

Ethics and War: Maintaining America's Constitutional Responsibilities in Times of Conflict

As Americans, what do we expect from our government? This question may elicit a variety of responses, depending on individual concerns. However, I believe it would be difficult to find an American citizen who did not expect and value good faith, lawfulness, and ethical practices from the Federal government. Ordinary citizens are expected to abide by the nation's laws, and government officials should, as well.

Most people are aware that some presidents have broken the law. Richard Nixon deceived the nation, and the American people were rightfully outraged at his deceit. The public once again lost faith in Washington when Bill Clinton lied under oath while attempting to cover up a sexual dalliance. I have found evidence in various government memos, sworn testimonies, and legal documents to suggest that the Bush administration quietly seemed to get away with something much more sinister: torture. This information should help my readers better understand the ways in which the Office of the Presidency attempted to unilaterally rewrite or outright break the law during the Iraq and Afghanistan conflicts. Inappropriate conduct in the nation's highest office should concern every American citizen.

In the wake of September 11, President George W. Bush's administration unilaterally waged war. Iraq was invaded, and our military was given a most wanted list by American intelligence. During the early years of the war, detention centers were quietly set up at Guantanamo Bay, Cuba (which is under long-term lease by the United States), and Abu Ghirab in Baghdad, Iraq. These detention centers were staffed with military guards, CIA agents, and translators, and were operated with the intention of gaining intelligence through the confessions of captured terrorists.

Iraqi suspects were rounded up and imprisoned without the benefit of a trial or habeas corpus, and there have been many claims that the detainees were subsequently tortured, sometimes for years (Partlow and Salahuddin:np), which is a direct violation of law. Although there are multiple anti-torture laws, including the Torture Victim Protection Act of 1991, the Alien Claims Tort Act, the Conventions Against Torture, and the McCain Amendment, I will only be referencing two of the most common laws, the Geneva Conventions and United States Code §2340A.

The most well-known and internationally accepted laws regarding the humane treatment of POW's are the Geneva Conventions. Common Article 3 of the Geneva Conventions states that no wartime prisoner may be subjected to "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," or "outrages upon personal dignity, in particular humiliating and degrading treatment." (Pfiffner:44) Sovereign nations the world over abide by this rule.

The United States specifically outlaws torture in U.S. Code, §2340A. This law defines torture as: "An act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering... upon another person within his custody or physical control; **(2)** "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from— **(A)** the intentional infliction or threatened infliction of severe physical pain or suffering; **(B)** the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; **(C)** the threat of imminent death." (U.S.C.§2340)

The brash and obvious disregard for the above laws was documented in a series of photographs taken at Abu Ghirab and leaked to the press beginning in April of 2004 (Torture:np). Numerous photos of injured and bleeding prisoners, some nude and shackled in forced sexual

positions (along with other bizarre poses), are truly shocking to the conscience. Grinning US soldiers giving an enthusiastic “thumbs up” can be seen in many of the pictures. One photo depicts the brutally beaten dead body of Manadel al-Jamadi with US soldiers happily posing beside him (Torture:np). The photo is disturbingly reminiscent of hunters proudly taking credit for a dead buck.

Even more telling is the sworn testimony of Ali Shalal, an Iraqi theology professor, which he presented to The War Crimes Commission following his release from Abu Ghirab. He describes being arrested on October 13, 2003 by American soldiers. He was questioned about his religious affiliation and replied that he was Muslim, prompting interrogators to label him as supportive of the resistance. Shalal says that he was asked if he considered the Americans to be “occupiers” or “liberators,” and when he answered “occupiers,” the interrogator, according to Shalal “...lost his temper and threatened me. He told me that I would be sent to Guantanamo Bay, where even animals could not survive.” (Shalal:np).

Shalal further asserts that he was stripped naked and repeatedly beaten. He says that at one point, a gun was held to his head and he was told that he would be executed. Guards threw human waste at him and urinated on him. Other detainees reportedly told him that they had been injected with hallucinogenic chemicals, and some that he encountered had untended broken bones. Two weeks into his detainment, an Israeli interpreter used his fist to insert a jagged wooden stick into Shalal’s rectum, followed by the barrel of a rifle. Shalal sustained internal bleeding, and was starved for 36 hours following the ordeal. He claims that as he lay in pain, any guard who walked by would kick him (Shalal:np). In March, 2004, five months after his arrest, Shalal was released by being thrown onto a highway, where a passer-by came to his aid. He was never charged with a crime, nor did he have information useful to the CIA (Shalal:np).

