



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

---

## **Prosecuting the Bush Administration's Torturers**

**by Andy Worthington**

It's a sign of how much the Bush administration skewed America's moral compass that we are currently facing the possibility that the only way to bring the torturers to account is through a "[Nonpartisan Commission Of Inquiry](#)" — essentially, a toothless truth and reconciliation commission — of the type proposed by Sen. Patrick Leahy, the chairman of the Senate Judiciary Committee.

We know that both President Obama and Attorney General Eric Holder believe that the Bush administration approved the use of torture. In [an interview with ABC News](#) on January 11, President-elect Obama responded to a recent CBS interview with Dick Cheney, in which the then-vice president had sounded his usual alarms about the need for "extraordinary" policies to deal with terror suspects, by stating, "Vice President Cheney I think continues to defend what he calls extraordinary measures or procedures and from my view waterboarding is torture. I have said that under my administration we will not torture."

Two days later, at his confirmation hearing, Eric Holder reinforced Obama's opinion. Noting, as the [New York Times](#) described it, that waterboarding had been used to torment prisoners during the Inquisition, by the Japanese in World War II, and in Cambodia under the Khmer Rouge, and adding, "We prosecuted our own soldiers for using it in Vietnam," he stated unequivocally, "Waterboarding is torture," and [reiterated his opinion](#) just three weeks ago, in a speech to the Jewish Council of Public Affairs in Washington. "Waterboarding is torture," he said again, adding, "My Justice Department will not justify it, will not rationalize it and will not condone it."

It took the Bush administration many years to admit that it had authorized the use of waterboarding — a form of controlled drowning with a long and ignoble history — but Gen. Michael Hayden, the director of the CIA, [broke the silence](#) last February, admitting, in an open session of Congress, that three "high-value detainees" in the "war on terror" — [Khalid Sheikh Mohammed](#) (KSM), [Abu Zubaydah](#) and [Abdul Rahim al-Nashiri](#) — had been waterboarded in secret CIA custody.

In December, Vice President [Dick Cheney also confessed](#), telling ABC News that he had been involved in approving the waterboarding of Khalid Sheikh Mohammed. This was the exchange, with ABC's presenter, Jonathan Karl:

**Jonathan Karl:** Did you authorize the tactics that were used against Khalid Sheikh Mohammed?

**Dick Cheney:** I was aware of the program certainly, and involved in helping get the process cleared, as the agency, in effect, came in and wanted to know what they could and couldn't do. And they talked to me, as well as others, to explain what they wanted to do, and I supported it.

**Jonathan Karl:** In hindsight, do you think any of those tactics that were used against Khalid Sheikh Mohammed and others went too far?

**Dick Cheney:** I don't.

**Jonathan Karl:** And on KSM, one of those tactics, of course, widely reported was waterboarding, and that seems to be a tactic we no longer use. Even that you think was appropriate?

**Dick Cheney:** I do.

As I explained in [an article at the time](#), Cheney's claim that he was merely responding to pressure from the CIA was patently untrue, as it was clear from at least November 2001 that the crucial decisions to hold prisoners without any rights whatsoever — which led inexorably to decisions that they could be interrogated illegally, and then to decisions that they could be tortured with impunity — originated in the vice president's office. However, even without a clear admission by Cheney that he was responsible for establishing the program, his confession that he was intimately involved in approving plans to waterboard a prisoner in U.S. custody establishes, beyond any doubt, that he was involved in approving the use of torture.

Nor are these the only occasions when senior officials have admitted that the Bush administration was involved in torture. In January, just a week before Barack Obama took office, retired judge Susan Crawford, the "convening authority" for the military commission trial system at Guantánamo (another [brain-child of Cheney](#) and his legal counsel, David Addington), admitted, in a [Washington Post](#) interview with Bob Woodward, that Mohammed al-Qahtani, a Saudi prisoner in Guantánamo, regarded as the potential 20th hijacker for the 9/11 attacks, had been tortured. "We tortured Qahtani," Crawford, a protégée of Cheney and a close friend of Addington, admitted. "His treatment met the legal definition of torture."

[What was remarkable](#) about this confession — beyond it being the first instance of a senior Bush administration official admitting that *anyone* had been tortured — was that al-Qahtani had not been subjected to waterboarding, but had, instead, been subjected, over a two-month period in late 2002 and early 2003, to a combination of other techniques, approved by Defense Secretary Donald Rumsfeld. For Crawford, however, it was the combined effect of these techniques —

which included extreme sleep deprivation and sustained acts of humiliation — that led to her decision not to put al-Qahtani forward for a trial by military commission.

