

CLOSING OFF THE TORTURE OPTION

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I. INTRODUCTION

Stomach-turning photographs of detainee abuses at Abu Ghraib prison threw the Bush administration's policies on torture under an international spotlight in early 2004. Soon afterward, the infamous Department of Justice "torture memos" came to light. These legal opinions asserted that neither treaty nor statute could limit the president's authority to order torture, and provided ready-made legal defense for executive branch officials who might later face criminal prosecution for torture.¹ The photographs and the memos appalled Americans, and public disgust helped carry into law the Detainee Treatment Act of 2005. Most observers probably assumed that the new law outlawed torture and other brutal and degrading interrogation techniques. It did not.

In fact, one of the Bush administration's legacies was an ongoing authority for the U.S. president to authorize cruel and inhuman treatment, amounting to torture, of prisoners in the "war on terror." The Bush team consistently worked behind the scenes to retain the torture option. For the Bush administration, torture was not a matter of law, but rather a matter of policy or prerogative. This Article pieces together the Bush administration's campaign to retain torture, taking into account a number of Bush administration legal memoranda that have come to light in the past year. It argues that one of the first priorities of the new administration and the new Congress must be to prohibit, permanently, torture and all forms of cruel, inhuman, or degrading treatment.

President Obama took a first step toward closing off the torture option with his executive order of January 22, 2009. The order prohibits torture and cruel, humiliating, or degrading treatment of any person in U.S. custody. It requires all U.S. personnel to adhere to the interrogation techniques² in the Army Field Manual on Human Intelligence Collector Operations² and orders the Central Intelligence Agency ("CIA") to close any detention facilities it operates.³ Important though the order is, it does not permanently rule out abusive interrogations. One lesson of the past

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¹ See, e.g., Jay S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press 2005).

² U.S. DEP'T. OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM 2-22.3 (FM 34-52) (Sept. 2006), available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

³ Ensuring Lawful Interrogations, 74 Fed. Reg. 4,893 (Jan. 27, 2009).

eight years is that the United States must ban torture once and for all. Events can change quickly: a new terrorist attack, or the capture of top-level Al Qaeda figures, could increase the pressure to squeeze information out of detainees, by brutal means if necessary. Or, a future administration may share the Bush administration's view that torture is, under some circumstances and when the president authorizes it, permissible. Now is the time to remove the torture option by statute, so that it is not available when circumstances or political leaders change.

II. THE TORTURE POLICY

By now enough of the documentary trail has become public to leave no doubt: immediately after the attacks of September 11, 2001, the Bush administration began to construct the legal and policy basis for torture and other coercive interrogation techniques. Five days after the attacks, Vice President Dick Cheney spoke with journalist Tim Russert on *Meet the Press*. He told Russert, "We also have to work, though, sort of the dark side, if you will. . . . [I]t's going to be vital for us to use any means at our disposal, basically, to achieve our objective."⁴ Cheney remained the administration's point man on working this "dark side." Assisted and supported by officials in the Department of Defense, the Department of Justice, and the White House, and with the knowledge and approval of President Bush, Cheney consistently pressed the case for torture.

The key facts are well known. Following the U.S. invasion of Afghanistan in October 2001, American forces captured or gained custody of thousands of fighters and suspected members of Al Qaeda or the Taliban. Questions immediately arose as to how the detainees could be treated. In particular, U.S. officials wanted to extract any information that the captives might have regarding future terrorist attacks or plans. President Bush took the first step toward torture when he issued a memorandum determining that the Geneva Conventions (which the United States has ratified and which strictly forbid physical coercion of prisoners) did not apply to members of Al Qaeda.⁵ The document also announced that, though the Geneva Conventions applied to members of the Taliban, they did not qualify for its protections because they were "unlawful combatants."⁶ Perhaps most importantly, the memorandum stated the underlying attitude of the administration toward rules governing the treatment of detainees: "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."⁷ The words, though sounding lofty, had a clear meaning: American military personnel would treat detainees humanely not because of any law but,

⁴ *Meet the Press with Tim Russert: Vice President Dick Cheney* (NBC television broadcast Sept. 16, 2001).

⁵ George W. Bush, *Memorandum for the Vice President et al., Re: Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 1, at 134 [hereinafter Bush, *Memorandum*]. CHARLES SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 146 (Little, Brown & Co. 2007).

