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0521853249 - The Torture Papers: The Road to Abu Ghraib
Edited by Karen J. Greenberg and Joshua L. Dratel
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THE TORTURE PAPERS

The Torture Papers consists of the so-called “torture memos” and reports that the U.S. government officials wrote to authorize and to document coercive interrogation and torture in Afghanistan, Guantánamo, and Abu Ghraib. This volume of documents presents for the first time a compilation of materials that prior to publication have existed only piecemeal in the public domain. The Bush Administration, concerned about the legality of harsh interrogation techniques, understood the desirability of establishing a legally viable argument to justify such procedures. The memos and reports in this volume document the systematic attempt of the U.S. government to authorize the way for torture techniques and coercive interrogation practices, forbidden under international law, with the concurrent express intent of evading liability in the aftermath of any discovery of these practices and policies.

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Introduction by Anthony Lewis



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Law and Security

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All of the above have helped bring this volume into being and we are therefore duly grateful.

Introduction

Anthony Lewis

The Torture Papers: The Road to Abu Ghraib includes the full texts of the legal memoranda that sought to argue away the rules against torture. They are an extraordinary paper trail to mortal and political disaster: to an episode that will soil the image of the United State in the eyes of the world for years to come. They also provide a painful insight into how the skills of the lawyer – skills that have done so much to protect Americans in this most legalized of countries – can be misused in the cause of evil.

We have the legal memoranda because committed reporters, from *The Washington Post* and others in the press, ferreted them out – until, finally, the government released official texts. Without the press, indeed, the whole torture episode might have remained hidden. The television program *Sixty Minutes* and Seymour Hersh, in *The New Yorker*, told the world what had gone on in Abu Ghraib and showed us the pictures. They relied on the unchallengeable findings of an inquiry by Major General Antonio M. Taguba into the conduct of a military police brigade in Iraq. The Taguba Report, too, is in *The Torture Papers*.

The mindset that produced the legal memos is easy enough to see. After the terrorist attacks of September 11, 2001, the Bush Administration reasoned that the United States was up against an enemy more insidious than any the country had faced. To defeat terrorism, it felt, we must have intelligence on the plans of al Qaeda and others.

The United States lacked what is called human intelligence: spies inside terrorist organizations. So officials focused on the hope of getting information by questioning captured terrorist suspects. They asked lawyers in the Justice Department and the Defense Department what methods could be used to extract information from suspects without violating the law.

Any lawyer acting for a business must be asked by its officials, from time to time, “Can we do this?” The lawyer understands that the company executives want her to say “Yes.” She is expected to spell out how the company can do what it wants without getting into legal trouble. That was the implicit scenario here. Lawyers were asked how far interrogators could go in putting pressure on prisoners to talk without making themselves, the interrogators, liable for war crimes. Or if that was not the specific question put to the lawyers, they well understood that that was the issue. They responded with the advice that American interrogators could go very far – to the brink of killing prisoners – and not face legal consequences.

“Physical pain amounting to torture,” Assistant Attorney General Jay S. Bybee advised the Counsel to the President, Alberto Gonzales, “must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death.”

That was Bybee's construction of the federal law against torture, to which the United States is a party. He adds that in the Justice Department's view, actions by interrogators "may be cruel, inhuman or degrading, but, still not produce pain and suffering of the requisite intensity."

Reading that advice, one has to imagine an interrogator making nice judgments about the suffering of his victim. In Argentina, during the tyranny of the generals, torturers in secret prisons sometimes had a doctor present at a torture session to judge when the prisoner was in danger of dying. Jacobo Timerman, a newspaper proprietor who was imprisoned by the regime, described how the doctor – after a torture session – asked his advice on a financial matter. It was as if the doctor were morally absent from reality.

The premise of the Bush Administration after September 11, 2001, was that the end, fighting terrorism, justified whatever means were chosen. It sought repeatedly to eliminate legal constraints on the means it adopted. Thus in November 2001, President Bush issued an order for trial by military tribunal of non-Americans charged with terrorist crimes. The order forbade the accused from going to any court, American or foreign. Keeping courts out was a major element in several programs.

The legal documents dealt with one large question in addition to the limits on interrogation techniques. That was the status of the hundreds of prisoners brought to the U.S. base at Guantánamo, Cuba, after the war in Afghanistan. Were they protected by the Geneva Convention, which the United States and almost all other countries have signed and which provides for the humane treatment of prisoners taken in conflicts? The Third Geneva Convention lays down rules for deciding whether a captive is a regular soldier, a spy or terrorist, or an innocent person picked up by chance. The issue is to be decided by a "competent tribunal."

In the 1991 Gulf War the American military held 1196 hearings before such tribunals. Most of them found the prisoner to be an innocent civilian. But this time the Bush administration legal memoranda found that the Guantánamo prisoners should not get the hearings required by the Third Geneva Convention.

The fourth memorandum in these volumes, from Deputy Assistant Attorney General John Yoo and another lawyer in the Justice Department's Office of Legal Counsel, Robert J. Delahunty, argued that the Geneva Convention dealt only with state parties, and al Qaeda was not a state. As for Taliban soldiers, it said that Afghanistan under the Taliban was a "failed state" to which the convention also did not apply. Although the Taliban had controlled almost all the country, the memo described it as a mere "militia or faction."

That memo went to White House Counsel Alberto Gonzales on January 9, 2002. Days later President Bush decided that the Third Geneva Convention did not apply to the prisoners at Guantánamo. All of them, he found, were "unlawful combatants" – a term not found in the convention. He made that finding without any hearings or any opportunity for the prisoners to contest the facts.

