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The Bush Torture Memos

by James Bovard

President Bush is proposing to medievalize the American legal code by permitting the use of coerced confessions in judicial proceedings. This is one of the most stunning proposals in U.S. political life since Franklin Roosevelt banned private ownership of gold in 1933. It is vital for Americans to understand the thinking that led the government to this effort to legalize barbaric treatment.

After 9/11, many Bush administration officials seemed determined to use any and every means to bludgeon people suspected of terrorism or terrorist intent. Two memos — one from the Justice Department and the other from the Pentagon — illustrate how the administration persuaded itself that it was entitled to do evil in the name of the greater good.

In June 2004, Americans learned of a memo written by the Justice Department Office of Legal Counsel at the request of White House Counsel Alberto Gonzales. The August 1, 2002, memo, which redefined U.S. torture policy, became known as the Bybee memo, after Jay Bybee, the head of the Office of Legal Counsel. Deputy Assistant Attorney General John Yoo was coauthor of the memo. The memo was titled “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A” (the U.S. anti-torture act) and was “akin to a binding legal opinion on government policy on interrogations.”

Rather than a strict interpretation of the law, the Bybee memo was a Torturers’ Emancipation Proclamation. Violating the anti-torture act carries a penalty as high as 20 years in prison. If the victim dies, the torturer can receive a death sentence. However, the Justice Department revealed that overzealous interrogators had little or nothing to fear from the law.

The memo began by largely redefining torture out of existence. It then explained why even if someone died during torture, the torturer might not be guilty if he felt the torture was necessary to prevent some worse evil. The memo concluded by revealing that the president has the right to order torture because he is above the law, at least during wartime (even if Congress has not declared war).

Justifying torture

The Bush-appointed lawyers showed that interrogators can easily be innocent of an intent to torture:

Because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective.... If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent.... Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.

The memo offered the following illustration: "In the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead." Mailing dubious herbal medicine brochures thus helped set the standard for government employees who club prisoners to death. The memo assured would-be torturers and torture supervisors, "A good faith belief need not be a reasonable one."

The memo stressed that mere garden-variety torment posed no legal problem for interrogators.

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.

And it is easy to dodge the charge of mental torture, since

if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature.

Thus, as long as a torturer subscribes to respectable medical journals, he can immunize himself.

The memo recited the damage of 9/11 in order to justify the presumption that torture would prevent similar carnage:

Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that information gained from al Qaeda personnel could prevent attacks of a similar (if not greater) magnitude from occurring in the United States.

But the Justice Department's top lawyers offered no evidence of the efficacy of torture (which both the FBI and U.S. military experts dispute).

The Justice Department stressed that even intentionally killing people during an interrogation might be okay:

The necessity defense may prove especially relevant in the current circumstances.

First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths).

Second, it must actually be the defendant's intention to avoid the greater harm....

Third, if the defendant reasonably believed that the lesser harm was necessary, even if, unknown to him, it was not, he may still avail himself of the defense....

Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

The Justice Department preemptively exonerated U.S. government officials who violate the Anti-Torture Act: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network." The Justice Department did not explain why preventing a catastrophic attack is the only reason why a suspect might be maimed during interrogation.

The memo's most revolutionary revelation was that federal criminal law does not apply to the president:

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign.... The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack.... Any effort to apply

Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

The memo stressed the uniqueness of the post-9/11 world:

The situation in which these issues arise is unprecedented in recent American history.... These attacks were aimed at critical government buildings in the Nation's capital and landmark buildings in its financial center.

But President James Madison did not announce that the U.S. government was obliged to start torturing people after the British burned down Washington in 1814.

The memo's absolutism would have brought a smile to despots everywhere:

As the Supreme Court has recognized ... the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. [We] will not read a criminal statute as infringing on the President's ultimate authority in these areas.

Thus, apparently the "commander in chief" label automatically trumps laws enacted by Congress and, for that matter, the Constitution.

The Pentagon's torture memo

Another memo that leaked out in June 2004 was the "Pentagon's Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations." This March 6, 2003, report — drawing heavily on the Bybee memo — helped establish interrogation policies for U.S. military personnel in Iraq, Afghanistan, Guantanamo Bay, and elsewhere.

The Pentagon report encouraged government officials to unchain themselves from the statute book: "Sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." The report stressed that "the necessity defense can justify the intentional killing of one person to save two others." Thus, invoking the possibility of another 9/11 can automatically banish any concerns about collateral damage during interrogations.

Like the Justice Department, the Pentagon brandished the "medical journal subscription" exemption to the Anti-Torture Act: "A defendant could show that he acted in good faith by taking such steps as surveying professional literature."

The Pentagon insisted that unless Congress specifies in a law that the president will be banned from committing specific crimes, he is presumed to be exempt from any limitation during wartime:

In light of the President's complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President's ultimate authority in these areas.

The Pentagon report noted, "As this authority [to torture] is inherent in the President, exercise of it by subordinates would be best if it can be shown to have been derived from the President's authority through Presidential directive or other writing." In other words, prudent torturers will possess a presidential authorization to immunize them for the pain they inflict.

The Pentagon updated American military morality, explaining why the principles of the Nuremberg war crimes trials may not apply if soldiers claim that they were "following orders." Interrogators who were ordered to use force would

certainly raise the defense of obedience to orders. The question then becomes one of degree. While this may be a successful defense to simple assaults or batteries, it would unlikely be as successful to more serious charges such as maiming, manslaughter, and maiming [sic]. Within the middle of the spectrum lay those offenses for which the effectiveness of this defense becomes less clear. Those offenses would include conduct unbecoming an officer, reckless endangerment, cruelty, and negligent homicide.

The fact that the Bush team placed "negligent homicide" in the "middle of the spectrum" of offenses hints at the rigor of interrogations under the new guidelines.

The report stressed that "the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful." But this is immunity-by-tautology — since the Justice Department's redefinition of torture excludes almost everything except killing and permanently maiming.

Every argument made in the Bybee and Pentagon memo against the Anti-Torture Act's not limiting the president's power also applies to the War Crimes Act. Dean Harold Koh of Yale Law School observed,

If the president has commander-in-chief power to commit torture, he has the power to commit genocide, to sanction slavery, to promote apartheid, to license summary execution.

Americans must pay closer attention to the words of their rulers. These memos trumpet the Bush administration's determination to be restrained by no law or by any accepted standard of decency. Americans cannot say that they were not warned about their government's descent.

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