“The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent,” she said. “You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge,” and to conclude that it was torture.

Further evidence that senior officials were intimately involved with the use of torture by U.S. forces came last week, in a detailed analysis by Mark Danner, in the [New York Review of Books](#), of a leaked secret report by the International Committee of the Red Cross, based on interviews with the 14 “high-value detainees” — including KSM, Abu Zubaydah and Abdul Rahim al-Nashiri — who were transferred to Guantánamo in September 2006. Danner’s article did not cite confessions by senior officials that they had authorized the use of torture — although it did include the Red Cross’s own unprecedented conclusion that, “in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture” — but what it did establish, with a chilling clarity, is that every slight amendment to the horrors of the torture program had to be approved further up the chain of command.

“It wasn't up to individual interrogators to decide, ‘Well, I'm gonna slap him. Or I'm going to shake him. Or I'm gonna make him stay up for 48 hours,’” CIA interrogator John Kiriakou explained. “Each one of these steps ... had to have the approval of the Deputy Director for Operations,” he continued. “So before you laid a hand on him, you had to send in the cable saying, ‘He's uncooperative. Request permission to do X.’ And that permission would come.” And as Danner noted, soon after the first “high-value detainee,” Abu Zubaydah, was captured in March 2002, CIA officers “briefed high-level officials in the National Security Council's Principals Committee,” including Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Attorney General John Ashcroft, who “then signed off on the [interrogation] plan.”

As a result of America’s commitment to the [UN Convention Against Torture](#) and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was presented to the U.S. Senate by Ronald Reagan on May 20, 1988, we should, therefore, be applauding an announcement by the Obama administration that those responsible for authorizing the use of torture will imminently be facing prosecution. As the convention makes clear, “Each state party shall ensure that all acts of torture are offences under its criminal law,” and shall, when alleged acts of torture are discovered, “submit the case to its competent authorities for the purpose of prosecution.” And under Article VI of the US Constitution, “all treaties made ... under the authority of the United States shall be the supreme law of the land.”

Instead of prosecution, however, we have Sen. Leahy's proposed "Nonpartisan Commission Of Inquiry," and those calling for President Obama to [appoint an Independent prosecutor](#) kept firmly outside the corridors of power.

So how did this happen, and what does it mean? Well, to be blunt, a "Nonpartisan Commission Of Inquiry" is politically useful because it implicitly acknowledges that, although senior officials in the Bush administration committed war crimes, they only did so because they believed that another major terrorist attack was imminent, and because they thought that only torture would enable them to "break" those who possessed vital knowledge that they would not disclose by any other means.

There are, of course, two major problems with this explanation: firstly, senior officials in the administration — including George W. Bush, Dick Cheney, David Addington, Donald Rumsfeld and William J. Haynes II, the Pentagon's general counsel — behaved with an arrogance that is, to my mind, unprecedented in American history, refusing to listen to the many critics (including, to name just two, the FBI and the Naval Criminal Investigative Service), who warned them that what they were doing — or were planning to do — was counterproductive, morally corrosive, and illegal; and secondly, because, as the UN Convention Against Torture makes clear, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."

As commentators have been pointing out since the confessions of Dick Cheney and Susan Crawford, "International treaties which the U.S. signs and ratifies aren't cute little left-wing platitudes for tying the hands of America. They're binding law according to the explicit mandates of Article VI of our Constitution" (Glenn Greenwald in [Salon](#), on January 18). However, while the Obama administration is clearly unwilling to do what it should, the key to breaking this deadlock — beyond the responsibility that rests on every law-abiding American citizen to demand that no one (not even the president or vice president of the United States) is above the law — can be found by looking at the reason that Dick Cheney felt so empowered to publicly declare his crimes before leaving office, which is also the reason that those who expected last-minute pardons of senior officials by President Bush were disappointed.

This key, as Cheney himself admitted, consists of the legal advice regarding the use of torture — and other crimes — that was given to senior officials by the Justice Department's Office of Legal Counsel (OLC). These documents — some of which were [recently released](#) by the Obama administration's Justice Department — include the notorious "Torture Memo" of August 2002 ([PDF](#)), which purported to redefine torture, described in the UN Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person," as, instead, an act producing pain of a kind "that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body

function will likely result,” and they were regarded as a “golden shield” by the administration, for good reason.

