Beaver asked herself as she surveyed the men around the room, 30 or more of them. She was invariably the only woman present—as she saw it, keeping control of the boys. The younger men would get particularly agitated, excited even. "You could almost see their dicks getting hard as they got new ideas," Beaver recalled, a wan smile flickering on her face. "And I said to myself, You know what? I don't have a dick to get hard—I can stay detached."

Not everyone at Guantánamo was enthusiastic. The F.B.I. and the Naval Criminal Investigative Service refused to be associated with aggressive interrogation. They opposed the techniques. One of the N.C.I.S. psychologists, Mike Gelles, knew about the brainstorming sessions but stayed away. He was dismissive of the administration's contention that the

techniques trickled up on their own from Guantánamo. "That's not accurate," he said flatly. "This was not done by a bunch of people down in Gitmo—no way."

That view is buttressed by a key event that has received virtually no attention. On September 25, as the process of elaborating new interrogation techniques reached a critical point, a delegation of the administration's most senior lawyers arrived at Guantánamo. The group included the president's lawyer, Alberto Gonzales, who had by then received the Yoo-Bybee Memo; Vice President Cheney's lawyer, David Addington, who had contributed to the writing of that memo; the C.I.A.'s John Rizzo, who had asked for a Justice Department sign-off on individual techniques, including waterboarding, and received the second (and still secret) Yoo-Bybee Memo; and Jim Haynes, Rumsfeld's counsel. They were all well aware of al-Qahtani. "They wanted to know what we were doing to get to this guy," Dunlavey told me, "and Addington was interested in how we were managing it." I asked what they had to say. "They brought ideas with them which had been given from sources in D.C.," Dunlavey said. "They came down to observe and talk." Throughout this whole period, Dunlavey went on, Rumsfeld was "directly and regularly involved."

Beaver confirmed the account of the visit. Addington talked a great deal, and it was obvious to her that he was a "very powerful man" and "definitely the guy in charge," with a booming voice and confident style. Gonzales was quiet. Haynes, a friend and protégé of Addington's, seemed especially interested in the military commissions, which were to decide the fate of individual detainees. They met with the intelligence people and talked about new interrogation methods. They also witnessed some interrogations. Beaver spent time with the group. Talking about the episode even long afterward made her visibly anxious. Her hand tapped and she moved restlessly in her chair. She recalled the message they had received from the visitors: Do "whatever needed to be done." That was a green light from the very top—the lawyers for Bush, Cheney, Rumsfeld, and the C.I.A. The administration's version of events—that it became involved in the Guantánamo interrogations only in November, after receiving a list of techniques out of the blue from the "aggressive major general"—was demonstrably false.

"A Dunk in the Water"

Two weeks after this unpublicized visit the process of compiling the list of new techniques was completed. The list was set out in a three-page memorandum from Lieutenant Colonel Jerald Phifer, dated October 11 and addressed to Dunlavey.

The Phifer Memo identified the problem: "current guidelines" prohibited the use of "physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." The prohibition dated back to 1863 and a general order issued by Abraham Lincoln.

The list of new interrogation techniques turned its back on this tradition. The 18 techniques were divided into three categories and came with only rudimentary guidance. No limits were placed on how many methods could be used at once, or for how many days in succession. The detainee was to be provided with a chair. The environment should be generally comfortable. If the detainee was uncooperative, you went to Category I. This comprised two techniques, yelling and deception.

If Category I produced no results, then the military interrogator could move to Category II. Category II included 12 techniques aimed at humiliation and sensory deprivation: for instance, the use of stress positions, such as standing; isolation for up to 30 days; deprivation of light and sound; 20-hour interrogations; removal of religious items; removal of clothing; forcible grooming, such as the shaving of facial hair; and the use of individual phobias, such as the fear of dogs, to induce stress.

January 2002: detainees in a holding area at Guantánamo's Camp X-Ray, the original detention facility, where the first military interrogations took place. *By Ron Sachs/CNP/Corbis.*

Finally came Category III, for the most exceptionally resistant. Category III included four techniques: the use of "mild, non-injurious physical contact," such as grabbing, poking, and light pushing; the use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; exposure to cold weather or water; and waterboarding. This last technique, which powerfully mimics the experience of drowning, was later described by Vice President Cheney as a "dunk in the water."

By the time the memo was completed al-Qahtani had already been separated from all other detainees for 64 days, in a cell that was "always flooded with light." An F.B.I. agent described his condition the following month, just as the new interrogation techniques were first being directed against him: the detainee, a 2004 memo stated, "was talking to non-existent people, reporting hearing voices, [and] crouching in a corner of the cell covered with a sheet for hours on end."

Ends and Means

Diane Beaver was insistent that the decision to implement new interrogation techniques had to be properly written up and that it needed a paper trail leading to authorization from the top, not from "the dirt on the ground," as she self-deprecatingly described herself. "I just wasn't comfortable giving oral advice," she explained, as she had been requested to do. "I wanted to get something in writing. That was my game plan. I had four days. Dunlavey gave me just four days." She says she believed that senior lawyers in Washington would review her written advice and override it if necessary. It never occurred to her that on so important an issue she would be the one to provide the legal assessment on which the entire matter would appear to rest—that her word would be the last word. As far as she was concerned, getting the proposal "up the command" was victory enough. She didn't know that people much higher up had already made their decisions, had the security of secret legal cover from the Justice Department, and, although confident of their own legal protection, had no intention of soiling their hands by weighing in on the unpleasant details of interrogation.

Marooned in Guantánamo, Beaver had limited access to books and other documents, although there was Internet access to certain legal materials. She tried getting help from more experienced lawyers—at SouthCom, the Joint Chiefs, the D.I.A., the JAG School—but to no avail.

In the end she worked on her own, completing the task just before the Columbus Day weekend. Her memo was entitled "Legal Review of Aggressive Interrogation Techniques." The key fact was that none of the detainees were protected by Geneva, owing to Douglas Feith's handiwork and the president's decision in February. She also concluded that the torture convention and other international laws did not apply, conclusions that a person more fully schooled in the relevant law might well have questioned: "It was not my job to second-guess the president," she told me. Beaver ignored customary international law altogether. All that was left was American law, which is what she turned to.

Given the circumstances in which she found herself, the memo has a certain desperate, heroic quality. She proceeded

methodically through the 18 techniques, testing each against the standards set by U.S. law, including the Eighth Amendment to the Constitution (which prohibits "cruel and unusual punishment"), the federal torture statute, and the Uniform Code of Military Justice. The common theme was that the techniques were fine "so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate government objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm." That is to say, the techniques are legal if the motivation is pure. National security justifies anything.

Beaver did enter some important caveats. The interrogators had to be properly trained. Since the law required "examination of all facts under a totality of circumstances test," all proposed interrogations involving Category II and III methods had to "undergo a legal, medical, behavioral science, and intelligence review prior to their commencement." This suggested concerns about these new techniques, including whether they would be effective. But in the end she concluded, I "agree that the proposed strategies do not violate applicable federal law." The word "agree" stands out—she seems to be confirming a policy decision that she knows has already been made.

Time and distance do not improve the quality of the advice. I thought it was awful when I first read it, and awful when I reread it. Nevertheless, I was now aware of the circumstances in which Beaver had been asked to provide her advice. Refusal would have caused difficulty. It was also reasonable to expect a more senior review of her draft. Beaver struck me as honest, loyal, and decent. Personally, she was prepared to take a hard line on many detainees. She once described them to me as "psychopaths. Skinny, runty, dangerous, lying psychopaths." But there was a basic integrity to her approach. She could not have anticipated that there would be no other piece of written legal advice bearing on the Guantánamo interrogations. She could not have anticipated that she would be made the scapegoat.

Once, after returning to a job at the Pentagon, Beaver passed David Addington in a hallway—the first time she had seen him since his visit to Guantánamo. He recognized her immediately, smiled, and said, "Great minds think alike."

The "VOCO"

On October 11, Dunlavey sent his request for approval of new techniques, together with Diane Beaver's legal memo, to General Tom Hill, the commander of SouthCom. Two weeks later, on October 25, Hill forwarded everything to General Myers, the chairman of the Joint Chiefs, in Washington. Hill's cover letter contains a sentence—"Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ"—which again makes it clear that the list of techniques was no surprise to Rumsfeld's office, whatever its later claims. Hill also expressed serious reservations. He wanted Pentagon lawyers to weigh in, and he explicitly requested that "Department of Justice lawyers review the third category of techniques."

At the level of the Joint Chiefs the memo should have been subject to a detailed review, including close legal scrutiny by Myers's own counsel, Jane Dalton, but that never happened. It seems that Jim Haynes short-circuited the approval process. Alberto Mora, the general counsel of the navy, says he remembers Dalton telling him, "Jim pulled this away. We never had a chance to complete the assessment."

When we spoke, Myers confessed to being troubled that normal procedures had been circumvented. He held the Haynes Memo in his hands, looking carefully at the sheet of paper as if seeing it clearly for the first time. He pointed: "You don't see my initials on this." Normally he would have initialed a memo to indicate approval, but there was no confirmation that Myers had seen the memo or formally signed off on it before it went to Rumsfeld. "You just see I've 'discussed' it," he said, noting a sentence to that effect in the memo itself. "This was not the way this should have come about." Thinking back, he recalled the "intrigue" that was going on, intrigue "that I wasn't aware of, and Jane wasn't aware of, that was probably occurring between Jim Haynes, White House general counsel, and Justice."

Further confirmation that the Haynes Memo got special handling comes from a former Pentagon official, who told me that Lieutenant General Bantz Craddock, Rumsfeld's senior military assistant, noticed that it was missing a buck slip, an

essential component that shows a document's circulation path, and which everyone was supposed to initial. The Haynes Memo had no "legal chop," or signature, from the general counsel's office. It went back to Haynes, who later signed off with a note that said simply, "Good to go."

Events moved fast as the process was cut short. On November 4, Dunlavey was replaced as commander at Guantánamo by Major General Geoffrey Miller. On November 12 a detailed interrogation plan was approved for al-Qahtani, based on the new interrogation techniques. The plan was sent to Rumsfeld for his personal approval, General Hill told me.

Ten days later an alternative plan, prepared by Mike Gelles and others at the N.C.I.S. and elsewhere, using traditional non-aggressive techniques, was rejected. By then the F.B.I. had communicated its concerns to Haynes's office about developments at Guantánamo. On November 23, well before Rumsfeld gave formal written approval to the Haynes Memo, General Miller received a "VOCO"—a vocal command—authorizing an immediate start to the aggressive interrogation of al-Qahtani. No one I spoke with, including Beaver, Hill, and Myers, could recall who had initiated the VOCO, but an army investigation would state that it was likely Rumsfeld, and he would not have acted without Haynes's endorsement.

Al-Qahtani's interrogation log for Saturday, November 23, registers the immediate consequence of the decision to move ahead. "The detainee arrives at the interrogation booth His hood is removed and he is bolted to the floor."

Reversal

Four days after the VOCO, Haynes formally signed off on his memo. He recommended, as a matter of policy, approval of 15 of the 18 techniques. Of the four techniques listed in Category III, however, Haynes proposed blanket approval of just one: mild non-injurious physical contact. He would later tell the Senate that he had "recommended against the proposed use of a wet towel"—that is, against waterboarding—but to the contrary, in his memo he stated that "all Category III techniques may be legally available." Rumsfeld placed his name next to the word "Approved" and wrote the jocular comment that may well expose him to difficulties in the witness stand at some future time.

As the memo was being approved, the F.B.I. communicated serious concerns directly to Haynes's office. Then, on December 17, Dave Brant, of the N.C.I.S., paid a surprise visit to Alberto Mora, the general counsel of the navy. Brant told him that N.C.I.S. agents had information that abusive actions at Guantánamo had been authorized at a "high level" in Washington. The following day Mora met again with Brant. Mike Gelles joined them and told Mora that the interrogators were under extraordinary pressure to achieve results. Gelles described the phenomenon of "force drift," where interrogators using coercion come to believe that if some force is good, then more must be better. As recounted in his official "Memorandum for Inspector General, Department of the Navy," Mora visited Steve Morello, the army's general counsel, and Tom Taylor, his deputy, who showed him a copy of the Haynes Memo with its attachments. The memorandum describes them as demonstrating "great concern." In the course of a long interview Mora recalled Morello "with a furtive air" saying, "Look at this. Don't tell anyone where you got it." Mora was horrified by what he read. "I was astounded that the secretary of defense would get within 100 miles of this issue," he said. (Notwithstanding the report to the inspector general, Morello denies showing Mora a copy of the Haynes Memo.)

On December 20, Mora met with Haynes, who listened attentively and said he would consider Mora's concerns. Mora went away on vacation, expecting everything to be sorted out. It wasn't: Brant soon called to say the detainee mistreatment hadn't stopped. On January 9, 2003, Mora met Haynes for a second time, expressing surprise that the techniques hadn't been stopped. Haynes said little in response, and Mora felt he had made no headway. The following day, however, Haynes called to say that he had briefed Rumsfeld and that changes were in the offing. But over the next several days no news came.

On the morning of Wednesday, January 15, Mora awoke determined to act. He would put his concerns in writing in a draft memorandum for Haynes and Dalton. He made three simple points. One: the majority of the Category II and III

techniques violated domestic and international law and constituted, at a minimum, cruel and unusual treatment and, at worst, torture. Two: the legal analysis by Diane Beaver had to be rejected. Three: he "strongly non-concurred" with these interrogation techniques. He delivered the draft memo to Haynes's office. Two hours later, at about five p.m. on January 15, Haynes called Mora. "I'm pleased to tell you the secretary has rescinded the authorization," he said.

The abusive interrogation of al-Qahtani lasted a total of 54 days. It ended not on January 12, as the press was told in June 2004, but three days later, on January 15. In those final three days, knowing that the anything-goes legal regime might disappear at any moment, the interrogators made one last desperate push to get something useful out of al-Qahtani. They never did. By the end of the interrogation al-Qahtani, according to an army investigator, had "black coals for eyes."

The Great Migration

Mike Gelles, of the N.C.I.S., had shared with me his fear that the al-Qahtani techniques would not simply fade into history—that they would turn out to have been horribly contagious. This "migration" theory was controversial, because it potentially extended the responsibility of those who authorized the Guantánamo techniques to abusive practices elsewhere. John Yoo has described the migration theory as "an exercise in hyperbole and partisan smear."

But is it? In August 2003, Major General Miller traveled from Guantánamo to Baghdad, accompanied by Diane Beaver. They visited Abu Ghraib and found shocking conditions of near lawlessness. Miller made recommendations to Lieutenant General Ricardo Sanchez, the commander of coalition forces in Iraq. On September 14, General Sanchez authorized an array of new interrogation techniques. These were vetted by his staff judge advocate, who later told the Senate Armed Services Committee that operating procedures and policies "in use in Guantánamo Bay" had been taken into account. Despite the fact that Geneva applied in Iraq, General Sanchez authorized several techniques that were not sanctioned by the Field Manual—but were listed in the Haynes Memo. The abuses for which Abu Ghraib became infamous began one month later.

Three different official investigations in the space of three years have confirmed the migration theory. The August 2006 report of the Pentagon's inspector general concluded unequivocally that techniques from Guantánamo had indeed found their way to Iraq. An investigation overseen by former secretary of defense James R. Schlesinger determined that "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded."

Jim Haynes and Donald Rumsfeld may have reversed themselves about al-Qahtani in January 2003, but the death blow to the administration's outlook did not occur for three more years. It came on June 29, 2006, with the U.S. Supreme Court's ruling in *Hamdan* v. *Rumsfeld*, holding that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Douglas Feith and John Yoo, and laid bare the blatant illegality of al-Qahtani's interrogation. A colleague having lunch with Haynes that day described him as looking "shocked" when the news arrived, adding, "He just went pale." Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.' "

Jim Haynes appears to remain a die-hard supporter of aggressive interrogation. Shortly after the Supreme Court decision, when he appeared before the Senate Judiciary Committee, Senator Patrick Leahy reminded him that in 2003 Haynes had said there was "no way" that Geneva could apply to the Afghan conflict and the war on terror. "Do you now accept that you were mistaken in your legal and policy determinations?," Leahy asked. Haynes would say only that he was bound by the Supreme Court's decision.

As the consequences of *Hamdan* sank in, the instinct for self-preservation asserted itself. The lawyers got busy. Within four months President Bush signed into law the Military Commissions Act. This created a new legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001, and

December 30, 2005. That covered the interrogation of al-Qahtani, and no doubt much else. Signing the bill on October 17, 2006, President Bush explained that it provided "legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs."

In a word, the interrogators and their superiors were granted immunity from prosecution. Some of the lawyers who contributed to this legislation were immunizing themselves. The hitch, and it is a big one, is that the immunity is good only within the borders of the United States.

A Tap on the Shoulder

The table in the conference room held five stacks of files and papers, neatly arranged and yellow and crisp with age. Behind them sat an elderly gentleman named Ludwig Altstötter, rosy-cheeked and cherubic. Ludwig is the son of Josef Altstötter, the lead defendant in the 1947 case *United States of America* v. *Josef Altstoetter et al.*, which was tried in Germany before a U.S. military tribunal. The case is famous because it appears to be the only one in which lawyers have ever been charged and convicted for committing international crimes through the performance of their legal functions. It served as the inspiration for the Oscar-winning 1961 movie *Judgment at Nuremberg*, whose themes are alluded to in Marcel Ophuls's classic 1976 film on wartime atrocities, *The Memory of Justice*, which should be required viewing but has been lost to a broader audience. Nuremberg was, in fact, where Ludwig and I were meeting.

The Altstötter case had been prosecuted by the Allies to establish the principle that lawyers and judges in the Nazi regime bore a particular responsibility for the regime's crimes. Sixteen lawyers appeared as defendants. The scale of the Nazi atrocities makes any factual comparison with Guantánamo absurd, a point made to me by Douglas Feith, and with which I agree. But I wasn't interested in drawing a facile comparison between historical episodes. I wanted to know more about the underlying principle.

Josef Altstötter had the misfortune, because of his name, to be the first defendant listed among the 16. He was not the most important or the worst, although he was one of the 10 who were in fact convicted (4 were acquitted, one committed suicide, and there was one mistrial). He was a well-regarded member of society and a high-ranking lawyer. In 1943 he joined the Reich Ministry of Justice in Berlin, where he served as a *Ministerialdirektor*, the chief of the civil-law-and-procedure division. He became a member of the SS in 1937. The U.S. Military Tribunal found him guilty of membership in that criminal organization—with knowledge of its criminal acts—and sentenced him to five years in prison, which he served in full. He returned to legal practice in Nuremberg and died in 1979. Ludwig Altstötter had all the relevant documents, and he generously invited me to go over them with him in Nuremberg.

I took Ludwig to the most striking passage in the tribunal's judgment. "He gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organisation from the eyes of the German people." The tribunal convicted Altstötter largely on the basis of two letters. Ludwig went to the piles on the table and pulled out fading copies of the originals. The first, dated May 3, 1944, was from the chief of the SS intelligence service to Ludwig's father, asking him to intervene with the regional court of Vienna and stop it from ordering the transfer of Jews from the concentration camp at Theresienstadt back to Vienna to appear as witnesses in court hearings. The second letter was Altstötter's response, a month later, to the president of the court in Vienna. "For security reasons," he wrote, "these requests cannot be granted." The U.S. Military Tribunal proceeded on the basis that Altstötter would have known what the concentration camps were for.

The words "security reasons" reminded me of remarks by Jim Haynes at the press conference with Gonzales: "Military necessity can sometimes allow ... warfare to be conducted in ways that might infringe on the otherwise applicable articles of the Convention." Haynes provided no legal authority for that proposition, and none exists. The minimum rights of detainees guaranteed by Geneva and the torture convention can never be overridden by claims of security or other military necessity. That is their whole purpose.

