

Gonzales on Torture

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As White House Counsel, Alberto Gonzales played an integral role in formulating Bush Administration policy on coercive interrogations in its “war on terror.” First, he advised the President to suspend application of the Geneva Conventions to Al Qaeda members and to categorically deny prisoner-of-war status to all Taliban members. (This is discussed in greater detail in the next section on “Gonzales and the Geneva Conventions,” starting on page 9.) Second, Gonzales asked the Justice Department to identify legal authority for harsh interrogation tactics that the intelligence community had misgivings about pursuing.

These two initiatives have had a corrosive effect on military operations from Afghanistan to Guantanamo to Iraq, sowing seeds of confusion, increasing the danger to U.S. troops, and damaging the reputation of the United States in the eyes of the world. As Attorney General, Gonzales would play a pivotal role in prosecuting this “war on terror.” Before being confirmed for that post, the Senate should demand that he provide candid, clear explanations regarding his own definitions of torture

and his view toward presidential power and immunity from prosecution.

Gonzales on Interrogation

In 2002, Gonzales asked the Office of Legal Counsel to prepare legal opinions on interrogation standards under the Convention Against Torture as implemented by federal statute (18 U.S.C. §§ 2340; 2340A) and binding international law obligations.¹ The memorandum addressed to Gonzales (the “Bybee memorandum”) does not appear to have been merely, as Gonzales has characterized it, an exercise in abstract legal reasoning.² Rather, Gonzales requested the memorandum with explicit policy ramifications in mind and it served as the direct legal underpinning (both retrospectively and prospectively) for harsh interrogation tactics employed on individuals detained by the United States in Afghanistan, Iraq and Guantanamo. He also disseminated these legal opinions to concerned policymakers.

The Bybee memorandum states: “You have asked for our Office’s views regarding the standards of conduct under the Convention

Against Torture . . . As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States.” The CIA had sought advice on the legal limits of interrogation, a request prompted by severe treatment of “high value detainees” such as Abu Zubaydah.³ The Bybee memorandum served as a basis for interrogation tactics that have reportedly included “waterboarding,” denial of pain killer medication, simulated drowning, and threatening to transfer detainees to other countries’ interrogators.⁴

The Bybee memorandum also served as the legal basis for another memorandum, authored by Assistant Attorney General John Yoo, that details permissible interrogation methods, including those mentioned above.⁵ The Bybee memorandum also figures prominently in the Defense Department’s *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (April 4, 2003) (“Working Group Report”), with many paragraphs excerpted verbatim. The Working Group Report in turn supported the actual policy implemented by the Defense Department at Guantanamo Bay on April 16, 2003. See *DOD Memorandum for the Commander, U.S. Southern Command: Counter-Resistance Techniques in the War on Terrorism* (April 16, 2003). The International Committee of the Red Cross (ICRC) reportedly informed the U.S. Government, including White House lawyers, that the interrogation techniques employed at Guantanamo Bay constitute “an intentional system of cruel, unusual and degrading treatment and a form of torture.”⁶

Thus, Gonzales’ request and apparent approval of the Bybee memorandum helped lay the legal foundation for DOD interrogation techniques at Guantanamo, including “Change of Scenery Up,” “Change of Scenery Down,” “Dietary Manipulation,” “Environmental Manipulation,” “Sleep Adjustment,” “False Flag,”

and “Isolation.” As has been widely documented, interrogation tactics employed at both Guantanamo and Afghanistan then “migrated” to Iraq.

The Bybee Memorandum is Wrong as a Matter of Law and Policy

The Bybee memorandum reads largely like a roadmap to circumvent the law banning torture. Indeed, in a number of instances the memorandum pointedly ignores significant case law that does not support its permissive view on torture and expansive presidential power. Many legal scholars have criticized the analysis as “reckless,” “weak,” and “embarrassing.”⁷ In response to the overwhelming criticism of the Bybee memorandum, the Department of Justice saw fit to disavow it.⁸ What remains most troubling is that no one, including Gonzales, apparently had any misgivings about this legal opinion until it was publicly disclosed.

The Bybee memorandum makes a number of questionable legal conclusions. We offer a brief critique of each of the central arguments and then provide some further policy analysis.

Bybee memorandum: “We conclude that for an act to constitute torture as defined in Section 2340 [the statutory prohibition against torture], it must inflict 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.”

