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Torture and the Lawless “New Paradigm”

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The president who campaigned on a pledge to “restore honor and dignity to the White House” has now been compelled to declaim: “We abide by the law of the United States, and we do not torture.” In the closing months of 2005, President George W. Bush has been forced to repeat this undignified denial several times, most recently with the head of the World Health Organization standing beside him, because a dwindling number of people believe him.

In fact, as witnessed by the International Committee for the Red Cross and as verified by numerous US military and intelligence officers, during the ongoing “war on terror” the United States has repeatedly employed interrogation tactics that constitute torture and inhumane treatment and are proscribed by the Geneva Conventions and US law. Of the 108 deaths of prisoners in custody in Iraq and Afghanistan since 2002, at least 26 were classified as homicides, including cases where people were tortured, beaten, frozen or suffocated to death. In addition, and despite Bush’s denial, the US does “render to countries that torture” — sending captured or kidnapped detainees off to Egypt, Jordan and other countries, where they have, on several documented occasions, suffered illegal forms of abuse.

Even as Bush issued his latest denial on December 6, Secretary of State Condoleezza Rice was issuing a “non-apology” in Germany for the CIA’s abduction and detention in Afghanistan of the German citizen Khalid al-Masri, who they wrongly suspected of complicity in terrorism and who is now suing the CIA alleging that he was tortured while in custody. Rice was in Europe to assuage the public furor at the revelation in the November 3 Washington Post of secret CIA prisons — termed “black sites” — in two eastern European countries. ABC News reported on December 5 that in advance of Rice’s visit the CIA had “scrambled” to move 11 “high-value al-Qaeda detainees” from the European locations to a new “black site” somewhere in North Africa.

The steady leaks about the Bush administration’s detention policies forced Rice to attempt to reassure Europeans further on December 7: “As a matter of US policy, the United States’ obligations under the UN Convention Against Torture, which prohibits cruel, inhumane and degrading treatment — those obligations extend to US personnel wherever they are, whether they are in the United States or outside of the United States.” But given the scope of the revelations of US torture that have poured out since the first Abu Ghraib photos hit the airwaves in late April 2004, “policy talk” will not satisfy or quiet Bush administration critics, since by definition policy can be adjusted as circumstances require. The ban on torture is a matter of law, not policy, and violations are a crime, not a bureaucratic error. The Bush administration, moreover, has sought to narrow the accepted legal definition of torture and to “legalize” the option of cruel, inhumane and degrading treatment.

These efforts not only subvert the law of the land, but they may also thwart the pursuit of justice for planners and abettors of the September 11, 2001 attacks that prompted the Bush administration to launch its war on terror.

THE NEW PARADIGM

In the pantheon of crimes, torture is an exceptionally serious one, not because it is necessarily the worst thing that people can do to others but because the legal prohibition is universal — it extends to all human beings in all places and circumstances. The primary purpose of the prohibition is to limit what public agents can do to people who are in custody but have not been found guilty of a crime, when the capacity to do harm is so one-sided and so tempting. In US law, the idea of forbidding torture traces back to the founding of the nation and was enshrined in the Constitution through the prohibition of cruel treatment, an enlightened repudiation of the tyrannical excesses of kings. Along with habeas corpus and the separation of powers, the ban on extralegal cruel treatment served as a foundation of the modern rule of law, because it was understood as essential for conditions of human dignity, liberty, security and due process to thrive.

In the second half of the twentieth century, the prohibition of torture "ripened" into a customary international legal norm, a fact that Congress recognized by passing the Torture Victims Protection Act in 1992. The 1949 Geneva Conventions, which prohibit torture and cruel, inhuman and degrading treatment of prisoners captured in war, are incorporated into the US Uniform Code of Military Justice (UCMJ), and federal anti-torture and war crimes statutes passed in the 1990s establish criminal liability for violations in times of war or peace.