Mohammed al-Qahtani is among the first six detainees scheduled to go on trial for complicity in the 9/11 attacks; the Bush administration has announced that it will seek the death penalty. Last month, President Bush vetoed a bill that would have outlawed the use by the C.I.A. of the techniques set out in the Haynes Memo and used on al-Qahtani. Whatever he may have done, Mohammed al-Qahtani was entitled to the protections afforded by international law, including Geneva and the torture convention. His interrogation violated those conventions. There can be no doubt that he was treated cruelly and degraded, that the standards of Common Article 3 were violated, and that his treatment amounts to a war crime. If he suffered the degree of severe mental distress prohibited by the torture convention, then his treatment crosses the line into outright torture. These acts resulted from a policy decision made right at the top, not simply from ground-level requests in Guantánamo, and they were supported by legal advice from the president's own circle.

Those responsible for the interrogation of Detainee 063 face a real risk of investigation if they set foot outside the United States. Article 4 of the torture convention criminalizes "complicity" or "participation" in torture, and the same principle governs violations of Common Article 3.

It would be wrong to consider the prospect of legal jeopardy unlikely. I remember sitting in the House of Lords during the landmark Pinochet case, back in 1999—in which a prosecutor was seeking the extradition to Spain of the former Chilean head of state for torture and other international crimes—and being told by one of his key advisers that they had never expected the torture convention to lead to the former president of Chile's loss of legal immunity. In my efforts to get to the heart of this story, and its possible consequences, I visited a judge and a prosecutor in a major European city, and guided them through all the materials pertaining to the Guantánamo case. The judge and prosecutor were particularly struck by the immunity from prosecution provided by the Military Commissions Act. "That is very stupid," said the prosecutor, explaining that it would make it much easier for investigators outside the United States to argue that possible war crimes would never be addressed by the justice system in the home country—one of the trip wires enabling foreign courts to intervene. For some of those involved in the Guantánamo decisions, prudence may well dictate a more cautious approach to international travel. And for some the future may hold a tap on the shoulder.

"It's a matter of time," the judge observed. "These things take time." As I gathered my papers, he looked up and said, "And then something unexpected happens, when one of these lawyers travels to the wrong place."

Philippe Sands is an international lawyer at the firm Matrix Chambers and a professor at University College London. His latest book is *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan).

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Mr. NADLER. I thank you and I thank the other witnesses. The Chair will now recognize himself for 5 minutes for the purpose of questioning the witnesses.

Professor Luban, you have written that the lawyers advising the Bush Administration on the legality of U.S. interrogation policies, including Alberto Gonzales, David Addington, Jay Bybee and John Yoo, showed a "willingness to bend or break the law to make their client's wishes come true."

Can you give a couple of concrete examples of ways that the law was bent or broken by their advice?

Mr. LUBAN. Yes. A couple of examples would be this: Mr. Yoo's two memos, the March 14, 2003 and August 1, 2002, both make an extraordinary claim of executive power, which is that the President, acting as Commander-in-Chief, can simply override any statute in the book, including the statute on torture.

Now a lawyer is supposed to present adverse legal authority as well as legal authority that supports the view. And here there are leading Supreme Court precedents that just say the opposite, the famous Youngstown case.

But there was an 1804 case called *Little v. Barreme* from the quasi war with France in which Congress had restricted what the navy could do. President Adams ordered a captain to violate that restriction, and the Supreme Court said that the President's order was not a shield against liability.

Those cases aren't even mentioned. That is the kind of thing that is a violation of the craft value that lawyers have.

Second would be this drawing of the definition of torture from a Medicare statute. The Medicare statute says, quite common sensically, that severe pain can be the symptom of a medical emergency. Mr. Yoo turns this around and says that unless the pain is organ failure or death, or a level associated with organ failure or death, it is not severe.

When Mr. Levin withdrew that opinion and replaced it with another, he said, quite plausibly, that Medicare statute wasn't trying to define severe pain. And if you took that literally, then you would think that, for example, if a dentist's drill hits a root and you jump out of the chair, well you know that is not organ failure or death, so that is not severe pain. And that simply violates common sense.

Mr. NADLER. Thank you. And in your article, "Liberalism, Torture and the Ticking Time Bomb," you say that it would be a dramatic mistake to suppose that the Justice Department has abandoned its views merely because it has disowned the Bybee memo.

Can you briefly explain what you mean? I mean, why you think it is clear that the Justice Department has not abandoned its views?

Mr. LUBAN. Yes, for a couple of reasons. After the Bybee memo was withdrawn, then the Levin memo was substituted, the Levin memo says in a footnote that all of the techniques that had been approved under the Bybee memo are still approved.

As for the commander-in-chief override argument, the Levin memo doesn't disown it. It says, well, there is no need for us to discuss it.

As for the criminal defenses in the Bybee memo, it doesn't reject those criminal defenses, it just says, well, since we don't torture, there is no need to discuss those.

And finally, one place that it completely stretches the law is in its definition of what severe physical suffering is. It states that severe physical suffering has to be prolonged.

Now if you look at the statute, that isn't in there at all. It was mentioned by Congressman Franks, I believe, that everybody who has been waterboarded broke in less than a minute, and it looks as though that language would say, well, therefore waterboarding can't be severe physical suffering because it wasn't prolonged.

Mr. NADLER. Thank you. Mr. Cohn, does the Military Commissions Act give officials of the Bush Administration immunity from prosecution under the War Crimes Act?

Ms. COHN. No. While we would argue that it tends to immunize those complicit in torture from criminal or civil liability is not permitted under the doctrine of jus cogens, the military can be protected——

Mr. NADLER. Under the doctrine of what?

Ms. COHN. Jus cogens, Latin for "the highest compelling law," like slavery, genocide and wars of aggression. But no, the Military Commissions Act does not provide immunity from prosecution. What the provision does is to provide that good faith reliance on the advice of counsel would be a defense to war crimes prosecutions.

But it could be proved that they were not acting in good faith reliance on the advice of counsel for several reasons. Number one, the advice was inherently and flagrantly not a good faith interpretation of the law.

Number two, they all knew that, and that is why they performed this so-called analysis in secret, avoiding all the normal processes that they usually use to arrive at these decisions.

And number three, they lied about the matter, both to the people within the Administration and the public, making numerous false exculpatory statements which can be considered evidence of guilt.

So the Administration's effort to avoid accountability under the Military Commissions Act is further evidence of their guilt and can be used as an——

Mr. NADLER. Fine. Now one more question before my time runs out. In the attachment to your testimony, you outline the case for criminal prosecution for the lawyers involved in the formulation of the interrogation policies at issue. From what U.S. laws and precedent do you draw your conclusions?

In other words, under American law, how could Administration lawyers face criminal liability for their counsel?

Ms. COHN. We have statutes that prohibit conspiracy. For example, the torture statute, which is a U.S. law, prohibits the conspiracy to commit torture, and it would be, I think, not difficult to show that these lawyers were part of a conspiracy, a common plan.

In fact, John Yoo said, we had a common strategy here. They got together on it. So I think that it clearly could come under conspiracy laws that they would be part of a criminal conspiracy to violate U.S. laws against torture.

Mr. NADLER. Thank you. Just one further question. How long is the statute of limitations on these crimes?

Ms. COHN. The statute of limitations under jus cogens prohibition is never. There is no statute of limitations at all for violation of a jus cogens norm.

Mr. NADLER. Thank you. My time is expired. I will now recognize for 5 minutes the distinguished Ranking Member of the Subcommittee, the gentleman from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman. Professor Cohn—forgive me, Mr. Luban, I was kind of moved by your comments relating to activist lawyers, because I happen to agree with you that lawyers shouldn't spin the law to reach a predetermined conclusion that their definition of a statute should be the same whether or not they were giving this to an opponent or to a client.

And I agree with that. In fact, with all due respect here, we have been hoping on the Republican side that we could get our Democrat friends to apply those standards to judges, because we think that is very, very important that the law should stand as it is written, not how interpreted in some way to twist it.

So I thought I would throw that out, and I will ask you something a little bit more of a contentious nature. You criticized how the term "severe pain"——[Laughter.]

Mr. FRANKS. You know how "severe pain" was defined in the Federal Anti-Torture Statute. Pretend that we are clients here of yours and that we are asking you for the bottom line here. How would you define that term, "severe pain," as written in the Federal Anti-Torture Statute?

Mr. LUBAN. The main point that I would make is that severe pain is not a technical legal term of art. It is a common sense term. As you might well imagine there is not a huge and rich jurisprudence on the boundaries of torture.

Mr. FRANKS. But you couldn't give us a definition of your own in that regard?

Mr. LUBAN. I think that at least one of the things that I would say is that it is the kind of pain that all of us would recognize as severe. For example, the dentist's drill, a broken bone, pain of that level.

The pain—if we are talking about waterboarding, I think we are talking not about pain so much as suffering, the feeling of pint after pint of water pouring down your throat.

You can only define these things by example and by appealing to subjective experience. And I would like to say that when Mr. Yoo says I was trying to get specific, I don't see anything more specific and less vague about saying the pain associated with organ failure or death.

If you ask me, well, what is that? I would say, well, I actually don't know. Haven't been there.

Mr. FRANKS. Well, that is why we were trying to ask you to define it. Ms. Cohn, just to respond related to waterboarding being torture, first of all, I want to point out that the waterboarding that the three terrorists that were in my testimony was done under very, very controlled circumstances for a very short period of time.

But as you know, our soldiers are as a matter of a training, some of our special forces and other soldiers are waterboarded to train

them. Now if indeed that is torture, do you not think that we shouldn't be doing that? I mean, to torture our own soldiers. So that is why I make the distinction between waterboarding and torture.

The question I have for you is, if you were writing a statute on severe interrogations, or interrogations of any kind that would involve terrorists who may have information that would save innocent American lives and refuse to give that information, what kinds of techniques would you think should be—what would you recommend to the government to use? What kind of techniques, if they were unwilling to voluntarily give information and if the information were critical to saving American lives, what could we do? What is the severest thing that we could do to get that information?

Ms. COHN. Thank you, Mr. Franks, for that question. First of all, no, I don't think we should be torturing our own soldiers, or anyone else for that matter. Torture is illegal when practiced against anyone.

What kind of statute would I write? I would write a statute that says that when you are interrogating a prisoner and you want to get information from him, you treat him with kindness, compassion and empathy. You gain his trust, you get him to like and trust you and then he will turn over information to you.

Torture does not work. And for example, Khalid Sheikh Mohammed and Abu Zabeda were tortured so severely that they confessed to al-Qaida targeting just about every building in the world.

Their information is virtually useless because of the torture. People will say anything to get the torture to stop. And we lost rich sources of intelligence because of that.

And contrary to what you said, there are reports that say that Abu Zabeda did not lead the Americans to Khalid Sheikh Mohammed, that someone was responding to a $25 million reward and walked in.

And also, do you believe that when the Administration says its waterboarding only lasts——

Mr. FRANKS. Mr. Chairman, Ms. Cohn, my time is about gone here.

Ms. COHN. I don't believe that.

Mr. FRANKS. I appreciate your comments here. I just have to say that to think that terrorists committed to the destruction of the western world, if you be nice to them, we will respond favorably. I think that is naive and I think al-Qaida would love for you to write that statute. And I say that not disrespectfully toward you.

Mr. Rivkin, do you have any closing comments on either of these testimony?

Mr. RIVKIN. Very briefly. I certainly do not agree with Professor Cohn. I think that it is a moral cop-out to argue that coercive techniques do not work because if they don't work, there will be nothing to debate.

Coercive techniques do work. There is plenty of evidence to that effect. It doesn't mean that anything goes, but what we need to have as a society is a serious dialogue along the lines of the question that you just asked, Congressman Franks, what is severe?

And let me tell you, I have debated this issue ad nauseum more than I care to. And most of the critics do not want to go down the path of defining what is severe.

And let's stipulate that maybe John Yoo's definition is a little narrow, but nobody wants to come up with any, any techniques. And what is particularly appalling to me is, if you at least somebody who wants to abolish all forms of coercion in the public sphere, be it in boot camp for juvenile offender, be it in a police station, there is plenty of psychological coercion going on.

Hopefully not physical, but plenty of psychological coercion going on in treatment of our own soldiers. But nobody cares about it. What the critics mostly want is to create only one portion of the public sphere that is coercion free, that is interrogating captured al-Qaida and Taliban detainees.

And that to me makes absolutely no moral or legal sense. And by the way, the point that Professor Luban made about the appellation protracted being used with regard to mental suffering and not physical, with all due respect, there are plenty of cases that stand for the proposition that that does not necessarily prevent the executive from construing the statute in a way that has a temporal element with regard to the physical pain and suffering. Does any normal person disagree that there is at least, in some circumstances, a temporal element?

That for example, the definition of severe pain and suffering that, for example, a stress position of 10 minutes is not mildly annoying. For 10 hours, it would be very painful. For 24 hours, it would be tortuous.

So of course there is that. So the notions it will proudly proclaim in the Congress, put the word "protracted" here. Okay, actually, the Latin term for that is expresso unius exclusio alterius. There is plenty of case law that says that doesn't necessarily mean that you cannot construe it this way.

Mr. NADLER. Thank you. The gentlemen's time has expired. I will now recognize for 5 minutes the distinguished Committee Chairman, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I want to commend the witnesses. This is an excellent examination of torture, the documents controlling them, how they were created, and who wrote them. Namely, we now know, lawyers.

So this is a good way to begin to get to the truth. And I think that we need to look at a number of other witnesses, some who have already agreed to come to our next hearing, some who will need more prodding through the legislative, coercive process, nonviolent, of course.

But I didn't think I would ask you a question, Attorney Rivkin, but do you have a definition of pain that you would like to leave with us? Because we are trying to find out.

I am going to be working on that, and I would like to keep your admonitions in mind.

Mr. RIVKIN. Chairman Conyers, I appreciate the question. Actually, I would like to reflect on it and maybe submit something in writing, because these are not easy decisions.

And I also would like to point out that hopefully, just because something is legal does not mean that you do it as a matter of pol-

icy. One of my problems is people commingle the legal box and the policy box.

The legal box can be yay-wide, doesn't mean that the policy box has to follow.

Mr. CONYERS. Well, let's continue to work on this together. You are a frequent witness anyway.

Mr. RIVKIN. Thank you.

Mr. CONYERS. Philippe Sands, we welcome you again here from overseas. What do you make of this, I think, very commendable beginning of the inquiry that has gone on about this. Marjorie Cohn has given us a to-do list for the Committee, which we appreciate.

And I think that is a good start. And I would like to ask you and any other of the witnesses, other things that they pursue and means of inquiry that we might engage in.

Mr. SANDS. Thank you very much for that question.

Mr. NADLER. Sir, would you turn on your mic, please?

Mr. SANDS. Thank you very much for that question, sir. I think the country, if I may say, finds itself at an important moment, because I think it is in everyone's interest that on this issue there is a degree of uniting and moving on, particularly in relation to the military interrogations that have, to the best of my knowledge, come to an end in terms of their abusive characteristics, although there is the issue of the CIA stuff.

Nevertheless, looking back to history is important as part of that process of moving on. And the Military Commissions Act of 2006 in that regard is extremely unhelpful, because whatever it purports to do in relation to immunization of lawyers or anyone else involved, it does sort of freeze the process of investigation.

It seems to me that to enable the United States to move on, and its allies with it, it would be extremely useful to throw the spotlight onto what actually happened during 2002.

I note from the exchange of letters, sir, between you and the Office of the Vice President that Mr. Addington indicates that he may be willing to come to address certain matters. One of the matters that he addresses, or says that he would possibly be willing to come, is to seek material information on "personal knowledge of key historical facts."

Those have not yet emerged in a forum such as this. Mr. Addington, in the story I looked at, appears throughout the story. He was deeply involved in the decision to get rid of Geneva. He was deeply involved in the decision to move to aggressive interrogation, including through the DOJ memos.

He visited Guantanamo at the end of September 2002 and met with Major General Dunleavey and Lieutenant Colonel Beaver. And the accounts that I received from them on the record, as I describe in the book, is that he was, in effect, the leader of the pack, and he was the person who was driving through the policy.

And I think questions and issues that go to that role may be extremely important. He was closely assisted by his friend and confidante, Mr. Haynes.

When the request that essentially had been imposed from the top, but then made its way back up to the Pentagon via General Hill in SOUTHCOM, made its way to General Myers, I describe in the book how General Myers' lawyer, Jane Dalton, who I think you

might also profitably talk to, described to Alberto Mora how the assessment that they would have liked to have made in Joint Chiefs never happened because Jim Haynes intervened to short-circuit the process.

I think it would be useful, sir, to focus on the facts. And with great respect, I don't think there is a great deal of utility to teasing out the issues of what actually constitutes severe mental pain and suffering.

There is a huge jurisprudence in American law. I am not expert on that. I do know about the jurisprudence in international law.

And one thing that one learns is you treat each case on its own merits. You can't come up with abstract definitions. And that has got to be the right approach.

Mr. CONYERS. We haven't even hardly touched upon, in conclusion, the whole notion of the hostility toward international law and working as a family of nations at the global level to try to turn back some of the violence that characterizes the 20th and 21st centuries.

And so this has been enormously helpful for me and we would invite all of our witnesses to stay in touch with us, feel free to communicate back and forth, so that we can really leave a serious record, not a partisan ranting type thing, but something that can be examined not only in the near future for all time.

We are setting some benchmarks here, where which way the most powerful Nation in the world will treat these kinds of violations of human dignity that have created so much unrest, so much desperation, and in the end, so much violence in the world.

And I thank you all very much.

Mr. NADLER. I thank the gentleman. The Chair now recognizes for 5 minutes the gentleman from Indiana.

Mr. PENCE. Thank you, Mr. Chairman. And I want to thank all of our witnesses for your testimony.

Mr. Rivkin, a quick question for you, and then I wanted to ask Mr. Sands a question. The Wall Street Journal pointed out in a recent editorial the Democrat majority in Congress "wants the U.S. interrogation policies made public, but the reason to keep them secret is so enemy combatants can't use them as a resistance manual."

They went on to write, "If they know what is coming, they can psychologically prepare for it. We know al-Qaida training often involves its own forms of resistance training, and publicly describing the rules offers our enemies a road map for resistance."

Mr. Rivkin, why would we want to risk offering our enemies a road map for resistance? Can you think of any good reason? Are you concerned about that?

Mr. RIVKIN. It is of some concern, Congressman Pence. In fact, it is an excellent point. There is a degree of irony here that there may be lesser forms of coercion that if unexpected, particularly psychological coercion may be quite efficacious, sort of vitiating, or at least minimizing the pressure to use the more difficult things.

But if you lay it out in advance, of course they are going to train for it. And again, the whole essence of the people we are dealing with is precisely because they are unlawful combatants, they view interrogations as a continuation of the fight, and happy the way it

is with lawful combatants and conscript soldiers who are quite happy to be away from combat and sitting in a prisoner of war camp enjoying life.

So there is a huge problem. And I think the critics have to acknowledge that we as a society can come up with any result as long as the debate is honest, as long as we don't propagate myths that coercive techniques don't work, or there is no cost to disclosure of sensitive information along the lines.

Again, the American people may decide in the end more or less along the lines of what my good friend Professor Sands says, which is zero coercion. But let's decide it in a way that is accountable so we can revisit this decision if unfortunately bad things happen down the road, instead of doing it in a way that is not transparent.

Mr. PENCE. Professor Sands, I appreciated your testimony very much. Whether I agree with your conclusions or not, I appreciate your yeoman's work.

David Rivkin and Lee Casey have written recently, "Some, of course, have suggested that relationship building interrogation techniques are preferable, and even more reliable I the long run than stress methods.

They raise the question, though, what about the hard cases, like Khalid Sheikh Mohammed, who was a mastermind of the September 11 attacks in this country? How would you respond to the observation that Khalid Sheikh Mohammed probably is not susceptible to relationship building methods.

