

# THE "TORTURE MEMOS": A FAILURE OF STRATEGIC LEADERSHIP

BY

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## **ABSTRACT**

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## THE “TORTURE MEMOS”: A FAILURE OF STRATEGIC LEADERSHIP

In the wake of the events of 11 September 2001, the Bush Administration made preventing more terrorist attacks its primary objective, creating “enormous pressure to stretch the law to its limits to give the President the powers” thought necessary to gain vital intelligence.<sup>1</sup> However, officials also worried that “criminal restrictions” would result in their actions subjecting them to future prosecution.<sup>2</sup> “These twin pressures – fear of not doing enough to stop the next attack, and an equally present fear of doing too much and ending up before a court or grand jury – lie behind the Bush administration’s controversial legal policy decisions,<sup>3</sup> including the approval of interrogation techniques through what came to be known as the “torture memos.” The incremental revelation of those memos in the wake of Abu Ghraib, through recent policy changes by the Obama Administration, has left some Americans shocked at its government’s policies, and others asserting that enhanced interrogation yielded valuable intelligence that kept the country safe.<sup>4</sup> This paper will examine the development of the memos and corresponding policy through the lens of the lawyer: the attorney’s professional responsibility, the use of the memos, ramifications for strategic leadership and civil-military relations, and recommendations for defining future process and policy.

### Development of the Torture Policy

Detainee treatment was an important topic of discussion in the Bush Administration in the early days of the Afghanistan conflict. On 09 January 2002, John C. Yoo, Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel (DOJ, OLC) and Special Counsel Robert Delahunty provided a memo to William J. Haynes II, General Counsel of the Department of Defense (DoD), arguing

that the Geneva Conventions governing the treatment of prisoners of war did not apply to Al Qaeda or the Taliban.<sup>5</sup> This position was sharply criticized by William H. Taft IV, who as the State Department's top legal advisor was arguably the government's primary interpreter of treaties; he called the opinion "seriously flawed" and "contrary to the official position of the United States, the United Nations and all other states that have considered the issue."<sup>6</sup> However, White House Counsel Alberto Gonzales told the President that the OLC opinion was "definitive," noted that terrorists would not apply Geneva Conventions, argued that terrorism called for a "new paradigm," declared that detainees would still be treated humanely, and concluded that the benefits of not applying Geneva outweighed the concerns.<sup>7</sup> Secretary of State Colin Powell disagreed, arguing that a blanket determination that Geneva Conventions did not apply would reverse a century of U.S. policy, undermine protections for U.S. troops, and have significant and "immediate adverse consequences" for foreign policy by undermining support among critical allies.<sup>8</sup> On 07 February, President Bush sided with Gonzales in announcing his decision – detainees would not be entitled to Geneva protections. However, he wrote,

Of course, our values as a Nation ... call for us to treat detainees humanely, including those who are not legally entitled to such treatment. ...[T]he 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.<sup>9</sup>

Despite Presidential assurances, more aggressive means of interrogation were already under consideration. In late 2001, Haynes solicited information on interrogation tactics from the Joint Personnel Recovery Agency (JPRA), an agency that oversees Survival Evasion Resistance and Escape (SERE) training, which prepares American

personnel to withstand harsh interrogation in the event of capture.<sup>10</sup> In the summer of 2002, the JPRA provided the General Counsel's office with documents including excerpts from SERE instructor lesson plans, a list of physical and psychological techniques, and a memo assessing their psychological effects for the purpose of "reverse engineering" the techniques.<sup>11</sup>

Members of the Cabinet and National Security Council were also discussing new interrogation techniques, including those used in SERE training.<sup>12</sup> Officials of the Central Intelligence Agency (CIA), frustrated by the inability to "break" a high-ranking Al Qaeda captive during interrogation, asked for a legal opinion on "how much pain and suffering a U.S. intelligence officer could inflict on a prisoner without violating" the law.<sup>13</sup> OLC's Yoo drafted two memos throughout July of 2002, meeting several times with senior Administration attorneys and officials, including Gonzales and vice-presidential counsel David Addington.<sup>14</sup> Meetings included detailed discussions of techniques.<sup>15</sup>

Final drafts of the opinions were issued in August 2002, both signed by Yoo's superior, Assistant Attorney General (and OLC chief) Jay Bybee.<sup>16</sup> The first memo, addressed to Gonzales, defined torture under a federal criminal statute<sup>17</sup> as an action that inflicted pain that is "difficult to endure":

Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture ... it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.<sup>18</sup>

The second memo responded to the CIA request and addressed the legality of specific interrogation tactics, based in part on JPRA's SERE training information.<sup>19</sup> Significantly,



neither military nor State Department experts in the law of war or international law were consulted during the process.<sup>20</sup>

As first steps in implementation, interrogators from the detention facility at Guantanamo received training from JPRA SERE instructors. In September 2002, senior Administration attorneys – including Haynes and Addington – visited Guantanamo. Shortly thereafter, Guantanamo personnel, responding to pressure to “get tougher,” drafted a memo proposing new interrogation techniques for use at the facility.<sup>21</sup> The OLC opinions figured prominently in the development of this policy, though in an oversimplified version: a CIA attorney orally advised that the language of the anti-torture statute was vaguely written, and that severe physical or mental pain was that which caused permanent damage.<sup>22</sup> The policy received a legal review by the Guantanamo Staff Judge Advocate, a lieutenant colonel who later testified that she tried to consult with experts and superiors but received no feedback; she never anticipated that her working level review “would become the final word on interrogation policies and practices within the Department of Defense.”<sup>23</sup>

As the request to use more aggressive interrogation techniques proceeded to the Joint Staff level, lawyers for the Air Force, DoD’s Criminal Investigative Task Force at Guantanamo, the Navy, and the Marine Corps, as well as the Army’s International and Operational Law Division, raised concerns about the effectiveness and legality of certain techniques. They voiced their concerns to the DoD General Counsel’s Office through Navy Captain Jane Dalton, counsel to the Joint Chiefs of Staff. Both their concerns and Dalton’s review were cut off.<sup>24</sup>

Reacting to criticism that the decision on Guantanamo interrogation was “taking too long,” and ignoring the concerns raised by the military services, Haynes sent a one-page memo to Secretary Donald Rumsfeld, recommending that he approve eighteen of the techniques in the Guantanamo proposal.<sup>25</sup> Rumsfeld signed Haynes’s recommendation on 02 December 2002, but provided no implementing guidance limiting use of the techniques.<sup>26</sup> This approval was temporarily rescinded on 15 January 2003, after a series of meetings between Haynes and Navy General Counsel, Alberto Mora; Mora told Haynes that the techniques approved “could rise to the level of torture.”<sup>27</sup> Rumsfeld directed the establishment of a “Working Group” to review interrogation policy, while Haynes went to OLC for another legal opinion.

Ultimately, the concerns of senior military and civilian lawyers were overridden in favor of a 14 March 2003 opinion by Yoo that repeated the analysis and conclusions of the earlier opinions.<sup>28</sup> He concluded that constitutional prohibitions against cruel treatment did not apply to enemy combatants held abroad, and that federal criminal laws prohibiting torture did not apply at Guantanamo, nor to military interrogations if they conflicted with the President’s war powers or prerogatives as Commander-in-Chief. He further opined that the Convention Against Torture (CAT) defining international law obligations enunciated the same standard of conduct as the federal torture statute; that an interrogator could not be prosecuted unless he specifically intended to cause intense pain; and that “customary international law does not supply any additional standards” to govern detainee treatment.<sup>29</sup>

Drafts of the Working Group’s report reflected Yoo’s opinions, to the alarm of other senior officials and attorneys. The Deputy Judge Advocate General (JAG) for the