This black-letter law would seem to settle that torture and inhumane treatment are not legitimate options for US interrogators, civilian or military. There is also a strong consensus among experts in the art of interrogation that hurting and degrading prisoners is highly unlikely to produce reliable intelligence or confessions anyway. But in the wake of the September 11 terrorist attacks, as part of a "new paradigm" for detention and interrogation, dominant voices in the Bush administration's inner circles subscribed to the idea that torture works. If torturing — or, the preferred euphemism, "coercively interrogating" — prisoners could provide intelligence to save American lives and win a "war on terror," then "quaint" laws should be no obstacle. The current torture crisis is a direct product of the policy preference for abandoning the law.

The "new paradigm" was shaped principally by Vice President Dick Cheney and his shadowy counsel (now chief of staff), David Addington, and varnished with legal opinions from the Justice Department's Office of Legal Counsel (OLC), most prominently by Berkeley law professor John Yoo, who served as deputy assistant attorney general from 2001-2003. Their goal was to expand executive power at the expense of the courts and Congress. To these ends, Yoo and his OLC colleagues produced a series of memos opining that the president, as commander-in-chief, should have unfettered powers to wage war, that any efforts to subject executive discretion over interrogation and detention policies to federal, military or treaty laws would be "unconstitutional," that the legal restriction on cruel, inhuman and degrading treatment is unenforceable outside the United States, and, for good measure, that prisoners designated as terrorists by presidential fiat (rather than status review by a tribunal) should have no habeas corpus right to contest their detention and no right not to be maltreated. These OLC opinions were treated as "controlling legal authority" and utilized by the CIA and Pentagon civilians to authorize practices that the International Committee of the Red Cross

(with unique access to prisoners) has characterized as “tantamount to torture.”

REMOVING LEGAL OBSTACLES

The larger story of how the rule of law and cherished legal norms were hijacked by right-wing radicals in the Bush administration is still being pieced together as documents and details emerge. But it is now clear that the clandestine drive to evade the laws of the land prohibiting torture and ill treatment started in earnest in January 2002, when then-White House counsel (now Attorney General) Alberto Gonzales asked the Defense Department to instruct intelligence officers at Guantánamo Bay, Cuba to fill out a one-page form on every detainee certifying the president’s “reason to believe” that the detainee was involved in terrorism. Those whom the president so suspected were to be tried by the special military commissions created by Bush’s November 2001 executive order. Within weeks, the officers began reporting back that interrogations were not producing the information needed to fulfill Gonzales’ request. At a time when these prisoners were touted as the “worst of the worst,” the presumption was that legal restraints on interrogation were the problem.

The first legal obstacle was cleared on February 7, 2002, when President Bush embraced the OLC opinion that suspected al-Qaeda detainees were not protected by the Geneva Conventions, and that suspected Taliban detainees are categorically not entitled to prisoner-of-war status under the conventions. This laid the ground for a “no crime without law” approach to the handling of prisoners. In the preceding weeks, the State Department had sharply criticized the legal flaws and political dangers of this position, for which it was rewarded by exclusion from discussions of interrogation and detention policies thereafter.

By the summer of 2002, official agitation was mounting over the lack of intelligence that could lead to the capture of Osama bin Laden and other top al-Qaeda and Taliban leaders, whose continuing evasion of the US dragnet was a political embarrassment. The most infamous memo that has come to light, dated August 1, 2002 and signed by then-Assistant Attorney General Jay Bybee but authored by Yoo, was written in response to the question of how far CIA agents, anxious about the risk of future prosecution under federal anti-torture laws, could go in interrogating high-value al-Qaeda suspects. Yoo opined that a tactic is not “torture” unless it causes pain comparable to “organ failure or death.” (The analysis in this memo was so shoddy and embarrassing that it was repudiated by the administration as soon as it became public in June 2004 and replaced that December with a new OLC memo. Yoo testily defended his work product and criticized the new memo for “muddying the water.”)