And I can tell by your grin, you acknowledge the somewhat absurd thought that you could move people who have masterminded the death of more than 3,000 Americans by Oprah Winfrey methods. But if you could respond to that question, I mean, how would you have solved, how do you think the United States should seek to gain information from a mastermind like Khalid Sheikh Mohammed if he refuses to answer questions voluntarily when additional American lives could be on the line with information that he is refusing to provide?

Mr. SANDS. Thank you, sir. I very much appreciate that question. That question seems to go to heart of many of the issues that we are discussing. I am not sure how thrilled Oprah Winfrey would be to the characterization of her methods in that particular way.

I think I have got to say by way of outset, I come from a country which spent 15 years involved in facing terrorism on the streets. I grew up in a country where my mother wouldn't let me go shopping on Oxford Street because bombs were going off at times on a weekly basis.

And that experience has had a very profound effect on how the United Kingdom addresses precisely the question that you have addressed. And the thinking in the British military, and the thinking across the board politically, it is really not a left-right issue.

It is a broad consensus in the United Kingdom is that coercion doesn't work. That the experience of the United Kingdom, which moved in the early 1970's to use techniques that were very similar to those that were used on Detainee 063, hooding, stress positions, humiliation, and so on and so forth, didn't work.

The view is taken in the United Kingdom that it extended the conflict with the IRA probably by between 15 and 20 years. Be-

cause what it did was that it outraged the community that was associated with those who were subject to these particular techniques, and it created a breeding ground, a recruiting ground which made it impossible for the British government, if you like, to persuade those who were associated with the IRA, but had not crossed the line into use of violence, to think another way.

And so in answering your question, I am profoundly influenced by that experience. And one of the great regrets that I have is that the Administration never seemed to turn for advice to its closest allies and ask them what was your experience when you faced a similar situation?

And the answer they would have got from whatever government it was, Conservative, Labour, is don't go down the route, one, of using coercion, and two, don't call it a war on terror.

Why? Because by calling it a war on terror, you transform criminals into warriors, and you create a context in which they are able to recruit in their struggle. And if you noticed, neither Prime Minister Blair nor Prime Minister Brown, nor, indeed, the Conservative leader of the opposition, ever uses the phrase "war on terror" because of the experience with the IRA.

Now in relation specifically to your question, there are hard cases. I did smile because, frankly, the image that weeks and weeks of rapport building with KSM is somehow going to produce results is counterintuitive.

But the reality is, we don't know. And I spoke in my investigation to a lot of interrogators, military, FBI who basically said coercion doesn't work. You get information that they want to give you that they think is going to stop the pain from happening.

And I listened just yesterday to a remarkable tape that I recommend to all of the Members of the Committee to listen to of Senator McCain, a man who has first-hand experience of this situation.

A brave man describing in a 1997 interview with Dan Rather how he broke and owned up and signed a confession to having personally targeted men and women, children in North Vietnam because he was facing such conditions that he could no longer cope.

And that, I think, is the reality. I firmly come to the view that coercion doesn't work, and it has such a negative backlash in terms of the consequences that the better price to pay is not to go down that route at all.

Mr. PENCE. Mr. Chairman, with your indulgence, could I have Mr. Rivkin respond to that as well? He was trying to cut in.

Mr. RIVKIN. Thank you. Very briefly. I don't doubt Professor Sands' sincerity, but a couple of points. First of all, I personally spent a fair amount of time with various British colleagues who take a different interpretation of what happened in the past.

And just like we have debates about Vietnam, they disagree. A more cynical interpretation is that the British efforts in 1971 and 1972 squeezed out the names of approximately 700 IRA operatives and were used as the body of knowledge to follow up, number one.

Number two, an interesting point to point out, and I hope Professor Sands would correct me if I am wrong, none of the British lawyers, to the best of my knowledge, will prosecuted in connection with aggressive interrogation, and let's be frank, their assassination policy by SAS against senior IRA operatives.

And the third point, with all due respect, IRA was a serious threat, but IRA is not an existentialist threat like al-Qaida. And the way you adopt coercion in the context of a non-existentialist threat is very different that you do it in the context of an existentialist threat.

I don't see us settling down with al-Qaida the way you resolve things with IRA.

Mr. NADLER. The gentleman's time has long since expired. The gentleman from Alabama is recognized for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman. Mr. Rivkin, let me begin with you. I had a chance to read the op-ed piece that you wrote in the Journal last week, and some of your positions are interesting in that they are extremely provocative. So I want to pose a couple of questions to you.

You just mentioned the Vietnam War. Did the United States military apply the Geneva Conventions to captured Vietcong operatives?

Mr. RIVKIN. It is a complicated question, Congressman Davis. Basically, the position of the United States government was that the Vietcong was not legally entitled to Geneva protections. We extended it as a matter of policy grace, largely, as I understand it, I am too young, of course, to have personal knowledge, but people I talk to, largely because the Vietcong threatened American prisoners who, God knows, were not treated particularly well but could have been treated a lot worse.

Mr. DAVIS. Well, let me take up that particular logic and apply it to another scenario. Let's say that Hezbollah, a known terrorist organization, were to capture an Israeli soldier and to take that individual into custody and to subject that individual to sleep depravation, physical abuse, physical degradation, any number of things that might strike some people, most especially including that Israeli soldier experiencing the pain, as torture.

Should that Israeli soldier and his government be able to invoke the Geneva convention against Hezbollah?

Mr. RIVKIN. There are two answers to that, Congressman Davis. The legal answer is this. If you are a lawful combatant, the fact that the people who have captured you are unlawful combatants and themselves upon capture would not be entitled to the gold standard of the Geneva Convention does not mean that you are not. So this is a non-reciprocity situation.

Mr. DAVIS. Do you think Hezbollah would adopt that interpretation, or do you think al-Qaida would adopt that interpretation.

Mr. RIVKIN. No, I understand the question.

Mr. DAVIS. [OFF MIKE]

Mr. RIVKIN. The practical answer is easy. And I don't mean to sound glib, but let me suggest this. Given the absolutely atrocious, medieval level of barbarism that is routinely inflicted by unlawful combatants by Taliban, al-Qaida, Hezbollah, where we are talking about not just torturing people but dismembering people and killing them.

There are plenty of examples of them in Iraq. If I were captured and my choice was being accorded the treatment that they generally accord to westerners versus being treated as somebody in Guantanamo, I would settle for Guantanamo in——

Mr. DAVIS. Well, of course, that wasn't the question I asked you. Let me perhaps come at the question a little bit differently.

Does the Israeli government apply the Geneva Convention to captured Hezbollah operatives, or captured Hamas operatives?

Mr. RIVKIN. Israeli government's position, as I understand it, is fairly complex. They believe that a state of armed conflict exists. They generally apply Geneva Conventions. They signed the Protocol One addition, which we have not signed. But it is fairly——

Mr. DAVIS. Is torture legal or illegal in Israel?

Mr. RIVKIN. Excuse me?

Mr. DAVIS. Is torture legal or illegal in Israel?

Mr. RIVKIN. Torture in Israel is illegal. However, Israelis, in appropriate circumstances, do use stress techniques. Their court has been quite involved on this issue.

Mr. DAVIS. Well, now, let me stop you at this point, because you are doing what witnesses like to do, which is talking fast enough that the questioner can't get a question out if the time runs out. So let me slow you down.

Because you have just said some very interesting things. I want to make sure everyone hears them. Israel, a democracy like ours, that is under daily siege from the most vicious murderers, assailants imaginable, which faces an existential threat to its existence, they are very small, 10 miles at the smallest point, makes torture illegal, applies the Geneva Convention, and they apply it to armies or quasi-armies with a history of being willing to kill women and children.

It would seem to me that those aren't incidental points to be talked over and talked around. Those are very significant moral propositions.

Mr. Sands, would you like to comment on that? Do you see the point that I am making?

Mr. SANDS. Well, I do, sir, very much see your point, and it is a point that is also made in relation to the United Kingdom. We have had, sadly, terrorist attacks on our territory. One of the bombs in July 7th went away 100 yards from the law school that teach at.

And I have followed the Israeli situation very carefully. The Israeli Supreme Court, and I think Mr. Rivkin was about to refer to it, gave a very famous judgment in which it said in relation to torture, firstly, it is the lot of a democracy to fight with one arm tied behind its back, but the democracy is still stronger, because that is who we are.

Secondly, it rejected the ticking time bomb theory. This is the theory that everyone raises, and yet ask anyone to find a single example in which the ticking time bomb theory, situation has arisen, and no one can identify one.

And with great respect, the way the Supreme Court of Israel dealt with it is the right way. Never means never. If a ticking time bomb scenario comes up, which we say is completely hypothetical, we will deal with it when it arises.

Mr. DAVIS. Mr. Rivkin, if the Chair will indulge me just one last hypothetical to you. Should the President of the United States issue a pardon to members of the executive branch who may be accused in the future of having violated statutes related to torture?

Mr. RIVKIN. In the current circumstances?

Mr. DAVIS. It is a hypothetical. Should the President of the United States issue a pardon before he leaves office to members of his executive who may be accused in the future of having violated statutes relating to torture?

Mr. RIVKIN. I have not considered this question carefully, but I would imagine there would be some reasons to do so. I frankly think as useful as the exploration of those issues is, it can go too far and it can certainly handicap our——

Mr. DAVIS. Mr. Rivkin, would you seriously suggest that a President issue a blanket pardon to members of his Administration? Because this is the standard for a pardon typically. Under precedent, that someone be convicted of a crime or have acknowledged culpability for a crime.

Has any member of the Bush Administration been convicted of a crime related to torture?

Mr. RIVKIN. No, but——

Mr. DAVIS. Have any of them acknowledged responsibility for this crime?

Mr. RIVKIN. You asked me a hypothetical question. And all I am saying is I have not studied this question in detail. I said there may be some reasons to consider doing it. Let me remind you that the blanket pardon——

Mr. DAVIS. I would suggest to you that it would be extraordinary.

Mr. RIVKIN. [continuing]. Would not be unprecedented. President Carter, for example, issued a blanket pardon to the Vietnam war related, I will say people who got in trouble in relation to the Vietnam war.

But I am not advocating for it. You asked me a hypothetical. The easiest answer is to say that I don't answer hypotheticals. I am trying to be forthcoming. I said it is something to consider. I did not say that it is something to do.

But my only—10-second point is this. If you look at Israel, they did make a choice in a transparent fashion as accountable democratic body polity. They do use drastic means of interrogation. I don't think that—in certain circumstances. I don't think that—that is at least my sense from talking to a lot of Israelis.

But yes, they have made a decision to take high risks, and that certainly is to consider.

Mr. NADLER. Time of the gentleman has expired. The Chair now recognizes for 5 minutes the gentleman from California.

Mr. ISSA. Thank you, Mr. Chairman. And I will try to pick up what I would have put in an opening statement in my questioning.

Mr. Rivkin, since you have had time to think about that earlier question and to give it due consideration, since Jane Harmon and Nancy Pelosi were knowing accomplices to this, they were well aware and had virtual tours of the site and were intimately familiar with waterboarding and all the other techniques, would they be appropriate for that blanket pardon?

Mr. RIVKIN. If——

Mr. ISSA. Since they seem to be repentant by now denying that it is their responsibility, but rather the responsibility of the Administration.

Mr. RIVKIN. I understand, Congressman. It is actually the point you make in your question is a correct one. If we are going to use broad conspiracy counts to bring people in who were not in an operational chain of command, a Member of Congress exercising his oversight power sort of acquiescing and blessing something may have things to be concerned about.

But as I said, look, there is a difficult issue here. I don't mean to be glib, it is a serious problem. Investigation, exploration is a good thing. But it can degenerate into a witch hunt. It can degenerate into an effort to smear the reputations of the people involved.

And again, I posed the same point I made earlier, which is, how is the future President going to get candid legal advice when everybody who worked for the previous President, or the previous two Presidents having their career ruined, being vilified, portrayed as war criminals, even if prosecutions don't mature, and have a bunch bar associations going after them and have students breaking down their doors when they try to teach.

That is not a good thing. It is not a good thing at all.

Mr. ISSA. I agree, and Ms. Cohn, I will switch to you for a second, because I think we may gain—I may gain some insight in this.

You may not be aware of this, but I have actually supported the ban on torture, and I happen to be much more in the McCain camp on this. So don't consider me a friend just because I say that, but I do want to——

Ms. COHN. You also come from my part of the country as well.

Mr. ISSA. Yes. I do want to get this right. And although I opened very clearly with the idea that we have got to move on, truly move on from a bipartisan decision that was made that is now public, that in fact is no longer done, to the question of what do we go going forward?

And as one Member of Congress on this side of the aisle, probably not, quotable by my friend and colleague, but perhaps, I think we are better than that. I think we can win this fight with one arm tied behind our back, as we have I World War II and other wars.

But having said that, I want to go through a line of questioning to see if perhaps I can get yes's on this. Do you think it is fair to lie to prisoners that we take on the battlefield, whether they be illegal combatants or just prisoners?

Ms. COHN. To lie to them?

Mr. ISSA. To lie to them. To tell them things that would cause them to spill the beans because we have lied to them, we have been disingenuous in what we tell them reality is. For example, the colleague that was taken with you, we have already killed him.

Ms. COHN. Well, I think it would depend because, for example, if you lied to someone and say we are going to kill your wife, even though you don't really intend to, we are going to kill your wife if you don't give us this information, then that is severe psychological coercion, and I would be opposed to that. And I don't think that that line——

Mr. ISSA. And I appreciate that. Maybe I will alter it a little bit. Mr. Rivkin, do you watch "Law and Order," any of the 35 different versions?

Mr. RIVKIN. I confess, I do not—science fiction.

Mr. ISSA. Okay. Well, for everyone else in the world, do you think that has watched it, do you think that in fact deceiving people, including by saying your partner just got a confession out of the other person taken on the battlefield. Do you think that is okay?

Mr. RIVKIN. It is okay. There is a small range of deceptive statements relative——

Mr. ISSA. And of course, you know that the Supreme Court has held that is okay, even in law cases that we deal with.

Mr. NADLER. Would the gentlemen yield for a second?

Mr. ISSA. Of course, Mr. Chairman.

Mr. NADLER. Thank you. I just want to pursue the one question. The Supreme Court has indeed ruled that deceiving a questioner saying your colleague has spilled the beans, you might as well tell us the rest, is okay. But is that the same law as threatening, I am going to kill your wife?

Mr. ISSA. Well, and I wasn't responding to Ms. Cohn, because I think it is important that we stay to the basic concept that we do get confessions out of prisoners in the United States and in other places by techniques other than physical contact or threat of torture.

We do often say, for example, and I will pick you up on this, Mr. Chairman, domestically, and I think the audience of all of us think domestically to say that if you don't cooperate, we are going to take every one in your family and we are going to arrest them, and they are going to serve as accomplices to your crime is in fact something that can be done in this country.

The threat of, in fact, widening the net to people beyond that, I think just, for all of you, those kinds of techniques are many of the alternatives, so we do have other tools besides the ones we are concentrating on today.

And my time is expiring, so I would appreciate it if I——

Mr. RIVKIN. Just 10 seconds. This is actually my favorite hypothetical, because the critics do not want any form of coercion, psychological coercion.

My favorite example is what prosecutors of Enron did to Andy Fastow. They threatened him, (a) to prosecute his wife harshly, (b) make sure that he and his wife would serve time concurrently, in which case their child would have to go into foster care.

Does anybody think that that is not a horrible psychological threat to make? They meant it, it broke him, and I am not holding a candle for him. I never represented him or anybody from Enron.

But this permeates—custodial interrogation frequently is permeated by horrible pressure, and that is okay. If it is okay for Andy Fastow, how it cannot be okay with Abu Zabeda or——

Mr. ISSA. And if we just let the others follow up because this is one where we know it has been held constitutional within some of these guidelines we are talking about. I would like to see how they view that for prisoners from the battlefield. Mr. Luban.

Mr. LUBAN. I agree with what the other witnesses have said. Lies that amount to death threats or threats of torture against the person or against their family, those are not permissible. Other kinds of lies are permissible.

I think that interrogation is a game in which you are trying to get information from somebody who doesn't want to give it. By defi-

nition, it is adversarial. Tricking it out of a person, it may not be something that in everyday life we would think is moral, but in that setting, that is moral. The difference is between tricking it out of them and coercing it out of them.

Mr. ISSA. Mr. Sands, I guess we will close with you because you haven't answered, and because these are techniques of course widely used in Britain.

Mr. SANDS. They are, but I think I am right in saying that the U.S. field manual permits this as a technique. And of course the U.S. field manual, which governs military interrogations, is an extremely sensible document. It has broad support across the spectrum politically.

It has been followed in many other countries around he world. It does not exclude those types of questioning techniques subject to the limitations in terms of family members and related issues.

And it is, of course, the basis for a vote, I believe, in both this House and the other House in relation to new legislation which, very sadly, I have to say, the President vetoed just a month and a half ago.

And I think it is important to point out, sir, that decisions that are taken by the President such as vetoing legislation which would prohibit the use of waterboarding is watched around the rest of the world. And it was the subject of intense media attention in the United Kingdom.

And I can go further than that. I wear two hats. I am an academic, but I am also a practicing lawyer. The area of work that I do is advising foreign governments.

And I have been in a room with a president of a foreign government who, when addressing these issues and discussing them, has whipped out a copy of John Yoo's legal advice and said to me, face to face, look, the United States allows this sort of stuff, so why not do it?

I have had a foreign minister say the same thing to me. It has a big consequence. And so I think you have put your finger on it. I think the United States has a terrific leadership role. It can do better than that.

It leads the world on these issues, and it needs to find a way to come back to that leadership role.

Mr. ISSA. Hopefully, as an academic, you suggested that that head of state that he not believe a lawyer. Thank you.

Mr. NADLER. The time of the gentleman has expired. The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Professor Sands, does torture work?

Mr. SANDS. That is a very general question.

Mr. ELLSION. Of course it is.

Mr. SANDS. I have spoken—I have never personally engaged in torture, so I have got no firsthand experience of knowing whether or not it does work.

What I have just engaged in is a year and a half of examining the aggressive interrogation of one man at Guantanamo. I obtained professional medical advice, coming back to this question of was he tortured or not, and the conclusion, which is set out in the book, is that if you asked 12 clinical psychiatrists whether this man was

tortured, all 12 would say he was because of the severe mental pain and suffering that he suffered over a 54-day period.

I know to the best of my abilities to find out that in the case of what happened to that man, who was potentially thought to be the 20th hijacker and therefore a serious individual, it produced nothing meaningful.

Mr. ELLISON. Here is my question. If you say that—let's just assume for just the briefest moment in time that some things a person who is tortured says, some things they say are true and some things they say are said simply to stop the pain. How do you determine which are true and which are just statements to just—that are false, but just to give the torturer some answer to make him stop?

Mr. SANDS. You can't. There is no way to do that. And the experience with Khalid Sheikh Mohammed, of course, who has owned up to everything under the sun, establishes the absurdity of going down that route.

It is simply impossible to know which of the multitude of things that man has now confessed to having done is or is not true, and there is no way to find it out. And the difficulty, of course, is that the disinformation then leads the interrogator and the state that is supporting the interrogation to perhaps exclude other avenues of investigation to determine the true facts.

So it is not an approach for that reason also that is useful. I think it is clear that it doesn't work. The British view is it doesn't work. You must never do it, and never means never.

Mr. ELLISON. Now Mr. Rivkin, I guess if I asked you that question, you probably would say sometimes it does work, right? And so, sir, again, I guess my question to you is, if we assume for a moment that a person who is subject to physical torture will say some things that are true, and will say some other things that are not true.

For example, if the torturer asks him, name everybody who you were with, the person won't just start giving names, particularly if the torturer doesn't like the answer that the victim of the torturer is giving, how do you know which is the right stuff and which is the wrong?