Air Force complained that the OLC opinions “were relied on almost exclusively,” disregarding considerations that should have been important for Haynes’s final recommendation to Rumsfeld: the uncertainty of successful defense; the reaction of future administrations; the disagreement of other nations with OLC’s interpretation of international conventions and law, risking criminal accusations abroad; the perception that the US was lowering treatment standards, with harmful impacts for captured DoD personnel as well as loss of international and domestic support for the war on terrorism; and adverse consequences for public perception of the military as well as military culture and self-image.<sup>30</sup> Similar concerns were echoed by the Army JAG, who further disagreed with the opinions’ overbroad view of presidential powers and the inapplicability of customary international law. He further recommended that the intelligence community review the techniques, which seemed to be of “questionable practical value in obtaining reliable information.”<sup>31</sup> The chief military attorney for the Marine Corps wrote that OLC’s opinion did not reflect concern for servicemembers, and predicted adverse impacts on human intelligence exploitation, surrender of enemy forces, and support of friendly nations, in addition to many of the same issues cited by the other JAGs.<sup>32</sup> The Navy JAG questioned how the American public would react to “condoning practices that, while technically legal, are inconsistent with our most fundamental values.”<sup>33</sup> He concluded: “[I]s this the ‘right thing’ for U.S. military personnel?”<sup>34</sup>

Notwithstanding these objections, on 16 April 2003, Secretary Rumsfeld approved the report and authorized the use of twenty-four specific interrogation techniques for use *at Guantanamo*.<sup>35</sup> However – despite the January rescission of

approval -- efforts had already been underway to extend the use of similar techniques elsewhere. By the summer and fall of 2003, interrogation influenced by SERE techniques and training had become standard operating procedure for U.S. forces in Afghanistan and Iraq. <sup>36</sup> By the spring of 2004, reports of physical, psychological, and sexual abuse of prisoners at Abu Ghraib had blossomed into a full-fledged scandal. Subsequently released documents and reports revealed details of detainee treatment that is difficult to reconcile with humane treatment consistent with the principles of Geneva. <sup>37</sup> Eventually, interrogation practices were required, by federal law and Executive Order and federal law, to conform to more commonly accepted standards enunciated in Army guidance. <sup>38</sup>

### Professional Responsibility

Lawyers played a significant role in the development of the interrogation plan. Lawyers defined the parameters of legally permissible actions; that permission became policy, from the first determination that detainees were not to be accorded Geneva coverage, to the details of specific interrogation techniques. An examination of the underlying opinions in light of standards of professional responsibility is, therefore, in order.

Attorneys are licensed by state authorities and are bound by a code of professional responsibility that, while varying from state to state, generally conforms to Model Rules of Professional Conduct promulgated by the American Bar Association (ABA). <sup>39</sup> Pertinent rules include a mandate that attorneys provide competent representation, with requisite "legal knowledge, skill, thoroughness and preparation." <sup>40</sup> Lawyers may not "counsel a client to engage, or assist a client, in conduct that the

lawyer knows is criminal or fraudulent,” but may “discuss the legal consequences of any proposed course of conduct” in a “good faith effort to determine the validity, scope, meaning or application of the law.”<sup>41</sup> A lawyer is to exercise “independent professional judgment” and render “candid advice,” referring “not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>42</sup>

In the wake of the corporate scandals of 2001–2002, and criticism that accountants and attorneys failed to prevent fraudulent conduct, the ABA adopted a new version of Rule 1.13 of the Model Rules of Professional Conduct, stating that a lawyer for an organization must view the organization, rather than its officers, as the client.<sup>43</sup> “These reforms embraced a view of attorneys as gatekeepers, amplifying their power to halt malfeasance by decisionmakers and prevent harm to the client or to innocent third parties.”<sup>44</sup> Though theoretically this duty extends to government attorneys, identifying the client can be more difficult.<sup>45</sup> While some insist that a government attorney must represent an actual *client* and “not ‘justice’ in some abstract sense,”<sup>46</sup> the more commonly held view is that government attorneys have a higher standard of duty.<sup>47</sup> Courts stress “that a lawyer representing a governmental client must seek to advance the public interest,” rather than “merely the partisan or personal interests of the government entity or officer involved.”<sup>48</sup>

OLC staffers have a particularly high standard of care because of the definitive role of their opinions and the dearth of rules, public accountability, or lawsuits and court decisions that act as checks on the work product of other attorneys.<sup>49</sup> OLC is the “frontline institution responsible for ensuring that the executive branch charged with

executing the law is itself bound by the law.”<sup>50</sup> Consequently, OLC has developed “powerful cultural norms” mandating “detached, apolitical legal advice,” providing “an accurate and honest appraisal of applicable law,” even if it will impede desired results.<sup>51</sup> Recognizing that the “stakes in the interrogation program were unusually high ...it was unusually important for OLC to provide careful and sober legal advice about the meaning of torture.”<sup>52</sup>

How do the torture memos measure up to these standards? While some attorneys have defended the torture memos as “standard lawyerly fare, routine stuff, ”<sup>53</sup> the preponderance of opinion is that they fall short of the mark.<sup>54</sup> The Dean of the Yale Law School called the memorandums "embarrassing" and "abominable." An expert in international human rights law remarked, "The scholarship is very clever and original but also extreme, one-sided and poorly supported by the legal authority relied on." Sharp words came from another law professor, who called the memos "egregiously bad" and “embarrassingly weak, just short of reckless.”<sup>55</sup> While Yoo – also a law professor -- said much of such criticism was political,<sup>56</sup> many conservative legal scholars also discredit his work.<sup>57</sup>

The criticism is especially sharp concerning the consideration of international law.<sup>58</sup> Typical of the reactions is the following:

The torture memoranda misconstrue or ignore the various U.S. treaty obligations that prohibit torture and inhuman treatment in various contexts, including the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights (“ICCPR”), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) the American Declaration on the Rights and Duties of Man ... and the Convention relating to the Status of Refugees...<sup>59</sup>

The opinions' comments on the Geneva Conventions made "overbroad determinations, ignore the differences between regular and irregular forces, [and] ignore Article 3 and Article 5... ." <sup>60</sup> The opinions rendered meaningless the Convention Against Torture by reading limitations into the American ratification that are "belied by the text, context, and negotiating history of this treaty," and creating exceptions and defenses that modify the treaty in a manner "totally at odds with its object and purpose...." <sup>61</sup> The opinions also failed to adequately consider "customary international law" – international consensus or "widespread judgment" on issues or procedures, now considered by both foreign and U.S. courts. <sup>62</sup> The memoranda mentioned only in passing that Geneva Conventions violations are considered *war crimes* under both customary and treaty law; they concentrated on defenses to war crimes accusations under U.S. law, but gave little attention to criminal liability under *international law*, even though these standards would be invoked if U.S. personnel were ever charged outside the U.S. <sup>63</sup>

Equally problematic are the memoranda's pronouncements on the President's war powers and authority as commander-in-chief, declaring that the President, or those acting under his direction, could ignore federal laws prohibiting torture. The writer failed to even cite the leading Supreme Court case on the subject dating from the Truman years, which rejected the argument that the President had inherent constitutional authority to seize private steel mills. <sup>64</sup> Law professors called this omission "incompetence." <sup>65</sup>

The writer of the memoranda fell short of other ethical mandates as well. The one-sided arguments neither meet the standard of a "good faith effort to determine the validity, scope, meaning or application of the law," nor take into account moral or other

considerations. The focus on providing “cover” and avoiding criminal liability suggests the type of “mob lawyer” activity the rules were designed to prevent; if the opinions do not violate restrictions against counseling clients how to violate the law, they come perilously close. As one critic noted, the memoranda “focus almost entirely on the prospect of *criminal* prosecutions,” “[d]riven by an apparent need to reassure U.S. officials that they need not fear being criminally prosecuted so long as they stop short of causing death or serious organ damage... .”<sup>66</sup> Another referred to the “intent loophole”: the memos suggest interrogators would not violate anti-torture laws if they lacked the specific intent to cause severe pain, or were motivated by protecting national security.<sup>67</sup> The importance of the memos as “legal cover” is exemplified by their nickname, the “Golden Shield,” so called by CIA officials who worried about criminal liability.<sup>68</sup> Journalists have noted that the memos, in effect, offered a detailed manual for interrogation without fear of prosecution.<sup>69</sup> In short, “these memoranda are advocacy briefs by ‘can do’ lawyers,” instead of a “competent, objective, candid, and honest assessment of the relevant law.”<sup>70</sup>