⁶ SAVAGE, *supra* note 5, at 147.

⁷ Bush, *Memorandum*, *supra* note 5, at 135 (emphasis added).

rather, as a policy choice which the president could reverse at his discretion. Furthermore, detainee treatment would be consistent with “the principles [not the rules] of Geneva” and, even then, only as “appropriate” and until overridden by “military necessity.”⁸ Finally, the memorandum applied only to U.S. military personnel, and not to other agencies like the CIA.⁹

Subsequent secret memoranda prepared by members of the Bush administration’s “torture team”¹⁰ established legal grounds for the government to authorize torture and other coercive interrogation techniques. The key documents came from the Office of Legal Counsel (“OLC”) within the Department of Justice; OLC opinions establish authoritative interpretations of U.S. law for the executive branch. The most notorious of the memoranda, dated August 1, 2002, is addressed to Alberto Gonzales, then Counsel to the President.¹¹ The opinion concludes that the primary U.S. law against torture—the Torture Statute—“prohibits only extreme acts.”¹² In the memo’s bizarre reasoning, the definition of what constitutes “extreme acts” comes not from any law or treaty regarding torture, but from a federal health care statute defining emergency medical conditions. The memo defines physical torture as acts producing pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹³ The infliction of mental pain or suffering would amount to torture only if it produced “significant psychological harm of significant duration, e.g., lasting for months or even years.”¹⁴ The memo further narrowed the definition of torture by requiring the specific intent to inflict suffering; in other words, only flat-out sadism could count as torture. The infliction of pain for other purposes (to elicit information) would not constitute torture. Having set the bar for torture extraordinarily high, the memo asserts that “there is a wide range of such [interrogation] techniques that will not rise to the level of torture.”¹⁵ Indeed, as Harold Koh has pointed out, that “wide range of techniques” could include atrocities that the Bush administration condemned Saddam Hussein’s regime for perpetrating: branding, electric shocks, pulling out fingernails, denial of food and water, and others.¹⁶

But the OLC lawyers offered the White House even more. In essence, they informed Gonzales that no statute could restrict the President’s ability to carry on the war against international terrorism. The laws against torture could not apply to actions taken by the President under his Commander-in-Chief authority, including interrogations.¹⁷ In addition, the memo declares,

⁸ *Id.*

⁹ *Id.*

¹⁰ Key members of the torture team were Dick Cheney, David Addington, Donald Rumsfeld, Doug Feith, Stephen Cambone, William J. Haynes II, and John Yoo. See generally PHILIPPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES (Palgrave Macmillan 2008).

¹¹ Bybee, *supra* note 1.

¹² *Id.* at 172.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 173.

¹⁶ Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 647–48 (2005).

¹⁷ Bybee, *supra* note 1, at 203.

“[a]ny effort to apply [the Torture Statute] 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.”¹⁸

Finally, in order to make it extra clear that when it came to torturing prisoners the President was above the law, the August 2002 memo provided a list of legal defenses that would be available to executive branch officials should they ever be prosecuted for torture.¹⁹ The memo stated that these justifications “would potentially eliminate criminal liability,”²⁰ meaning that if a prosecutor or special investigator at some later time were to determine that torturing detainees did in fact violate U.S. law, anyone who had acted under the President’s orders had a ready-made defense. In a separate letter, also dated August 1, 2002, John Yoo sought to remove any other legal barriers to the president’s discretion regarding torture.²¹ He informed Gonzales that interrogation methods that did not violate the Torture Statute (and essentially none could) would not violate the Torture Convention and would therefore not be prosecutable at the International Criminal Court.²²

It was during this same time that the OLC was giving the “go ahead” to the CIA to implement brutal interrogations. Memos reveal that the OLC approved specific “enhanced interrogation techniques,” including waterboarding, for use by the CIA. The memos from 2002 and 2004 were secret until July 2008, when the government released them only in heavily censored form and in response to a Freedom of Information Act lawsuit.²³ An OLC memo, dated August 1, 2002, appears to give legal cover to (presumably) CIA interrogators who use specific (but blacked out) coercive interrogation methods.²⁴ This inference receives support from an August 2004 memorandum from the CIA to the OLC that refers to a “classified August 2002 DoJ opinion” determining that specific interrogation techniques, including waterboarding, would not violate the Torture Statute.²⁵ The CIA, in other words, was free to carry out the administration’s policy to extract information from detainees by virtually any means necessary.