YOOIFICATION AND GITMOIZATION

Although the August 1 torture memo was written specifically for the CIA, the White House forwarded it to the Pentagon, where it was seized upon as a solution to military interrogators’ frustration that Guantánamo detainees were tenaciously resisting lawful interrogation methods. It should be noted that in August 2002, a senior Arabic-speaking CIA analyst dispatched to assess Guantánamo detainees’ intelligence value concluded that few had any meaningful ties to or information about al-Qaeda. One exception was Muhammad al-Qahtani, alleged to be the twentieth hijacker. The desire to “break” him was the reason for authorization to use dogs, protracted sleep deprivation and stress positions, forced nudity and other forms of degrading treatment. A memo by Army Lt. Col. Diane Beaver, dated October 11, 2002, noted that coercive tactics are “per se” illegal under the UCMJ, but

that this might be circumvented on the basis of the commander-in-chief's authority (one of the key arguments in the August 1 memo).

A December 2, 2002 Defense Department memo authorizing a three-category menu of interrogation tactics was rescinded on January 15, 2003, apparently because of concerns among the uniformed military about the ramifications of abandoning the UCMJ. The Pentagon then convened a working group to produce new military interrogation guidelines for Guantánamo. The working group was instructed by General Counsel William Haynes to accept the OLC's August 1 analysis, and forbidden from developing analysis that would conform to military law (or 50 years of military practice). Top lawyers in the Judge Advocate General's Corps from all four branches of the military wrote memos to the Pentagon leadership in February and March 2003 conveying uniform dismay at the authorization of "torture lite" tactics. They protested that this contravenes the UCMJ, which enshrines Geneva Convention rules and governs the military, regardless of the status of prisoners, that it would expose soldiers to the risk of court martial, and that it would undermine military doctrine and discipline, as well as public support for the war.

On March 14, 2003, Yoo sent a memo to Haynes responding to the JAGs' concerns, which was used by Pentagon civilians to silence the dissent. (The contents of this memo, which has not yet become public, are apparently so sensitive or embarrassing that even a 2005 official investigation into prisoner abuse, headed by Vice Adm. Albert Church, was barred from making a copy and had to read it in a secure location.) The Pentagon working group issued its final report on interrogation policy for Guantánamo on April 4, 2003. (This document was also declassified in June 2004, and in March 2005 was officially rescinded and declared to be "a historical document with no standing in policy, practice or law to guide any activity of the Department of Defense.")

The coercive tactics authorized for military interrogators at Guantánamo, where the Bush administration claimed that the Geneva Conventions do not apply to prisoners, "migrated" in late August 2003 to Iraq, where there was no dispute that the Geneva Conventions do apply. Lt. Gen. Ricardo Sanchez, commander of the Iraqi theater of operations, signed off on tactics that would "Gitmoize" Iraqi prisons, including use of dogs, sexual humiliation, stress positions and other forms of prisoner abuse that were conveyed to the world in the Abu Ghraib photos. When Defense Secretary Donald Rumsfeld was called before Congress in May 2004 to explain the Abu Ghraib debacle, he claimed that US forces in Iraq were adhering to the Geneva Conventions and that any violations were the work of "rogue soldiers." But when Army Capt. Ian Fishback saw the footage of Rumsfeld's testimony, he "was immediately concerned that the Army was taking part in a lie to the Congress, which would have been a clear violation of the Constitution." He knew, from firsthand experience, that the tactics depicted in the Abu Ghraib photos were being used systematically in Iraq and Afghanistan, where he had done tours of duty. Fishback spent 17 months seeking clarification about the legal standards for interrogations, during which he was repeatedly told by his superiors to ignore abuses and advised to "consider your career." The civic-minded captain finally turned to Human Rights Watch, which corroborated his allegations with the testimony of other soldiers.