The pronouncements of the critics have, in essence, been corroborated. In 2004, Jack Goldsmith, Bybee’s successor as head of OLC, was alarmed when he reviewed the opinions.<sup>71</sup> They interpreted the term “torture” too narrowly, using a definition of “severe pain” drawn from a health benefits statute.<sup>72</sup> Goldsmith noted other “errors of statutory interpretation;” an “unusual lack of care and sobriety in ... legal analysis;” “cursory and one-sided legal arguments that failed to consider ... competing ... authorities;” and the “tendentious tone,” more like an argumentative brief than a balanced opinion.<sup>73</sup> He withdrew the memos, despite a strong tradition in OLC of



adhering to previous opinions.<sup>74</sup> In 2006, the Supreme Court determined that the Geneva Conventions did, in fact, apply to detainee treatment.<sup>75</sup> By the end of the Bush Administration, all of the pertinent memoranda dealing with detainee treatment had been repudiated.<sup>76</sup> A DOJ investigation into the professional responsibility of Yoo, Bybee, and another OLC attorney, underway for nearly 5 years, was completed in 2008 but has not yet been released.<sup>77</sup> It is reported to be sharply critical of the attorneys, citing “sloppy legal analysis, misjudgments and possible political interference,”<sup>78</sup> as well as the blurring of lines between independent, objective legal advice and policy advocacy.<sup>79</sup> Reports also indicate it will refer the attorneys to state bar associations for possible disciplinary action.<sup>80</sup>

### Use of Legal Opinions

Describing the shortcomings of the legal opinions is only part of the analysis – the way in which they were utilized must also be examined. Why did these legal opinions carry such weight that they influenced security policy and intelligence and military operations to the degree they did? As Goldsmith points out, “never in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.”<sup>81</sup> Although Yoo disingenuously said in an interview that “sometimes, what’s legal and not legal is not the same thing as what you can do or what you should do,”<sup>82</sup> Goldsmith recognized that in the Bush Administration, “the question ‘What should we do?’ so often collapsed into the question ‘What can we lawfully do?’<sup>83</sup> He attributed this to fear of criticism for failure to use any available means to prevent terrorist attacks.<sup>84</sup> Another Administration official noted that the Administration was

careful to maintain presidential powers, fearing “it would set limiting legal precedents to take any other view.”<sup>85</sup>

This culture gave lawyers, especially those in the White House and DOJ, the final word on matters with profound national security and diplomatic consequences.<sup>86</sup> While legal considerations are important, they are also limited. The lawyers formulating terrorism policy were not well versed on Islamic fundamentalism, intelligence, terrorist operations, diplomacy, or even national security.<sup>87</sup> As a former National Security Advisor complained, lawyers’ considerations “exclude a lot of issues that matter, like public relations, congressional politics, and diplomacy.”<sup>88</sup> Moreover, lawyers are generally trained to spot legal issues and articulate a defensible position – not deal with moral issues or develop legal policy.<sup>89</sup> The result was a “deflection of responsibility” in the

substitution of detailed legal formulations for detailed moral ones... [and] ... thorough policy analysis at the critical and formative subcabinet and expert level. The result produced a situation in which cabinet principals, and the President, were not well served – even if at the time they thought they were getting what they wanted ...<sup>90</sup>

Thus, interrogation policy was developed in a series of meetings among lawyers discussing the details of particular techniques, rather than the larger question of whether they should be used at all; and these lawyers had been selected because they were unlikely to be critical of the policy or its underlying assumptions.<sup>91</sup> Substantive issues were simply dismissed with a reminder that the OLC opinion was “definitive.”

This example also demonstrates a corollary to the reduction of multi-faceted issues to legal considerations: the use of lawyers, “and especially legal opinions by OLC lawyers, as a sword to silence or discipline” any dissent.<sup>92</sup> The OLC determinations

were used to trump any legal objections, leaving only policy objections that the Administration could simply overrule.<sup>93</sup> The interagency process was largely abandoned. Although it had been OLC policy to circulate draft opinions to agencies with relevant expertise in order to improve their quality through expert criticism, this practice was abandoned after Powell and Taft objected to the determination of the inapplicability of Geneva protections; subsequent OLC drafts were not circulated to the State Department, despite the obvious implications for international law and diplomacy.<sup>94</sup> Similarly, a senior military lawyer recalled that he was involved in the initial deliberations on detainee status, but Gonzales's office had ignored the language and history of the Conventions, "as if they wanted to look at the rules to see how to justify what they wanted to do. ... It was not an open and honest discussion."<sup>95</sup> When the subsequent memos were drafted, military lawyers were intentionally excluded from discussions.<sup>96</sup> Only when the DoD Working Group used the OLC opinions were the JAGs able to weigh in. Their views were disregarded.<sup>97</sup> In addition to thwarting dialogue within the Executive Branch, the White House "had taken working with Congress off the table," foreclosing many "sensible policy options."<sup>98</sup> Predictably, the resulting policy was fatally flawed, with serious consequences.

#### Ramifications of the Use of Legal Opinions

Over-reliance on legal opinions and refusing open dialogue resulted in a failure to consider interrogation policy at a strategic level. The only strategic analysis, in fact, appeared in the JAG memos.<sup>99</sup> These memos identified legal concerns -- that courts might find that abuse violated international and domestic criminal law. But they raised strategic concerns as well, noting that "a policy of torture is sure to constitute a fatal flaw

in any war against jihadi terror.”<sup>100</sup> The JAG memos restated some arguments raised by State but “also plunge[d] into new critical territory,” observing that since information is crucial to preventing terrorist attacks, then abusive interrogation could actually impede the collection of useful information. Moreover, the JAG memos foresaw that even secret interrogation practices would eventually become public and “alienate a rich and unsurpassable source of information,” sympathetic Muslim nations and communities around the world:

...[T]he apprehension of jihadi terrorists relies heavily not on coercion, but on informants who *willingly* provide information either for political, ideological, or personal reasons. Connections to Muslim communities must be based on trust, and such trust is obviously less likely to exist if the threat of detention with torture and without trial is a cornerstone of U.S. policy.<sup>101</sup>

The JAGs raised concerns about adverse effects on the surrender of enemy forces and termination of hostilities, a concern borne out by history.<sup>102</sup> Ironically, the interrogation policy – designed to elicit useful information and give the U.S. an advantage in the war on terrorism – may have been counterproductive by undermining allies and sympathizers in the Muslim world.

Moreover, Abu Ghraib and other scandal aided “materially in the recruitment of young Muslims to the extremist cause.”<sup>103</sup> A leading military interrogator reported that he learned from foreign insurgents that the primary reason they joined the insurgents was American detainee policy.<sup>104</sup> Flag-level officers concurred in this assessment, corroborated by intelligence estimates.<sup>105</sup>

Nor can the information gained from interrogation readily be used to bring terrorists to trial, long held to be an important policy objective. Military and civilian judges typically disallow the use of evidence gained by coercive measures, making it

highly unlikely that terrorists will be convicted. Judges have already thrown out cases of detainees who received abusive treatment at Guantanamo. This irony illustrates another strategic failure – “[t]he use of torture deprives the society whose laws have been so egregiously violated of the possibility of rendering justice.”<sup>106</sup>

Long term strategic goals of world leadership, relations with allies, and other foreign policy interests have also been sacrificed for short-term considerations. American claims of advancing the rule of law appear hypocritical.<sup>107</sup> The U.S. has not only lost the moral high ground of its historic commitment to “universal, fundamental, and inalienable rights to human dignity,” but has insulted other nations and international bodies by relegating their reactions to “second order considerations of policy.”<sup>108</sup>