(Page 1)

Response: This interpretation of the prohibition against torture ignores the plain meaning of the statute’s text and provides only a strained and limited construction of the term “severe pain.” Both common sense and moral consciousness suggest that pain that is diffi-

cult to endure may fall well short of organ failure. In addition, the conclusion ignores federal case law discussed elsewhere in the memorandum that a single incident of beatings and kickings to the stomach constituted torture under the same statutory language. (Pages 22-27)⁹

Bybee memorandum: “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.” (Page 31)

Response: In response to a question whether this was “good law in this administration,” Gonzales declined to repudiate the analysis, explaining only that thus far the President “has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary to protect the national security of this country.”¹⁰ But the analysis is legally indefensible. As the Supreme Court just recently made clear in *Hamdi v. Rumsfeld*, “a state of war is not a blank check for the President . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”¹¹ In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court rejected President Truman’s claims of inherent domestic authority in wartime and held unconstitutional the President’s summary seizure of the steel mills.¹² Particularly where, as here, Congress has directly prohibited certain forms of torture and ill-treatment in ratifying and implementing through legislation the Convention Against Torture, the President’s discretion in exercising his Commander-in-Chief powers in this realm is at its minimum. As reflected in the statutory prohibition against torture, and in the Convention Against Torture itself as ratified, Congress has prohibited torture and other cruel treatment; such treatment may not be

excused on the basis of emergency or state of war, and superior orders do not excuse it.¹³ Finally, whatever powers the President has to act in the short term to repel insurrection or invasion – the subject of most of the case law cited in the Bybee memorandum – such powers have no application to the practice of coercive interrogation the memorandum addresses.

Bybee memorandum: “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.” (Page 31)

Response. The Supreme Court has made clear that executive officials who commit unlawful acts pursuant to presidential order are not, solely on that basis, made immune from prosecution in court.¹⁴ Indeed, criminal liability for abuses committed by federal officials against detainees attaches not only to those directly responsible for carrying out such acts, but also those who assisted, abetted, ordered or otherwise caused such offenses to occur. Thus, for example, a military or civilian superior may be held legally responsible not just for unlawful orders he may require troops under his command to carry out, but also for the failure “to take such measures as [a]re within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”¹⁵

Bybee memorandum: “[E]ven if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.” (Page 46)

Response: The Bybee memorandum acknowledges that “[t]he [necessity] defense is available ‘only in situations wherein the legislature has not itself, in its criminal statute[s], made a determination of values.’” The memorandum claims that “Congress has not

explicitly made a determination of values vis-à-vis torture.” But of course Congress has made such a determination of values; Congress ratified the Convention Against Torture and passed the federal statute banning torture. Significantly, Article 2 of the Convention Against Torture states, in relevant part: “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 of torture.”¹⁶ The Convention Against Torture is the supreme law of the land, and as such should be viewed as explicitly precluding any recourse to a necessity defense.

The Bybee self-defense argument is even weaker. Case law and legislation on self-defense require that a person show he was confronted by a serious threat of bodily harm or death, the threat was imminent, and his response was both necessary and proportionate.¹⁷ The general practice of coercive interrogation contemplated by the Bybee memorandum – motivated by a generalized concern of potential terrorist attacks against the nation instead of against the person himself – does not come close to constituting the kind of imminent threat required to justify the use of self-defense. The Bybee memorandum does not cite any cases suggesting that the government might immunize an entire policy by virtue of a self-defense rationale.

The Bybee Memorandum Flies in the Face of Military Regulations

Notably absent from the Bybee memorandum’s discussion of the law on torture is any reference to military regulation or U.S. policy regarding torture. The United States Army categorically prohibits torture *and* coercion of detainees in its custody. The Army Field Manual on Intelligence Interrogation (Field Manual 34-52), the Army’s primary guidance for the conduct of interrogations, states that

international law and U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the UCMJ. If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question.¹⁸

The Field Manual further notes the shame and danger brought on by the torture of detainees: “Revelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It also may place U.S. and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused U.S. and allied [prisoners of war] does not justify using methods of interrogation specifically prohibited by [international law] and U.S. policy.”¹⁹

In addition to their illegality, the United States has long known that torture and cruel, inhuman or degrading treatment are ineffective methods for obtaining information. Field Manual 34-52 states, “Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”²⁰

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of career military officers. Ignoring these sources on intelligence interrogation was both unwise and imprudent. Sadly, reports of abuse from Abu Ghraib, Bagram and Guantanamo demonstrate the deleterious effect this disregard has had on our military and on detainees.