On January 26, Secretary of State Powell asked the President to reverse that decision, which he said would "reverse over a century of U.S. policy and practice... and undermine the protections of the law of war for our troops (Memo #8)". The State Department's Legal Adviser, William H. Taft IV, sent a memo (Memo #10) to White House Counsel Gonzales arguing that sticking to Geneva would show that the United States

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“bases its conduct on its international legal obligations and the rule of law, not just on its policy preferences.”

Gonzales rejected the State Department view. In a memorandum (Memo #7) to the President he said, “the nature of the new war [on terrorism] places a high premium on . . . the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities . . .” He said this “new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners” and made other Geneva provisions “quaint.”

The memorandum (Memo #4), submitted on Jan. 9, 2002, by John Yoo and Robert J. Delahunty of the Department of Justice, first raised the idea of overriding presidential power to order the use of torture. It said that “restricting the President’s plenary power over military operations (including the treatment of prisoners)” would be “constitutionally dubious.”

Seven months later Assistant Attorney General Jay S. Bybee hardened the “constitutionally dubious” argument into a flat assertion of presidential immunity from legal restraints on torture. In a memorandum to White House Counsel Gonzales, Bybee said that in a war like the one against terror, “the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply [the criminal law against torture] in a manner that interferes with the President’s direction of such core war matter as the detention and interrogation of enemy combatants thus would be unconstitutional.”

The argument got further elaboration in a memorandum of March 6, 2003 (Memo #25), from an ad hoc group of government lawyers to Secretary of Defense Donald Rumsfeld, a memo also included in *The Torture Papers*. “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants,” it argued, “than it may regulate his ability to direct troop movements on the battlefield.” So presidential power overrode the International Convention Against Torture, to which the United States is a party, and the Congressional statute enforcing the convention.

Abu Ghraib became a focus of world attention when the photographs of humiliated prisoners were published. But there was also considerable disquiet about the prison at Guantánamo Bay. There were no incriminating photographs of Guantánamo, and everything about the prison was kept secret. When habeas corpus actions were brought in federal courts to challenge the detention of particular prisoners, the Bush Administration argued that the courts held no jurisdiction to hear the cases. (The Supreme Court eventually rejected that contention.)

But the very secrecy about Guantánamo produced criticism. A judge of Britain’s highest court, Lord Steyn, called it a “legal black hole.” When some British citizens who had been held there – after capture not in Afghanistan but in other countries – were sent home to Britain, they said they had been mistreated.

It also became clear that the American military and the Central Intelligence Agency were holding terrorist suspects at places other than Abu Ghraib and Guantánamo. Some were not listed with the Red Cross, which complained that it was unable to check on the condition of all American prisoners. And some died while under interrogation. One, an Iraqi general, Abed Hamed Mowhoush, was found in an autopsy to have died from “asphyxia due to smothering and chest compression.”

What, then, did the legal memoranda on the treatment of prisoners do? A longtime national security advisor to President George H. W. Bush, Donald P. Gregg, wrote in *The New York Times* that the memoranda “cleared the way for the horrors that have been revealed in Iraq, Afghanistan and Guantánamo and make a mockery of the administration’s assertions that a few misguided enlisted personnel perpetrated the vile abuse of prisoners. I can think of nothing that can more devastatingly undercut America’s standing in the world or, more important, our view of ourselves, than those decisions.”

Jacobo Timerman, the Argentine prisoner mentioned earlier in this introduction, was saved from likely death by pressure from the administration of President Jimmy Carter. He was released and went to Israel. I met him there years later, and we talked about interrogation of prisoners. He asked whether I would agree to torture a prisoner if he knew of a terrorist outrage that would shortly take place. After trying to avoid the question, I finally said, Yes, I would. “No!” he said. “You cannot start down that road.”

The Supreme Court of Israel, with many painful examples of terror, agreed with Timerman’s view when it considered the question of torture. It rejected the use of torture even when a suspect is thought to know the location of a “ticking bomb.”

In an age when the ticking bomb may be a weapon of mass destruction, the question is not always easy to answer. But when officials are tempted to use torture, they should remember that suppositions of what a suspect knows are usually wrong. They should understand that statements extracted by torture have repeatedly been found to be useless. They should know, finally, that torture does terrible damage not only to the victim but to the torturer.

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From Fear to Torture

Karen J. Greenberg

The word *torture*, long an outcast from the discourse of democracy, is now in frequent usage. Alongside the word, the practice of torture is now in place as well. The coercive techniques that have been discovered at Abu Ghraib and Guantánamo resulted from advice given by leading figures at the Department of Justice, the Department of Defense, and the White House. The policy came about as the result of a series of memos in which the Administration asked for – and was granted – the right to interrogate prisoners with techniques possibly outlawed by the Geneva Conventions and by American military and civil law. The authors of the memos then justified the interrogation techniques on the grounds that in these specific cases, the legal restrictions did not apply. The result is a carefully constructed anticipation of objections at the domestic and international levels and a legal justification based on considerations of failed states, non-state actors, and the national security agenda of the United States.

This volume contains the documentary record of the Bush Administration's path to the coercive interrogation of prisoners held on the suspicion of terrorist activity. Many of the documents included here were brought initially to public attention through the investigative work of reporters at *The Washington Post* and *Newsweek* as well as at the American Civil Liberties Union. Through the publication of these documents, we can now reconstruct the chronological, legal, and political story of how a traditionally banned form of interrogation became policy.