Another adverse consequence of the policy, and the process used in its development, has been a setback in military-civil relations. In a situation similar to the “Revolt of the Generals,” a group of senior military lawyers from the Army JAG’s office, concerned about the emergent interrogation policy, sought help outside the Defense Department, meeting with Scott Horton, a human rights attorney. The military lawyers complained of being shut out of the process, and that civilian political lawyers were changing the military rules of engagement and creating an “atmosphere of legal ambiguity.”<sup>109</sup> The Army JAG also expressed concerns to U.S. senators about the 20 July 2007 executive order that, while purporting to end aggressive detainee treatment, could be interpreted to permit the CIA’s interrogation program to continue. He issued a memo to soldiers to ensure they understood that the executive order applied only to the CIA, not to military interrogations; they needed to follow Army regulations and the Geneva Conventions.<sup>110</sup>

In what appeared to be a retaliatory move, the Bush administration proposed a regulation requiring “coordination” of any JAG Corps promotion with the service’s General Counsel – a political appointee who serves as counsel to the Secretary of each service. JAG officers were concerned that this would destroy their independence and their role as a check on presidential power, giving new leverage to Haynes and chilling JAG advice to commanders.<sup>111</sup> Yoo joined in the debate over the proposal, writing an article criticizing the JAGs’ unwillingness to endorse the Administration’s detainee treatment and undermining Administration policies.<sup>112</sup> Although the proposal was ultimately unsuccessful, it exacerbated the divide between opposing views and personalities. Moreover, the proposal appeared to introduce partisan requirements for promotion in what has historically been a nonpartisan calling.<sup>113</sup>

The different rules under which the CIA and military interrogators operated created problems in military operations as well, since the detention facilities were run by the military regardless of who did the interrogations. Nor were outside observers cognizant of the differences in the identity of interrogators. Commentators on the Abu Ghraib incident noted that CIA rules severely undermined military morale and discipline.<sup>114</sup> Moreover, the Army JAG was right to be concerned; soldiers were at risk for the misdeeds of CIA operatives. Emerging doctrines of international law hold the agency operating a detention facility responsible for what occurs, regardless of whether the actual wrong is done by other law enforcement or intelligence agencies.<sup>115</sup>

Interrogation policy is ultimately a strategic issue – a determination of the means to be employed in achieving desired ends in the national interest – to be decided by political leaders. But the military has a professional stake in the uses to which it will be

put and the risks to which is it exposed as it becomes the instrument of that policy. Professional military advice should play a role in determining its propriety, particularly when military leaders harbor grave concerns about the legality or ethical nature of the policy. <sup>116</sup> Ignoring the military's input in the interrogation controversy has had "dire consequences for the country and its armed forces." <sup>117</sup>

The development of the interrogation policy is a stunning example of a decision process shortchanged in the interests of expediency – of what happens when an organization fails to involve stakeholders, engage in dialogue, examine different points of view and underlying values and priorities, identify courses of action phrased in terms beyond minimum legal requirements, and assess the short-range and long-range impacts of proposed courses of action to determine policy. It is the role of strategic leadership to ensure that the policy-making process works effectively. <sup>118</sup> The interrogation policy decision process was thus a failure not only of meeting professional standards, or of strategic *thinking*, but of strategic *leadership* as well.

### Recommendations

Accountability is an important aspect of strategic leadership, encouraging leaders to meet goals and make intelligent decisions. <sup>119</sup> Holding leaders and their subordinates accountable is an important means of encouraging future performance. And while victims of torture have compensation mechanisms under treaties and statutes, a fuller sense of justice demands that wrongdoers bear some responsibility for their actions. In the instant situation, there are a number of parties to consider.

Unless they are indicted in foreign courts or by international bodies, the interrogators themselves will not be held accountable; President Obama announced

that interrogators who relied on the OLC opinions will not be prosecuted.<sup>120</sup> It appears that attorneys -- at least those formerly in OLC -- may be held accountable for professional responsibility failings through the DOJ investigation and subsequent referral to state bar disciplinary authorities.<sup>121</sup> The ABA could moderate future problems by writing a Model Rule more clearly defining the duties of Government lawyers.

Finally, there are the policy makers and their top advisors to consider -- those who misused legal opinions, and may have influenced the writing of the opinions in order to achieve desired ends. Various remedies have been discussed. House Judiciary Committee Chairman John Conyers and others are calling for a special prosecutor appointed by DOJ; but the resulting secret grand jury process would do little for public awareness or confidence.<sup>122</sup> It could be precluded by conflict of interest rules, since DOJ played a role in policy development. Moreover, a criminal trial could harden positions; make political martyrs of its subjects; or simply be impracticable, since both prosecution and defense may need classified or sensitive intelligence information.<sup>123</sup>

Another suggestion involves issuing pardons,<sup>124</sup> giving the President political flexibility in assigning accountability without attendant problems of criminal liability. But pardons could have an unintended and undesirable consequence by encouraging other countries to prosecute. International law suggests that a state's "attempts to immunize officeholders from prosecution" can confer prosecutorial jurisdiction on other states.<sup>125</sup>

A better alternative is a commission of inquiry, which elsewhere has provided a means of dealing with politically sensitive issues.<sup>126</sup> Similar to the Warren or Rockefeller Commissions, a forum for investigation, public education and discussion could identify key actors and pinpoint how the policy was developed. If investigation revealed that



crimes were committed, new public awareness could then support such action.<sup>127</sup> The commission should also make suggestions for future interrogation policy – changes in laws, regulations, or procedures.<sup>128</sup> A critical role for the commission must be a final, professional, and objective determination of whether the intelligence gained from the aggressive techniques was reliable and valuable – a conclusion that, despite heated argument, is still unclear<sup>129</sup> – and whether useful information could only have been gained by such methods, as well as a “balancing of these gains against the moral stain and the political cost” of coercive techniques.<sup>130</sup>

A final recommendation is establishment of organizational culture and norms that promote dialogue and strengthen interagency processes; training in these disciplines must be part of the education of senior officials, even political appointees. Moreover, improved civil-military relations require that high level civilians in defense agencies have a healthy respect for the service and advice of their military colleagues. Involvement of more civilians in senior service schools, or classes in military history or culture, could promote this.

### Conclusion

The Obama Administration faces many challenges, but none may have more significance for national security, military operations, foreign relations, civil – military relations, or national values than detainee policy. Policy pronouncements made without deliberation and interagency collaboration are just as dangerous for this Administration as it proved to be for the last. The President should swiftly move to establish a commission of inquiry – not to exact retribution, but to bring closure to a devastating national experience. Equally important, the record produced by this commission may

serve as a lesson to future policy makers of the dangers of abdicating the responsibilities of strategic leadership.

## Endnotes

<sup>1</sup> Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, (New York: W.W. Norton & Company, Inc., 2007), 11. An Associate White House Counsel confirmed that “There was relatively little tolerance for ... timidity in the weeks and months after 9/11.” Bradford Berenson, interview on “The Torture Question,” *Frontline*, Public Broadcasting Service, 14 July 2005; available from <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/berenson.html>; Internet; accessed 22 April 2009.

<sup>2</sup> Goldsmith, 12.

<sup>3</sup> Ibid.

<sup>4</sup> See, e.g., Dick Cheney, interview by Sean Hannity, 21 April 2009; transcript available from <http://www.foxnews.com/politics/2009/04/21/transcript-excerpts-hannitys-interview-cheney/>; Internet; accessed 02 May 2009. In actuality, Americans appear to be fairly evenly split on the issue; approximately 49% believe that torture is permissible under some circumstances, while 47% believe that it can rarely or never be justified; these statistics come from a poll by the Pew Forum on Religion & Public Life, “The Religious Dimensions of the Torture Debate,” Internet; available from <http://pewforum.org/docs/?DocID=156>; accessed 09 May 2009; Jennifer Agiesta, “Torture: The Memos and Partisan Reaction,” *The Washington Post*, 26 April 2009[online journal]; Internet; available from [http://voices.washingtonpost.com/behind-the-numbers/2009/04/torture\\_the\\_partisan\\_playing\\_f.html](http://voices.washingtonpost.com/behind-the-numbers/2009/04/torture_the_partisan_playing_f.html); accessed 29 April 2008.