Mr. RIVKIN. I understand. And again, it is a——

Mr. ELLISON. But I guess I know you understand, but I need you to answer my question. How do you determine which is right and which is wrong?

Mr. RIVKIN. My answer would be this. In most situations, we have an opportunity to go back and cross-examine, if a person being interrogated says the safe house is in this building on this street, and you go and it is not there, you can go back——

Mr. ELLISON. Cross-examine like a court proceeding? You mean like check it against other facts——

Mr. RIVKIN. Well, no, no. You could go back to the same person. Look, there are people who will tell you that you can learn as much from a person lying as a person telling you the truth as long as you understand the context.

The worst situation for you an interrogator is, you are not getting anything. No information at all.

Mr. ELLISON. Now wait a minute. Now Mr. Rivkin, let's just say you get an answer and that answer is false. The torturer believes that you know, and let's just say that the torture victim does not know, but the torture victim gives the torturer an answer because this guy is going to keep shocking me or beating me or drowning me until I tell him something.

So you tell him something, so he names the kids who are on his baseball team, or soccer team. Don't you now have to go and use investigative time and resources to either verify or reject that false information?

Mr. RIVKIN. That is correct.

Mr. ELLISON. Does that take time?

Mr. RIVKIN. It does take time.

Mr. ELLISON. Does it take money?

Mr. RIVKIN. And as always in life, you can have false leads. But I repeat, from everything I have heard——

Mr. ELLISON. Can you give me an example of a true ticking time bomb situation, a specific example in which there was a time and a place and a person who was believed to have information about some explosion or something, where in fact this particular case saved somebody's life even. Can you give us an example of that?

Mr. RIVKIN. Well, yes. While I am at a disadvantage because I personally do not have—being legalistic—I personally don't have complete proof. But I would point out there is an excellent article in the last issue of the National Journal by Stewart Taylor, who is widely regarded as a very objective and non-partisan commentator.

Mr. ELLISON. What is the name of the case that you are referring to.

Mr. RIVKIN. He argues that Khalid Sheikh Mohammed in the circumstances so close post-September 11 was as close as you can get to a ticking time bomb, because here was the man who we believe to have some information——

Mr. ELLISON. Wait a minute, Mr. Rivkin. I am not asking close as you can get, I am asking there——

Mr. RIVKIN. Well, but he was——

Mr. ELLISON. [continuing]. The ticking—I am talking about if you don't—we have to torture you because within 3 hours the bomb is going to go off and we have to torture you to stop that bomb from going off. Do we have a situation like that? I will even give you 4 hours.

Mr. RIVKIN. Well, with all due respect, that is very generous of you, Congressman—3 or 4 hours does not——

Mr. ELLISON. Five.

Mr. RIVKIN. It is like arguing what severe is. The view of the Administration, as I understand had, was somebody like KSM who has information about impending attacks, could have been matter of days or weeks. It does not make it any less——

Mr. ELLISON. Okay, Mr. Rivkin, thank you. Mr. Chairman, I would just ask the other panelists if they know of a ticking time bomb case? Mr. Sands, Ms. Cohn, Mr. Luban, do you know of a ticking time bomb, the real case?

Ms. COHN. I know of one. It is on the show "24." [Laughter.]

Mr. ELLISON. It is fictional.

Ms. COHN. And that is the only one I know of.

Mr. ELLISON. Mr. Sands?

Mr. SANDS. I know of none other. And I have never seen the show "24," so I don't even know of that one.

Mr. ELLISON. Mr. Luban?

Mr. LUBAN. Yes, I have been trying to chase down true ticking time bomb cases for a couple of years. There have been a couple that have been alleged to be ticking time bomb cases. They turned out not to be true.

If I could take a second to describe one, I think the poster child was the bomb maker, al-Qaida bomb maker in the Philippines, his name was Morad, who was captured because the bomb went off.

The Philippine police tortured him brutally, and he revealed in the end that there was a plot to blow up American Airliners and to assassinate the Pope. Now that looks like the ticking time bomb case, except for two things.

First, the torture was not the thing that broke him. What broke him was the threat that he was going to be turned over to the Israelis, who apparently, according to one journalist, he feared even more than he hated.

And secondly, all the information was already on his laptop, which the Philippine police had, except that when you take torture as your "A" option, you don't look at the "B" options.

And so the idea that a ticking time bomb case is one where only torture produces the information, that is crucial. And torture oriented interrogation organizations, police forces begin to gravitate toward torture and they leave aside all the non-torture methods. All of that information was on Morad's computer.

Mr. NADLER. The time of the gentleman has expired. The Chair now recognizes for 5 minutes the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman. I would like to thank all the witnesses for your testimony. And there has been a lot of information poured forth from this panel.

It has answered some questions and it has created some curiosity on my part. And as I listen, I would lift out of some of the testimony Lieutenant Calley in the My Lai Massacre was raised, and the Abu Ghraib prison issues were raised.

And I would draw those two comparisons as the critics of American conduct in Southeast Asia invariably focused on Abu Ghraib. That is the lens through which they would like to have history review the Vietnam conflict.

The critics of the military operations that liberated Iraq from Saddam's reign of terror would like to have had us view that experience through the lens of focusing on the Abu Ghraib prison incidents, rather than the broader picture and a broader view.

I will submit that the American soldiers and the American military and our American intelligence security personnel have conducted themselves, by and large, extraordinarily honorably throughout history. And I think it is a disservice to focus on the exceptions as narrow as they in fact are in the breadth of the history of this country.

And so this question emerges in my mind, and I ask, I think, first from Mr. Sands, who may be more objective about this because of his country of nationality and origin. But is there an ex-

ample throughout the history of the United States of America, and I will take us back 1776, where the United States has been in a conflict against an enemy, militarily, cultural or just an enemy, where our enemy took a more moral posture toward our soldiers and our combatants and maybe our spies and intelligence people than we have ourselves?

The posture of the United States vis-&-vis our enemies, are we viewed—is there is a historical exception where on balance, for the conflict that you might choose, that the enemy has taken a stand superior in moral authority than the United States?

Mr. SANDS. Sir, I am afraid I am not an expert on military history, and I am therefore not able to answer that question beyond a number of general observations.

Firstly, I would agree with your observation that the United States has been a global leader in relation to these issues, both historically and also in relation to more recent conflicts, and also in relation to the vast majority of practice in relation to current conflicts.

I have had the opportunity to meet a very large number of serving members of the United States military who have been involved in Afghanistan, who have been involved in Iraq, and who are involved in other parts of the world. And I leave with an enormously positive impression of the role that they have played.

The story that I have told is not a story about things going wrong in relation to the military. It is a story in relation to political appointees, and I——

Mr. KING. Mr. Sands, in the interest of time, I want to concede your point that you are about to make and acknowledge that the breadth of this is not a broad criticism, it is very narrow. We agree.

Mr. SANDS. I believe it is narrow, but its narrowness does not diminish its importance because of the recent——

Mr. KING. And I will concede that point to you, and I know it is what we are examining here. And I thank you for your response.

And I turn to Ms. Cohn, and you are advocating for the gaining the trust of the person who would be questioned and as one who is every day involved in this business of folks gaining my trust, we are very resistant to that tactic here in Congress.

Because there are confidences that we must maintain, or our leverage and influence is significantly diminished. And I would ask if you could point out a case where there has been a successful interrogation of enemy personnel by gaining trust that has saved lives in the fashion that has been illustrated in the equivalency of lives and intelligence that might be comparable to that of Ranking Member Trent Franks as he talked about the three incidents of waterboarding.

Can you eclipse that in your historical knowledge of gaining trust of the enemy?

Ms. COHN. Thank you for that question, Mr. King. It is my understanding that when Saddam Hussein was in custody after the United States came in and took over that country, that he was treated with kindness and in fact, he provided a very rich source of information for the people who were interrogating him.

So that would be example that comes to mind. But I want to say one other thing——

Mr. KING. Is that quantified?

Ms. COHN. Pardon me?

Mr. KING. Is that quantified? I mean, I understand that, too. But have we quantified the intelligence gains from Saddam in a fashion that measures up against the intelligence gains that referenced by Mr. Franks in his opening statement?

Ms. COHN. Well, the problem is that the intelligence gains that were referenced by Mr. Franks in his opening statements are also not verifiable because of top secrecy and, quite frankly, given the number of misrepresentations coming from the high levels of the Bush Administration, I don't have great confidence in the statements that come from that Administration.

But I want to say one other thing. And that is that I agree with you that our soldiers have been admirable, our troops in this conflict. And we are not talking about our troops, we are talking about interrogators, many of whom are mercenaries who are following policies that come from the top of the highest levels of this government, and we are not talking just about an isolated case of Abu Ghraib.

We are talking about torture and cruel, inhuman or degrading treatment and punishment that has come at Guantanamo, in Iraq, in Afghanistan and in the CIA—this is not just an isolated incident.

Mr. KING. Thank you, Ms. Cohn. I would like to slip in one question in conclusion here, if I might. And it focuses back on the statement made by Mr. Sands.

And as you illustrated, the IRA and the—by the way, I want to say, I agree with you and we shouldn't call it a war on terror. I think that is a misnomer.

But you made the statement that the IRA, the Irish Republican Army, that conflict was extended by 15 to 20 years because of the, I believe it was humiliation that was imposed upon some of them that extended it because of the outrage.

And now I would make the point to you that wallowing in self-guilt as a Nation and bringing hearings before this Congress and pumping this into the media constantly when we have identified that these are narrow, very narrow exceptional circumstances.

And our knowledge on it isn't complete, that it extends the outrage, and this panel and this testimony and those things that supplement it across this media also extend the outrage and may well be extending this global war against these people whom we won't call terrorists, we will call them Islamic Jihadists. Mr. Sands?

Mr. SANDS. I would very much like to respond to that, sir. I would be very happy to share with the Committee, it is not my area of expertise, but I do have access to some of the information of the views of the British military and the British political circles as to the consequences of using the so-called five techniques on the IRA.

And in fact, the situation I can segueway into your question, sir, but——

Mr. KING. I want to know if your testimony extends the outrage.

Mr. SANDS. But Mr. Rivkin said he didn't believe that any of the lawyers involved in the U.K. techniques would ever hold up before a court. But the United Kingdom was, and what enabled the

United Kingdom to move on in that relationship and to get closure on that terrible period were judgments of the European Commission on Human Rights and the European Court on Human Rights.

And my hope, sir, would be that either this Committee or some other Committee is able to bring closure to this issue by accepting that errors were made and allowing the country to move on.

Because the consequence of not going down that route is that there will be investigations and possibly prosecutions abroad after the failure of the United States to have acted. So it is about finding closure and moving on.

Mr. KING. I would ask unanimous consent to allow Mr. Rivkin to answer that question.

Mr. RIVKIN. Very briefly—thank you, very briefly. I want the record to show that none of the senior British officials were prosecuted in connection with any of the activities, including assassination, which if the laws of war did not apply would be legal killings of IRA operatives.

So there are different—even if you assume the importance of bringing closure to that, there is a right way of bringing closure, there is a wrong way of bringing closure. And criminal investigations are prosecutions for the next two decades ain't the right way to bring closure.

And that is what Britain has done. That is not what Israel has done.

Mr. LUBAN. Mr. Chairman, may I add one comment to this? That is that the government of the United Kingdom at that time made a clean breast of the five techniques and publicly acknowledged that it had been using the five techniques.

Mr. SANDS. Very briefly sir, it is not accurate to say that no individuals faced individual sanction or responsibility. And I will be pleased to provide the Committee with detailed information as to what has happened in the United Kingdom.

Mr. KING. I yield back.

Mr. NADLER. Thank you. The Chair now recognizes for 5 minutes the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. I thank our witnesses for their testimony.

Ms. Cohn, you mentioned jus cogens and indicated there is no statute of limitations for prosecution.

Ms. COHN. Correct.

Mr. SCOTT. Is there anywhere in the United States criminal code where we can find a basis for prosecution of that concept generally?

Ms. COHN. Yes. Several Supreme Court decisions have referred to jus cogens and customary international law, and it is part of U.S. law, just the same way as treaties are once we ratify them.

Mr. SCOTT. Thank you. We have all agreed that torture is illegal. Is there any basis for retroactive immunity if you get good, life-saving information?

Ms. COHN. No. There is no justification for torture under the Geneva Conventions, under the Torture Convention and under the International Covenant on Civil and Political Rights, all three of which are treaties the United States has ratified, and therefore part of U.S. law under the supremacy clause of the Constitution.

Mr. SCOTT. And the fact that you got good information does not retroactively immunize you for the torture?

Ms. COHN. No, it doesn't. No exceptional circumstances whatsoever will ever allow torture under those three treaties.

Mr. SCOTT. And one of the problems with this is that you don't even know if you are going to get good information when you decide to torture, that you start torturing and you may or may not—you may find it didn't work or you may find the person didn't even have information.

How many people—if we were to allow torture in the cases where you can get good information, how would you know that you are going to get good information when you decide to torture?

Ms. COHN. There is no way or knowing, Mr. Scott. That is the problem.

Mr. SCOTT. Mr. Sands, you have talked about this generally. Could you just specifically say the effect of allowing torture, what effect that would have on United States troops?

Mr. SANDS. Well, firstly, I think that there is considerable evidence that the use of abusive interrogation techniques has undermined morale. I have even in the past few days from the publication of the article in Vanity Fair and the book coming out received rather amazing e-mails from military, very upper-echelon individuals who are, shall we say, feeling very positive about the way in which steps are going to draw a line under this historical moment.

But more significantly, and I think one need only reverse the situation. If President Bush vetoes legislation that this House has passed and that the Senate has passed, which outlaws these techniques of interrogation because he wants to leave them open to possible use in the future, imagine what that does to someone who is holding American troops or American nationals and also wishes to use the same techniques.

It simply creates a basis for exposing American nationals or American troops to abusive techniques of interrogation that are not permitted. And so it creates, I think, an additional risk for American troops in the field and for American nationals, business community, NGOs, individuals traveling around the world doing their honest business.

And that is the fundamental problem with what has happened. It has created a fundamental risk for the good men and women of the United States, in particular in the military. And that is what makes this so pernicious.

Mr. SCOTT. Thank you. Ms. Cohn, does anybody outside of this Administration think that waterboarding is not torture?

Ms. COHN. This Administration? Well, at Michael Mukasey's confirmation hearing to be attorney general, retired navy Rear Admiral—he is retired—navy Rear Admiral John Hutson testified that aside from the rack and thumbscrews, waterboarding is perhaps the most iconic form of torture going back to the Spanish Inquisition.

The United States pushed for an got prosecutions of Japanese leaders after World War II for waterboarding. It is called the water torture, the water cure.

There is really no good argument that in fact waterboarding is not torture, and that is why I was so puzzled that Michael

Mukasey refused to say that waterboarding was torture. I think the reason for that was two-fold.

First of all, he would have been calling his bosses criminals because they admitted engaging in waterboarding. And if waterboarding is torture and torture is a war crime, they could be liable under the War Crimes Act.

And secondly, under the Military Commissions Act, evidence obtained by torture is inadmissible, but evidence obtained by coercion is admission if it took place before December 30, 2005.

And so Michael Mukasey knew that information presumably was obtained by waterboarding, and if that was torture, then that could not be used in some of these military commissions trials. Those are the only two reasons I can think of that Michael Mukasey would refuse to say what everyone else knows, and that is that waterboarding is torture.

Mr. SCOTT. Well, can this Administration change the law by memo?

Ms. COHN. Can they change the law? It is either torture or it is not torture, and waterboarding, if you were almost drowning, and some people actually do drown, and so then we are talking about homicide, we are talking about murder.

I mean, there is torture leading to murder, but if you are pouring water down someone's nose and mouth until they almost drown, there are just no two explanations for that. There is no good argument that that is not torture.

And so if the U.S. passed a law saying waterboarding is not torture, it would be like saying the sun doesn't rise in the east and set in the west. It just would not make sense.

Mr. SCOTT. Thank you.

Mr. NADLER. I thank the gentleman. I now recognize the gentleman from North Carolina for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I just have one question, but before I ask the question, I just want to express how proud I feel that this hearing is being held and the manner in which it is being held. And I associate myself with the Chairman's statement that we have a high responsibility here.

And I would have to say when I came in, I had this fear that it was going to deteriorate into a partisan tit or tat, and there has been some of that, as there always is in these hearings.

But by and large, it has just been a very informative, and I think a very important hearing to start a process that I think is very important. And I want to commend the Chair and the Chair of the full Committee and others who have conducted it at that level.

Now, the question and I am going to ask this question to Mr. Rivkin and Professor Luban because I think they are the only two that have not answered it, but I want to express what I think I heard from Professor Sands and Professor Cohn already in response.

And if I misheard them, I hope they will correct what I think I heard. I think I heard Professor Cohn say that we ought to be seriously contemplating as a next step pursuing the possibility of a special prosecutor to pursue this and pushing this further in that way.

I think I heard Professor Sands say that he thinks that a more productive course would be to document more or less for history and for future purposes what has occurred so that we make sure that we have some rules of the road going forward, but not focus so much on pursuing those who may have engaged in—now I may be misstating that, and I hope you will correct me if I am.

Mr. Rivkin, I don't think you have expressed an opinion on this, so what I think is—my question generally is, where do you think this Committee should take this, if anywhere, beyond today?

Should we just let bygones by bygones and go on and keep trucking down the road? Or what do you think we should be doing next in this process?

Mr. RIVKIN. I appreciate the question, Congressman. You are obviously seized of this issue, and you were doing it, how to bring it to a responsible conclusion.

I guess it depends on what is your narrative as to what has transpired. My narrative is entirely different. I think that——

Mr. WATT. Well, I appreciate you giving me your narrative. I think I know your narrative. But I am more interested in where you think we should go from here rather than a restatement of your narrative.

Mr. RIVKIN. Well, I guess, I am—forgive me. I guess I am with Professor Sands, which is document the history as fairly and as objectively as you can. I think doing anything beyond that would be a gross disservice.

Even if you think the laws were broken, prosecutorial discretion implies exercising law enforcement function wisely. In a time where people in good faith, not for any other reason, on both sides of the aisle——

Mr. WATT. Well, we are not prosecutors, we are a Committee of Congress, so——

Mr. RIVKIN. Well, but you can—judgment of you are right—you have a right to reflect as representatives of the people and your own personal capacity, of course, you have a right to express an opinion.

And all I am saying is that to the extent the Congress sometimes recommends prosecutions, sometimes it doesn't. I know technically law enforcement belongs to the executive branch. I think it would be madness to prosecute anybody, given the facts involved.

Mr. WATT. I want to come back to you if I have time. But I want to make sure that Professor Sands seemed to be a little discomforted by the way I characterized what he said, and then I want to get Professor Luban's opinion. But I want to give Professor Sands a chance to get a level of comfort if I didn't correctly state what he was saying.

Mr. SANDS. Sir, not discomforted at all, but if there was an inaccuracy in what I conveyed, then the inaccuracy would be my responsibility and I am sure not yours.

My position is as follows. There are facts which need to be explored. And it seems to me, and I say this with great deference, that that is one thing this Committee can usefully do.

You are going to have some of these lawyers appear before you. You will have an opportunity to put to them specific factual issues

that have not previously been tested and examined. And that is a vitally important function.

With regards to other aspects, I think one has to accept the following situation. The Torture Convention and the Geneva Convention were violated. Crimes I think on the basis of the material I have seen, were committed.

Under the Torture Convention of 1984, the United States has an obligation to investigate and, if appropriate, to prosecute or to extradite to a country where the individual would be prosecuted.

The position as follows is that, and I set out in the book, there are likely to be investigations outside this jurisdiction in relation to what has happened. Foreign countries, friendly allies of the United States, will have prosecutors, and I described two of them in the book that I met with confidentially, who have asked me for all of my materials.