Civilian lawyers in the Department of Defense similarly began creating a permissive framework for interrogating detainees. In mid-January 2003, Secretary of Defense Donald Rumsfeld had charged his General Counsel, William J. Haynes II, with putting together a working group that would evaluate the “legal, policy, and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the war on

¹⁸ *Id.* at 200.

¹⁹ *Id.* at 207–13.

²⁰ *Id.* at 207.

²¹ See John Yoo, *Letter to Alberto R. Gonzalez, Counsel to the President* (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 1, at 218 (re: “the views of our Office concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism . . . on captured al Qaeda operatives”).

²² *Id.*

²³ Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. TIMES, July 25, 2008, at A19.

²⁴ See U.S. Dep’t of Justice Office of Legal Counsel, Memorandum for [blacked out]: Interrogation of [blacked out] (Aug. 1, 2002), available at http://www.aclu.org/pdfs/safefree/cia_3686_001.pdf.

²⁵ Memorandum from the CIA to the OLC (Aug. 4, 2004), available at http://www.aclu.org/pdfs/safefree/cia_3685_001.pdf.

terrorism.”²⁶ Haynes, who had consistently pushed for broad leeway for military interrogators to employ harsh techniques, sought an advisory opinion from Yoo at the OLC.²⁷ On March 14, 2003, Yoo complied with this request with a memorandum to Haynes declaring that the President could authorize any interrogation techniques he wanted, and that neither international treaties nor U.S. statutes could limit the President’s discretion with respect to the treatment of detainees.²⁸ Yoo’s March 2003 memo (whose contents came to light only in April 2008) followed the August 2002 OLC memo in narrowly defining torture and offering multiple legal defenses that would protect U.S. officials from prosecution.²⁹ But the new memorandum went even further. It argued that the constitutional guarantee of substantive due process bans conduct that “shocks the conscience,” and that the standard for what shocks the conscience depends in part “on whether [that conduct] is without any justification, i.e., it is ‘inspired by malice or sadism.’”³⁰ Torturing Al Qaeda detainees would not be mere sadism, under Yoo’s reasoning, because it could be justified by the possibility of preventing injury to others by gaining information that would prevent future attacks.³¹ The report of Haynes’s working group closely followed the Yoo memo.³²

III. BACKLASH: RETREATING FROM TORTURE?

The Abu Ghraib revelations were so shocking that they, at least temporarily, put the Bush administration on the defensive with respect to torture. High level administration officials, and even the President himself, felt compelled to affirm repeatedly that “America does not torture.”³³ However, with the administration lawyers so narrowly defining torture, almost nothing that U.S. officials did to detainees would count as torture. So, although U.S. agents might subject prisoners to deafening noise, extremes of heat and cold, denial of food and water, stress positions, sleep deprivation, and waterboarding, none of that counted—in the government’s view—as torture.

²⁶ Donald Rumsfeld, *Memorandum for the General Counsel of the Department of Defense Re: Detainee Interrogations* (Jan. 15, 2003), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 1, at 238.

²⁷ SAVAGE, *supra* note 5, at 179.

²⁸ Memorandum from John Yoo to William J. Haynes II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), at 68, available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

²⁹ *See id.*

³⁰ *Id.*

³¹ *Id.*

³² *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 1, at 286; *see also* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 143 (W. W. Norton & Co. 2007).

³³ *See, e.g.*, Michael A. Fletcher, *Bush Defends CIA’s Clandestine Prisons*, WASH. POST, Nov. 8, 2005, at A15 (President Bush declares, “We do not torture.”); *Bush: “This Government Does Not Torture People,”* CNN.COM, Oct. 5, 2007, available at <http://www.cnn.com/2007/POLITICS/10/05/bush.torture/index.html> (Bush stating, “This government does not torture people.”); Dan Eggen & Michael Abramowitz, *Congress Seeks Secret Memos on Interrogation*, WASH. POST, Oct. 5, 2007, at A1 (White House Spokeswoman Dana Perino stating, “It is a policy of the United States that we do not torture, and we do not.”).