Judging from Shalal's description, there is no doubt that the military broke every facet of the anti-torture laws. There is also no doubt that superior officers knew of the torture. As the torture photos began surfacing in the press, Washington realized that it faced a volatile situation. The Bush administration quickly put the blame on prison guards in an attempt to distance themselves from any wrongdoing. Former Abu Ghirab Brigadier General Janis Karpinsky was one of several officers demoted amidst the torture scandals. She proceeded to give several interviews to the press stating that the orders to torture came from Washington, and went so far as to implicate Defense Secretary Donald Rumsfeld. According to Karpinski, classified memos from Rumsfeld outlining torture techniques were posted on the walls of the prison. In the margin of one such photocopied memo, in handwriting which matched Rumsfeld's signature, was the phrase "Make sure this happens." (Karpinski:np) The fact that torture techniques were on the walls in a United States-run facility is brazen enough, but the idea that Rumsfeld may have *insisted* that such actions take place is truly contemptible.

One may wonder why such high-ranking officials would be willing to be engage in something that was obviously illegal. The strange truth is that the Office of Legal Counsel (OLC), a division of the Department of Justice, was able to create a legal shield for military intelligence by rewriting and reinterpreting certain laws. The OLC is a group of some of the brightest lawyers in the nation. It acts in an advisory manner to the Attorney General, and is informally recognized as the President's law firm (Turner:532). The office is responsible for determining the legality and constitutionality of an administration's undertakings. It should be noted, however, that the OLC is comprised of lawyers who are appointed by the president; naturally, there would be an ideological cohesion between the two (Weiner:2). In the instance of detainee torture, the OLC was sandwiched between pleasing the administration and protecting high-ranking officials who were

already involved in torturing prisoners (Weiner:4). Because the OLC was requested to review the interrogation techniques after the torture had already been going on for months (Weiner:5), any indication that military officials were breaking the law could have caused interrogators to be arrested. Consequently, a slew of now de-classified memos from the OLC to various government officials reveal that the OLC was in the business of creating a legal safety net in order for the American military to torture prisoners.

In August of 2002, Assistant Attorney General Jay Bybee signed a memo written by Deputy Assistant Attorney General John Yoo for Alberto Gonzales, President Bush's counsel. The OLC, at Yoo and Bybee's direction, found that due to the current circumstances of the war, "...prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement on the President's authority to conduct war." (Bybee:1) This is truly an outrageous claim. By such reasoning, *anything* that the Executive Office did (or ordered others to do) during wartime would be legal, regardless of the statutes it was breaking. The OLC also included a variety of possible defenses should the interrogators be called into a court of law to answer for their actions, including the claims of "necessity" (in order to prevent a possible terrorist attack) and, incredulously, "self-defense." (Bybee:39) Another suitable defense mentioned in the memo is a claim by the defendant that he or she did not intend for a criminal act to occur (Bybee:3). Because U.S. code §2340A requires the *intentional* infliction of pain, someone accused of torture need only deny torturous intent to create a sufficient defense, according to the OLC. It is unusual that the memo spends approximately twenty pages insisting that all of the interrogator's actions are completely legal, and then the last thirty pages detailing what the interrogator should do if he were to get caught. This certainly leads one to the conclusion that the OLC knew that

these actions were questionable. Why would the officials need such a strong defense for adhering to the law?

Further memos attempt to define what may or may not be construed as torture, and are presented as guidelines for interrogators. For example, one memo from the OLC to John Rizzo, Senior Deputy General Counsel of the CIA, dated May 10, 2005, describes various interrogation techniques such as abdominal slaps, subjecting a prisoner to repeated near-drowning, and forced starvation as not constituting torture, and then concludes that using any combination of these techniques would therefore be legal as well (Office of Legal Counsel:5). This is obviously contradictory to both Common Article 3 of the Geneva Convention and U.S. code §2340A, yet the OLC acted as a legal shield for the Bush administration. They maliciously and willingly enabled the United States to participate in the torture of hundreds, and possibly thousands, of detainees.

It is truly frightening to think that the expanding power of the Office of the Presidency is putting America's integrity at risk. The founding fathers created the three branches of government with an interest in preventing tyrannical rule. If future administrations continue the current trend of circumventing laws, the United States may well have a grim future. America not only risks its reputation by cruelly treating prisoners, but also hinders its ability to insist on the humane treatment of American soldiers who fall into enemy hands. Thomas Jefferson, in an 1809 letter to James Madison remarked: "...it has a great effect on the opinion of our people and the world to have the moral right on our side." (Turner:534) Lawmakers would be wise to take Jefferson's words to heart. The lawless actions of our highest officials are a formidable threat to our democracy, and may forever tarnish America's reputation as a just and ethical nation.

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