I think that the reason they are able to do that, and they told me the reason they are able to do that, is that nothing has happened in the United States. And my point, and I probably did not put it as clearly as I could have, is that it is first and foremost for the United States to investigate these matters.

It could do so to begin with within this Committee, whether it is by special prosecutor or other means. That is a matter for others to decide. But if the United States doesn't address it, other countries will.

Ms. COHN. Mr. Watt, may I clarify——

Mr. WATT. Mr. Chairman, the——

Mr. NADLER. Without objection——

Mr. WATT. The one witness we have not heard from on this is Professor Luban.

Mr. NADLER. And without objection——

Mr. WATT. I would at least like to get his response.

Mr. NADLER. Professor Luban.

Mr. LUBAN. I will put my mike on and then I will be brief. I think that it is much more important for this Committee to find out what happened to publicize the memos that are still secret than—I think prosecutions are much further down the road. I don't think that it would be madness, but I think as somebody who believes strongly that people are innocent until they are proven guilty, that it is really premature to be talking about this.

I would like to find out whether there were ethics violations committed, and there is no right against self-incrimination for ethics violations.

I think that getting the full story out is the most important job of this Committee. And if I could say one other thing, I don't think that there is any worry about revealing secret interrogation techniques because the interrogation techniques have been known for over 3 years. And al-Qaida reads newspapers.

And the idea that this would humiliate the United States and make things worse I think is wrong. It would show that the United States rights its own ship when the ship is listing.

Mr. NADLER. Ms. Cohn, you wanted to answer that, too.

Ms. COHN. Yes. I just wanted to follow up on what Professor Sands was saying about other countries prosecuting our leaders, because that may be kind of a foreign concept to people.

What I believe Professor Sands is talking about is the concept of universal jurisdiction, which is well established in U.S. law as well as the laws of most other countries. And universal jurisdiction says that if a country such as the United States is unwilling or unable to prosecute its own nationals for these heinous crimes, they are crimes that are so heinous that they are crimes against all of humanity, and any country can prosecute and punish them.

And Israel used the doctrine of universal jurisdiction to convict, to try, convict and execute Adolf Eichmann for his crimes during the holocaust, even though they had no direct relationship with Israel. So this is—an there have been investigations.

My organization, the National Lawyers Guild, together with other organizations, have talked to prosecutors in other countries to try to encourage them to do these investigations because they are not being done in this country.

Mr. NADLER. Thank you. The gentleman's time is now truly expired.

Mr. WATT. Thank you, Mr. Chairman.

Mr. NADLER. The gentleman from Tennessee is recognized for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman, and Chairman Conyers, for holding this hearing.

Professor Sands, you wrote in your book about a gentleman by the name of Spike, aka Marion Bowman. What basis did he have to believe that people at the FBI felt that the interrogation techniques being used by our government were illegal?

Mr. SANDS. I had, as I describe in the book, two meetings with Mr. Bowman, whose given birth name was Marion. As he explained to me in our first meeting, that was a name that, as a gentleman, has got him into some difficulties, so he changed it unilaterally to Spike.

He described to me memoranda that he received and communications that came directly from Guantanamo, for he was not himself at Guantanamo, but I think he was an associate general counsel for the FBI counterterrorism division.

He began to receive in late October and early November information from Guantanamo that there was a move toward aggressive interrogation at the push of the Pentagon. It is important to recall down at Guantanamo, you had not only military interrogators, you also had FBI interrogators, and the CIA were also present.

And there was a tremendous tension going on down at Guantanamo as to what was right and what was wrong. And it would be very wrong to portray a situation, it was all one side in favor of aggressive interrogation.

That is not the case. There were a lot of people who were very strongly opposed to it. They communicated their concerns to Mr. Bowman, and Mr. Bowman then took steps, as I describe in the book, to raise the issue directly with the Office of the General Counsel in the Department of Defense.

Now that is one issue that factually this Committee, I think, would profitably use its powers to get to the bottom of. Because one of the things that I was as I describe in the book is that Mr. Bowman spoke to Mr. Haynes, and from Mr. Haynes he got a brush-off about these issues.

Now if my account is accurate, and I believe that it is, Mr. Haynes would, by the time he received Mr. Bowman's account and expressions of concern, have already have been deeply involved in this story.

And I think that is one area that this Committee would, I respectfully suggest, very carefully look at. What, precisely, was Mr. Haynes' role in the decision on Geneva? When did he first become aware of the fact that Mr. Al-Qahtani was being held down at Guantanamo? What did he do when he got that information, and what conversations did he have with Mr. Rumsfeld about it?

What meetings did he have and conversations with Mr. Yoo about the memo of the first of August, 2002? Now this is an absolutely central point, and I apologize for belaboring it.

The Administration has stood up and has said time after time the August 1, 2002 memo of Yoo and Bybee had nothing to do with Administration policies and decisions. That is plain wrong.

Mr. Haynes went down to Guantanamo at the end of September 2002, he had knowledge of the contents of the opinion written by Mr. Yoo. And to all intents and purposes, the legal advice that he claims to have relied on from the staff judge advocate at Guantanamo was irrelevant because he already knew he had Department of Justice sign-off.

And frankly, that is what makes, to my mind, the story that I uncovered the most unhappy story, it is that in the face of sign-off by Department of Justice of the techniques that were used on detainee 063, when Mr. Haynes appeared before the Senate in July 2006, he pointed to Major General Dunleavey and Lieutenant Colonel Beaver essentially as being responsible for what had happened.

Those two people have suffered considerable unhappiness as a result of that. They have been prosecuted, they have been singled out. Neither was given any warning that their memoranda were going to be made public.

Diane Beaver's legal advice, which of course normally ought to have been kept confidential, as all legal advice usually is, was released without her being given any proper warning. Her name was left on the legal advice.

It could have been blacked out. There was no need to reveal publicly that a person who had served honorably in the U.S. military for many years should be outed in this way.

And these are the kinds of facts that as you will see I feel rather passionately this Committee can usefully investigate as a way of setting the account straight and ensuring that those who truly took the decisions are responsible, and that honorable individuals associated with the U.S. military are not tarred with the responsibility which they should not have.

Mr. COHEN. As my time has expired, further Congressman asketh not. Thank you. I yield back.

Mr. NADLER. [continuing]. The responsibility gentleman. All questioning having been concluded, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly at you can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion into the record. The Chair wants to take this opportunity particularly to thank the witnesses.

And with that, this hearing is adjourned.

[Whereupon, at 12:17 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

WHITE PAPER ON THE LAW OF TORTURE AND HOLDING ACCOUNTABLE THOSE WHO ARE COMPLICIT IN APPROVING TORTURE OF PERSONS IN U.S. CUSTODY

National Lawyers Guild
International Association of Democratic Lawyers

This paper provides the background to the legal issues underpinning the call by the National Lawyers Guild (NLG) to prosecute and dismiss from their jobs people like then Deputy Assistant Attorney General John Choon Yoo,[1] then Assistant Attorney General Jay Bybee[2] and others who participated in the drafting of memoranda claimed to be based on sound legal precedent that purported to authorize the commitment of acts of torture or other cruel, inhuman or degrading treatment[3] on behalf of the U.S. government. The memoranda were written at the request of high ranking U.S. officials in order to insulate them from the risk of future prosecution for subjecting detainees in U.S. custody to torture. By logical extension, this paper explains why all those who approved the use of torture and committed it—whether ordering it, approving it or giving purported legal advice to justify it—are subject to prosecution under international and U.S. domestic law.

The prohibition of torture is a *jus cogens* norm (these are principles of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties). The United States has consistently prohibited the use of torture through its Constitution, laws, executive statements and judicial decisions and by ratifying international treaties that prohibit it. The prohibition against torture applies to all persons in U.S. custody in times of peace, armed conflict, or state of emergency. In other words, the prohibition is absolute. However, the legal memoranda drafted by government lawyers purposely or recklessly misconstrued and/or ignored *jus cogens*, customary international law, and various U.S. treaty obligations in order to justify the unjustifiable, claiming that clearly unlawful interrogation "techniques" were lawful.

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[1] Yoo is currently a Professor of Law at the Boalt Hall School of Law, University of California, Berkeley. The NLG is not advocating that Yoo be dismissed for engaging in lawful First Amendment Speech as a Professor of Law. On the contrary, the Guild is calling for Yoo's prosecution, disbarment, and dismissal for his actions as Deputy Assistant Attorney General.

[2] Bybee is currently a federal judge on the United States Court of Appeals for the Ninth Circuit.

[3] What is commonly referred to as the Convention Against Torture, as well as other treaties to which the U.S. is a party, in fact prohibits torture and other cruel, inhuman or degrading treatment or punishment. The term "torture" will be generally used in this paper, but no discussion of the prohibitions should be limited to it.

I. THE PROHIBITION AGAINST TORTURE IS A *JUS COGENS* NORM.

The prohibition against torture is a *jus cogens* norm.[4] *Jus cogens* are defined as norms "accepted and recognized by the international community of states as a whole ... from which no derogation is permitted..."[5] In international criminal law, the legal duties that arise in connection with crimes designated as violations of *jus cogens* norms include the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunities up to and including those enjoyed by Heads of State, the non-applicability of the defense of "obedience to superior orders" and universal jurisdiction over perpetrators of such crimes. Other *jus cogens* norms include the prohibitions against slavery, genocide, and wars of aggression. *Jus cogens* norms, like customary international law norms, are legally binding. No affirmative executive act may undercut the force of these prohibitions nor may a legislature legalize crimes designated as violating *jus cogens* norms or immunizing from prosecution those responsible. *Jus cogens* norms differ from norms which have attained the status of customary international law by dint of their universal and non-derogable character and the fact that *jus cogens* norms are peremptory, that is, they trump any other inconsistent international law.

While legal scholars often differ as to what specific acts can be defined as being subject to *jus cogens* norms, it is beyond dispute that the prohibition against torture has attained that status.[6] The right to be free from torture and other cruel and inhuman treatment was recognized in Article 5 of the Universal Declaration of Human Rights (1948). It is contained in Article 7 of the International Covenant on Civil and Political Rights and Article 5(2) of the American Convention on Human Rights. Torture is also outlawed under the Rome Statute which created the International Criminal Court (ICC). The U.S. Army Field Manual 34-52 makes clear that techniques of interrogation are to be established under the rules laid out by The Hague and Geneva Conventions. Field Manual 34-52 is unambiguous in its prohibition on the use of torture and any other force in interrogation of prisoners.

Article 17 of the 1949 Geneva Convention III prohibits physical or mental torture and any other coercive action against prisoners of war, and Article 130 classifies violation of Article 17 as a grave breach of the Geneva Conventions. The Fourth Geneva Convention prohibits an occupying

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[4] *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate* Ex Parte Pinochet Ugarte (No. 3), [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702(d) ("torture or other cruel, inhuman, or degrading treatment or punishment") reporters' note 5.

[5] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 698-99 (1969).

[6] *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of jus cogens.") ; Restatement, *supra* note 4; Human Rights Committee (of the ICCPR), General Comment No. 24, para. 8, U.N. Doc. CCPR/c/21/REV.1/add.6 (1994) (also noting that attempted reservations to the ICCPR that would permit torture or cruel, inhuman or degrading treatment are void as a matter of law).

power from torturing protected persons (Article 32) or engaging in all other "measures of brutality" (Article 283). Common Article 3 (that is, Article 3 in each of the conventions) prohibits torture as well as the separate crimes of inhuman, humiliating and degrading treatment against those who are taking no active part in hostilities, members of armed forces who have laid down their arms, or those who are *hors de combat*.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention or CAT) codified the prohibitions against torture into specific rules. The Convention "prohibits torture and other acts of cruel, inhuman, or degrading treatment or punishment." It criminalizes torture and seeks to end impunity for any torturer by denying him all possible refuge. The Convention is categorical: "No exceptional circumstances whatsoever, whether a state of war, or a threat or war, internal political instability or any other public emergency, may be invoked as a justification for torture."

The prohibition against torture has attained *jus cogens* status. This means we must examine the actions of Yoo and the others who sought to provide legal cover for acts in violation of the prohibition through a lens which acknowledges that they violated a norm which the world has universally declared to be part of the highest and most compelling law. Because it is a *jus cogens* norm, no world leader has the right to resort to torture, nor may a legislature attempt to legalize it, nor may an official of the government use it. Indeed, if the rule of law is to have real meaning, it demands severe consequences for anyone who transgresses.

II. THE CONVENTION AGAINST TORTURE, THE TORTURE STATUTE, AND THE WAR CRIMES ACT

As noted above, one of the processes which helped confer *jus cogens* status on torture was the ratification by the U.S. of the International Covenant on Civil and Political Rights (ICCPR)[7] and the Torture Convention.[8] The U.N. General Assembly adopted the CAT in 1984 to strengthen existing prohibitions against torture and other cruel, inhuman, or degrading treatment.[9] On October 21, 1994, the United States ratified Convention, which expressly prohibits torture under

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[7] International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992)

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 8, S. Treaty Doc. No. 100-20, (1988), 1465 U.N.T.S. 85 G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 (1984).

[9] *See* J. Herman Burgers & Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1 (1988).

all circumstances. The 1999 decision by the House of Lords to extradite Augusto Pinochet for prosecution for promoting and condoning acts of torture committed during his regime was based in part on the existence of the Convention and its contribution to the recognition of torture as a *jus cogens* norm.[10]

Torture is defined in Article 1 of the Convention as:

> 1. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.
>
> Under Article 2:
>
> 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
>
> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

As a ratified convention, the CAT is a treaty which, through Article VI, Section 2 of the United States Constitution (Supremacy clause), is "the Supreme Law of the Land" in domestic U.S. law. Pursuant to the dictates of the CAT, Congress criminalized torture for actions outside the United States.[11] The language of the Torture Statute tracks to a large degree the language of the Torture

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[10] *Regina v. Bartle*, 2 W.L.R. 827 (H.L.) (March 24, 1999).

[11] 18 U.S.C. §§ 2340-2340A. §2340 provides in full:

> As used in this chapter--

Convention and punishes conspiracy to commit torture as well as torture itself. While the U.S. included various "understandings[12] along with its ratification of the Convention, international law does not permit such "understandings" to undercut the force and language of the Convention.[13] While the Torture Statute covers acts committed outside the United States (as

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(1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

§2340A provides in full:

(a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

[12] "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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 procedures calculated to disrupt profoundly the senses or personality." S. Exec. Rep. No. 101-30, at 36 (1990).

[13] "Understandings" differ from "reservations." An "understanding" cannot change an international legal obligation under the Convention. Under international law, where there is conflict between international obligation and domestic law, international law will govern. *See* P. Sands, *Lawless World: America and the Making and Breaking of Global Rules - From FDR's Atlantic Charter to George W. Bush's Illegal War*, p. 213, Penguin Books (2006). While Yoo in his Commentary in UC Berkeley Point of View dated January 5, 2005, claimed that the Senate in ratification narrowed the definition of torture in the convention in these "understandings" and the criminal statutes, this is not true. Section 2 of Article 1 of the CAT does not prohibit national legislation which would give wider protection. It is clear that the Convention would not tolerate national legislation which would give less protection. *See* Jordan J. Paust, Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror 33-34, 189-91 nn.59, 63.

opposed to the CAT, which is not site specific as to the place the torture occurs), the opinions sought from Yoo and the others in 2002 address actions taken by U.S. officials outside the United States, in the various "black sites" as well as bases in Afghanistan and Guantánamo. At that time, the administration argued that Guantánamo was outside of the United States and beyond the reach of any U.S. court.[14]

III. THE UNITED STATES PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT

The U.S. Court of Appeals for the Second Circuit declared more than 25 years ago that the prohibition against torture is universal, obligatory, specific, and definable.[15] Since then, every U.S. circuit court has held that torture violates universal and well-established customary international law, with the Eleventh Circuit finding that official torture is now prohibited by the law of nations, including U.S. law.[16]

Moreover, "understandings" that violate the object and purpose of a treaty are void, according to the Article 19(2) of the Vienna Convention on the Law of Treaties. The claim that treatment of prisoners that would amount to torture under CAT does not constitute torture under the U.S. "understanding" violates the object and purpose of CAT, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[14] Actions taken by military personnel or any other person, who commit or have committed torture, would be covered by the War Crimes Act, 18 U.S.C. §2441 et seq. which states: "Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death. Subsection (b) provides that the circumstances are that "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." In 18 U.S.C. §2441(b) "war crime" is defined as follows:

As used in this section the term 'war crime' means any conduct-

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict ....

[15] *Filartiga v. Peña-Irala*, 630 F. 2d 876 (2nd Cir. 1980).

[16] *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996). *See also* e.g. *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (noting that torture is prohibited by "universally accepted norms of international law") (quoting

In 2004, Congress declared that "the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States" here or abroad. Congress also affirmed the requirement that "no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." Congress reiterated "the policy of the United States to . . . investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States."[17]

IV. BUSH'S ORDER AND THE TORTURE MEMOS

"A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called terrorist and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush administration in 2002."[18]

On February 7, 2002, President Bush announced that Geneva's Common Article 3 did not apply to alleged Taliban and Al Qaeda members. Bush said, however, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity,* in a manner consistent with the principles of Geneva." But the Torture Convention and *jus cogens* absolutely prohibit torture in *all* circumstances.

Filartiga); Iliao v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) (declaring that torture is a specific, universal, and obligatory norm of international law); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status."); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (holding that torture is a well-recognized violation of customary international law and U.S. law), overruled on other grounds by *Aldana v. Del Monte Fresh Produce*, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (declaring that international and U.S. law prohibit torture); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (recognizing that international and U.S. law prohibit torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass.1995) (declaring that torture is a well-recognized violation of customary international and U.S. law); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (imposing civil liability for acts of torture).

[17] Sense of Congress and Policy Concerning Persons Detained by the United States, Pub. L. No. 108-375, 118 Stat. 1811, § 1091 (a)(1)(6), (a)(8), (b)(2) (Oct. 28, 2004).

[18] Paust, *supra* note 13, at 1.

In the summer of 2002, the Pentagon sought advice on whether the army was bound by the Field Manual in interrogating prisoners at Guantánamo. An advisory memo written by Colonel Diane Beaver, a U.S. Army lawyer, tried to find a way around the Field Manual constraints on interrogation.[19] Before issuing her opinion, Colonel Beaver was visited by lawyers from Washington D.C. including David Addington, Jim Haynes, and others who made it clear that those at the top of the administration sought an outcome which would permit deviation from the strictures of the field manual.[20]

Her advisory opinion concluded that international obligations are irrelevant and that because the detainees were not prisoners of war the Geneva Conventions did not apply. Before Colonel Beaver issued her opinion, the Justice Department was providing advice on whether interrogation techniques which were assumed to be legal under U.S. law could nonetheless expose the U.S. to prosecution at the ICC[21] or violate the CAT.[22]

There are many lawyers in the Office of Legal Counsel, the Justice Department and elsewhere cognizant of the legal – indeed, constitutional – obligations the U.S. has under ratified treaties. The administration, however, turned to political appointees, including then Deputy Assistant Attorney General John Yoo and then Assistant Attorney General Jay Bybee for these opinions.

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[19] Colonel Beaver was relying on Bush's executive order of February 7, 2002, which stated that the detainees at Guantánamo were not prisoners of war and therefore allegedly not covered under the Geneva Conventions.

[20] The importance of this meeting, which occurred in Guantanamo, is to contradict the administration's original story that requests for permission to use torture, euphemistically referred to as enhanced interrogation techniques, came from the bottom up. The new book by Philippe Sands, entitled Torture Team, shows the decision to seek to use these methods came from the very top and that significant pressure was placed on Beaver to write an opinion that provided justification for what Addington and others wanted to do.

[21] Although the United States has not ratified the Rome Statute, violations of the statute in countries which have ratified it could subject persons within the territory to prosecution.