<sup>5</sup> United States Department of Justice, Office of Legal Counsel, Deputy Assistant Attorney General John C. Yoo, and Special Counsel Robert Delahunty, “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” memorandum to William J. Haynes II, General Counsel of the Department of Defense, Washington, D.C., 09 January 2002; Internet; available from [http://pegc.us/archive/DOJ/20020109\\_yoomemo.pdf](http://pegc.us/archive/DOJ/20020109_yoomemo.pdf); accessed 03 May 2009. Also reproduced in *The Torture Papers: The Road to Abu Ghraib*, Karen J. Greenberg and Joshua L. Dratel, ed. (New York: Cambridge University Press: 2005), 38.

<sup>6</sup> United States Department of State Legal Adviser, William H. Taft, IV, “Your Draft Memorandum of January 9,” memorandum to John C. Yoo, Deputy Assistant Attorney General, Department of Justice, Washington, D.C., 11 January 2002; Internet; available from <http://www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf>; accessed 28 March 2009; R. Jeffrey Smith, “Lawyer for State Dept. Disputed Detainee Memo; Military Legal Advisers Also Questioned Tactics,” *The Washington Post*, 24 June 2004, Sec. A, p. 7.

<sup>7</sup> Counsel to the President, Alberto R. Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban,” Memorandum to the President, Washington, D.C., 25 January 2002; Internet; available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>; accessed 01 May 2009. Also reproduced in *The Torture Papers*, 118.

<sup>8</sup> United States Secretary of State Colin L. Powell, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," memorandum to Counsel to the President, Washington, D.C., 26 January 2002; Internet; available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>; accessed 26 March 2009. Also reproduced in *The Torture Papers*, 122.

<sup>9</sup> President George W. Bush, "Humane Treatment of al Qaeda and Taliban Detainees," Memorandum for the Vice President et al, Washington, D.C., 07 February 2002; Internet; available from <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>; accessed May 01 2009. Also reproduced in *The Torture Papers*, 134.

<sup>10</sup> U.S. Congress, Senate, Armed Services Committee, Executive Summary, Inquiry into the Treatment of Detainees in U.S. Custody, 110th Cong., 2d sess., 11 December 2008, xiii. (hereafter, "Executive Summary") These techniques, considered illegal under the Geneva Conventions, are largely based on Chinese methods used during the Korean War. SERE instructors are not qualified interrogators, but train American personnel to resist providing information. The Executive Summary further noted that JPRA's higher headquarters subsequently limited its support to interrogation, calling the use of its knowledge for "'offensive purposes' ... outside the roles and responsibilities of JPRA." *Ibid.*, xxv, citing memorandum from Major General James Soligan, 29 September 2004.

<sup>11</sup> *Ibid.*, xiv.

<sup>12</sup> *Ibid.*, xv.

<sup>13</sup> R. Jeffrey Smith and Dan Eggen, "Gonzales Helped Set the Course for Detainees," *The Washington Post*, 05 January 2005, Sec. A, p. 1. There is some suggestion that the CIA was already using these techniques and asked for the opinions for "legal cover"; see Bruce Fein, interview by Bill Moyers, 01 May 2009; Internet; transcript available from <http://www.pbs.org/moyers/journal/05012009/transcript4.html>; accessed 02 May 2009.

<sup>14</sup> Executive Summary, xv-xvi.; Smith and Eggen.

<sup>15</sup> *Ibid.* Those techniques included sensory deprivation, sleep disruption, stress positions, slapping, forced nudity, hooding, waterboarding, keeping lights on, using loud noise and flashing lights, exposure to extreme temperatures, and treating a person like an animal.

<sup>16</sup> Executive Summary, xv- xvi.

<sup>17</sup> U.S. Code Title 18, Section 2340 (known as the "Torture Statute" or "Anti-Torture Statute") defines torture as "an act committed by a person acting under the 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." See also the War Crimes Act of 1996, which provides criminal penalties for a "grave breach of the Geneva Conventions," including willful killing, torture or inhuman treatment, codified at U.S. Code Title 18, sec. 2441. Prosecution is predicated upon applicability of Geneva Conventions.

<sup>18</sup> Assistant Attorney General, Office of Legal Counsel, Jay S. Bybee, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A," memorandum for Alberto R.

Gonzales, Counsel to the President, Washington, D.C., 01 August 2002; Internet; available from <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>; accessed 19 March 2009. Also reproduced in *The Torture Papers*, 172.

<sup>19</sup> Executive Summary, xvi; Jay S. Bybee, "Interrogation of al Qaeda Operative," memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Washington, D.C., 01 August 2002; Internet; available from [http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc\\_08012002\\_bybee.pdf](http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf); accessed 01 May 2009.

<sup>20</sup> Smith and Eggen; Goldsmith, 23-24.

<sup>21</sup> Executive Summary, xvi – xvii.

<sup>22</sup> *Ibid.*, xvii. The attorney is also reported to have said that torture was "subject to perception," and that "[i]f the detainee dies you're doing it wrong." *Ibid.*; Joby Warrick, "CIA Played Larger Role in Advising Pentagon: Harsh Interrogation Methods Defended," *The Washington Post*, June 18, 2008, Sec. A, p.1.

<sup>23</sup> Diane E. Beaver, "Statement, Lieutenant Colonel (Retired) Diane E. Beaver, USA," statement before the Senate Armed Services Committee, Washington, D.C., 17 June 2008; Internet; available from [http://www.fas.org/irp/congress/2008\\_hr/061708beaver.pdf](http://www.fas.org/irp/congress/2008_hr/061708beaver.pdf); accessed 02 May 2009. She also believed that her opinion was not intended to be a "blank check," and that interrogations would be "strictly reviewed, controlled, and monitored." Her opinion is available in *The Torture Papers*, 229.

<sup>24</sup> *Ibid.*, xvii - xix. Captain – now Rear Admiral – Dalton later testified that this was the only time she had been told to stop short a legal review.

<sup>25</sup> *Ibid.*, xix. Haynes later said that the only written legal opinion he had considered was LTC Beaver's, despite it having been labeled "insufficient" and "inadequate" by senior military lawyers.

<sup>26</sup> *Ibid.* In point of fact, aggressive interrogations by CIA operatives had already begun

<sup>27</sup> *Ibid.*, xxi.

<sup>28</sup> *Ibid.*; Deputy Assistant Attorney General, Office of Legal Counsel, John C. Yoo, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," memorandum for William J. Haynes II, General Counsel of the Department of Defense, Washington, D.C., 14 March 2003; Internet; available from [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf); accessed 29 April 2009.

<sup>29</sup> Yoo, memo to Haynes.

<sup>30</sup> United States Air Force Deputy Judge Advocate General, Major General Jack L. Rives, "Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism," memorandums for SAF/GC, Washington, D.C., 05 and 06 February 2003; reproduced in Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006), 377-381.

<sup>31</sup> United States Army Judge Advocate General, Major General Thomas J. Romig, "Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism," memorandum for General Counsel of the Department of the Air Force, Washington, D.C. 03 March 2003; reproduced in *The Torture Debate in America*, 386-387.

<sup>32</sup> Staff Judge Advocate to the Commandant of the Marine Corps, Brigadier General Kevin M. Sandkuhler, "Working Group Recommendations on Detainee Interrogations," memorandum for General Counsel of the Air Force, Washington, D.C., 27 February 2003; reproduced in *The Torture Debate in America*, 383.

<sup>33</sup> United States Navy Judge Advocate General, Rear Admiral Michael F. Lohr, "Working Group Recommendations Relating to Interrogation of Detainees," memorandum for General Counsel of the Air Force, Washington, D.C., 06 February 2003; reproduced in *The Torture Debate in America*, 382.

<sup>34</sup> *Ibid.*

<sup>35</sup> Executive Summary, xxii; United States Secretary of Defense Donald Rumsfeld, "Counter-Resistance Techniques in the War on Terrorism," memorandum for the Commander, US Southern Command, Washington, D.C., 16 April 2003; Internet; available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>; accessed 20 December 2008.

<sup>36</sup> *Ibid.*, xxi-xxiii.