Still, Abu Ghraib forced the question: how far up did responsibility extend for the abuse of detainees? The Bush administration reassured the world that the mistreatment at the Iraqi prison was the work of a few “bad apples,” a small number of low-ranking personnel acting on their own. In fact, however, ever since early 2002 the administration had been preparing legal memoranda that not only denied the protection of law to detainees suspected of terrorist ties, but also authorized torture and brutal interrogations. In retrospect, we know—from the growing array of detailed investigative analyses—that responsibility for unleashing torture and other abusive techniques extended all the way to the White House, to Vice President Cheney and to President Bush himself. Their subordinates could hardly fail to get the message: *do whatever you need to in order to extract information; the old rules no longer apply.*

But in early 2004, as the Abu Ghraib photos ricocheted around the world, all of the administration’s findings and memos on torture and interrogation were still secret. Indeed, the public revelation of grotesque abuses perpetrated by Americans may have helped to shake loose the first documents that would eventually create the paper trail leading to the White House. The Abu Ghraib story and pictures broke in late April 2004³⁴ and by early June 2004, the August 2002 OLC “torture memo” was leaked.³⁵ Within days of the revelation of the memo, journalists queried President Bush on the legality of torture. Bush would only state that he had instructed “our people to adhere to law.”³⁶ When asked if he agreed with the OLC memorandum that he had the authority to “order any kind of interrogation techniques that are necessary to pursue the war on terror,” the President did not respond, only declaring that he had “authorized” that U.S. conduct conform to the law.³⁷ He did not say that torture was illegal, nor did he say whether the laws permitted him as president to order torture.³⁸ His administration’s top legal advisors had already determined that the President could authorize torture and that neither Congress nor the courts could limit his power to do so.

Still, the government did step back from some of the more extreme claims made by the OLC in its memoranda on detainees and torture. Part of the impetus for revising the policies came from the new chief of the OLC, Jack Goldsmith, who had taken over the position in October 2003. Shortly after assuming his position, Goldsmith became aware of the torture memos and became increasingly uncomfortable with their legal findings. Despite a powerful tradition in the OLC of not overturning previous legal memoranda, Goldsmith concluded that the August 2002 torture memo and Yoo’s March 2003 memorandum to Haynes were so deeply flawed that

³⁴ The Abu Ghraib story first became public with a report by Dan Rather on *60 Minutes II* on April 28, 2004. Seymour Hersh’s reporting, along with some of the photos, were posted on the website of *The New Yorker* magazine (www.newyorker.com) on April 30, 2004. See David Remnick, *Introduction*, in SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* xviii (Harper 2004).

³⁵ The Washington Post posted a copy of the August 1, 2002 memorandum on its web site on June 13, 2004. See Dana Priest, *Justice Dept. Memo Says Torture ‘May Be Justified,’* available at <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>.

³⁶ *Transcript: Bush Holds Post-G-8 Summit News Conference*, WASH. POST, June 10, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A32143-2004Jun10.html>.

³⁷ *Id.*

³⁸ *Id.*

they would have to be withdrawn.³⁹ The opinions, in Goldsmith's view, contained "errors of statutory interpretation," displayed an "unusual lack of care and sobriety in their legal analysis," and "were wildly broader than was necessary."⁴⁰ In addition, they "gave interrogators a blank check."⁴¹ Goldsmith notified Haynes in December 2003 that the Defense Department should no longer rely on the March 2003 Yoo memorandum, and then, in June 2004, Goldsmith withdrew the August 2002 memo.⁴²

The OLC, with Attorney General John Ashcroft's blessing, had pulled out the legal foundations of the Bush administration's unlimited claims of executive authority to authorize torture. However, that did not mean that the administration itself gave up on those claims. In fact, from 2004 on—and this is the heart of the matter—the administration made public displays of backing away from its professed power to order torture and other coercive interrogation techniques, while quietly holding onto precisely those prerogatives.