[22] It is now known from the chronology provided by Philippe Sands in his recent *Vanity Fair* article entitled "Green Light" that the lawyers for the president, vice president and secretary of defense, to wit: Addington, Haynes, Gonzales, Yoo and Bybee, met in Guantánamo to discuss the use of various interrogation techniques which were being proposed to be used on various detainees. It is also now known from recent news reports that there were meetings at the White House in which the specific interrogation/torture techniques to be applied to various detainees were discussed and approved.

ABC News reported last month that Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. When asked, Bush admitted, "yes, I'm aware our national security team met on this issue. And I approved."

On January 9, 2002, Yoo submitted a memorandum opinion titled "Application of Treaties and Laws to al Qaeda and Taliban Detainees." Co-authored with Special Counsel Robert J. Delahunty, the memo purported to address "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan."

This memo argued that the president was not bound by international laws in the war on terror. It stated that "any customary international law of armed conflict in no way binds, as a legal matter, the president or the U.S. Armed Forces concerning the detention or trial of members of al-Qaeda and the Taliban." The memo found it proper to deny the protections of international laws to detainees and to exempt from liability those who denied such protections.

Yoo also authored a memorandum opinion dated August 1, 2002, titled "Standards of Conduct for Interrogation under 18 U.S.C. ss. 2340-2340A." This opinion was addressed to Alberto Gonzales from Jay Bybee, but was in fact drafted by Yoo.

In the August 1, 2002 memo, Yoo/Bybee changed the definition of torture contained in U.S. law and the CAT, limiting it to those acts inflicting pain of equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. This definition is much narrower than our laws provide in the CAT and the Torture Statute.

Recently, a March 14, 2003 Yoo memorandum opinion has surfaced titled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States." This 81-page memo again reiterates that the president is not bound by federal laws. "Such criminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution's grant of the Commander in Chief power solely to the president." Yoo states that the president is not bound by laws that prohibit torture, assault, maiming, stalking, and war crimes. The opinion applies the restrictions imposed by treaties against torture to circumstances leading to death.

The memo does not recognize the prohibition of torture as a *jus cogens* norm, but wrongly declares that customary international law is not federal law and that the president is free to override it at his discretion. Yet more than a century ago, in *Paquete Habana*, the Supreme Court held that customary international law is part of the laws of the United States that must be ascertained and applied by the judiciary.[23] In 1984, Justice O'Connor wrote that power

[23] 175 U.S. 677 (1900).

"delegated by Congress to the Executive Branch" and a relevant congressional-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law."[24]

And finally, the memo suggests several defenses (military necessity and self defense) for those brought up on criminal charges for violating laws during interrogations, notwithstanding the *jus cogens* norm, the Geneva Conventions' clear command that military necessity does not justify treatment Geneva prohibits, and CAT's absolute prohibition on torture.

V. THE AUGUST 2002 TORTURE MEMO IS WITHDRAWN

Many scholars have opined on the legal deficiencies of Yoo's and others' "torture memos."[25] Referring to the discussion of *jus cogens* above, there is no legal basis for the claim that the president is not bound by the law against torture. No one, not a lawyer or Congress, has the authority to re-write the definition of torture contained in the CAT to allow for interrogation techniques which clearly would amount to torture under the CAT's definition. The "war on terror" does not give the executive branch the ability to disregard the Geneva Conventions and commit war crimes.[26]

After the exposure of the atrocities at Abu Ghraib, and the existence of the August 1, 2002 memo was revealed, the Department of Justice knew that the Yoo memos could not be legally defended. The August 2002 memorandum opinion was withdrawn as of June 1, 2004. A new opinion was written. This memo, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, stating: "Under the language adopted by Congress in sections 2340-2340A, to constitute 'torture,' the conduct in question must have been 'specifically intended to inflict severe physical or mental pain or suffering.'" The memo separately considers the components of this key phrase: (1) the meaning of "severe;"[27] (2) the meaning of "severe physical pain or suffering;" (3) the meaning of "severe mental pain or suffering;" and (4) the meaning of "specifically intended."

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[24] *TransWorldAirlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984)(O'Connor, J.). Every relevant federal case has recognized that the President is bound by the laws of war. *See, e.g.,* Paust, *supra* note 13, at 20-22, and cases cited.

[25] *See e.g.* Sands, Lawless World, supra, n. 13; M. Cohn, Cowboy Republic: Six Ways the Bush Gang Has Defied the Law, PoliPointPress (2007); Paust, *supra* note 13, at 9-11, 19-20, 29-30, 146, 148-49. In addition, both Steven Gillers of NYU Law School and Scott Horton, adjunct professor at Columbia University Law School, have provided various commentaries.

[26] Indeed, the UN Convention on Suppression of Terrorist Bombings of 1997 treats "terrorists" as criminals, whose punishments are subject to criminal law of the country at issue.

[27] It cites cases where treatment was considered severe enough to qualify as torture: *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga.

With respect to "specific intent" to torture, the Levin memo does concur with LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted) who states: "With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

VI. HAMDAN V. RUMSFELD

On June 29, 2006 the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld*,[28] that Guantánamo detainees were entitled to the protections provided under Geneva's Common Article 3. The Court invoked the legal precedents that had been sidestepped by Yoo and others. Justice Anthony Kennedy, joining the majority, pointedly observed that "violations of Common Article 3 are considered 'war crimes.'"

Four months after *Hamdan*, President Bush signed into law the Military Commissions Act[29] which was passed to address the restrictions imposed on the administration by *Hamdan*, and also attempted to create a new legal defense against lawsuits for misconduct arising from the "detention and interrogation of aliens" between September 11, 2001 and December 30, 2005.[30]

2002); *Doliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998).

[28] 548 U.S. 557,126 S. Ct. 2749 (2006).

[29] Pub. L. No. 109-326, 120 Stat. 2600 (10/17/06)

[30] While we would argue that attempts to immunize those complicit in torture from civil or criminal liability is not permitted in the context of the violation of a *jus cogens* norm, the language in the Military Commissions Act creating this legal defense is not a blanket grant of immunity, as pointed out by Houston Law Center Professor Jordan Paust. §8(b) provides that: "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)" the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions is revised where, under § 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person ... did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." It does not "provide immunity from prosecution for any criminal offense by the proper authorities." The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. *See, e.g.*, J. Paust, et al., International Criminal Law: Cases and Materials, 3rd Ed. at 51-78, 100-114, Carolina Academic Press (2007).

VII. CAN ANY OF THOSE WHO WERE INVOLVED IN ANY WAY IN DECIDING TO TORTURE AVOID PROSECUTION?

Professor Philippe Sands, an eminent international lawyer, in his book, *Lawless World*, stated: "What do you do as an international lawyer when your client asks you to advise on the international rules prohibiting torture? Do you start with the rules and ask how an international court – or your allies – might address the issue and reach a balanced conclusion? Or do you focus on the narrower issues of the relevance, applicability, and enforceability of the international rules in the national context, and reach a conclusion that you know – if you ask yourself the question – no international court would accept? Let me put it another way. Do you advise, or do you provide legal cover?"[31]

The National Lawyers Guild agrees with Sands's conclusion that giving political cover makes a lawyer complicit in the decision to torture.[32] It is the Guild's view that there can be no two opinions on whether those who are involved in the decision to torture must be held accountable, both under the War Crimes Act and the Torture Statute. 18 U.S.C. §2340A specifically applies to those who conspire to commit torture. Yoo and other lawyers who were involved in providing the opinions used to justify the use of torture are just as complicit as those who authorized and carried out the torture itself and must be held equally accountable.

The Yoo/Bybee memos were either prospective, for the purpose of advising the executive of the limits (or lack thereof) of its authority, or retrospective, for the purpose of addressing already approved of actions. Although they purport to be the former, it now appears they were written after the program of what the Bush administration euphemistically refers to as "enhanced interrogation techniques" began. Regardless, there are only two conclusions one can draw from the memos. The first is that their purpose was not to give the client (assuming for the sake of argument that the Justice Department's client is the president and not the people) a full understanding of the legal issues, but to give legal cover to an already decided upon, potentially criminal, policy. The second is that the drafters did their best to present all possible conclusions and consequences, in which case the advice given fell so far below the requisite standard of care as to constitute legal malpractice. No one, and certainly not the NLG, has accused Yoo of being that incompetent.

Yoo, Bybee and others counseled that there were no laws which protected from torture the detainees held at black sites, in prisons in Afghanistan or the Guantánamo concentration camp.

Furthermore, there can be no immunity, including Head of State immunity, for violation of a *jus cogens* norm. There is no statute of limitations for a *jus cogens* crime and there is universal jurisdiction over those accused of violating *jus cogens* norms.

[31] Sands, *supra*, n. 13, p. 205.

[32] *Id.*, p. 208.

They defined torture as only those actions which caused sufficient pain as to cause organ failure and/or death. These memos "green lighted" torture and many detainees were subjected to these techniques including, it has been estimated, more than 100 who died at the hands of their captors. They knew, or should have known, that a direct result of their counsel would be the use of interrogation techniques against certain allegedly recalcitrant detainees which would amount to torture. Or they knew it was already going on and they were doing their best to justify it. Regardless, they are part of the conspiracy to commit torture. The "torture memos" written by the DOJ lawyers, and "presidential and other authorizations, directives, and findings substantially facilitated the effectuation of a common, unifying plan to use coercive interrogation and that use of authorized coercive interrogation tactics were either known or substantially foreseeable consequences."[33] John Yoo admitted that the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[34]

Some have criticized the National Lawyers Guild for targeting lawyers who were "merely fulfilling their duty by giving advice." It should be emphasized that the Guild is not only targeting the lawyers. It has called for the impeachment of the president and vice president and has continually called for prosecution of all those (not just the few lower-ranking enlisted people who deserved punishment but who have been scapegoats for administration policy) responsible for these crimes. However, the lawyers cannot be permitted to hide under the cover of fulfilling their professional responsibilities.

Nor does the attorney-client privilege extend to keeping silent about planned criminal action. Even conceding Yoo and his co-conspirators actually believed their position was correct, no competent lawyer could have believed it unassailable. Giving real advice necessarily meant advising of the risks as well as the arguments favoring torture.[35] And, it should be noted, their incredibly narrow definition of torture completely ignored the prohibition against other cruel, inhuman or degrading treatment or punishment, which would be obvious to anyone who chose to read even the full name of the CAT. It is impossible to believe this was the result of incompetence, leaving only the conclusion that they were willing participants in a conspiracy to violate a *jus cogens* norm. Professor Yoo and Judge Bybee, as well as the other lawyers who provided cover for illegal torture, are not protected by their right to free speech or academic freedom. They were not expressing their unsupportable legal opinions in scholarly journals or in classrooms. They were asked to justify what the administration wanted to do and they willingly did it, knowing the inevitable results.

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[33] J. Paust, International Crimes Within the White House, 10 N.Y. City L. Rev. 339, 345 (2007).

[34] *Id.* at 344.

[35] The very phrase "arguments favoring torture" indicates how completely unjustifiable the Yoo/Bybee memos were.

The prosecution of Josef Altstoetter and fifteen other lawyers who were tried in Germany before a U.S. military tribunal – many of whom were convicted of committing international crimes through the performance of their legal functions established the principle that lawyers and judges in Nazi Germany bore a particular responsibility for the regime's crimes. But it is not just that case that should expose Yoo and his cohorts to liability for his advice. Their memos were not written for the purpose of advocacy. If they were defending the president in an impeachment case, or before the International Criminal Court, they would be free to argue, however vainly, their novel positions. But they cannot divorce themselves from the consequences of their advice and cannot be permitted immunity or impunity. The loss of their professional status would be a small price to pay for the commission of war crimes.

Statement of Professor Jordan J. Paust,[??] before the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

I. The Common Plan to Use Coercive Interrogation

During his so-called "war" on "terror," President Bush has authorized and ordered manifest violations of customary and treaty-based international law concerning the detention, transfer, and interrogation of numerous individuals. For example, in a February 7, 2002 memorandum, President Bush expressly authorized the denial of absolute rights and protections contained in the 1949 Geneva Conventions that apply in all circumstances to any person who is detained during an armed conflict. The President's memo denied rights and protections under Geneva law by ordering that humane treatment be provided merely "in a manner consistent with the principles of Geneva" and then only "to the extent appropriate and consistent with military necessity," despite the fact that (1) far more than the "principles" of Geneva law apply, (2) it is not "appropriate" to deny treatment required by Geneva law, and (3) it is well-understood that alleged military necessity does not justify the denial of treatment required by Geneva law.[2] Necessarily, the President's 2002 memorandum authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered

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[2] See JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 7-8 (2007).

violations of the Geneva Conventions, which are war crimes.[3]

My new book at Cambridge University Press, *Beyond the Law*,[4] identifies a reported presidential finding, signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving unlawful interrogation techniques, including water boarding, and an authorization for the CIA to secretly detain and interrogate persons in a September 17, 2001 directive known as a memorandum of notification and that harsh interrogation tactics were devised in late 2001 and early 2002.[5] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized as well as another document that contains a Department of Justice legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.[6] In fact, during a speech on September 6, 2006, President Bush publicly admitted that a CIA program has been implemented "to move ... [high-value] individuals to ... where they can be held in secret" and interrogated

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[3] Every violation of the law of war is a war crime. *See, e.g., id.* at 133. A uniform and overwhelming number of federal cases demonstrates that the President and all persons within the executive branch are unavoidably bound by the customary and treaty-based laws of war. *See, e.g., id.* at 21-22, 169-72. Even inconsistent federal legislation does not obviate the reach of the laws of war since they have domestic and international primacy. *See, e.g., id.* at 44-45, 60, 83, 129. Moreover, an overwhelming number of cases demonstrate that the existence of the president's commander in chief power does not change the president's obligations to comply with the laws of war and relevant congressional legislation. *See, e.g., id.* at 86-91, 233-49 nn.3-48. The theory that the commander in chief is above the law is false.

[4] *Supra* note 1.

[5] *Id.* at 28. *See also infra* note 21.

[6] *Id.* at 28-29. *See also infra* note 7.

using "tough" forms of treatment and he stated that the CIA program will continue.[7] In July, 2006 and in furtherance of his program, President Bush had singed a new executive order authorizing "enhanced" interrogation tactics to be used against persons held in secret "black sites" overseas and elsewhere.[8]

As documented in *Beyond the Law*, the unlawful "tough" interrogation tactics that are an admitted part of the Bush program are war crimes.[9] They are also violations of nonderogable customary and treaty-based human rights law[10] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11] The transfer of non-prisoners-of-war out of war-related occupied territory in Afghanistan and Iraq during the Bush program was also a patent and per se violation of the laws of war. Such transfers are absolutely prohibited by express language in Article 49 of the Geneva Civilian Convention[12] and clearly and unavoidably constitute "grave breaches" of the Convention.[13] Moreover, the refusal to disclose the names or whereabouts of persons subjected to secret transfer and secret detention is a manifest and serious

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[7] *Id.* at 29, 32.

[8] *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Sever Interrogations*, N.Y. TIMES, Oct. 4, 2007, at 1 (also disclosing the existence of memos penned by Seven G. Bradbury in OLC, DOJ). *See also* Randall Mikkelsen, *CIA Detention Program Remains Active: U.S. Official*, Reuters News, Oct. 4, 2007.

[9] *See, e.g.*, PAUST, *supra* note 1, at 2-4, 12-18, 27-31; Appendix, *infra*.

[10] *Id.* at 4-5, 12-18, 27-31.

[11] 1465 U.N.T.S. 85. *See* PAUST, *supra* note 1, at 5, 11, 16, 31, 33, 44-45, 143-44.

[12] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 49, 75 U.N.T.S. 287 [hereinafter GC].

[13] *See, e.g.*, GC, *supra* note 11, art. 147; PAUST, *supra* note 1, at 18, 163-64.

crime against humanity known as forced disappearance – a crime that also involves patent violations of related human rights law, the Convention Against Torture, and the laws of war.[14]

John Yoo, a former Deputy Assistant Attorney General at OLC, has disclosed that detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[15] During meetings chaired by White House Counsel Gonzales, the inner circle decided that following Geneva law would interfere with their "ability to ... interrogate," since everyone understood that "Geneva bars 'any form of coercion.'"[16] For the inner circle, "[t]his became a central issue,"[17] and they calculated that "treating the detainees as unlawful combatants would increase flexibility in detention and interrogation,"[18] and the question became merely "what interrogation methods fell short of the torture ban and could be used"[19] as "coercive interrogation,"[20] which includes outlawed cruel,

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[14] *See, e.g.*, PAUST, *supra* note 1, at 12, 26, 28, 30, 32, 34-41.

[15] JOHN YOO, WAR BY OTHER MEANS ix (2006). In 2008, John Yoo stated that "[t]he proposal for interrogation methods comes from the CIA," that the plan involved "using coercive measures" and "aggressive interrogations," that the March 2003 Yoo memo "applied to interrogations of al Qaeda detained at Guantanamo Bay," that Ashcroft "approved it," and that "[w]hat the government is doing is ... the use of violence." *See* Exclusive: "Torture Memo" Author John Yoo Responds to This Week's Revelations, available at http://www.esquire.com/the-side/qa/john-yoo-responds.

[16] *Id.* at 30, 35, 39. According to Yoo, the meetings began in December 2001 when "senior lawyers from the attorney general's office, the White House counsel's office, the Departments of State and Defense, and the NSC met ... [in the] Old Executive Office Building." *Id.* at 30. They met early in 2002 in the White House situation room. *Id.* at 39.

[17] *Id.* at 39-40.

[18] *Id.* at 43.

[19] *Id.* at 171-72.

inhuman, and degrading treatment.[21]

In early April, 2008, ABC News disclosed that an inner "inner circle" composed of the National Security Council's Principals Committee conducted meetings to approve various specific coercive interrogation tactics, including water boarding, and that meetings were attended by Cheney, Rice, Rumsfeld, Tenet, Ashcroft, and others. President Bush was quoted as stating "yes, I'm aware our national security team met on this issue. And I approved."[22] One "top official" quoted Aschcroft's statement of concern and warning at one of the meetings: "Why are we talking about this is the White House? History will not judge this kindly."[23]

In view of the fact that a "common, unifying approach" was devised to use "coercive interrogation" tactics and President Bush has admitted that such tactics and secret detention have been used as part of his approved program in other countries, it is obvious that use of coercive interrogation migrated to Afghanistan and Iraq as part of the common plan. It is also clear that presidential and other authorizations, directives, and findings (including two authorizations from Secretary of Defense Rumsfeld[24] and one from Lt. Gen. Sanchez[25]) and memos (such as the

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[20] *Id.* at 172, 177-78, 187, 190-92, 202. *See also supra* note 14.

[21] *See, e.g., id.* at 200; PAUST, *supra* note 1, at 30, 182 n.37.

[22] ABC News, available at http://abcnews.co.com/print id 4635175. The meetings were held in the White House situation room. *Id.* See also Lara Jakes Jordan & Pamela Hess, *Cheney, others OK'd harsh interrogations*, AP News, available at http://ap.google.com/article/ALeqMSIA8mY9rbbDdkUe1Y9KObwHhqrqYgD8VVCEG80.

[23] ABC News, *supra* note 21.

[24] *See, e.g.*, PAUST, *supra* note 1, at 13-16, 26-27, 146, 154-56, 160, 174.

[25] *Id.* at 16-17, 161-62, 174-75.

Yoo-Delahunty,[26] Gonzales,[27] Aschcroft,[28] Bybee,[29] Goldsmith,[30] and the newer Bradbury memos[31]), and the 2003 DOD Working Group Report[32] substantially facilitated effectuation of the common, unifying plan to use coercive interrogation and that use of unlawful coercive interrogation tactics was either known or a substantially foreseeable consequence of the common plan. Clearly, several memo writers and those who authorized coercive interrogation tactics were aware that their memos and authorizations would assist perpetrators of coercive interrogation.