<sup>37</sup> See, e.g., *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation*, February 2004, in Mark Danner, *Torture and Truth: American Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004), 251-275; International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, Washington, D.C., February 2007; Internet; available from <http://www.nybooks.com/icrc-report.pdf>; accessed 03 May 2009 (concluding that the treatment of selected detainees constituted torture). The Army reported in 2006 that it had investigated over 600 allegations of detainee abuse in Iraq and Afghanistan and disciplined 251 soldiers. Dawn E. Johnsen, Introduction to "Guidelines for the President's Legal Advisors," *Indiana Law Journal* 81 (2006) 1345, 1346.

<sup>38</sup> Karen DeYoung, "Bush Approves New CIA Methods," *The Washington Post*, 21 July 2007, Sec. A, p. 1; Internet; available from <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html?hpid=topnews>; accessed 03 May 2009; *Detainee Treatment Act of 2005*, Public Law 109-163, codified at U.S. Code Vol. 42, Chapter 21D (2007); also available from <http://uscode.house.gov/download/pls/42C21D.txt>; accessed 03 May 2009. This Act, and an implementing Executive Order issued in July of 2007, applied only to the military; another Act of Congress that would apply the same standards to other agencies, including the CIA, was vetoed by President Bush. Thomas Ferraro, "Republicans Uphold Bush Veto of Anti-Torture Bill", 11 March 2008 [on-line journal]; Internet; available from <http://www.reuters.com/article/politicsNews/idUSN1163630920080312>; accessed 27 March 2009. Subsequently, President Obama issued an Executive Order on 22 January 2009, mandating that all agencies follow Army Field Manual interrogation guidelines. The Order also

prohibited reliance on any Department of Justice or other legal advice concerning interrogation that was issued between 11 September 2001 and 20 January 2009. White House Press Release, "Executive Order regarding Interrogation", 22 January 2009; Internet; available from [http://www.whitehouse.gov/the\\_press\\_office/BACKGROUNDPresidentObamasignsExecutiveOrderPersonDetentionandInterrogationPolicy/](http://www.whitehouse.gov/the_press_office/BACKGROUNDPresidentObamasignsExecutiveOrderPersonDetentionandInterrogationPolicy/); accessed 28 March 2009.

<sup>39</sup> Center for Professional Responsibility, American Bar Association, "ABA Model Rules of Professional Conduct," available from [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html); Internet; accessed 17 December 2008.

<sup>40</sup> *Ibid.*, Rule 1.1.

<sup>41</sup> *Ibid.*, Rule 1.2.

<sup>42</sup> *Ibid.*, Rule 2.1.

<sup>43</sup> *Ibid.* In particular, the rule states: "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization." The rule also imposes an affirmative duty to report potential violations of the law to the organization's leaders – problematic if it is those leaders who are intending to violate the law.

<sup>44</sup> "Government Counsel and their Obligations," *Harvard Law Review* 121 (March 2008): 1409, 1411.

<sup>45</sup> *Ibid.*; "[T]he ABA left the matter open by failing to define the relevant client."

<sup>46</sup> Jesselyn Radack, "Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism," *University of Colorado Law Review* 77 (Winter 2006): 1, 7, citing Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* (1978), 141.

<sup>47</sup> Radack, 3-4.

<sup>48</sup> "Government Counsel and their Obligations," 1414, citing *Restatement (Third) of the Law Governing Lawyers*, § 97 cmt. f (2000); see also *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983); Richard B. Bilder and Detlev F. Vagts, "Speaking Law to Power: Lawyers and Torture," *American Journal of International Law* 98 (October, 2004):689, 693 (" [T]he government lawyer's 'client' is not simply his or her administrative superior, but also the government agency or military service for which he or she works, the U.S. government as a whole, and indeed the American public and its collective interests and values. Moreover, government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions.")

<sup>49</sup> Goldsmith, 32-33. OLC's opinions are controlling within the Executive Branch, unless overruled by Attorney General or President; all agencies must conform to its determinations. Johnsen, 1345.

<sup>50</sup> Goldsmith, 33.

<sup>51</sup> Ibid. Radack agrees, noting that OLC “maintains a longstanding tradition of dispensing objective legal advice to its clients in executive-branch agencies... .” Radack, 2-3. John W. Dean, Nixon’s White House counsel, wrote that OLC “once prided itself as an office that followed the law, and so advised the president, regardless of what the White House wanted to hear. ...OLC was a consistent restraining influence, regarding both foreign and domestic legal matters. One example will suffice: Nixon wanted a clear signal from OLC that he could – and ideally should – criminally prosecute the *New York Times* for publishing classified information associated with the Pentagon Papers. Then-OLC head William Rehnquist (no shrinking violent either regarding presidential powers), in essence, advised against it.” John W. Dean, “Beyond the Pale: The Newly-Released, Indefensible Office of Legal Counsel Terror Memos,” *Writ*, March 6, 2009 [journal on-line]; available from <http://writ.lp.findlaw.com/dean/20090306.html>; accessed 28 March 2009.

<sup>52</sup> Goldsmith, 148.

<sup>53</sup> Eric Posner and Adrien Vermeule, “A ‘Torture’ Memo and its Tortuous Critics,” *Wall Street Journal*, 06 July 2004, Sec. A, p.22.

<sup>54</sup> Johnsen writes that the legal analyses have been “harshly and almost universally condemned.” Johnsen, 1346.

<sup>55</sup> Adam Liptak, “The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture,” *New York Times*, 25 June 2004, Sec. A, p. 14.

<sup>56</sup> Ibid.

<sup>57</sup> Dean.

<sup>58</sup> Stephen Gillers, “Legal Ethics: A Debate,” in *The Torture Debate in America*, 239. Gillers notes that there is a “substantial body of opinion” from international law specialists that rejects the memos’ conclusions, and that over 100 lawyers from both political parties state that the arguments in the memoranda ignore the unambiguous terms of the treaty that make it applicable to all conflicts and protects even unlawful combatants from humiliating, degrading, or cruel treatment. See also Bilder and Vagts, 690; Omer Ze’ev Bekerman, “Torture – the Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?” *The American Journal of Comparative Law* 53 (Fall, 2005): 743, 769-774.

<sup>59</sup> Jose E. Alvarez, “Torture and the War on Terror: Torturing the Law,” *Case Western Reserve Journal of International Law* 37 (2006): 175, 179.

<sup>60</sup> Ibid., 180.

<sup>61</sup> Ibid., 182-183. Jeffrey K. Shapiro, “Legal Ethics and Other Perspectives,” in *The Torture Debate in America*, ed. Greenberg, 233, suggests that OLC was asked only to opine on the applicability of Geneva. But Gillers, in another chapter in the same book, notes that the memos refer to “international treaties and federal laws,” and that a client’s narrowly framed request does not limit a lawyer’s responsibility to fully respond. Gillers, 236-237.

<sup>62</sup> Ibid., 188-189; Radack, 15-18. Radack notes that there is widespread world judgment against slavery, apartheid, genocide, juvenile execution, and torture.

<sup>63</sup> Alvarez, 175, 190.

<sup>64</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>65</sup> Liptak. See also Gillers, 237-238. Similar reaction is found at Bilder and Vagts, 690-691.

<sup>66</sup> Alvarez, 184-185. Alvarez notes that the memo writers focused on U.S. federal and military law, while shortchanging the prospect of prosecution under international law. In point of fact, efforts to prosecute have been initiated in Spain, although these have not borne any results. Yoo, Bybee, Gonzales, Addington, Haynes, and former Undersecretary of Defense Douglas J. Feith are the subject of a 98-page complaint filed in a Spanish court in March of 2008 on behalf of the Association for the Rights of Prisoners. However, it is likely to be dismissed to allow the U.S. to do its own investigation first. Al Goodman, "Prosecutor: Drop Case Against Bush officials," CNN International Europe, 16 April 2009; Internet; available from <http://edition.cnn.com/2009/WORLD/europe/04/16/spain.guantanamo/>; accessed 18 April 2009.

