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The Torture Lawyers

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THE TORTURE LAWYERS

MICHAEL P. SCHARF*

INTRODUCTION

Some truths are inconvenient; some are stranger than fiction. This one might be characterized as both.¹ This is the true story of how, in the months following the attacks of 9/11, the legal policy of the U.S. government with respect to the war on terrorism was hijacked and dictated by a cabal of four highly placed government lawyers who called themselves the “War Council.”² Together, they produced a series of legal memoranda which deliberately ignored adverse precedent, misrepresented legal authority, and were written to support a pre-ordained result, namely to “eliminate any hurdles posed by the torture law.”³

The looming presence behind the group was Vice President Dick Cheney, who was a strong proponent of the principle *Inter Arma Enim Silent Leges* (in times of war the law must be silent). He believed that the president had to be unshackled from the constraints of international law in

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1. The issue of potential prosecution of former Bush Administration officials involved in the drafting of the Torture Memos has been extremely politically divisive and has put the Obama Administration in a difficult position. Tim Reid, *Photos Bring New Claims that Military Abused Prisoners*, THE TIMES (LONDON), April 25, 2009, at 51.

2. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 22-23 (2007).

3. DEP’T OF JUSTICE, OFFICE OF PROF’L RESPONSIBILITY REPORT, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 160 (2009), [hereinafter OFFICE OF PROF’L RESPONSIBILITY REPORT], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>; see also *id.* at 3, 9, 51-52, 159, 226-28 (indicating instances in which the legal memoranda ignored adverse precedent, misrepresented legal authority, and supported a pre-ordained result). This article relies only on the factual findings of the Office of Professional Responsibility Report; the report’s legal conclusion that John Yoo had committed professional misconduct was subsequently overturned by the Deputy Attorney General. See Memorandum for the Attorney General from David Margolis, Associate Deputy Attorney General, on Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (Jan. 5, 2010) [hereinafter Memorandum for the Attorney General from David Margolis], <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

order to successfully combat the new terrorist threat.⁴ As he explained, “We also have to work through sort of the dark side, if you will It is a mean, nasty, dangerous, dirty business out there, and we have to operate in that arena.”⁵

The self-anointed “War Council” in turn was led by Vice President Cheney’s chief counsel and trusted lieutenant, David Addington, about whom it was said, “if you favored international law, you were in danger of being called ‘soft on terrorism.’”⁶ Addington played a large role in shaping the content of the torture memoranda.⁷ The second dominant figure was Jim Haynes, the chief counsel of the Department of Defense—a political appointee who had served as best man at Addington’s wedding.⁸ The third figure in this group was White House Chief Counsel, Alberto Gonzales, who famously declared after the 2001 U.S. invasion of Afghanistan that the Geneva Conventions were “quaint” and outmoded and did not apply to this new war on terror.⁹

But the most important member of all turned out to be a young Berkeley law professor named John Yoo.¹⁰ Like the other members of the “War Council,” Yoo “defined himself as a partisan Republican” who was devoted to the political success of his party and president.¹¹ Yoo was brought on board to serve as deputy head of the Department of Justice’s Office of Legal Counsel (“OLC”), a government office with extraordinary power to issue memoranda interpreting the government’s requirements under the U.S. Constitution and federal statutes. Yoo had come to the White House’s attention because he had authored a series of law review

4. See *ABC News: Cheney Defends Hard Line Tactics* (ABC television broadcast Dec. 16 2008), available at: <http://abcnews.go.com/Politics/story?id=6464697>. In this interview Dick Cheney admitted that he felt waterboarding was “appropriate,” that he “had the Justice Department issue the requisite opinions” to facilitate waterboarding, and that he actively helped “get the process cleared.” Explaining his mindset, Cheney said: “when you contemplate the 9/11 with terrorists instead of being armed with box cutters and airline tickets, equipped with a nuclear weapon or a biological agent of some kind in the middle of one of our cities and think about the consequences of that and then I think we’re justified in taking bold action.”

5. Quoted in Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 397 (2009).

6. PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 213 (2008).

7. OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3, at 51-52.

8. SANDS, *supra* note 6.

9. Memorandum from Alberto R. Gonzales, Counsel to George W. Bush, President, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Alberto R. Gonzales Memo] (*reprinted in Appendix*, 37 CASE W. RES. J. INT’L L. 615 (2006)).

10. OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3, at 26.

11. Robertson, *supra* note 5, at 394.

articles arguing for near limitless powers of the presidency during crisis.¹² He was a “true believer” in his client’s cause,¹³ and a prolific writer; and it was his work product that would in a few years garner the mantle, “White House Torture Memos.”¹⁴

This article recounts the story about how these four individuals intentionally cut off the government’s primary experts on the Geneva Conventions, the Torture Convention, and customary international law from the decision making process. In doing so, they presented a one-sided and distorted view of U.S. obligations under international law that led to a widespread government policy and practice of torture. It also reveals how a trio of important Supreme Court precedents disrupted these plans, and ultimately swung the balance back in favor of compliance with international law.