IV. RETAINING TORTURE

With the August 2002 torture memo withdrawn, OLC attorneys began drafting a replacement. The Department of Justice posted the new memorandum on its web site on December 30, 2004. The new opinion "supersede[d] the August 2002 Memorandum in its entirety."⁴³ It dumped the old memo's narrow definition of torture (as producing pain that is "excruciating,"⁴⁴ "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death"⁴⁵). The replacement concluded that "'severe physical suffering' may constitute torture even if it does not involve 'severe physical pain'."⁴⁶ It affirmed that torture was "abhorrent and unlawful," and invoked the President's "directive that United States personnel not engage in torture."⁴⁷

Equally important was what the new opinion did not do: it did not reject, repudiate, or replace the August 2002 memo's findings on presidential powers and potential defenses to liability for torture. The December 2004 memorandum stated that the earlier opinion's discussion of those issues was "unnecessary"—not incorrect, simply unnecessary.⁴⁸ The new memo's reference to the President's "directive that United States personnel not engage in torture" left intact the Bush administration's initial claim with regard to torture and presidential authority: that torture was not

³⁹ GOLDSMITH, *supra* note 32, at 146.

⁴⁰ *Id.* at 146, 148, 150.

⁴¹ *Id.* at 151.

⁴² *Id.* at 146, 149.

⁴³ Memorandum Opinion from Daniel Levin on Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> [hereinafter 2004 Opinion].

⁴⁴ Bybee, *supra* note 1, at 183.

⁴⁵ *Id.* at 172.

⁴⁶ 2004 Opinion, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ *Id.*

a legal issue but a policy question. The President had instructed U.S. personnel not to torture. But the President could change policy and direct U.S. agents to torture detainees. If the President decided to issue a new directive permitting torture, there was no OLC opinion on file to prohibit him from doing so.

Though it may seem difficult to believe that the Bush White House regarded the directive against torture not as a matter of law but, rather, as a matter of presidential choice, the administration's subsequent actions eliminated any doubt. Within days of the release of the new OLC memo on torture, Gonzales sat before a Senate committee to begin the hearings on his nomination as U.S. Attorney General. One of the striking features of Gonzales's appearance was his refusal to disavow torture. In his opening statement to the Senate Judiciary Committee, Gonzales stated that he would "remain deeply committed to ensuring that the United States government complies with all of its legal obligations as it fights the war on terror, whether those obligations arise from domestic or international law. These obligations include, of course, honoring Geneva Conventions whenever they apply."⁴⁹ Gonzales continued, "[T]he president has made clear that he is prepared to protect and defend the United States and its citizens and will do so vigorously, but always in a manner consistent with our nation's values and applicable law."⁵⁰ The key, carefully chosen phrases were "whenever they apply" and "applicable law." Gonzales knew, of course, that the President had already determined that the Geneva Conventions did not apply to Al Qaeda. And Bush administration officials believed that neither treaty nor U.S. statute could limit the President's Commander-in-Chief powers in the war on terrorism. For the White House, in other words, torture was still an option for Al Qaeda detainees—though, understandably, Gonzales did not want to say so explicitly in front of the Senators and the news reporters.

Within months after Gonzales took the helm at the Justice Department, the OLC issued three more secret memoranda on torture. The memos, signed by OLC chief Steven G. Bradbury and approved by Gonzales, flatly contradicted Bush's repeated assertion that "America does not torture." A May 10, 2005, OLC memorandum ruled that a number of specific individual techniques proposed for use by the CIA would not violate the U.S. Torture Statute (18 U.S.C. §§ 2340–2340A): diet manipulation, forced nudity, slapping, cramped confinement, stress positions, sleep deprivation, and waterboarding.⁵¹ A second memo on the same date authorized the CIA to employ those same techniques in combination.⁵² A few weeks later, an

⁴⁹ *Senate Judiciary Committee Confirmation Hearing: Transcript*, N.Y. TIMES, Jan. 6, 2005, available at http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?_r=1&pagewanted=print&position=&oref=slogin (last visited Mar. 17, 2009).

⁵⁰ *Id.*

⁵¹ Steven G. Bradbury, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency* 9–15 (May 10, 2005), available at <http://online.wsj.com/public/resources/documents/OLC10May05-1a.pdf> (part 1) and <http://online.wsj.com/public/resources/documents/OLC10May05-2a.pdf> (part 2).

⁵² Steven G. Bradbury, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005), available at <http://wsj.com/public/resources/documents/OLCcombinedEITs10May05.pdf> (part 1) and

additional memorandum informed the CIA that the techniques discussed in the earlier May 2005 documents would not violate U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. In addition, the memorandum argued that constitutional limits only prohibit conduct that “shocks the conscience.” The key point was that the same techniques might or might not “shock the conscience,” depending on the setting and purpose.⁵³ That is, though it would shock the conscience to waterboard a child or an accused jaywalker, it might not shock the conscience to do the same to a suspected terrorist.