Implementation of the common plan apparently occurred first at Guantanamo Bay, Cuba. It is well-known that Secretary of Defense Donald Rumsfeld had expressly authorized patently unlawful interrogation tactics involving the stripping of persons naked, use of dogs, and hooding, among other unlawful tactics, in an action memo on December 2, 2002[33] and in another memo on April 16, 2003,[34] the Secretary adding that if additional interrogation techniques for a

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[26] *Id.* at 9-11, 19-20, 29-30, 146, 148-49.

[27] *Id.* at 5-6, 8-9, 144-45, 148, 176.

[28] *Id.* at 7, 28, 30, 146, 148, 151.

[29] *Id.* at 11, 146, 150-51, 168-69, 243, 248.

[30] *Id.* at 18, 30, 163.

[31] See *supra* note 7.

[32] See PAUST, *supra* note 1, at 14-15, 24, 30, 90, 155-58, 168-69, 180.

[33] Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA J. TRANSNAT'L L. 811, 840-41 (2005).

[34] *Id.* at 843-44 & nn.120, 122. *See also* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006,

particular detainee were required he might approve them upon written request.[35]

Former CIA Director Porter Goss has admitted that prior Agency techniques for interrogation have been restricted under the McCain Amendment to the 2005 Detainee Treatment Act, which reiterated the prohibition of cruel, inhuman, and degrading treatment.[36] Some CIA personnel have reported that approved Agency techniques include "striking detainees in an effort

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addressing a memo from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004, available at http://www.newyorker.com/images/pdfs/moramemo.pdf, and the memos of Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, abuse at Guantanamo, and the failure to foster checks and balances and the flow of the best available information within Executive decisional processes that might provide ultimate decisionmakers with sound information required for rational, policy-serving choice.

[35] Paust, *supra* note 32, at 843-44.

[36] *See, e.g.*, Goss Says CIA "Does Not Do Torture," But Reiterates Need for Interrogation Flexibility, The Frontrunner, Nov. 21, 2005. *See also* YOO, *supra* note 14, at 171 (under the Bush policy, "methods ... short of the torture ban ... could be used"), 178 (the Bush policy had been that "[m]ethods that ... do not cause severe pain or suffering are permitted"), 187 ("using 'excruciating pain'" related to "coercive interrogation" not prohibited by the executive), 190-91 ("coercive interrogation" was used), 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate"); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations" in violation of Geneva law and CIA officer and former director of intelligence programs of the National Security Agency, Mary O. McCarthy, has stated that CIA policies authorized treatment she "considered cruel, inhumane or degrading."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA TODAY, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo apparently exists that is more detailed than the 2002 Bybee torture memo and it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 33 (the memo allows inhumane treatment of persons held by the C.I.A.); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by CIA, military, and others and tactics included use of the cold cell). This paragraph is borrowed from Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 352-54 (2007).

to cause pain and fear," "the 'cold cell'... [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' ... [which produces] a terrifying fear of drowning," each of which is manifestly illegal under the laws of war and human rights law. In February 2008, CIA Director Michael Hayden admitted that the CIA had used waterboarding against three persons from 2002 to 2003.[37]

As documented in *Beyond the Law*, condemnation of these and other illegal tactics used during the program of coercive interrogation has appeared in reports by the Committee Against Torture under the auspices of the Convention Against Torture; reports by the Human Rights Committee under the auspices of the International Covenant on Civil and Political Rights; a 2006 U.N. Experts' Report on the Situation of Detainees at Guantanamo Bay, under the auspices of the Commission on Human Rights; and a 2005 Council of Europe Parliamentary Assembly resolution on the Lawfulness of Detentions by the United States in Guantanamo Bay. The International Committee of the Red Cross has also stated that various tactics used were "tantamount to torture" and violations of Geneva law.

II. Types of Criminal Responsibility

What types of criminal responsibility can exist under international law with respect to such conduct? First, it is obvious that direct perpetrators of violations of the laws of war, the Convention Against Torture, and crimes against humanity (such as forced disappearance of persons as part of the President's "program" of secret detention) have direct liability. Leaders who issue orders or authorizations to commit international crimes can also be prosecuted as

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[37] *See, e.g.*, Mark Mazzetti, *Intelligence Chief Cites Qaeda Threat to U.S.*, N.Y.T., Feb. 6, 2008, at A1, available at

direct perpetrators.[38]

Second, any person (even a lawyer) who aids and abets an international crime has liability as a complicitor or aider and abettor before the fact, during the fact, or after the fact.[39] Liability exists whether or not the person knows that his or her conduct is criminal.[40] Under customary international law, a complicitor or aider and abettor need only be aware that his or her conduct would or does assist a direct perpetrator.[41] In any case, ignorance of the law is no excuse. Especially relevant in this respect are the criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in *United States v. Altstoetter* (The Justice Case).[42] Clearly, several memo writers in the Bush administration abetted the "common, unifying" plan and their memos substantially facilitated its effectuation.

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http://www.nytimes.com/2008/02/06/washington/06intel.html?_r=1&oref=slogin&pagewan

[38] *See, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW 32, 35, 51-73 (3 ed. 2007) [hereinafter ICL].

[39] *See, e.g., id.* at 35, 44-49; PAUST, *supra* note 1, at 18, 24, 30, 165, 167, 185, 193, 199, 277.

[40] *See, e.g.*, Rome Statute of the International Criminal Court, arts. 25(3)(c)-(d), 30, 32(2), 2187 U.N.T.S. 90.

[41] *See, e.g.*, The Prosecutor v. Blaskic, ICTY-95-14-T-A (Appeals Chamber, 29 July 2004), para. 50; The Prosecutor v. Furundzija, ICTY-95-17/1 (Trial Chamber, 10 Dec. 1998), paras. 236-38, 245, 249; *supra* note 38. *But see* Rome Statute of the ICC, *supra* note 39, art. 25(3)(c) (adding a new "purpose" to facilitate test [as opposed to awareness that conduct will assist or facilitate] that will leave ICC jurisdiction incomplete).

[42] See United States v. Altstoetter (The Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1058

Third, individuals can also be prosecuted for participation in a "joint criminal enterprise,"[43] which the International Criminal Tribunal for Former Yugoslavia has recognized can exist in at least two relevant forms: (1) where all the accused "voluntarily participate in one aspect of a common plan" and "intend the criminal result [whether or not they knew it was a crime], even if not physically perpetrating the crime"[44]; and (2) where "(i) the crime charged is the natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness participated in that enterprise."[45]

Fourth, civilian and military leaders with either de facto or de jure authority can also be liable for dereliction of duty with respect to acts of subordinates when the leader (1) knew or should have known that subordinates were about to commit, were committing, or had committed international crimes; (2) the leader had an opportunity to act; and (3) the leader failed to take reasonable corrective action, such as ordering a halt to criminal activity or initiating a process for prosecution of all subordinates reasonably accused of criminal conduct.[46]

III. Available U.S. Legislation

What legislation allows prosecution of some of these crimes? In the United States, there

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(1951).

[43] *See, e.g.*, ICL, *supra* note 37, at 32, 37-38.

[44] *See, e.g.*, The Prosecutor v. Brdanin, IT-99-36-T (Trial Chamber Judgment, 1 Sept. 2004), para. 264.

[45] *Id.* para. 265.

[46] *See, e.g.*, ICL, *supra* note 37, at 51-73; PAUST, *supra* note 1, at 18-19, 153, 202, 220, 261.

are several forms of legislation that can be used. However, there is presently no federal statute permitting prosecution of "crimes against humanity" as such, although one could be enacted and operate retroactively without violating any *ex post facto* prohibitions as long as what is being prosecuted under the new statute was a crime against humanity under international law at the time of the alleged commission.[47] A new federal statute (like the piracy statute, 18 U.S.C. § 1651, parts of the War Crimes Act, and alternative war crimes legislation noted below) could simply incorporate crimes against humanity under international law by reference and could read in pertinent part "crimes against humanity as defined under international law." Actually, such legislation should also be enacted for other important reasons.[48]

With respect to violations of the laws of war, prosecution in the federal district courts would most likely occur under two forms of federal legislation that allow prosecution of relevant

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[47] *See, e.g.*, ICL, *supra* note 37, at 233-37.

[48] For example, the existence of such a federal statute would allow the United States to have flexibility regarding prosecution of crimes against humanity in our courts as opposed to the need to extradite U.S. and foreign nationals to foreign countries. In a reverse circumstance, if no such legislation exists when a U.S. national is reasonably accused of crimes against humanity and is held in a foreign country, a U.S. request for extradition could be denied because of the lack of dual criminality (*i.e.*, because the alleged offense is not a crime prosecutable as such under the laws of the requested and requesting countries). Further, when no such legislation exists and a U.S. accused is rendered to the International Criminal Court, the principle of complimentarity (allowing U.S. prosecution under Article 17 of the Statute of the ICC) would not be applicable. That U.S. nationals can be prosecuted before the ICC in certain circumstances, *see, e.g.*, Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1 (2000); Rome Statute of the ICC, *supra* note 39, arts. 12(2)(a), 13(a) and (c).

A similar problem regarding the lack of dual criminality and a lack of complimentarity exists with present genocide legislation, since the legislation does not mirror the customary definition of genocide. The genocide legislation should be amended so that within 18 U.S.C. § 1091(a) the word "substantial" is deleted; § 1091(a)(3) is changed to reflect the customary definition; and § 1093(8) is deleted. *See also* ICL, *supra* note 37, at 800-03.

war crimes. The first is the War Crimes Act.[49] This statute allows prosecution, for example, of those who are U.S. nationals who commit a relevant war crime outside the United States. Listed war crimes include some violations of the 1907 Hague Convention No. IV[50] and all "grave breaches" of the Geneva Conventions[51] (which include certain forms of mistreatment of detainees and the unlawful transfer of persons[52]). Also clearly relevant is the statutory listing of violations of common Article 3 of the 1949 Geneva Conventions,[53] which expressly requires humane treatment of detained persons "in all circumstances" and also covers separate offenses involving "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment" of "persons taking no active part in the hostilities."[54] Today, customary international law reflected in common Article 3 provides a set of minimum rights and duties in any armed conflict, although the article was originally designed to apply to cases of insurgency.[55] The Supreme Court's opinion in *Hamdan*[56] and the concurring opinion of Justice Kennedy[57]

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[49] 18 U.S.C. § 2441.

[50] *Id.* § 2441(c)(2).

[51] *Id.* § 2441(c)(1).

[52] *See, e.g.*, GC, *supra* note 11, art. 147.

[53] See 18 U.S.C. § 2441(c)(3).

[54] GC, *supra* note 11, art. 3. See also Jordan J. Paust, *The DOJ and the Geneva Conventions: Getting Rights Wrong*, available at http://jurist.law.pitt.edu/forumy/2008/04/doj-and-geneva-conventions-getting.php.

[55] *See, e.g.*, PAUST, *supra* note 1, at 2-3, 136-38.

[56] See Hamdan v. Rumsfeld, 548 U.S. 557 , _ (2006) (the Court ruled that "there is at

generally affirm this point about Geneva law, a point documented further in *Beyond the Law*.[58] It should be noted, however, that certain changes to the War Crimes Act rushed through with enactment of the 2006 Military Commissions Act do not reflect customary and treaty-based international law[59] and should be changed to comply with international law which, in any event, has primacy domestically.[60]

A second set of federal laws allows prosecution in federal district courts of any violation of the laws of war as offenses against the laws of the United States. As recognized by the Supreme Court in cases such as *Ex parte Quirin*[61] and *In re Yamashita*,[62] the precursor to 10 U.S.C. § 818 incorporated the laws of war by references as offenses against the laws of the United States. Under 18 U.S.C. § 3231, all offenses against the laws of the United States can be prosecuted in the federal district courts, whether or not there is concurrent jurisdiction in any

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least one provision of the Geneva Conventions that applies here.... Common Article 3.").

[57] See 548 U.S. at _ (Kennedy, J. concurring) ("the requirement of the Geneva Conventions ... [is] a requirement that controls here.... The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan.... That provision is Common Article 3.... The provision is part of a treaty the United States has ratified and thus accepted as binding law..... By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses.").

[58] *See, e.g.*, PAUST, *supra* note 1, at 2-3, 136-38.

[59] *See, e.g., id.* at 94-98, 254-60.

[60] *See, e.g., id.* at 92-94, 253-54; *see also id.* at 44-45, 60-61, 64, 83, 93-94, 129.

[61] 317 U.S. 1, 28, 30 (1942) ("Congress ... exercised its authority to define and punish offenses against the law of nations.... Congress has incorporated by reference ... all offenses which are defined as such by the law of war").

[62] 327 U.S. 1, 7-8 (1946).

military tribunal. These points have been well-documented.[63] Additionally, prosecution of some forms of torture could occur under the federal torture statute.[64]

It would also be possible to prosecute civilians in a properly constituted military commission in a war-related occupied territory using at least the minimum due process requirements under customary international law incorporated by reference in common Article 3 of the Geneva Conventions[65] and reflected in Article 14 of the International Covenant on Civil and Political Rights.[66] Prosecution of civilians might also be possible in a general courts-martial in a theater of war in time of war if such a prosecution can survive a Fifth Amendment challenge such as that addressed in the Supreme Court's decision in 1957 in *Reid v. Covert*[67] (which might be distinguished, since the case addressed the impropriety of military tribunal jurisdiction over U.S. civilians in time of peace).

Prosecution of some persons is also possible under the Military Extraterritorial Jurisdiction Act,[68] which applies extraterritorially to "whoever engages in conduct outside the United States" that would be conduct criminally proscribed had the conduct been engaged "within the special maritime and territorial jurisdiction of the United States," but the conduct of a

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[63] Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 10-23, 27 (1971), *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (Am. Soc'y Int'l Law 1976).

[64] 18 U.S.C. § 2340-2340A.

[65] GC, *supra* note 11, art. 3.

[66] 999 U.N.T.S. 171. *See* PAUST, *supra* note 1, at 105, 111-19, 121-27, 272-73 n.29.

[67] 354 U.S. 1 (1957).

person who is not a member of the armed forces of the United States would have to have been engaged in while that person was (1) "employed by" U.S. armed forces,[69] or (2) "accompanying" U.S. armed forces outside the United States.[70]

A significant problem today, however, is the fact that the Bush Administration is unwilling to prosecute "their own" under any relevant statute and experts expect that the new Attorney General will not attempt to enforce relevant criminal law.[71] As documented in *Beyond the Law*, "for more than five [now six] years the Bush administration has furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad."[72] For example, the Administration refuses to prosecute memo-writers who have abetted what President Bush admitted in September 2006 is his "program" of (1) secret detention or forced disappearance and the per se war crime and "grave breach" of Geneva law involving the transfer of persons out of occupied territory, and (2) "tough" interrogation tactics (which are violative of several treaties of the United States and customary international laws, as documented most

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[68] 18 U.S.C. § 3261.

[69] 18 U.S.C. § 3261(a)(1).

[70] *Id.*

[71] *See, e.g.*, Anthony D'Amato, *Waterboarding: The Key Question for Mukasey*, available at http://jurist.law.pitt.edu/forumy/2007/10/waterboarding-key-question-for-mukasey.php; Benjamin Davis, *Mukasey on Torture: Of Sins, Mistakes and Crimes*, available at http://jurist.law.pitt.edu/forumy/2007/10/mukasey-on-torture-of-sins-mistakes-and.php.

[72] PAUST, *supra* note 1, at 31-32.

recently in *Beyond the Law*[73]), and those who authorized such criminal activity during what has been described as a "common, unifying" plan devised by the "inner circle" to engage in what are patently unlawful forms of "coercive interrogation." Only a few of the direct perpetrators of the common plan have been prosecuted in military fora and penalties have generally been surprisingly lenient.

IV. Conclusion

Finally, in the long history of the United States, the Bush administration is unique. President Bush and others have clearly authorized and abetted various types of serious and manifest international crime and the administration refuses (1) to stop the violations, and (2) to initiate prosecution of all who are reasonably accused. We who care about the rule of law and democratic values must continue our efforts to assure that no President, Vice President, and cabal of politically-appointed lawyers ever initiate, authorize, engage in, and abet such a common plan and program again. The very soul of America, the rule of law, and our common humanity are at stake.

Appendix

Sixteen "Tough," "Coercive" Tactics Authorized for Interrogation [and Categories of International Legal Proscription][74]

1. water-boarding [terror, torture, cruel, inhuman, physical coercion]
2. use of dogs to intimidate [terror, torture, cruel, inhuman, threats of violence, moral coercion]
3. threatening to kill family members [terror, torture, cruel, inhuman, threats of violence moral coercion]

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[73] *See id.* at 2-5, 12-18, 27-31.

[74] as documented in PAUST, BEYOND THE LAW, *supra* note 1, available at www.cambridge.org.

4. cold cell [torture, cruel, inhuman, physical coercion, degrading, humiliating]
5. stripping naked [inhuman, degrading, humiliating, moral coercion – in a given culture, cruel, physical coercion]
6. "fear up harsh" [cruel, inhuman, physical coercion, moral coercion]
7. striking to cause pain and fear [cruel, inhuman, physical coercion, moral coercion]
8. severe stress matrix, including short shackling [cruel, inhuman, physical coercion]
9. withholding of pain medication [cruel, inhuman, physical coercion]
10. prolonged deprivation of sleep [cruel, inhuman, physical coercion]
11. secret detention [forced disappearance, cruel, inhuman]
12. threat of transfer to country for torture [cruel, inhuman, threats of violence, moral coercion – in a given case, terror, torture]
13. transfer from occupied territory [unlawful transfer, grave breach]
14. hooding to cause fear [inhuman, moral coercion – exacerbated when used with stripping naked and/or hooding to include other categories of illegality]
15. sexual humiliation [inhuman, degrading, humiliating, moral coercion]
16. withholding of food [inhuman, physical coercion]

Prosecuting the President and His Entourage

– Jordan J. Paust[1]

During his so-called "war" on "terror," President Bush has authorized and ordered manifest violations of customary and treaty-based international law concerning the detention, transfer, and interrogation of numerous individuals. For example, in a February 7, 2002 memorandum, President Bush expressly authorized the denial of absolute rights and protections contained in the 1949 Geneva Conventions that apply in all circumstances to any person who is detained during an armed conflict. The President's memo denied rights and protections under Geneva law by ordering that humane treatment be provided merely "in a manner consistent with the principles of Geneva" and then only "to the extent appropriate and consistent with military necessity," despite the fact that (1) far more than the "principles" of Geneva law apply, (2) it is not "appropriate" to deny treatment required by Geneva law, and (3) it is well-understood that alleged military necessity does not justify the denial of treatment required by Geneva law.[2] Necessarily, the President's 2002 memorandum authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.[3]

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[1] Mike and Teresa Baker Law Center Professor, University of Houston.

[2] See JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 7-8 (2007).

[3] Every violation of the law of war is a war crime. *See, e.g., id.* at 133. A uniform and overwhelming number of federal cases demonstrates that the President and all persons within the executive branch are bound by the customary and treaty-based laws of war. *See, e.g., id.* at 21-22, 169-72.

My new book at Cambridge University Press, *Beyond the Law*,[4] identifies a reported presidential finding, signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving unlawful interrogation techniques, including water boarding, and an authorization for the CIA to secretly detain and interrogate persons in a September 17, 2001 directive known as a memorandum of notification and that harsh interrogation tactics were devised in late 2001 and early 2002.[5] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized as well as another document that contains a Department of Justice legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.[6] In fact, during a speech on September 6, 2006, President Bush publicly admitted that a CIA program has been implemented "to move ... [high-value] individuals to ... where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue.[7] In July, 2006 and in furtherance of his program, President Bush had singed a new executive order authorizing "enhanced" interrogation tactics to be used against persons held in secret "black sites" overseas and elsewhere.[8]

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[4] *Supra* note 1.