As Jane Mayer explained in her book [\*The Dark Side\*](#),

The OLC plays a unique role in the federal government. Sometimes referred to as the Attorney General’s private law firm, its small but often brilliant staff of lawyers, many of whom are political appointees, issue opinions that are legally binding on the rest of the executive branch. If the OLC interprets the law in a certain way, unless the attorney general overrules it, the government must too. If the OLC says a previously outlawed practice, such as waterboarding, is legal, it is nearly impossible to prosecute US officials who followed that advice on good faith.

It is for this reason, of course, that Dick Cheney stated, in his December interview with ABC News, "On the question of so-called 'torture,' we don't do torture, we never have. It's not something that this administration subscribes to. Again, we proceeded very cautiously; we checked, we had the Justice Department issue the requisite opinions in order to know where the bright lines were that you could not cross. The professionals involved in that program were very, very cautious, very careful, wouldn't do anything without making certain it was authorized and that it was legal. And any suggestion to the contrary is just wrong." It also explains why George W. Bush felt able to leave office without pardoning anyone responsible for war crimes.

However, the good news, for those who are less than happy living in a country where the highest officials in the land can get away with torture simply by being voted out of office, is that the legal advice prepared by the OLC for use by the Bush administration has been the subject of a four-year investigation, which began in 2003 when law professor Jack Goldsmith took over from Jay S. Bybee (now a judge on the Ninth Circuit Court of Appeals) as the head of the OLC. Goldsmith memorably withdrew many of the OLC’s most controversial memos before leaving the OLC just a year later, complaining, as [\*Newsweek\*](#) explained last month, that he was “astonished” by the “deeply flawed” and “sloppily reasoned” legal analysis in the memos — including the “Torture Memo” — that were written primarily by Bybee and by John Yoo, a lawyer in the OLC (and now a visiting professor at the Chapman University School of Law), “including their assertion ... that the president could unilaterally disregard a law passed by Congress banning torture.”

According to *Newsweek*’s Michael Isikoff, who broke the story on the *Rachel Maddow Show*, H. Marshall Jarrett, the head of the Justice Department’s Office of Professional Responsibility (OPR), “confirmed last year he was investigating whether the legal advice in crucial interrogation memos ‘was consistent with the professional standards that apply to Department of Justice attorneys,’” and a draft of the report, submitted in the final weeks of the

Bush administration, was apparently “causing anxiety among former Bush administration officials.”

This, it was clear, was because, as Isikoff explained, “OPR investigators focused on whether the memo's authors deliberately slanted their legal advice to provide the White House with the conclusions it wanted.” A former Bush lawyer, speaking anonymously, added that he “was stunned to discover how much material the investigators had gathered, including internal e-mails and multiple drafts that allowed OPR to reconstruct how the memos were crafted.”

What this means, I believe, is that the investigators discovered not just how Yoo and Bybee — and, later, Stephen Bradbury, the OLC’s acting head from 2005 onwards — produced legal advice that was inconsistent with the OLC’s professional standards, but also how that advice was not produced independently, but in response to demands from Dick Cheney and David Addington, and as a result of close collaboration.

It is, I hope, the smoking gun that leads to the Office of Vice President Dick Cheney — and to David Addington — as it is abundantly clear that, far from maintaining distance between Cheney’s office and the OLC, the “war team” of those who believed in unfettered executive power, including Cheney, Addington, Yoo, Pentagon lawyer Timothy Flanigan, and White House counsel, and later Attorney General Alberto Gonzales, effectively conspired in unison to justify their actions, and I raise it again here, not because there have been any great new developments in the last month — although the Justice Department’s [unlikely defense of John Yoo](#) is worth looking at, as is a [New York Times](#) article about the “torture lawyers,” and a profile of Bybee in the [Las Vegas Sun](#) — but simply because it is far too important to be allowed to drop off the radar.

“No one is above the law,” Attorney General Eric Holder has repeatedly stated. If Holder means what he says, we must demand that the OPR’s report is released.

*Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America’s Illegal Prison](#) (published by Pluto Press). Visit his website at: [www.andyworthington.co.uk](http://www.andyworthington.co.uk).*

**This article was originally published in March 2009.**