The assent to coercive interrogation techniques, defined under international law as torture, constitutes a landmark turn in American legal and political history. It did not happen without sustained debate on the part of Americans responsible for directing the course of their nation, individuals at the Pentagon, in the State Department, and in the Department of Justice. The memos do not overlook basic ethical and legal questions. From the start, the Administration is concerned about the legality of harsh interrogation techniques and the importance of establishing a legally viable argument for such procedures to be implemented. These memos argue, with increasing acknowledgment of the tenuous legal ground on which they stand, for the right to implement "Counter-Resistance Strategies." Most of the memos ask for approval without specifying the goal of such techniques. By October, 2002, the Commander of the U.S. Southern Command, James T. Hill, explains, "...despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. 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 (Memo #16)." The result is the creation of three categories of torture and a final compendium of approved

techniques taken from all three categories in light of the arguments outlined in the memos.

There are a number of moral and legal issues embedded in these documents. They include the matters of reciprocity, of human rights protocols, and of constitutionality. The concepts of rights and reciprocity are easy when it comes to the behavior of other nations, but it is in times of crisis and fear that such a principle is truly tested. In the wake of 9/11 and the stresses and strains of an undeclared war on Arab states and persons, the principle faltered at an early stage. The search for legal grounds for these strategies began with the argument that the Taliban and al Qaeda are not covered under the Geneva Conventions, the former on the grounds that Afghanistan was at the time a failed state, the latter because al Qaeda is a non-state actor. Therefore, the authors of these memos reasoned, the right of reciprocity for the United States would not be abrogated.

Despite raising numerous legal questions, there is much these memos overlook. Nowhere is the matter of precedent raised in terms of changes in the American treatment of prisoners; what kinds of across-the-board policies would the approval of such procedures launch? This lapse raises the further question, to what extent were these practices in place elsewhere within the American penal system, military or otherwise? Also missing is a discussion of the fact that these procedures were designed for use on detainees picked up in the Afghan theatre and yet they were applied, as the Reports included in this volume demonstrate, to alleged terrorists and to prisoners in Iraq. The justifications for this are hard to find. Also missing from these discussions is the matter of the effect of such procedures and policies upon those who implement them. As the American historian Arthur Schlesinger, Jr., recently suggested, “the abuse of captives brutalizes their captors.”¹ Finally, there is but scant mention of such techniques. As Michael Dunlavey, an Army lawyer pointed out, while the techniques may work initially, over time, there is less proof of their efficacy.²

These concerns are but the beginning of the debate which must ultimately call into question not the Bush Administration but the American people. The use of coercive interrogation techniques was downplayed, not only by the military, but by the American press as well. The American public insisted in the early stages of the exposure of the memos and reports included in this volume that the practice could not possibly be systematic, reasoned, or intended. The general consensus was that Americans could not possibly be involved in such tactics. Which brings into focus yet another aspect of the decision to use torture; namely, what will be the spiritual cost, the overall damage to the character of the nation?

In the path to torture, there have been numerous individuals involved. They include: those who wrote the memos, those who ordered the torture, those who carried it out, and those in government and later in the public sector who refused to register the abuses as wrongdoing. Many have a distinctive history of academic accomplishment. John Yoo studied at Harvard (B.A.) and Yale (J.D.), taught at Stanford University,

¹ Arthur Schlesinger, Jr., “The Making of a Mess,” *The New York Review of Books*, 42, September 23, 2004.

² October 11, 2002, Memo from Maj. Gen. Michael E. Dunlavey to Commander, U.S. Southern Command.

and now teaches at Boalt Hall at Berkeley. Alberto Gonzales attended Rice University and Harvard (J.D.). Donald Rumsfeld graduated from Princeton (A.B.). William J. Haynes II, earned his degrees from Davidson College (B.A.) and Harvard (J.D.). William H. Taft, IV, who advised against the policy of torture, attended Yale (B.A.) and Harvard (J.D.). Jack Goldsmith received his J.D. from Yale. Rumsfeld, Taft, Haynes, Timothy Flanigan and Jay S. Bybee worked in the administration of the first President Bush. Some of the main players in the torture narrative – for example, Bybee and John Ashcroft – have deeply religious beliefs. In addition to the authors and recipients of these memos, there remains the possibility that there is advice coming from numerous quarters that is not documented here. The confluence of prior associations, overlapping affiliations and other connections among the drafters of the torture memos remains for journalists and historians to discover over time.

Ultimately, what the reader is left with after reading these documents is a clear sense of the systematic decision to alter the use of methods of coercion and torture that lay outside of accepted and legal norms, a process that began early in 2002 and that was well defined by the end of that year, months before the invasion of Iraq. The considerations on torture included here relate exclusively therefore to Guantánamo. Not only did the lawyers and policy makers knowingly overstep legal doctrine, but they did so against the advice of individuals in their midst, notably Secretary of State Colin Powell and William H. Taft, Legal Advisor to the Secretary of State. Powell's memo, a virtual cry in the dark, warns that the policy will "undermine the protections of the law of war for our troops."³ He warns also about the "negative international reaction"⁴ that will follow and the possibility that the implementation of coercive interrogation practices will "undermine public support among critical allies, making military cooperation more difficult to sustain."⁵ In regard to the war on terror, he foresees the possible deleterious effect upon anti-terrorist legal cooperation with Europe. Yet another voice of dissent comes many months later from Guantánamo Bay Staff Judge Advocate Diane E. Beaver, recommending "legal, medical, behavioral science and intelligence"⁶ vetting of the recommended interrogation procedures.

The reports included in this volume show the use of these techniques in Abu Ghraib and against individuals picked up apparently outside of the Afghan theatre, leaving open the question of how and why these considerations were drafted for one context and utilized in the war on terror as well as in the war in Iraq. It remains for scholars and policy makers to explore the links between the initial policies that served Bagram Air Force Base and Guantánamo and the later policies in Afghanistan and against terror suspects picked up outside of the Afghan battlefield. It remains for lawyers and judges, military and civil, to recommend the remedies to address the legal license taken in accordance with these documents, remedies for lawyers, for government officials, for interrogators, and for agency policies as well. It remains for human rights activists, journalists, and others to discover the extent to which these procedures were utilized.