JOHN DOES

Since June 2004, developments affecting the interrogation and detention of foreign prisoners have come at a fast and furious pace. In that month, the Supreme Court ruled in the Rasul v. Bush and al-Odeh v. Bush cases that Guantánamo detainees do, in fact, have

habeas corpus rights. Lawyers with the Center for Constitutional Rights, who filed the Rasul suit, have assumed a lead role in coordinating the work of hundreds of lawyers who were prompted by the decision, which came on the heels of the Abu Ghraib scandal, to sign on as representatives of other Guantánamo detainees. The hundreds of lawyers hitting the shores of Cuba have become important sources of information both about the tactics used there and the dubious veracity of the information extracted from prisoners through coercion and torture. Thomas Wilner of the firm Shearman and Sterling, who represents Fawzi al-Odeh and ten other Kuwaiti prisoners, maintains that Guantánamo's purpose "was to avoid law, and this lawless, simple-minded, lousy government lawyering led to Abu Ghraib. All my clients were tortured, however you define the term."

The influx of lawyers impelled the CIA to shut down its operations at Guantánamo. But the Rasul decision did nothing to clarify the nature of rights that prisoners could claim, and the Justice and Defense Departments have fought lawyers' requests for improved treatment or information, including the identities of hundreds of Guantánamo prisoners, foiling any access to lawyers or courts for habeas corpus motions. Nor has the government made any effort to charge most of the Guantánamo detainees. As is now known, two alternatives to prosecution have been to "render" detainees to other countries, where they may be held indefinitely without charge, or to whisk them off to secret CIA-run facilities overseas. A government report, declassified in March 2005, confirms that the Pentagon authorized holding "ghost detainees" for the CIA, with no access for the Red Cross. This policy of denying access to the Red Cross continues to date.

Among the ghost detainees in CIA custody are Abu Zubayda, al-Qaeda's operations chief, Khalid Sheikh Muhammad, the alleged mastermind of the September 11 attacks, and Ramzi bin al-Shibh, an alleged September 11 planner. The fate of these men, and an undisclosed number of others, is one of the "known unknowns" in the war on terror.

Fearing that some or all of the unknown Guantánamo prisoners might be disposed of through secret rendition to other countries, on February 11, 2005, the Center for Constitutional Rights filed a habeas motion in federal court, John Does 1-570 v. Bush. "We call these petitioners 'John Does,'" explained the Center's Barbara Olshansky, "because they have no names and no faces. They have been disappeared by an administration that shows as little regard for an order of the Supreme Court as it does for international law and human rights."

THE BOTTOM LINE

In July 2005, Lt. Gen. Mark Schmidt issued his report on FBI allegations of detainee abuse at Guantánamo to Congress. The report is classified, but according to the executive summary that has been published, Schmidt and his fellow investigators certified that some detainees were subjected to tactics that were clearly "abusive" (20-hour interrogations for 48 days in a row, short-shackling to the floor for extended periods) and "degrading" (being smeared with fake menstrual blood, being forced to bark like a dog and perform dog tricks). In an Orwellian twist, however, the report concluded that these tactics were not unlawful. Why not? In Schmidt's view, echoing Yoo's logic, the "abusive" tactics were not "inhumane," and nothing in US law prohibited degrading and humiliating treatment of "unlawful combatants."

Defining "humane treatment" has become the bottom line in the current battle over interrogation and detention policies. The universally recognized baseline standard for the treatment of prisoners in wartime is Geneva Convention Common Article 3, which extends

to all detained persons regardless of status. It states that they "shall in all circumstances be treated humanely," and that "[t]o this end," certain specified acts "are and shall remain prohibited at any time and in any place whatsoever" including "cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment."

This "baseline" is far lower than the standards for lawful prisoners of war. To go below the baseline, as the Bush administration has done — and seeks to continue doing — is literally to undermine the very concept of "humanity." If some people cannot claim any legal right to the minimum standards of treatment in Common Article 3, then they are, by extension, no longer legally recognized as "human." The 9/11 Commission, the JAGs and numerous others have declared that, even where Common Article 3 might not apply as a matter of treaty obligation, the standards must be the point of reference for the treatment of prisoners. The Bush administration's only concession on this matter is to state that prisoners will be treated "humanely" as a matter of policy, implying that some people still have no legal right to their humanity. Cheney, Addington and Yoo have continued to insist that there is no baseline in a war on terror because no law can bridle executive discretion and that the president is under no obligation to abide by customary international law.

