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The Green Light.

The Infamous Department of Justice Memorandum designed to authorize torture

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Theme: Crimes against Humanity, Law and Justice

Yesterday the public finally got to see the full text of an infamous Department of Justice memorandum from March 2003 designed to authorize torture. I will have some more comments on this odious document authored by John Yoo, a man who (amazingly) teaches at a prominent law school. But this disclosure serves as a fitting introduction for the publication today of Philippe Sands's article "The Green Light" in *Vanity Fair.* The article is a teaser for Sands's forthcoming book, set for release later this month, *The Torture Team.*

We've all heard *ad nauseam* the Administration's official torture narrative. This is a different kind of war, they argue. Each invocation of "different" is to a clear point: the Administration wishes to pursue its war unfettered by the laws of war. Unfettered, indeed, by any form or notion of law. But Sands's work is important because he has looked carefully at the chronology: what came first, the decision to use torture techniques, or the legal rationale for them?

> Gonzales and Haynes laid out their case with considerable care. The only flaw was that every element of the argument contained untruths. The real story, pieced together from many hours of interviews with most of the people involved in the decisions about interrogation, goes something like this: The Geneva decision was not a case of following the logic of the law but rather was designed to give effect to a prior decision to take the gloves off and allow coercive interrogation; it deliberately created a legal black hole into which the detainees were meant to fall. The new interrogation techniques did not arise spontaneously from the field but came about as a direct result of intense pressure and input from Rumsfeld's office. The Yoo-Bybee Memo was not simply some theoretical document, an academic exercise in blue-sky hypothesizing, but rather played a crucial role in giving those at the top the confidence to put pressure on those at the bottom. And the practices employed at Guantánamo led to abuses at Abu Ghraib.
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> The fingerprints of the most senior lawyers in the administration were all over the design and implementation of the abusive interrogation policies. Addington, Bybee, Gonzales, Haynes, and Yoo became, in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse.

Sands's article and book put "the torture team"–the group of more than a half dozen Bush Administration lawyers who gave the green light for the introduction of torture–into sharp focus.

> The lawyers in Washington were playing a double game. They wanted maximum pressure applied during interrogations, but didn't want to be seen as the ones applying it—they wanted distance and deniability. They also wanted legal cover for themselves. A key question is whether Haynes and Rumsfeld had knowledge of the content of these memos before they approved the new interrogation techniques for al-Qahtani. If they did, then the administration's official narrative—that the pressure for new techniques, and the legal support for them, originated on the ground at Guantánamo, from the "aggressive major general" and his staff lawyer—becomes difficult to sustain. More crucially, that knowledge is a link in the causal chain that connects the keyboards of Feith and Yoo to the interrogations of Guantánamo.
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> When did Haynes learn that the Justice Department had signed off on aggressive interrogation? All indications are that well before Haynes wrote his memo he knew what the Justice Department had advised the C.I.A. on interrogations and believed that he had legal cover to do what he wanted. Everyone in the upper echelons of the chain of decision-making that I spoke with, including Feith, General Myers, and General Tom Hill (the commander of SouthCom), confirmed to me that they believed at the time that Haynes had consulted Justice Department lawyers. Moreover, Haynes was a close friend of Bybee's. "Jim was tied at the hip with Jay Bybee," Thomas Romig, the army's former judge advocate general, told me. "He would quote him the whole time." Later, when asked during Senate hearings about his knowledge of the Yoo-Bybee Memo, Haynes would variously testify that he had not sought the memo, had not shaped its content, and did not possess a copy of it—but he carefully refrained from saying that he was unaware of its contents. Haynes, with whom I met on two occasions, will not speak on the record about this subject.

Sands notes the focal role that the torture lawyers saw for the Attorney General's opinion power. It was, as Harvard law professor Jack Goldsmith suggested in a recent book, a device that could be used to give a sort of pardon in advance for persons undertaking criminal acts. Enforced nudity, stress techniques common at Abu Ghraib

And of course, the torture lawyers fully appreciated from the outset that torture was a criminal act. Most of the legal memoranda they crafted, including the March 2003 Yoo memorandum released today, consist largely of precisely the sorts of arguments that criminal defense attorneys make–they weave and bob through the law finding exceptions and qualifications to the application of the criminal law. But there are some major differences: these memoranda have been crafted not as an after-the-fact defense to criminal charges, but rather as a roadmap to committing crimes and getting away with it. They are the sort of handiwork we associate with the *consigliere*, or mob lawyer. But these *consiglieri* are government attorneys who have sworn an oath, which they are violating, to uphold the law.

They have dragged the Department of Justice, as an institution, straight into the gutter. And amazingly, five years later, it continues to sit there in the muck, unable to stand up and step out of it.

Of course they missed some things along the way. The legal analyses were so poorly crafted–making the sorts of sophomoric arguments that would land a law student a failing grade on an examination, that Justice was forced to rescind them. It immediately crafted new opinions, which it continues to keep under lock and key, with the certain knowledge that when they are disclosed the resulting public uproar will force their withdrawal as well. This is the quality of legal work that emanates from the Justice Department under Alberto

Gonzales, and now, Michael Mukasey.

They also missed the established precedent I have cited repeatedly here, namely *United States v. Altstoetter,* under the rule of which the conduct of the torture lawyers is a criminal act not shielded by any notions of government immunity. Sands discusses the history of that case which is, lamentably, known by so few American lawyers. And then he turns to the prosecution of Generalissimo Augusto Pinochet, the Chilean strong man whose life ended in a swarm of indictments and criminal proceedings. Americans seem also to forget exactly what the crime was that plagued Pinochet to his deathbed. The answer is fairly simple: he was accused on the basis of convincing evidence of having authorized a regime of torture in connection with the interrogation of insurgents, who were removed from the rule of law. The precise techniques used included a number of those subsequently authorized by President Bush's torture team and incorporated into his "Program." Sands recounts a prophetic moment in the course of the proceedings surrounding Pinochet's case in London.

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

Those are words for members of the torture team to contemplate. In the meantime, they should think twice before traveling abroad. Around the world, and increasingly within the United States itself they are regarded as criminals whose day of reckoning is drawing closer on the horizon.