³ January 26, 2001, Memo from Colin L. Powell to Counsel to the President and Assistant to the President for National Security Affairs.

⁴ Ibid.

⁵ Ibid.

⁶ October 11, 2002, Memo from Diane E. Beaver to Commander, JTF 170.

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From Fear to Torture

With the documents before us, it is possible now to begin these explorations and to consider the record both as symptom of its time and as precedent to the future. Fear is an irrefutable catalyst. More than the law, more than treaties, it must stand the judgment of good men and women who flinch less from fear than from the loss of respect for one another. The constructive value of these memos and reports is to enable open-minded reflection and self-correction even in times such as these.

The Legal Narrative

Joshua L. Dratel

While the proverbial road to hell is paved with good intentions, the internal government memos collected in this publication demonstrate that the path to the purgatory that is Guantánamo Bay, or Abu Ghraib, has been paved with decidedly bad intentions. The policies that resulted in rampant abuse of detainees first in Afghanistan, then at Guantánamo Bay, and later in Iraq, were the product of three pernicious purposes designed to facilitate the unilateral and unfettered detention, interrogation, abuse, judgment, and punishment of prisoners: (1) the desire to place the detainees beyond the reach of any court or law; (2) the desire to abrogate the Geneva Convention with respect to the treatment of persons seized in the context of armed hostilities; and (3) the desire to absolve those implementing the policies of any liability for war crimes under U.S. and international law.

Indeed, any claim of good faith – that those who formulated the policies were merely misguided in their pursuit of security in the face of what is certainly a genuine terrorist threat – is belied by the policy makers' more than tacit acknowledgment of their unlawful purpose. Otherwise, why the need to find a location – Guantánamo Bay – purportedly outside the jurisdiction of the U.S. (or any other) courts? Why the need to ensure those participating that they could proceed free of concern that they could face prosecution for war crimes as a result of their adherence to the policy? Rarely, if ever, has such a guilty governmental conscience been so starkly illuminated in advance.

That, of course, begs the question: what was it that these officials, lawyers, and lay persons feared from the federal courts? An independent judiciary? A legitimate, legislated, established system of justice designed to promote fairness and accuracy? The Uniform Code of Military Justice, which governs courts-martial and authorizes military commissions? The message that these memoranda convey in response is unmistakable: these policy makers do not like our system of justice, with its checks and balances, and rights and limits, that they have been sworn to uphold. That antipathy for and distrust of our civilian and military justice systems is positively un-American.

However, that distaste for our justice system was not symmetrical, as the memos reveal how the legal analysis was contrived to give the policy architects and those who implemented it the benefit of the doubt on issues of intent and criminal responsibility while at the same time eagerly denying such accommodations to those at whom the policies were directed. Such piecemeal application of rights and law is directly contrary to our principles: equal application of the law, equal justice for all, and a refusal to discriminate based on status, including nationality or religion. A government cannot pick and choose what rights to afford itself, and what lesser privileges it confers on its captives, and still make any valid claim to fairness and due process.

The memoranda that comprise this volume follow a logical sequence: (1) find a location secure not only from attack and infiltration, but also, and perhaps more importantly in light of the December 28, 2001, memo that commences this trail, from intervention by the courts; (2) rescind the U.S.'s agreement to abide by the proscriptions of the Geneva Convention with respect to the treatment of persons captured during armed conflict; and (3) provide an interpretation of the law that protects policy makers and their instruments in the field from potential war crimes prosecution for their acts. The result, as is clear from the arrogant rectitude emanating from the memos, was unchecked power, and the abuse that inevitably followed.

The chronology of the memoranda also demonstrates the increasing rationalization and strained analysis as the objectives grew more aggressive and the position more indefensible – in effect, rationalizing progressively more serious conduct to defend the initial decisions and objectives, to the point where, by the time the first images of Abu Ghraib emerged in public, the government's slide into its moral morass, as reflected in the series of memos published in this volume, was akin to a criminal covering up a parking violation by incrementally more serious conduct culminating in murder.

The memos also reflect what might be termed the “corporatization” of government lawyering: a wholly result-oriented system in which policy makers start with an objective and work backward, in the process enlisting the aid of intelligent and well-credentialed lawyers who, for whatever reason – the attractions of power, careerism, ideology, or just plain bad judgment – all too willingly failed to act as a constitutional or moral compass that could brake their client's descent into unconscionable behavior constituting torture by any definition, legal or colloquial. That slavish dedication to a superior's imperatives does not serve the client well in the end and reduces the lawyer's function to that of a gold-plated rubber stamp.

Nor does any claim of a “new paradigm” provide any excuse, or even a viable explanation. The contention, set forth with great emphasis in these memoranda, that al Qaeda, as a fanatic, violent, and capable international organization, represented some unprecedented enemy justifying abandonment of our principles is simply not borne out by historical comparison. The Nazi party's dominance of the Third Reich is not distinguishable in practical terms from al Qaeda's influence on the Taliban government as described in these memos.

Al Qaeda's record of destruction, September 11th notwithstanding – and as a New Yorker who lived, and still lives, in the shadow of the Twin Towers, which cast a long shadow over lower Manhattan even in their absence, I am fully cognizant of the impact of that day – pales before the death machine assembled and operated by the Nazis. Yet we managed to eradicate Nazism as a significant threat without wholesale repudiation of the law of war, or a categorical departure from international norms, even though National Socialism, with its fascist cousins, was certainly a violent and dangerous international movement – even with a vibrant chapter here in the United States.