Months later, another secret memorandum reportedly declared that the techniques authorized for the CIA would not violate the proposed law being debated in Congress, which would prohibit “cruel, inhuman, and degrading treatment.”⁵⁴ The memo repeated the argument that constitutional limits only prohibited conduct that “shocks the conscience.”⁵⁵ Whether or not a particular act was cruel, inhuman, or degrading, then, could depend on the circumstances. When the existence of the secret memos came to light in October 2007, the White House once again discussed torture in policy, not legal, terms: “It is a policy of the United States that we do not torture.”⁵⁶

The Abu Ghraib scandal had also triggered action in Congress. Senator Richard Durbin (Ill.) first proposed legislation to prohibit U.S. agencies from not just torturing but also, from using “cruel, inhuman, or degrading” interrogation techniques.⁵⁷ Republican Senator John McCain (Ariz.), along with Republican colleagues John Warner (Va.) and Lindsey Graham (S.C.), introduced legislation in the summer of 2005 to outlaw torture and abusive treatment of prisoners.⁵⁸ The so-called McCain Amendment (attached to the annual Department of Defense appropriations bill) would limit the interrogation of persons detained by the Department of Defense to techniques “authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”⁵⁹ The legislation would also prohibit any kind of “cruel, inhuman, or degrading treatment” for detainees “under the physical control of the United States Government, regardless of

<http://wsj.com/public/resources/documents/OLCmemo10May05-2.pdf> (part 2).

⁵³ Steven G. Bradbury, *Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* 3 (May 30, 2005), available at

<http://online.wsj.com/public/resources/documents/OLC3part105312005.pdf> (part 1) and

<http://online.wsj.com/public/resources/documents/olcpinion3part205302005.pdf> (part 2).

⁵⁴ Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

⁵⁵ *Id.*

⁵⁶ Dan Eggen & Michael Abramowitz, *Congress Seeks Secret Memos on Interrogation*, WASH. POST, Oct. 5, 2007, at A1. Though the existence of the May 2005 memoranda became known in October 2007, the memos themselves did not become public until the Obama administration released them in April 2009.

⁵⁷ Shane, Johnston, & Risen, *supra* note 54.

⁵⁸ See 151 CONG. REC. S11,061-03 (daily ed. Oct. 3, 2005) (amendment SA 1977 proposed by Sen. McCain). The Senators’ concern for torture may be due to the fact that all three have military backgrounds: McCain was a Navy pilot who had suffered torture during five years of captivity in Vietnam. Warner was a veteran of active duty in both the Navy and the Marine Corps and a former Secretary of the Navy. Graham had served in the Air Force as a Judge Advocate and was currently a colonel in the Air Force Reserves.

⁵⁹ *Id.* at S11,062.

nationality or physical location.”⁶⁰ The ban on torture and cruel treatment would seemingly apply to not just military personnel, but also to all agents of the U.S. government, including the CIA.

The Bush White House opposed the torture ban. Cheney made the rounds on Capitol Hill arguing against the proposed law and asking Senate leader Bill Frist to keep the larger Defense Department appropriation from reaching the Senate floor as long as McCain’s amendment was attached. Cheney also lobbied for the CIA to be exempt from any law banning torture and cruel, inhuman, or degrading treatment.⁶¹ But the measure gained support, including endorsements from twenty-five retired generals and two former chairmen of the Joint Chiefs of Staff, Colin Powell and John Shalikashvili.⁶² Despite this strong support, the White House announced that, if passed, President Bush would veto the bill (it would be the first veto of his presidency) on the grounds that “it would limit the president’s ability as commander in chief to effectively carry out the war on terrorism.”⁶³ As the legislation moved into a House-Senate conference committee, Cheney again visited Capitol Hill to try to kill it.⁶⁴ He sought to convince McCain to modify the amendment so that it would not apply to CIA interrogators.⁶⁵ But Congress approved the bill, and the White House bowed to political reality—or at least made a show of doing so. On December 15, 2005, with McCain and Warner present and the news cameras rolling, President Bush announced his intention to sign the Detainee Treatment Act into law.⁶⁶

Shortly thereafter, on December 30, 2005, Bush signed the military appropriations bill and the attached Detainee Treatment Act while away from the White House press corps at his ranch in Crawford, Texas.⁶⁷ He also issued two statements, one essentially a press release and the other a “presidential signing statement,” intended to shape the interpretation and application of the new law.⁶⁸ The press release mentioned some of the Act’s main points in a positive, laudatory tone. However, the signing statement, issued without fanfare at 8:00 p.m. on that Friday night during the winter holidays,⁶⁹ carried exactly the opposite message.