<sup>67</sup> Charlie Savage, "Military Cites Risk of Abuse by CIA; New Bush Rules on Detainees Stir Concern," *The Boston Globe*, 25 August 2007; available from [http://www.boston.com/news/nation/washington/articles/2007/08/25/military\\_cites\\_risk\\_of\\_abuse\\_by\\_cia/](http://www.boston.com/news/nation/washington/articles/2007/08/25/military_cites_risk_of_abuse_by_cia/); accessed 28 March 2009.

<sup>68</sup> Jan Crawford Greenburg, Howard L. Rosenberg and Ariane de Vogue, "Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'" ABC News, 09 April 2008; Internet; available from <http://abcnews.go.com/print?id=4583256>; accessed 02 May 2009.

<sup>69</sup> In the words of one journalist, "As such they provide a manual about exactly how far they could go to stay within the letter – if not the spirit – of the law. For example, the temperature of water used to douse detainees should be no lower than 41F, while exposure should not exceed 20 minutes 'without drying and rewarming'. Waterboarding was not supposed to last more than 40 seconds, so, 'in the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted and the use of these procedures would not constitute torture within the meaning of the statute'. Tom Baldwin, "Torture Memos Acted as a 'Golden Shield' to Help American Interrogators Try to Stay within the Law," *Times on Line*, 18 April 2009 [on-line journal]; Internet; available from [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article6116281.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6116281.ece); accessed 07 May 2009.

<sup>70</sup> Alvarez, 185-186, 220.

<sup>71</sup> Goldsmith, 10. He later wrote that he was "astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations."

<sup>72</sup> Ibid., 145.



<sup>73</sup> Ibid., 146, 148-149.

<sup>74</sup> Ibid., 145.

<sup>75</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Savage, "Military Cites Risk of Abuse by CIA."

<sup>76</sup> For a summary of all the memoranda and their status, see United States Department of Justice, Office of Legal Counsel, Principal Deputy Assistant Attorney General Steven G. Bradbury, "Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," Memorandum for the Files, 15 January 2009; Internet; available from <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>; accessed 08 May 2009.

<sup>77</sup> Jason Leopold, "Bush's Lawyer-Shopping for Torture," *Consortiumnews*, 24 March 2009 [on-line journal]; Internet; available from [www.consortiumnews.com/2009/032409a.html](http://www.consortiumnews.com/2009/032409a.html); accessed 28 March 2009.

<sup>78</sup> Carrie Johnson, "Experts Say Authors Of Memos May Avoid Professional Sanctions," *The Washington Post*, 07 May 2009; Internet; available from <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603182.html?hpid=moreheadlines>; accessed 07 May 2009.

<sup>79</sup> Jason Leopold, "DOJ Probe on Yoo Torture Memos 'Damning;' Senators Demand Answers," *Online Journal*, 18 February 2009 [on-line journal]; Internet; available from [www.onlinejournal.com/artman/publish/article\\_4379.shtml](http://www.onlinejournal.com/artman/publish/article_4379.shtml); accessed 28 March 2009.

<sup>80</sup> Ibid.; Johnson. However, it is doubtful that they will be disciplined because of the difficulty of securing witnesses and sensitive DOJ and White House documents. Debra Cassens Weiss, "Experts See Discipline Hurdles for Interrogation Memo Authors", *ABA Journal*, 07 May 2009 [on-line journal]; Internet; available from [http://www.abajournal.com/news/experts\\_see\\_discipline\\_hurdles\\_for\\_interrogation\\_memo\\_authors/](http://www.abajournal.com/news/experts_see_discipline_hurdles_for_interrogation_memo_authors/); accessed 07 May 2009

<sup>81</sup> Goldsmith, 129-130.

<sup>82</sup> John C. Yoo, "Ex-Bush Lawyer Talks about Torture Memos," interview with Eugene W. Fields, *Orange County Register*, 03 March 3, 2009; Internet; available from [www.ocregister.com/articles/government-think-legal-2323245-people-decisions](http://www.ocregister.com/articles/government-think-legal-2323245-people-decisions); accessed 28 March 2009.

<sup>83</sup> Goldsmith, 131; similar sentiments are echoed by Philip Zelikow, "Legal Policy for a Twilight War," Annual Lecture to Houston Journal of International Law, 26 April 2007; Internet; available from <http://74.125.95.132/search?q=cache:http://hnn.us/articles/39494.html>; accessed 08 May 2009.

<sup>84</sup> Goldsmith, 130-131.

<sup>85</sup> Zelikow. Goldsmith shares this view, as well. Goldsmith, 132.

<sup>86</sup> Goldsmith, 130.

<sup>87</sup> *Ibid.*, 130.

<sup>88</sup> Stephen Hadley, cited in Goldsmith, 132.

<sup>89</sup> Zelikow.

<sup>90</sup> Zelikow.

<sup>91</sup> Goldsmith, 167. See also Goldsmith's discussion of the "War Council," consisting of Gonzales, Addington, Haynes, deputy White House counsel Tim Flanigan, and Yoo, pp. 22-23.

<sup>92</sup> *Ibid.*, 131.

<sup>93</sup> *Ibid.*, 132.

<sup>94</sup> *Ibid.*, 166-167.

<sup>95</sup> Smith and Eggen.

<sup>96</sup> *Ibid.*; Smith.

<sup>97</sup> Scott Horton, "Military Misgivings Mount over Bush Torture Order," *Harper's Magazine*, August 2007; available from <http://harpers.org/archive/2007/08/hbc-90001021>; accessed 28 March 2009. Horton also reports that when the 20 July 2007 Executive Order -- which could be interpreted to allow different interrogation rules for the CIA -- was drafted, the JAGs and other senior military leaders were "completely taken aback" -- it was kept secret from them until the last moment, they were given about thirty hours in which to make comments, and "their comments were, as usual, totally disregarded."

<sup>98</sup> Goldsmith, 133.

<sup>99</sup> Karen J. Greenberg, "The Achilles Heel of Torture: What the JAG Memos Tell Us," The Center on Law and Security, New York University School of Law; Internet; available from [http://lawandsecurity.org/get\\_article/?id=48](http://lawandsecurity.org/get_article/?id=48); accessed 28 March 2009. Dr. Greenberg is the Executive Director of the Center, and has written numerous books and articles on interrogation policy, in addition to collecting relevant documents with Joshua L. Dratel in *The Torture Papers*. Dr. Greenberg characterized the JAG memos as "a welcome oasis of sanity in a desert of compliance with the government's decision to use torture as a weapon in its 'war on terror.'"

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* Greenberg noted that, according to General Eisenhower, the fact that the US military was known not to abuse prisoners contributed greatly to hastening the end of World War II. "Nazis were willing to turn themselves in to the Allied forces and brought with them information that played an important role in ending the war."

<sup>103</sup> Mark Danner, "Tales from Torture's Dark World," *New York Times*, 15 March 2009; available from [www.nytimes.com/2009/03/15/opinion/15danner.html?\\_r=2&pagewanted;](http://www.nytimes.com/2009/03/15/opinion/15danner.html?_r=2&pagewanted;) accessed 28 March 2009.

<sup>104</sup> Ken Gude, "Opening up Bush's Tortured Logic," *Guardian*, 16 April 2009 [on-line journal]; Internet; available from <http://www.guardian.co.uk/commentisfree/cifamerica/2009/apr/16/torture-memo-bush-prosecution;> accessed 18 April 2009. As Danner summed up, "By deciding to torture, we freely chose to embrace the caricature they had made of us." Danner, "Tales from Torture's Dark World."

<sup>105</sup> Executive Summary, p. 1.

<sup>106</sup> Danner, "Tales from Torture's Dark World." Jose Padilla, for example, was convicted of terrorist activity, but not the charges on which he was originally arrested, of conspiring to set off radioactive "dirty bombs." "Jury finds Padilla Guilty on Terror Charges", CNN, 16 August 2007; Internet; available from <http://www.cnn.com/2007/US/08/16/padilla.verdict/index.html>; accessed 08 May 2009. Prosecutors could not use evidence associated with the "dirty bomb" plot because it was obtained from another detainee whose interrogation included waterboarding. "Conspiracy to Torture," *The Nation*, 08 December 2005 [on-line journal]; Internet; available from <http://www.thenation.com/doc/20051226/editors>; accessed 08 May 2009.