Indeed, like the Nazis' punctilious legalization of their “final solution,” the memos reproduced here reveal a carefully orchestrated legal rationale, but one without valid legal or moral foundation. The threshold premise here, that Guantánamo Bay is outside the jurisdiction of the U.S. courts, was soundly rejected by the Supreme Court last June in *Rasul v. Bush*, and the successive conclusions built upon that premise

will, like the corrupted dominoes they are, tumble in due course. There they will join the other legally instituted but forever discredited stains upon U.S. legal history: the internment of Japanese during World War II, the treatment of Native Americans, and slavery.

Review of the memoranda reveals that not all the players were villains, though. There were dissenters from this march toward ignominy. The Department of State pointed out the perils – to U.S. service personnel principally, who would likely be treated reciprocally if captured – of not applying the standards of the Geneva Convention, and the contradictory position of the United States with respect to the status of the Taliban as the existing government of Afghanistan. Military officers also manifested an implicit reticence, and even incredulity, in demanding explicit authority and direction before implementing the full range of “counter-resistance” techniques. Yet, unfortunately, the policy makers to whom they appealed were only too willing to oblige, and to ignore the cautions communicated by the State Department.

It would be remiss of those of us who have compiled these memoranda and reports to leave them as the record without offering some solutions. The most important change would be the recognition by the Executive that unilateral policy fails not only because it ignores the checks and balances of the other branches, but also because it creates policies distorted by only a single, subjective point of view. Even failing that voluntary reform, Congress must exercise its authority, through oversight and legislation, just as the courts have invoked their power of judicial review.

Lawyers and public officials need to be instructed, in school and on the job, to be cognizant of the real-life consequences of their policy choices. Government is not some academic political science competition, in which the prize goes to the student who can muster coherent doctrinal support, however flimsy, for the most outlandish proposition. Here, real people suffered real, serious, and lasting harm due to violations of whatever law applies – U.S., international, common, natural, moral, or religious – committed by our government, in our name.

As citizens, we surely enjoy rights, but just as surely responsibilities as well. We cannot look the other way while we implicitly authorize our elected officials to do the dirty work, and then, like Capt. Renault in *Casablanca*, be “shocked” that transgressions have occurred under our nose. The panic-laden fear generated by the events of September 11th cannot serve as a license – for our government in its policies, or for ourselves in our personal approach to grave problems – to suspend our constitutional heritage, our core values as a nation, or the behavioral standards that mark a civilized and humane society. That type of consistency in the face of danger, in the face of the unknown, defines courage and presents a road map for a future of which we can be proud.

Timeline

September 14, 2001: President Bush issues “Declaration of National Emergency by Reason of Certain Terrorist Attacks.”

September 25, 2001: John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice advises Timothy E. Flanigan, Deputy Council to the President, that the President has “broad constitutional power” in the matter of military force, military pre-emption and retaliatory measures against terrorists (persons, organization or States) and those who harbor them.

October 7, 2001:¹ President Bush announces that on his orders, “the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”²

November 13, 2001: George W. Bush, “Military Order of November 13, 2001,” “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,” authorizes the detention of alleged terrorists and subsequent trial by military commissions that, given the threat of terrorism, should not be subject to the same principles of law and rules of evidence recognized in US criminal courts.

December 28, 2001: Deputy Assistant Attorney General John C. Yoo and Deputy Assistant Attorney General Patrick F. Philbin advise William J. Haynes II, General Counsel, U.S. Department of Defense, that Federal Courts in the United States lack jurisdiction to hear habeas corpus petitions of prisoners held in Guantánamo Bay, Cuba. This opinion becomes the basis of the government’s legal strategy of trying to prevent detainees from challenging their detention in U.S. courts.

January 9, 2002: Justice Department lawyer John C. Yoo, a U.C. Berkeley law professor, and Special Counsel Robert J. Delahunty advise William J. Haynes II, General Counsel, U.S. Department of Defense, that the Geneva Conventions do not protect members of the al Qaeda network or the Taliban militia.

January 16, 2002: The first suspected al Qaeda and Taliban prisoners arrive at Guantánamo Bay, Cuba.

January 19, 2002: Secretary of Defense Donald Rumsfeld informs the Chairman of the Joint Chiefs of Staff, Richard B. Myers, that al Qaeda and Taliban members are “not entitled to prisoners of war status” under the Geneva Conventions but should be treated “to the extent appropriate” in a manner consistent with the Geneva Conventions of 1949.

¹ *Italicized dates refer to events of note that took place, not to memos.*

² Presidential Address to the Nation, October 7, 2001. <www.whitehouse.gov/news/releases/2001/10/20011007-8>

January 22, 2002: Then-Assistant Attorney General Jay S. Bybee writes to White House Counsel Alberto R. Gonzales and Department of Defense General Counsel William J. Haynes II, arguing that the Geneva Conventions do not apply to “non-state actors” and are not entitled to prisoner of war status.

January 25, 2002: White House Counsel Alberto R. Gonzales, in a memo to President Bush, considers Secretary of State Colin Powell’s objections “unpersuasive” on the grounds that determining that members of al Qaeda and the Taliban are not prisoners of war “holds open options for the future conflicts in which it may be more difficult to determine whether an enemy force as a whole meets the standard for POW status.” This memo also refers to the President’s decision that the Geneva Conventions, in the Treatment of the Prisoners of War, “do not apply with respect to the conflict with the Taliban,” and “that al Qaeda and Taliban detainees are not prisoners of war” under the Geneva Conventions.