[5] *Id.* at 28.

[6] *Id.* at 28-29. *See also infra* note 7.

[7] *Id.* at 29, 32.

[8] *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Sever Interrogations*, N.Y. TIMES, Oct. 4, 2007, at 1 (also disclosing the existence of memos penned by Seven G. Bradbury in OLC, DOJ). *See also* Randall Mikkelsen, *CIA Detention*

As documented in *Beyond the Law*, the unlawful "tough" interrogation tactics that are an admitted part of the Bush program are war crimes.[9] They are also violations of nonderogable customary and treaty-based human rights law[10] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11] The transfer of non-prisoners-of-war out of war-related occupied territory in Afghanistan and Iraq during the Bush program was also a patent and per se violation of the laws of war. Such transfers are absolutely prohibited by express language in Article 49 of the Geneva Civilian Convention[12] and clearly and unavoidably constitute "grave breaches" of the Convention.[13] Moreover, the refusal to disclose the names or whereabouts of persons subjected to secret transfer and secret detention is a manifest and serious crime against humanity known as forced disappearance – a crime that also involves patent violations of related human rights law, the Convention Against Torture, and the laws of war.[14]

John Yoo, a former Deputy Assistant Attorney General at OLC, has disclosed that detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[15] During meetings chaired by White

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Program Remains Active: U.S. Official, Reuters News, Oct. 4, 2007.

[9] *See, e.g.*, PAUST, *supra* note 1, at 2-4, 12-18, 27-31; Appendix, *infra*.

[10] *Id.* at 4-5, 12-18, 27-31.

[11] 1465 U.N.T.S. 85. *See* PAUST, *supra* note 1, at 5, 11, 16, 31, 33, 44-45, 143-44.

[12] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 49, 75 U.N.T.S. 287 [hereinafter GC].

[13] *See, e.g.*, GC, *supra* note 11, art. 147; PAUST, *supra* note 1, at 18, 163-64.

[14] *See, e.g.*, PAUST, *supra* note 1, at 12, 26, 28, 30, 32, 34-41.

[15] JOHN YOO, WAR BY OTHER MEANS ix (2006).

House Counsel Gonzales, the inner circle decided that following Geneva law would interfere with their "ability to ... interrogate," since everyone understood that "Geneva bars 'any form of coercion.'"[16] For the inner circle, "[t]his became a central issue,"[17] and they calculated that "treating the detainees as unlawful combatants would increase flexibility in detention and interrogation,"[18] and the question became merely "what interrogation methods fell short of the torture ban and could be used"[19] as "coercive interrogation,"[20] which includes outlawed cruel, inhuman, and degrading treatment.[21]

In early April, 2008, ABC News disclosed that an inner "inner circle" composed of the National Security Council's Principals Committee conducted meetings to approve various specific coercive interrogation tactics, including water boarding, and that meetings were attended by Cheney, Rice, Rumsfeld, Tenet, Ashcroft, and others. President Bush was quoted as stating "yes, I'm aware our national security team met on this issue. And I approved."[22] One "top official" quoted Aschcroft's statement of concern and warning at one of the meetings: "Why are

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[16] *Id.* at 30, 35, 39. According to Yoo, the meetings began in December 2001 when "senior lawyers from the attorney general's office, the White House counsel's office, the Departments of State and Defense, and the NSC met ... [in the] Old Executive Office Building." *Id.* at 30. They met early in 2002 in the White House situation room. *Id.* at 39.

[17] *Id.* at 39-40.

[18] *Id.* at 43.

[19] *Id.* at 171-72.

[20] *Id.* at 172, 177-78, 187, 190-92, 202.

[21] *See, e.g., id.* at 200; PAUST, *supra* note 1, at 30, 182 n.37.

[22] ABC News, available at http://abcnews.co.com/print?id=4635175.

we talking about this is the White House? History will not judge this kindly."[23]

In view of the fact that a "common, unifying approach" was devised to use "coercive interrogation" tactics and President Bush has admitted that such tactics and secret detention have been used as part of his approved program in other countries, it is obvious that use of coercive interrogation migrated to Afghanistan and Iraq as part of the common plan. It is also clear that presidential and other authorizations, directives, and findings (including two authorizations from Secretary of Defense Rumsfeld[24] and one from Lt. Gen. Sanchez[25]) and memos (such as the Yoo-Delahunty,[26] Gonzales,[27] Aschcroft,[28] Bybee,[29] Goldsmith,[30] and the newer Bradbury memos[31]), and the 2003 DOD Working Group Report[32] substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that use of unlawful coercive interrogation tactics was either known or a substantially foreseeable consequence of the common plan. Clearly, several memo writers and those who authorized coercive interrogation tactics were aware that their memos and authorizations would assist perpetrators of coercive

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[23] *Id.*

[24] *See, e.g.*, PAUST, *supra* note 1, at 13-16, 26-27, 146, 154-56, 160, 174.

[25] *Id.* at 16-17, 161-62, 174-75.

[26] *Id.* at 9-11, 19-20, 29-30, 146, 148-49.

[27] *Id.* at 5-6, 8-9, 144-45, 148, 176.

[28] *Id.* at 7, 28, 30, 146, 148, 151.

[29] *Id.* at 11, 146, 150-51, 168-69, 243, 248.

[30] *Id.* at 18, 30, 163.

[31] See *supra* note 7.

interrogation.

Implementation of the common plan apparently occurred first at Guantanamo Bay, Cuba. It is well-known that Secretary of Defense Donald Rumsfeld had expressly authorized patently unlawful interrogation tactics involving the stripping of persons naked, use of dogs, and hooding, among other unlawful tactics, in an action memo on December 2, 2002[33] and in another memo on April 16, 2003,[34] the Secretary adding that if additional interrogation techniques for a particular detainee were required he might approve them upon written request.[35]

Former CIA Director Porter Goss has admitted that prior Agency techniques for interrogation have been restricted under the McCain Amendment to the 2005 Detainee Treatment Act, which reiterated the prohibition of cruel, inhuman, and degrading treatment.[36] Some CIA

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[32] See PAUST, *supra* note 1, at 14-15, 24, 30, 90, 155-58, 168-69, 180.

[33] Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA J. TRANSNAT'L L. 811, 840-41 (2005).

[34] *Id.* at 843-44 & nn.120, 122. *See also* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, addressing a memo from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004, available at http://www.newyorker.com/images/pdfs/moramemo.pdf, and the memos of Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, abuse at Guantanamo, and the failure to foster checks and balances and the flow of the best available information within Executive decisional processes that might provide ultimate decisionmakers with sound information required for rational, policy-serving choice.

[35] Paust, *supra* note 32, at 843-44.

[36] *See, e.g.*, Goss Says CIA "Does Not Do Torture," But Reiterates Need for Interrogation Flexibility, The Frontrunner, Nov. 21, 2005. *See also* YOO, *supra* note 19, at 171 (under the Bush policy, "methods ... short of the torture ban ... could be used"), 178 (the Bush policy had been that "[m]ethods that ... do not cause severe pain or suffering are permitted"), 187

("using 'excruciating pain'" related to "coercive interrogation" not prohibited by the executive), 190-91 ("coercive interrogation" was used), 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate"); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations" in violation of Geneva law and CIA officer and former director of intelligence programs of the National Security Agency, Mary O. McCarthy, has stated that CIA policies authorized treatment she "considered cruel, inhumane or degrading."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA TODAY, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo apparently exists that is more detailed than the 2002 Bybee torture memo and it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 33 (the memo allows inhumane treatment of persons held by the C.I.A.); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by CIA, military, and others and tactics included use of the cold cell). This paragraph is borrowed from Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 352-54 (2007).

personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell'... [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' ... [which produces] a terrifying fear of drowning," each of which is manifestly illegal under the laws of war and human rights law. In February 2008, CIA Director Michael Hayden admitted that the CIA had used waterboarding against three persons from 2002 to 2003.

Condemnation of these and other illegal tactics used during the program of coercive interrogation has appeared in reports by the Committee Against Torture under the auspices of the Convention Against Torture; reports by the Human Rights Committee under the auspices of the International Covenant on Civil and Political Rights; a 2006 U.N. Experts' Report on the Situation of Detainees at Guantanamo Bay, under the auspices of the Commission on Human Rights; and a 2005 Council of Europe Parliamentary Assembly resolution on the Lawfulness of Detentions by the United States in Guantanamo Bay. The International Committee of the Red Cross has also stated that various tactics used were "tantamount to torture."

What types of criminal responsibility can exist under international law with respect to such conduct? First, it is obvious that direct perpetrators of violations of the laws of war, the Convention Against Torture, and crimes against humanity (such as forced disappearance of persons as part of the President's "program" of secret detention) have direct liability. Leaders who issue orders or authorizations to commit international crimes can also be prosecuted as direct perpetrators.[37]

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[37] *See, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW 32, 35, 51-73 (3 ed. 2007) [hereinafter ICL].

Second, any person who aids and abets an international crime has liability as a complicitor or aider and abettor before the fact, during the fact, or after the fact.[38] Liability exists whether or not the person knows that his or her conduct is criminal.[39] Under customary international law, a complicitor or aider and abettor need only be aware that his or her conduct would or does assist a direct perpetrator.[40] In any case, ignorance of the law is no excuse. Especially relevant in this respect are the criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in *United States v. Altstoetter* (The Justice Case).[41] Clearly, several memo writers in the Bush administration abetted the "common, unifying" plan.

Third, individuals can also be prosecuted for participation in a "joint criminal enterprise,"[42] which the International Criminal Tribunal for Former Yugoslavia has recognized can exist in at least two relevant forms: (1) where all the accused "voluntarily participate in one

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[38] *See, e.g., id.* at 35, 44-49; PAUST, *supra* note 1, at 18, 24, 30, 165, 167, 185, 193, 199, 277.

[39] *See, e.g.*, Rome Statute of the International Criminal Court, arts. 25(3)(c)-(d), 30, 32(2), 2187 U.N.T.S. 90.

[40] *See, e.g.*, The Prosecutor v. Blaskic, ICTY-95-14-T-A (Appeals Chamber, 29 July 2004), para. 50; The Prosecutor v. Furundzija, ICTY-95-17/1 (Trial Chamber, 10 Dec. 1998), paras. 236-38, 245, 249; *supra* note 33. *But see* Rome Statute, *supra* note 38, art. 25(3)(c) (adding a new "purpose" to facilitate test that will leave ICC jurisdiction incomplete).

[41] See United States v. Altstoetter (The Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1058 (1951).

[42] *See, e.g.*, ICL, *supra* note 36, at 32, 37-38.

aspect of a common plan" and "intend the criminal result [whether or not they knew it was a crime], even if not physically perpetrating the crime"[43]; and (2) where "(i) the crime charged is the natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness participated in that enterprise."[44]

Fourth, civilian and military leaders can also be liable for dereliction of duty with respect to acts of subordinates when the leader (1) knew or should have known that subordinates were about to commit, were committing, or had committed international crimes; (2) the leader had an opportunity to act; and (3) the leader failed to take reasonable corrective action, such as ordering a halt to criminal activity or initiating a process for prosecution of all subordinates reasonably accused of criminal conduct.[45]

What legislation allows prosecution of some of these crimes? In the United States, there are several forms of legislation that can be used. However, there is presently no federal statute permitting prosecution of "crimes against humanity" as such, although one could be enacted and operate retroactively without violating any *ex post facto* prohibitions as long as what is being prosecuted under the new statute was a crime against humanity under international law at the

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[43] *See, e.g.*, The Prosecutor v. Brdanin, IT-99-36-T (Trial Chamber Judgment, 1 Sept. 2004), para. 264.

[44] *Id.* para. 265.

[45] *See, e.g.*, ICL, *supra* note 36, at 51-73; PAUST, *supra* note 1, at 18-19, 153, 202, 220, 261.

time of the alleged commission.[46]

Prosecution in the federal district courts would most likely occur under two forms of federal legislation that allow prosecution of relevant war crimes. The first is the War Crimes Act.[47] This statute allows prosecution, for example, of those who are U.S. nationals who commit a relevant war crime outside the United States. Listed war crimes include some violations of the 1907 Hague Convention No. IV[48] and all "grave breaches" of the Geneva Conventions[49] (which include certain forms of mistreatment of detainees and the unlawful transfer of persons[50]). Also clearly relevant is the statutory listing of violations of common Article 3 of the 1949 Geneva Conventions,[51] which expressly requires humane treatment of detained persons "in all circumstances" and also covers "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment" of "persons taking no active part in the hostilities."[52] Today, customary international law reflected in common Article 3 provides a set of minimum rights and duties in any armed conflict, although the article was originally designed to apply to

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[46] *See, e.g.*, ICL, *supra* note 36, at 233-37.

[47] 18 U.S.C. § 2441.

[48] *Id.* § 2441(c)(2).

[49] *Id.* § 2441(c)(1).

[50] *See, e.g.*, GC, *supra* note 11, art. 147.

[51] See 18 U.S.C. § 2441(c)(3).

[52] GC, *supra* note 11, art. 3.

cases of insurgency.[53] The Supreme Court's opinion in *Hamdan*[54] and the concurring opinion of Justice Kennedy[55] generally affirm this point about Geneva law, a point documented further in *Beyond the Law*.[56]

A second set of federal laws allows prosecution in federal district courts of any violation of the laws of war as offenses against the laws of the United States. As recognized by the Supreme Court in cases such as *Ex parte Quirin*[57] and *In re Yamashita*,[58] the precursor to 10 U.S.C. § 818 incorporates the laws of war by references as offenses against the laws of the United States. Under 18 U.S.C. § 3231, all offenses against the laws of the United States can be prosecuted in the federal district courts, whether or not there is concurrent jurisdiction in any military tribunal. These points have been well-documented in another article.[59] Additionally,

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[53] *See, e.g.*, PAUST, *supra* note 1, at 2-3, 136-38.

[54] See Hamdan v. Rumsfeld, _ U.S. _ , _ (2006) (the Court ruled that "there is at least one provision of the Geneva Conventions that applies here.... Common Article 3.").

[55] See _ U.S. at _ (Kennedy, J. concurring) ("the requirement of the Geneva Conventions ... [is] a requirement that controls here.... The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan.... That provision is Common Article 3.... The provision is part of a treaty the United States has ratified and thus accepted as binding law..... By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses.").

[56] *See, e.g.*, PAUST, *supra* note 1, at 2-3, 136-38.

[57] 317 U.S. 1, 28, 30 (1942) ("Congress ... exercised its authority to define and punish offenses against the law of nations.... Congress has incorporated by reference ... all offenses which are defined as such by the law of war").

[58] 327 U.S. 1, 7-8 (1946).

[59] Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 10-23, 27 (1971), *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (ASIL 1976).

prosecution of some forms of torture could occur under the federal torture statute.[60]

It would also be possible to prosecute civilians in a properly constituted military commission in a war-related occupied territory using at least the minimum due process requirements under customary international law incorporated by reference in common Article 3 of the Geneva Conventions[61] and reflected in Article 14 of the International Covenant on Civil and Political Rights.[62] Prosecution of civilians might also be possible in a general courts-martial in a theater of war in time of war if such a prosecution can survive a Fifth Amendment challenge such as that addressed in the Supreme Court's decision in 1957 in *Reid v. Covert*[63] (which might be distinguished, since the case addressed the impropriety of military tribunal jurisdiction over U.S. civilians in time of peace).

Prosecution of some persons is also possible under the Military Extraterritorial Jurisdiction Act,[64] which applies extraterritorially to "whoever engages in conduct outside the United States" that would be conduct criminally proscribed had the conduct been engaged "within the special maritime and territorial jurisdiction of the United States," but the conduct of a person who is not a member of the armed forces of the United States would have to have been

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[60] 18 U.S.C. § 2340-2340A.

[61] GC, *supra* note 11, art. 3.

[62] 999 U.N.T.S. 171. *See* PAUST, *supra* note 1, at 105, 111-19, 121-27, 272-73 n.29.

[63] 354 U.S. 1 (1957).

[64] 18 U.S.C. § 3261.

engaged in while that person was (1) "employed by" U.S. armed forces,[65] or (2) "accompanying" U.S. armed forces outside the United States.[66]

A significant problem today, however, is the fact that the Bush Administration is unwilling to prosecute "their own" under any relevant statute and experts expect that the new Attorney General will not attempt to enforce relevant criminal law.[67] As documented in *Beyond the Law*, "for more than five years the Bush administration has furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad."[68] For example, the Administration refuses to prosecute memo-writers who have abetted what President Bush admitted in September 2006 is his "program" of (1) secret detention or forced disappearance and the per se war crime and "grave breach" of Geneva law involving the transfer of persons out of occupied territory, and (2) "tough" interrogation tactics (which are violative of several treaties of the United States and customary international laws, as documented most recently in *Beyond the Law*[69]), and those who authorized such criminal activity during what has

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[65] 18 U.S.C. § 3261(a)(1).

[66] *Id.*

[67] *See, e.g.*, Anthony D'Amato, *Waterboarding: The Key Question for Mukasey*, available at http://jurist.law.pitt.edu/forumy/2007/10/waterboarding-key-question-for-mukasey.php; Benjamin Davis, *Mukasey on Torture: Of Sins, Mistakes and Crimes*, available at http://jurist.law.pitt.edu/forumy/2007/10/mukasey-on-torture-of-sins-mistakes-and.php.

[68] PAUST, *supra* note 1, at 31-32.

[69] *See id.* at 2-5, 12-18, 27-31.

been described as a "common, unifying" plan devised by the "inner circle" to engage in what are patently unlawful forms of "coercive interrogation." Only a few of the direct perpetrators of the common plan have been prosecuted in military fora and penalties have generally been surprisingly lenient.

Finally, in the long history of the United States, the Bush administration is unique. President Bush and others have clearly authorized and abetted various types of serious and manifest international crime and the administration refuses (1) to stop the violations, and (2) to initiate prosecution of all who are reasonably accused. We who care about the rule of law and democratic values must continue our efforts to assure that no President, Vice President, and cabal of politically-appointed lawyers ever initiate, authorize, engage in, and abet such a common plan and program again. The very soul of America, the rule of law, and our common humanity are at stake.

Appendix

Sixteen "Tough," "Coercive" Tactics Authorized for Interrogation [and Categories of International Legal Proscription][70]

1. water-boarding [terror, torture, cruel, inhuman, physical coercion]
2. use of dogs to intimidate [terror, torture, cruel, inhuman, threats of violence, moral coercion]
3. threatening to kill family members [terror, torture, cruel, inhuman, threats of violence moral coercion]
4. cold cell [torture, cruel, inhuman, physical coercion, degrading, humiliating]
5. stripping naked [inhuman, degrading, humiliating, moral coercion – in a given culture, cruel, physical coercion]
6. "fear up harsh" [cruel, inhuman, physical coercion, moral coercion]
7. striking to cause pain and fear [cruel, inhuman, physical coercion, moral coercion]
8. severe stress matrix, including short shackling [cruel, inhuman, physical coercion]
9. withholding of pain medication [cruel, inhuman, physical coercion]
10. prolonged deprivation of sleep [cruel, inhuman, physical coercion]
11. secret detention [forced disappearance, cruel, inhuman]
12. threat of transfer to country for torture [cruel, inhuman, threats of violence, moral coercion – in a given case, terror, torture]
13. transfer from occupied territory [unlawful transfer, grave breach]
14. hooding to cause fear [inhuman, moral coercion – exacerbated when used with stripping naked and/or hooding to include other categories of illegality]
15. sexual humiliation [inhuman, degrading, humiliating, moral coercion]
16. withholding of food [inhuman, physical coercion]

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[70] as documented in PAUST, BEYOND THE LAW, *supra* note 1, available at www.cambridge.org.