Gonzales' request for the Bybee and Yoo memoranda and the various reports of coercive interrogations belie his assertions that the Bybee memorandum was one limited to abstract legal questions. News reports indicate that Gonzales understood that the legal opinions on torture and interrogation methods would give license to or limit the severity of the treatment of detainees. At the very least, as the apparent conduit for CIA requests for legal authority to employ certain interrogation techniques, Gonzales' approval of the memoranda would have supported the use of torture as an interrogation tactic on high value detainees from Al Qaeda. In addition, the fact that the CIA often worked with U.S. armed forces or in their facilities provided further opportunities for military personnel to adopt or mimic interrogation techniques authorized for the CIA.

As the recipient of the Bybee memorandum, Gonzales also apparently disseminated the memorandum to other individuals and agencies in the government, thereby expanding the applicability of the legal reasoning to agencies besides the CIA. Given the wholesale adoption of the memorandum's analysis of the law on torture in the Working Group Report, it appears that Gonzales did not express any criticism of the memorandum and that he saw fit to provide the memorandum to those crafting interrogation tactics to be employed on a much wider scale.

Gonzales' request for a legal opinion on torture was not an academic exercise. The repercussions were felt in Afghanistan, Guantanamo, and Iraq. Gonzales must answer for both his actions and omissions.

Questions for Gonzales on Torture

1 According to a *USA Today* article on June 28, 2004, you requested a memorandum detailing the legality of specific interrogation techniques. Will you provide this document to us?

2 Which interrogation tactics were deemed acceptable under the laws prohibiting torture and cruel, inhuman or degrading treatment or punishment? (See also Letter to Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Asst. Attorney General, Office of Legal Counsel (August 1, 2002).)

3 Press reports indicate that you requested the August 1, 2002 memorandum from Assistant Attorney General Jay Bybee (the "Bybee memorandum") on standards of conduct for interrogation under the federal law banning torture, 18 U.S.C. §§ 2340-2340A, to provide legal authority for harsh interrogation techniques employed on high-ranking Al Qaeda members. The memorandum itself reads: "You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture . . . As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States." Did you suggest or encourage the Office of Legal Counsel to tailor its legal analysis to justify the techniques the CIA wished to use? Which techniques were these?

4 What did you do with the August 1, 2002 Bybee memorandum when you received it? With whom did you share it? With whom did you discuss its legal analysis? Did you approve its analysis?

5 The Bybee memorandum served as the basis for much of the legal analysis in the Pentagon Working Group Report (April 4, 2003), which in turn supported newly author-

ized interrogation techniques for use at Guantanamo (April 16, 2004)? How did the DOD Working Group come to employ so much of the language of the Bybee memorandum? Who transmitted the Bybee memorandum to the Working Group?

6 In June 2004, the Justice Department disavowed the Bybee memorandum’s legal analysis. Why did the Justice Department disavow the contents of the memorandum? Did you support the disavowal? Had you previously raised any concerns about its contents between August 2002 and June 2004? Are there parts of the Bybee memorandum that you find objectionable? Are there any portions of the legal argument with which you disagree?

7 Do you agree with the Bybee memorandum’s claim that “even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability?” Do you agree with its claim that the torture statute does not preclude the forced administration of all drugs, but rather prohibits only the use of drugs that “disrupt profoundly the senses or the personality . . . manifested by “dementia,” “brief psychotic disorder[s],” “obsessive-compulsive disorder behaviors,” and “pushing someone to the brink of suicide?” Finally, must an interrogation technique cause, as the Bybee memorandum argues, “severe pain” at least as great as that associated with organ failure in order to constitute torture?

8 Is it your opinion that a person following Presidential orders to commit acts of torture is immune from prosecution under Section 2340 of the federal torture statute? Do you agree with the theory of executive power – that Congress’ torture statute unconstitutionally infringes on presidential power – that the Bybee memorandum advances? As Attorney General would you prosecute such an individual?

9 In releasing a number of memoranda regarding torture and interrogation tactics on June 22, 2004, you stated: “What [the President] has done is ordered a standard of conduct that is clearly lawful. He has not had to – as I indicated, in terms of what he has done or has not done, he has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary to protect the national security of this country.” Were you saying there, and do you believe, that the President may *choose* to override the statutory prohibition against torture?

10 Article 2 of the Convention Against Torture states, in relevant part: “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 of torture.” Do you believe any “exceptional circumstances” exist that would justify torture? Would you authorize the use of torture as Attorney General in any circumstances?

11 To your knowledge has this President ordered the use of interrogation techniques that rise to the level of cruel, inhuman or degrading treatment or punishment? Have you advised the use of any interrogation techniques that rise to the level of cruel, inhuman or degrading treatment or punishment?