January 26, 2002: Secretary of State Colin Powell asks for reconsideration of the Administration’s stance on al Qaeda and Taliban members as not entitled to POW status on the grounds that this determination should only be made on a case-by-case basis. He argues that this should be done in order not to jeopardize the United States in matters of reciprocity, international cooperation and legal vulnerability.

January 27, 2002: Defense Secretary Donald Rumsfeld visits Guantánamo Bay and says the prisoners there “will not be determined to be POWs.”³

February 1, 2002: Attorney General John Ashcroft, in a memo to President Bush, argues that the Geneva Conventions do not apply to members of al Qaeda or the Taliban.

February 2, 2002: In a memo to White House Counsel Alberto Gonzales, State Department Legal Advisor William H. Taft IV argues that the Geneva Conventions *do* apply to the war in Afghanistan.

February 7, 2002: President Bush signs an order declaring, “I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva (Conventions) as between the United States and Afghanistan, but I decline to exercise that authority at this time.” He then says that he is reserving the right to do so “in this or future conflicts.”

February 7, 2002: In a memo to White House Counsel Alberto Gonzales, Assistant Attorney General in the Department of Justice’s Office of Legal Counsel Jay S. Bybee writes that the Taliban do not deserve protection under Article 4 of the Third Geneva Convention because they do not meet legal conditions to be considered legal combatants.

February 26, 2002: DOJ Assistant Attorney General Jay S. Bybee concludes in a memo to General Counsel in the Department of Defense William J. Haynes III that information derived from military interrogations is admissible in Article III Courts, even without *Miranda* warnings. His memo raises the question of the relationship between coercive interrogation and *Miranda* rights.

August 1, 2002: Jay S. Bybee states in a memo to Alberto R. Gonzales that the text of the Torture Convention “prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for ‘cruel, inhuman, or degrading treatment or punishment.’”

³ “Rumsfeld Visits Camp X-Ray,” CNN.com/Transcripts, January 27, 2002. <www.cnn.com/TRANSCRIPTS/020127/sun.09.html>

Timeline

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October 11, 2002: A series of memos are issued, considering acceptable counter-resistance techniques. These memos include:

- A memo from Commander Maj. Gen. Michael E. Dunlavey considering the “counter-resistance strategies.” Dunlavey acknowledges the intelligence that has resulted, but expresses doubt about the effectiveness of such techniques over time.
- Cover letter from DOD Guantánamo Bay Staff Judge Advocate Diane E. Beaver, in which she recommends “that interrogators be properly trained in the use of the approved methods of interrogation,” and that there be a legal review of interrogation techniques in Categories II and III. Her memo evaluates the interrogation techniques in Categories I, II, and III in terms of domestic and international law pertaining to interrogation and torture and recommends a more in-depth “legal, medical, behavioral science and intelligence review” of Categories II and III.
- Director of JTF 170 Guantánamo Bay Jerald Phifer’s memo, which outlines Category I, II, and III techniques for counter-resistance strategies.

October 25, 2002: U.S. Southern Command Commander General James T. Hill sends a memo to Chairman of the Joint Chiefs of Staff Richard B. Myers, commenting upon the October 11 memos defining counter-resistance techniques and their legality. Hill is “uncertain whether all the techniques in the third category are legal under U.S. law, given the absence of judicial interpretation of the U.S. torture statute.”

November 27, 2002: Department of Defense General Counsel William J. Haynes advises Secretary of Defense Donald Rumsfeld to apply only Category I and II techniques and “mild, non-injurious physical conduct” techniques from Category III during interrogations.

December 2, 2002: Secretary of Defense Rumsfeld approves the techniques outlined in William J. Haynes’ November 27 memo.

January 15, 2003: In a memo to U.S. Southern Commander James T. Hill, Secretary of Defense Rumsfeld rescinds permission to use previously approved Category II and III techniques during Guantánamo interrogation and approves use of these techniques only on a case-by-case basis and with the approval of the Secretary of Defense. Rumsfeld also convenes a working group to assess legal policy and operational issues relating to detainees.

January 17, 2003: Memo from William J. Haynes designates Mary L. Walker, the General Counsel for the Department of the Air Force, to chair the Working Group assessing legal policy and operational issues relating to interrogation.

March 6, 2003: Working Group Report recommends taking the Geneva Conventions into account but determines that Taliban detainees do not qualify as prisoners of war and the Geneva Conventions do not apply to the other prisoners at Guantánamo, as they are non-state actors. The United States is, however, bound to the Torture Convention of 1994 (as long as it is in accord with U.S. constitutional Amendments 5, 8 and 14) which includes in the definition of torture the requirement of specific intent “to inflict severe mental pain or suffering” and in cases of mental pain, the damage must be prolonged. The report includes debate over 8th Amendment precedents on torture as well as standard defenses to criminal conduct.

March 19, 2003: President Bush announces that on his orders, “coalition forces have begun striking selected targets of military importance” in Iraq.⁴

⁴ Presidential Address to the Nation, March 19, 2003. <www.whitehouse.gov/news/releases/2003/03/20030319-17>

April 4, 2003: The updated version of the March 6, 2003, Working Group Report argues that it may be necessary to interrogate detainees “in a manner beyond that which may be applied to a prisoner of war who is subject to the Geneva Conventions.” In greater detail than the March 6 report, this report discusses the affirmative defenses for the use of torture and the legal technicalities that can be used to create a “good faith defense against prosecution.” Includes a chart that lists the utility of various interrogation techniques, along with a system displaying their consistency with both U.S. domestic law and international norms.

April 16, 2003: In a memo to U.S. Southern Command Commander General James T. Hill, Secretary of State Rumsfeld provides a new list of approved interrogation techniques that include most Category I techniques and a limited number of Category II techniques. Some of the techniques listed require the specific approval of the Secretary of Defense, on the grounds that they may be perceived as in violation of the Geneva Conventions on prisoners of war.