The signing statement declared that the executive branch would interpret the new anti-torture law “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”⁷⁰ Given the White House’s limitless conception of the President’s authority to conduct wars and to act as Commander in Chief, the statement offered a declaration that the President

⁶⁰ *Id.*

⁶¹ Eric Schmitt, *White House Seeks Exception in Abuse Ban*, N.Y. TIMES, Oct. 25, 2005, at A16.

⁶² SAVAGE, *supra* note 5, at 221.

⁶³ *Id.*

⁶⁴ *Id.* at 221–22.

⁶⁵ R. Jeffrey Smith & Josh White, *Cheney Plan Exempts CIA from Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A1.

⁶⁶ SAVAGE, *supra* note 5, at 223.

⁶⁷ *Id.* at 224.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=65259>.

would not be bound by the law against abusing detainees, and, at any time in the “war on terror,” the President could order torture.

While the Bush administration may have conceded to the prohibition on torture and cruel, inhuman, or degrading treatment for the armed services, it clearly did not give it up on the CIA’s capacity to implement brutal interrogation techniques. Though the OLC withdrew the general August 1, 2002 torture memo, the administration did not rescind a memorandum from the same date authorizing the CIA to employ specific coercive interrogation techniques. A set of recently released 2007 letters from the Department of Justice to Congress reveals that the Bush administration regarded the CIA as outside the laws prohibiting torture and other cruel treatment.⁷¹ The letters show that the administration continued to allow the CIA to make decisions regarding the permissibility of enhanced interrogation techniques on a case-by-case basis, despite a July 2007 executive order that President Bush said would require the CIA to comply with international rules prohibiting inhumane interrogations.⁷² But that order did not specify which methods the government considered permissible.⁷³

Finally, in March 2008, Bush vetoed a bill that would have prohibited the CIA from using harsh interrogation techniques, like waterboarding.⁷⁴ The bill would have placed the CIA under the stricter rules contained in the Army Field Manual on Interrogation, which forbids interrogators from using physical force on detainees.⁷⁵ In a radio address, Bush defended the veto, declaring, “Because the danger remains, we need to ensure our intelligence officials have all the tools they need to stop the terrorists.”⁷⁶ The Bush administration clearly wanted to keep the torture option open.

V. BANNING TORTURE

After the outrage over Abu Ghraib, the withdrawal of some of the torture memos, and the passage of the Detainee Treatment Act of 2005, most observers probably believed that the United States had shut the door on torture and abusive interrogations. However, the Bush administration retained the torture option in three ways. First, the Bush administration consistently claimed extraordinarily broad executive discretion over the treatment of “enemy combatants” and suspected terrorists, including the power to determine the conditions of confinement and the nature of interrogations. Five days before the Bush administration left office, the head of the Office of Legal Counsel, Steven G. Bradbury, filed a memorandum that nullified portions of nine earlier OLC memoranda. The document addressed the general question of executive authority, and though it did not focus on torture or coercive interrogations specifically, it

⁷¹ Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. TIMES, Apr. 27, 2008, at A1.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Steven Lee Myers, *Veto of Bill on C.I.A. Tactics Affirms Bush’s Legacy*, N.Y. TIMES, Mar. 9, 2008, at A1.

⁷⁵ See Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 327 (2008).

⁷⁶ Myers, *supra* note 74.

did discuss “authority over captured enemy combatants.”⁷⁷ The January 2009 memorandum voided the extreme position taken in five OLC legal opinions (from 2002 and 2003) that Congress had no power to regulate “the President’s ability to detain and interrogate enemy combatants.”⁷⁸ However, though it acknowledged that Congress did possess some constitutional authority over the detention and treatment of enemy combatants, the memorandum did not explore the limits of the president’s discretion over detainees and interrogation. It did affirm that the president had “broad authority” in such matters.⁷⁹ In other words, the Bush administration never did abandon its position that Bush’s “directive” that U.S. personnel not engage in torture was a presidential policy choice, not a legal requirement.