<sup>107</sup> Danner, "Tales from Torture's Dark World."

<sup>108</sup> Alvarez, 189.

<sup>109</sup> Ken Silverstein, "U.S. Military Lawyers Felt 'Shut Out' of Prison Policy," *Los Angeles Times*, 14 May 2004; Internet; available from <http://articles.latimes.com/2004/may/14/nation/najag14>; accessed 28 March 2009.

<sup>110</sup> Savage.

<sup>111</sup> Charlie Savage, "Bush Seeks to Limit Military Lawyers' Independence," *International Herald Tribune*, 15 December 2007; Internet; available from <http://www.ihf.com/articles/2007/12/15/america/jag.1-189605.php>; accessed 28 March 2009.

<sup>112</sup> Ibid.

<sup>113</sup> Scott Horton, "Bush Assails the JAG Corps," *Harpers Magazine*, December 2007; Internet; available from <http://www.harpers.org/archive/2007/12/hbc-90001929>; accessed 28 March 2009.

<sup>114</sup> Horton, "Military Misgivings Mount over Bush Torture Order," citing an Army report on Abu Ghraib.

<sup>115</sup> Horton, "Military Misgivings Mount over Bush Torture Order." In cases decided at the end of World War II, Axis military authorities were held accountable for the torture and mistreatment of prisoners, despite defenses that abuse was done by intelligence agents,

because military authorities had custody of the prisoners. The U.S. also court-martialed American prison commanders over incidents that occurred at U.S.-run prison camps during the Korean War, using the same theory.

<sup>116</sup> See discussion of the role of military advice in Martin L. Cook, "The Proper Role of Professional Military Advice in Contemporary Uses of Force," *Parameters* 33, No. 4 (Winter 2002-03): 21.

<sup>117</sup> Horton, "Military Misgivings Mount over Bush Torture Order."

<sup>118</sup> One writer on strategic leadership notes that "highly consequential decisions are rarely made by strategic leaders in isolation," since complex issues are such that one individual cannot encompass them all. Rather, the quality of a decision most frequently rests of the quality of those advising the decision maker, and their relationships with each other. Advisors should reflect a variety of disciplines, expertise and perspectives to permit a more in-depth exploration of problems and generate more decision options, rather than reflecting the "perspective of the decision maker." Owen T. Jacobs, "Managing Strategic Decision Making," chapter in *Strategic Leadership: The Competitive Edge* (Washington, D.C.: Industrial College of the Armed Forces, 2000), 115. For a discussion of the benefits of dialogue and discussion, see Peter M. Senge, *The Fifth Discipline: The Art & Practice of the Learning Organization* (New York: Doubleday, 1990), 238-249.

<sup>119</sup> Richard L. Morrill, *Strategic Leadership* (Westport, CT: Greenwood Publishing Group, 2007), 190 -191.

<sup>120</sup> Randall Mikkelsen, "Obama Shields CIA Interrogators from Charges," *The Boston Globe*, 16 April 2009 [on-line journal]; Internet; available from [http://www.boston.com/news/nation/washington/articles/2009/04/16/obama\\_to\\_shield\\_cia\\_interrogators\\_from\\_charges/?rss\\_id=Boston.com+++Latest+news](http://www.boston.com/news/nation/washington/articles/2009/04/16/obama_to_shield_cia_interrogators_from_charges/?rss_id=Boston.com+++Latest+news); accessed 08 May 2009. This announcement outraged the United Nations rapporteur for torture, who argues that the U.S. has a duty under international treaties to conduct criminal investigations. "Obama Reprieve for CIA Illegal: U.N. Rapporteur," Reuters News Service, Vienna, 18 April 2009 [on-line journal]; available from <http://www.reuters.com/article/politicsNews/idUSTRE53H1Y020090418>; Internet; accessed 18 April 2009. For other reactions, see Tom Raum, "Analysis: Obama Policy on Torture Has Two Sides," Associated Press, 18 April 2009; Internet; available from <http://www.google.com/hostednews/ap/article/ALeqM5hCJSzhMqjwKVnVzXQHTIeU0NeVSqD97L074G0>; accessed 18 April 2009.

<sup>121</sup> Despite the release of many formerly classified memos, there is insufficient information to fully determine the role of Haynes, Gonzales, and Addington, and whether they, too, failed in professional responsibility standards. Relevant inquiries might include how the questions or requests to OLC were framed, who had a role in the framing, why Captain Dalton's legal review was cut off and under whose authority, how attorneys for the Working Group were selected and by whom, and what use was made of the JAG memos.

<sup>122</sup> Jason Leopold, "Conyers, Nadler Formally Request DOJ Appoint Torture Special Prosecutor," *The Public Record*, 28 April 2009 [on-line journal]; available from <http://www.pubrecord.org/torture/869.html?task=view>; accessed 10 May 2009; "ACLU Asks Justice Department to Appoint Independent Prosecutor to Investigate Torture," 18 March 2009;

Internet; available from <http://www.aclu.org/safefree/torture/39060prs20090318.html>; accessed 10 May 2009.

<sup>123</sup> Gude. Obama adviser Cass Sunstein has similarly warned that pursuing prosecutions of Bush Administration officials would generate a “cycle” of partisan recriminations; Scott Horton, “Justice After Bush: Prosecuting an Outlaw Administration,” *Harper’s Magazine*, December, 2008; Internet; available from <http://www.harpers.org/archive/2008/12/0082303>; accessed 28 March 2009.

<sup>124</sup> Constitutional and international law scholar Bruce Fein – who is also a former OLC attorney and counsel to Counsel to the Joint Congressional Committee on Covert Arms Sales to Iran, chaired by Congressman Dick Cheney -- favors this approach. Fein Interview.

<sup>125</sup> Horton, “Justice After Bush;” Philippe Sands, “The Green Light,” *Vanity Fair*, May 2008 [on-line journal]; Internet; available from [http://vanityfair.com/politics/features/2008/05/guantanamo200805?printable=true&currentpage=;](http://vanityfair.com/politics/features/2008/05/guantanamo200805?printable=true&currentpage=:) accessed 20 April 2009.

<sup>126</sup> This type of commission is favored by Scott Horton and Mark Danner. Horton provided a thoughtful review of the purposes and functions of such “reconciliation” commissions, which were effective in Argentina, Chile, East Timor, Peru, and South Africa, where “newly elected leaders feared that the criminal prosecution of their predecessors would wreck the fragile political consensus that had been used to establish both peace and a legitimate democracy. A commission of inquiry allowed these countries to move toward accountability in a slow but deliberate way,” while educating the public about the wrongdoing in a constructive manner. Horton, “Justice After Bush.” Mark Danner likens this type of commission to the Watergate hearings, which provided investigation so that legal proceedings afterwards did not seem like a political witch hunt. Mark Danner, interview by Bill Moyers, 01 May 2009; transcript available from <http://www.pbs.org/moyers/journal/05012009/transcript4.html>; Internet; accessed 02 May 2009. Although President Obama has appointed a Task Force to review interrogation practices, it is limited to determining whether different or additional guidance is needed for the CIA.

<sup>127</sup> Horton, “Justice After Bush.”

<sup>128</sup> Ibid.

<sup>129</sup> Peter Finn and Joby Warrick, “Detainee’s Harsh Treatment Foiled No Plots,” *The Washington Post*, 29 March 2009, Sec. A, p.1; David Rose, “Tortured Reasoning,” *Vanity Fair*, 16 December 2008 [on-line journal]; Internet; available from [http://vanityfair.com/magazine/2008/12/torture200812?printable=true&currentPage=;](http://vanityfair.com/magazine/2008/12/torture200812?printable=true&currentPage=) accessed 20 April 2009.

<sup>130</sup> Zelikow.