March 19, 2004: Assistant Attorney General in the Office of Legal Counsel, Jack Goldsmith, justifies the forcible removal of persons who have not been accused of an offense from Iraq “for a brief but not indefinite period” for the purposes of interrogation. Goldsmith argues that Article 49 of the Fourth Geneva Convention prohibition on deportations does not apply to aliens in occupied territory and does not “forbid the removal from occupied territory . . . of ‘protected persons’ who are illegal aliens.”

Missing Documents

These documents have not yet been declassified and/or are currently not obtainable.

1. Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (November 6, 2001).¹
2. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the Untied States* (October 17, 2001).²
3. *Information Paper, Subject: Background Information on Taliban Forces* (February 6, 2002), by Rear Admiral L.E. Jacoby, U.S. Navy, J-2.³
4. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (March 13, 2002).⁴

¹ This document is referred to in footnote 3 (p. 3) of the January 9, 2002, memo from John C. Yoo and Robert J. Delahunty.

² This document is referred to in footnote 104 (p. 29) of the January 22, 2002, memo from Jay S. Bybee. This document is ascribed a different date, October 23, 2001, in a subsequent document (the February 26, 2002, memo from Jay S. Bybee, at footnote 16, p. 21).

³ This document is referred to in the text (at p. 2) of the February 7, 2002, memo from Jay S. Bybee. It is relevant because it was cited in that memo as a basis for concluding that the Taliban, as a whole, was not entitled to Prisoner of War status under the provisions of Geneva Convention III.

⁴ This document is referred to at p. 38 of the August 1, 2002, memo from Jay S. Bybee.

Biographical Sketches

Ashcroft, John

Attorney General, U.S. Department of Justice

Ashcroft became U.S. Attorney General in January 2001. Prior to that, he served as Attorney General of Missouri for two terms and as Governor of Missouri from 1985 through 1993. He was elected to the U.S. Senate in 1994 and represented the state of Missouri there until the end of 2000.

Bybee, Jay S.

Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Bybee was appointed to the position of Assistant Attorney General by President George W. Bush in 2001. He joined the Department of Justice in 1984, where he worked in the Office of Legal Policy and the Appellate Staff of the Civil Division. From 1989 to 1991, he served in the White House as Associate Counsel to the President. From 1991 until his appointment in 2001, he taught law at Louisiana State University and the University of Nevada, Las Vegas.

Church Albert T. III, (Vice Admiral)

Director of the Navy Staff

Prior to serving as Director of the Navy Staff, Vice Admiral Church had two Director-level positions in the Navy. From July 1998 until March 2003, he served as both Director, Office of Budget in the Office of the Assistant Secretary of the Navy and Director, Fiscal Management Division, in the Office of the Chief of Naval Operations.

Delahunty, Robert J.

Associate Professor of Law, University of St. Thomas, Former Deputy General Counsel, White House Office of Homeland Security

Delahunty served as the Deputy General Counsel at the White House Office of Homeland Security from 2002 to 2003. He joined the U.S. Department of Justice in 1986, where he began working for the Office of Legal Counsel in 1989. He spent much of his legal career in the Office of Legal Counsel and in 1992, he was appointed Special Counsel in that department.

Dunlavey, Michael E. (Major General)

Former Operational Commander, Guantánamo Bay, Cuba

A career military man, Major General Dunlavey was made Commander of Terror Suspect Operations at Guantánamo Bay, Cuba, in 1997. Prior to that position, he served as Assistant Deputy Chief of Staff for Intelligence in the Office of the Deputy Chief of Staff for Intelligence.

Fay, George R. (Brigadier General)

Commanding General, U.S. Army Intelligence and Security Command (INSCOM)

A career military man, Brigadier General Fay became the INSCOM Acting Commander in July 2003. Prior to this position, he served as the Deputy Commanding General of INSCOM, a position he assumed in October 1999.

Flanigan, Timothy

Former Deputy White House Counsel

Flanigan is currently serving as the General Counsel for Corporate and International Law at Tyco, International. Prior to this, he was Deputy White House Counsel and a Deputy Assistant to President George W. Bush. Mr. Flanigan was a partner in the law firm White & Case and had previously served as Assistant Attorney General for the Department of Justice's Office of the Legal Counsel during the administration of the first President Bush. In 1985 and 1986, he served as a law clerk to Chief Justice Warren Burger of the United States Supreme Court.

Goldsmith, Jack Landman III

Former Assistant Attorney General, Office of Legal Counsel

Goldsmith is currently a Professor of Law at Harvard Law School. Until recently, he was an Assistant Attorney General in the Justice Department's Office of Legal Counsel for the Bush Administration. Previously, he taught law at the University of Chicago and the University of Virginia. He has written numerous books and articles in the field of international and foreign relations law.

Gonzales, Alberto R.

Assistant to the President and White House Counsel

Gonzales was appointed as Counsel to President George W. Bush in January 2001. Prior to his position in the White House, Gonzales served as a Justice of the Supreme Court of Texas, a position he was appointed to in 1999. He also served as Texas' Secretary of State from December 1997 to January 1999 and was the General Counsel to Governor Bush for three years prior to becoming Secretary of State.

Haynes William J. II

General Counsel, U.S. Department of Defense

Haynes was appointed to the position of General Counsel of the Department of Defense by President George Bush in May 2001. He serves as the chief legal officer of the Department of Defense and the legal advisor to the Secretary of Defense. In 1990, the President appointed him General Counsel of the Department of the Army, a position he held until 1993, when he joined the law firm Jenner & Block.