12 As Attorney General you would oversee the Office of Legal Counsel. As the office primarily responsible for rendering legal advice to all government agencies, OLC has exerted significant influence over interrogation policy. From as early as January 2002 to as late as March 2004, OLC has issued a series of memoranda, variously determining that the United States was not bound by the Geneva Conventions with respect to certain groups in Afghanistan and Iraq, and that particular interrogation methods rising to the level of extreme violence and degradation did not violate U.S. or international law. Many of the arguments are inconsistent with binding do-

mestic and international law. These memoranda have served as the basis for many policies reflected in DOD Orders, and military agency authorizations of interrogation techniques. Military investigations have attributed many of the incidents of torture to, in part, confusion over appropriate treatment because of abdication of the existing interrogation regime in Army Field Manual 34-52, Intelligence Interrogation, and the proliferation of varied legal opinions. Will you as Attorney General order the revocation of all such OLC-generated memoranda and reaffirm FM 34-52 as defining the limits of United States' interrogation techniques and the applicability of the Geneva Conventions to all detainees, thereby bringing clarity and removing any ambiguity for interrogators in the theater of operations, be it at Guantanamo, Afghanistan, Iraq, or elsewhere?

13 Do you support the 9/11 Commission's recommendation to order all U.S. Armed Forces and other U.S. government agencies engaged in detention and interrogation to observe Geneva Convention protections for all combatants and civilians, and publicly affirm the United States' binding obligation to (in the language of Geneva Common Article 3) prohibit violence, cruel treatment, torture, or any outrages upon personal dignity, including humiliating and degrading treatment, of those in U.S. custody?

Section Notes

¹ See Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (August 1, 2002) (“Bybee memorandum”); Letter to Alberto R. Gonzales, Counsel to the President, from: John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel (August 1, 2002) (“Yoo Letter”).

² See Press Briefing by White House Counsel Alberto Gonzales, et al. (June 22, 2004), available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (accessed Nov. 23, 2004).

³ See Michael Hirsh, John Barry and Daniel Klaidman, “A Tortured Debate,” *NEWSWEEK*, June 21, 2004; see also David Johnston and James Risen, “Aides Say Memorandum backed Coercion Already in Use,” *N.Y. TIMES*, June 26, at A1; Dana Priest, “CIA Puts Harsh Tactics on Hold,” *WASH. POST*, June 27, 2004, at A1.

⁴ *Id.*

⁵ Toni Locy and John Diamond, “Memorandum Lists Acceptable ‘Aggressive’ Interrogation Methods,” *USA TODAY*, June 28, 2004; see also Yoo Letter, *supra* note 1 (The Yoo Letter and various news reports refer to the Yoo memorandum on the legality of specific interrogation techniques, but it has not been released to the public).

⁶ Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantanamo,” *N.Y. TIMES*, Nov. 30, 2004, A1. Government lawyers were reportedly informed of the ICRC’s findings in July 2004, which included interrogation techniques involving shared medical information, “humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.” *Id.*

⁷ See Adam Liptak, “Legal Scholars Criticize Memos on Torture,” *N.Y. TIMES*, June 25, 2004; Edward Alden, *FINANCIAL TIMES*, June 10, 2004, at 7 (quoting Yale Law School Dean Harold Koh) (“Lawyers who are employed by the U.S. government have a responsibility to uphold and enforce the laws of the United States.”).

⁸ Richard W. Stevenson, “White House Says Prisoner Policy Set Humane Tone,” *N.Y. TIMES*, June 23, 2004.

⁹ See, e.g., *Mehinovich v. Vuckovic*, 198 F. Supp. 2d 1322, at 1346 (N.D. Ga. 2002); Torture Victim Protection Act, 28 U.S.C. § 1350 note (2000).

¹⁰ See Gonzales Press Briefing *supra* note 2.

¹¹ 124 S. Ct. 2633, 2650 (2004).

¹² 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹³ See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [hereinafter CAT] art. 2.3, opened for signature February 4, 1985, S. Treaty Doc. 100-20 (1988) 1465 U.N.T.S. 85 (“An order from a superior officer or a public authority may not be invoked as a justification of torture.”); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding President’s order to naval officer could not legalize what would otherwise have been a trespass).

¹⁴ *Cf. United States v. Nixon*, 418 U.S. 683 (1974).

¹⁵ *In re Application of Yamashita*, 357 U.S. 1, 16 (1946).

¹⁶ CAT, *supra*, note 12, art. 2.2.

¹⁷ See WAYNE R. LAFAYE ET AL., *CRIMINAL LAW* 495 (3d ed. 2000) (footnote omitted).

¹⁸ Field Manual 34-52, 1-8.

¹⁹ *Id.*

²⁰ *Id.*