TRYING TO RESTORE THE RULE OF LAW

The denouement of this rule of law fiasco may be at hand. In July, when Sen. Lindsey Graham (R-SC) finally succeeded in his year-long quest to obtain the release of the JAG memos written in the spring of 2003, he said, "The JAGs were telling the policymakers: if you go down this road, you are going to get your own people in trouble…and they were absolutely right."

The JAG memos spurred Graham, an Air Force reserve lawyer himself, and fellow Republicans John McCain and John Warner to draft legislation that would bring all interrogations conducted anywhere in the world by any US agents (including the CIA) back within the rubric of the law. Cheney led the White House campaign to thwart their initiative, thus earning himself the nickname "vice president for torture." The McCain language was endorsed by dozens of retired military officers, including former Secretary of State Colin Powell, as well as otherwise stalwart Bush administration backers from the American Enterprise Institute and the Weekly Standard.

On October 5, the Senate voted 90-9 to attach McCain's initiative as an amendment to the defense appropriations bill, prompting the threat of a presidential veto and a lobbying campaign directed at Republicans in the House of Representatives. McCain announced on November 5 his intention to attach his amendment to every piece of legislation that goes before the president. For now, the amendment is in committee, and Republicans are striving to arrive at a compromise with the White House, which continues to insist on a CIA exemption. Domestic and foreign pressure on the government has intensified, but the administration's current "policy talk" is just another way of endorsing the lawless "new paradigm" as guiding principle for the treatment of prisoners.

JUSTICE LOST?

One of the many adverse effects of utilizing "enhanced interrogation techniques," conducting "extraordinary renditions" to countries that torture and "disappearing" people in CIA custody was to undermine the prospect of ever bringing to justice any of the captured

authors of the September 11 attacks, or other suspects. As David Cole points out in a December 3 Los Angeles Times op-ed, “One probable reason for the military’s reluctance [to charge and prosecute most detainees in US custody] is the real risk that any trial will turn into a trial of the United States’ own interrogation practices. Although the military tribunal rules do not exclude the use of testimony extracted by torture, no trial will ever be viewed as legitimate if it allows such testimony, and defense lawyers are certain to make this a central issue in any proceeding.”

Critics of US interrogation practices include the military defense lawyers assigned to represent the first five Guantánamo detainees slated for trial before the military commissions. These JAGs have mounted a vigorous defense of their clients by speaking out against the government’s authorization of violent and degrading interrogation tactics, as well as the military commission rules that permit the use of information from others that might have been extracted through torture. In November, the Supreme Court agreed to hear the case of Hamdan v. Rumsfeld, which was brought by Navy Lt. Cmdr. Charles Swift on behalf of his client Salim Ahmad Hamdan, and which aims to challenge the constitutionality of the military commissions themselves. Even if the McCain amendment survives the pressures and “compromises” and the prohibitions on torture and cruel treatment are reinforced as a matter of law, a defeat for the petitioners in the Hamdan case would indicate that the highest court in the land has abdicated its independence and succumbed to the “new paradigm” of unfettered executive dispatch.

The US government has a right to pursue justice for the September 11 attacks and for other acts of terrorism that target civilians. But justice is a matter of law, not policy, and it requires lawful treatment of prisoners and witnesses, and legal venues that are able and willing to function independently to interpret and enforce the laws of the land. At this juncture, it is vital that many more citizens school themselves in the legal issues at stake, and speak out loudly to demand lawful policies. Torture is inimical to law and justice.

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For background on the military commissions, see Charles Schmitz, “Beating a Slow, Stubborn Retreat at Guantánamo Bay,” Middle East Report Online (May 2005).

For background on legal and political debates about torture, see Lisa Hajjar, “Torture and the Future,” Middle East Report Online (May 2004).

Documents on US torture during the war on terrorism can be accessed at www.aclu.org. See also the torture-related posts at www.balkin.blogspot.com and www.intel-dump.com.

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