Hill, James T. (General)

Commander, U.S. Southern Command

General Hill was appointed the Commander of the U.S. Southern Command in October 2002. Since being commissioned by the infantry after his college graduation in 1968, General Hill has had numerous Commanding Military assignments. He also earned many medals and awards throughout his military career.

Jones, Anthony R. (Lieutenant General)

Deputy Commanding General/Chief of Staff U.S. Army Training and Doctrine Command, Fort Monroe, VA

Biographical Sketches

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A career military man, Lieutenant General Jones became the Deputy Commanding General and Chief of Staff for Headquarters, U.S. Army Training and Doctrine Command, in June 2003.

Mikolashek, Paul T. (Lieutenant General)

Commanding General, Third U.S. Army

A career military man, Lieutenant General Mikolashek became the Commanding General of the Third U.S. Army and U.S. Army Forces Central Command in June 2000. Prior to this position, he served as Commanding General for U.S. Army Southern European Task Force, a position he assumed in September 1998.

Philbin, Patrick F.

Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Philbin was appointed to the position of Deputy Assistant Attorney General in September 2001. Prior to joining the Justice Department, he was a partner in the Washington office of the law firm Kirkland & Ellis.

Powell, Colin L.

Secretary of State, U.S. Department of State

Powell was nominated to the position of Secretary of State by President Bush in December 2000 and was sworn in as Secretary in January 2001. Prior to becoming Secretary of State, Powell was the chairman of America's Promise – The Alliance for Youth. Prior to this position, he served as a professional soldier for 35 years. He was the Chairman of the Joint Chiefs of Staff in the Department of Defense from October 1989 to September 1993 and Assistant to the President for National Security Affairs from December 1987 to January 1989.

Rumsfeld, Donald F.

Secretary of Defense, U.S. Department of Defense

Rumsfeld was sworn in as Secretary of Defense for the second time in January 2001. He previously held this position from 1975 to 1977, serving under President Ford. In addition, Rumsfeld served as White House Chief of Staff from 1974 to 1975, U.S. Ambassador to NATO from 1973 to 1974, and U.S. Congressman from 1962 to 1969. From 1977 to 2000, he worked in the private sector, during which time he was chief executive officer of two Fortune 500 companies.

Sanchez, Richardo S. (Lieutenant General)

Former Commander of Joint Task Force 7

A career military man, Lt. Gen. Sanchez was the commander of Combined Joint Task Force 7 and the senior military official in Iraq until July 2004. In July 2001, Lt. Gen. Sanchez became commanding general of V Corps' 1st Armored Division. He held that position for nearly two years before assuming command of the V Corps on June 14, 2003.

Schlesinger, James R.

Former U.S. Secretary of Defense

Schlesinger served as Secretary of Defense from 1973 to 1975. He currently is a Consultant to the U.S. Department of Defense, as well as a Commissioner on the U.S. Commission on National Security/21st Century/Hart-Rudman Commission and a member of the Homeland Security Advisory Council. Schlesinger's prior positions include Secretary of Energy (1977–79), Assistant to the President (1977), Director of the C.I.A. (1973), and Director of Strategic Studies (1967–69), and Senior Staff Member (1963–67), at the RAND Corporation.

Taft William H. IV

Legal Advisor, Office of the Legal Advisor, U.S. Department of State

Taft was appointed as the Legal Advisor to the Secretary of State in April 2001. Prior to this position, Taft was a litigation partner in the law firm Fried Franks, which he joined in 1992. From 1989 to 1992, he served as the U.S. Permanent Representative to NATO. He was the Deputy Secretary of Defense from January 1984 to April 1989 and Acting Secretary of Defense from January to March 1989. He also served as General Counsel for the Department of Defense from 1981 to 1984.

Taguba, Antonio M. (Major General)

U.S. Army Commander

A career military man, Major General Taguba is currently Deputy Assistant Secretary of Defense for readiness, training, and mobilization in the office of the Assistant Secretary of Defense for Reserve Affairs. Taguba was reassigned to this position, after serving as Deputy Commanding General, Third U.S. Army, U.S. Army Forces Central Command, and Coalition Forces Land Component Command. He previously was the Acting Director of the Army Staff, Headquarters, Department of the Army, The Pentagon.

Yoo, John C.

Professor of Law, Boalt Hall School of Law, University of California, Berkeley/Former Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Yoo served as Deputy Assistant Attorney General from 2001 to 2003. Prior to this position, he served as General Counsel of the U.S. Senate Judiciary Committee from 1995 to 1996. He has been a member of the Boalt faculty since 1993 and clerked for Justice Clarence Thomas on the U.S. Supreme Court.

The Torture Papers is the debut album by underground hip hop collective Army of the Pharaohs, released March 21, 2006 on Babygrande Records. The crew was established in 1998 by Jedi Mind Tricks frontman Vinnie Paz, and originally featured Jedi Mind Tricks, Chief Kamachi, 7L & Esoteric, Virtuoso and Bahamadia. Virtuoso and Bahamadia later split from the group, which now consists of Paz, Kamachi, 7L & Esoteric, Apathy, OuterSpace, King Syze, Reef the Lost Cauze, Des Devious, Celph Titled and Faez One Listen free to Army of the Pharaohs – The Torture Papers (Battle Cry, Gorillas and more). 13 tracks (51:30). Discover more music, concerts, videos, and pictures with the largest catalogue online at Last.fm. Also, the record apparently has a concept behind it (from the subtitle "The Torture Papers," at least), but neither Vinnie Paz nor Stupe nor any of the guests ever enlighten listeners about what the concept is, or what it means. (The best bet is yet more conspiracy theories, perhaps wrapped up with some Egyptology, and endless Middle Eastern war.)