Second, the Bush administration determined that cruel, inhuman, or degrading treatment is that which “shocks the conscience.” According to current OLC legal opinions, conduct that may shock the conscience in one context might not in another. In the Bush administration’s view, it would not shock the conscience to torture or brutally interrogate a terror suspect or “enemy combatant.” Third, the Bush administration sought to shield the CIA from restrictions on interrogation techniques. It argued, for example, that the Detainee Treatment Act of 2005 applies to the military forces, not the CIA. In addition, secret OLC memoranda in 2005 authorized a number of coercive interrogation methods for the CIA. Further, when Bush vetoed the 2008 bill that would have extended the ban on cruel, inhuman, or degrading interrogation methods to the CIA, he proclaimed that the intelligence community needed to retain all interrogation options.

Though the Bush administration retained the torture option, the general public assumption was probably that it would only be applied to hardened, extremist foreigners bent on attacking America. But, in fact, President Bush also claimed the power to detain U.S. citizens as enemy combatants and to treat them as enemy combatants. According to Bush administration legal findings, the President could order treatment amounting to torture for U.S. citizens. On at least two occasions, President Bush designated U.S. citizens as enemy combatants. Bush claimed the authority to hold them indefinitely in military brigades for extended periods in solitary confinement, without access to an attorney, without charges being filed against them, and without the right to challenge their detention in court.

In the case of Yaser Esam Hamdi, the Supreme Court finally held that while the president could imprison “unlawful combatants,” any U.S. citizens so detained were entitled to file *habeas corpus* petitions in federal courts.⁸⁰ Before Hamdi could appear in court to challenge his detention, the government simply released him and sent him to Saudi Arabia.⁸¹ Similarly, with José Padilla, the government again detained—indefinitely, without representation—a U.S. citizen as an enemy combatant. The Padilla case

⁷⁷ Steven G. Bradbury, *Memorandum for the Files, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), at 2, available at <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>.

⁷⁸ *Id.* at 2–3.

⁷⁹ *Id.* at 4.

⁸⁰ *Hamdi v. Rumfeld*, 542 U.S. 507, 533 (2004).

⁸¹ SAVAGE, *supra* note 5, at 199.

added another dimension: Padilla claimed to have been subjected to brutal and abusive treatment while in a military prison.⁸² This time, the government transferred Padilla to the criminal justice system, just before the Supreme Court had a chance to rule on the legality of his detention.⁸³ The about-face strongly suggests that the government was pessimistic about its chances of prevailing in the Supreme Court (even the appeals court judge accused the government of seeking to avoid high court review) and fearful of suffering a stinging rejection of its detention policy for U.S. citizens.⁸⁴

The Bush administration's grandiose claims of power remain available to subsequent presidents, and no court has rejected its sweeping assertions of authority with respect to the treatment of detainees in the "war on terror." President Obama's executive order took a first, important step toward restoring the rule of law in the detention and interrogation of terror suspects. But torture must also be banished in law. Unfortunately, with the nation focused on its economic and financial crises, the torture issue may seem ready to fade from public consciousness and from government attention.

The United States should close the door to torture once and for all. The power to order cruel, inhuman, or degrading treatment of detainees or interrogation techniques that amount to torture is not one that any president—Republican or Democrat, liberal or conservative—should possess. Any leader, in a time of crisis and anxiety, could be tempted to order brutal treatment for detainees. We do not want a future president, when reaching into the toolbox for dealing with perceived enemies (foreign or domestic), to be able to pull out torture.

The new Congress and the new administration should therefore move quickly to enact a law prohibiting any U.S. government agency or contractor from authorizing or carrying out torture or any form of cruel, inhuman, or degrading treatment. The statute could incorporate much of the language of President Obama's executive order. President Obama's first year in office would be the ideal time to banish by law the interrogation policies that have undermined the rule of law in America and diminished its moral standing in the world.

⁸² *Id.* at 215.

⁸³ *Id.* at 200.

⁸⁴ *Id.*