The information relied on for this article comes from the findings of the bipartisan Senate Armed Service Committee report following extensive hearings into the matter in the summer and fall of 2008,¹⁵ the July 2009 Department of Justice Ethics Probe whose conclusions were made public in February 2010;¹⁶ the personal recollections of two of the major players in this saga—Jack Goldsmith¹⁷ and John Yoo¹⁸—as contained in their memoirs; the reflections of William Taft and John Bellinger—the two State Department Legal Advisers who were in office during the period of the “Torture Memos”; and in limited instances other first-person accounts recorded by scholars. From these sources, the article seeks to distill the essential lessons necessary for the government to avoid the possibility that a small group like this could ever pull off another “policy coup d’état” in the future.

12. OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3, at 26.

13. Robertson, *supra* note 5, at 395.

14. OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3, at 227 (“According to [CIA Director] Rizzo, there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result.”).

15. See S. ARMED SERVICES COMM., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (2008), http://armed-services.senate.gov/Publications/Detainee_Report_Final_April_22_2009.pdf [hereinafter S. ARMED SERVICES COMM., INQUIRY].

16. See OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3. This article relies only on the factual findings of the Office of Professional Responsibility Report; the report’s legal conclusion that John Yoo had committed professional misconduct was subsequently overturned by the Deputy Attorney General. See Memorandum for the Attorney General from David Margolis, *supra* note 12.

17. See GOLDSMITH, *supra* note 2.

18. See JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR (Atlantic Monthly Press, 2006).

I. THE TORTURE MEMOS

A. Legal War Council – Minus L

The story behind the White House Torture Memos begins soon after the terrorist attacks of September 11, 2001 and the U.S. invasion of Afghanistan. Rather than follow the traditional practice of vetting questions related to the interpretation of international law through the legal departments of all the relevant agencies, the “War Council” (Gonzales, Addington, Haynes, and Yoo) pursued a strategy of excluding the high level government lawyers from other departments who possessed the most expertise and institutional experience in this area.¹⁹ Most notable in this regard was the State Department Legal Adviser, William Taft, who headed an office of 170 international law specialists known as “L.” The Legal Adviser is appointed by the president with the advice and consent of the Senate. His rank within the Department of State is equivalent to that of an Assistant Secretary of State, and he answers directly to the Secretary of State. “L” is responsible for furnishing legal advice on all problems, domestic and international, that arise in the course of the work of the Department of State. While “L” may be little known outside government circles, the importance of the office is considerable: traditionally no foreign policy decision can be made without first receiving clearance from “L,” and no delegation can be sent to an international negotiation or international organization without a representative of “L.” Just as the Solicitor General is the government’s point man for constitutional questions, the Legal Adviser is the government’s principal expert in international legal affairs. And just as the Solicitor General argues cases for the government before the U.S. Supreme Court, the Legal Adviser argues on behalf of the United States at the International Court of Justice and other international tribunals.²⁰

John Yoo has been quite open in explaining why the “War Council” cut the State Department Legal Adviser out of the decision-making process concerning treatment of detainees: “The State Department and OLC often disagreed about international law. State believed that international law had a binding effect on the President, indeed on the United States, both internationally and domestically,” whereas Yoo and the other members of the “War Council” did not hold to that view.²¹ William Taft in turn

19. SANDS, *supra* note 6, at 213.

20. MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER xix (2010) [hereinafter SCHARF & WILLIAMS, SHAPING FOREIGN POLICY].

21. YOO, *supra* note 18, at 33.

observed that the State Department Legal Adviser was likely excluded due to the fear, “in light of some of the positions we had taken, that we would not agree with some of the conclusions other lawyers in the [Bush] Administration expected to reach and that we might leak information about the work to the press.”²²

The “War Council” used heightened categories of classification in order to keep the State Department Legal Adviser out of the loop. As the Justice Department Office of Professional Responsibility explained:

We found that the limitations imposed on the circulation of the [OLC] draft were, in part, based on the limited number of security clearances granted to review the materials. This denial of clearances to individuals who routinely handle highly classified materials has never been explained satisfactorily and represented a departure from OLC’s traditional practices of widely circulating drafts of important opinions for comment. In the end, the restrictions added to the failure to identify the major flaws in the OLC’s legal advice.²³

B. Circumventing the Geneva Conventions

The four Geneva Conventions and their Additional Protocols establish the core obligations of states during an armed conflict.²⁴ They are widely considered to be the rulebook governing the lawful conduct of warfare. Every U.S. military officer is extensively schooled in the substance and application of this body of law.²⁵

The Geneva Conventions require states to provide certain rights and protections to non-combatants, wounded soldiers, and prisoners of war.²⁶ In

22. William H. Taft IV, *The Bush (43rd) Administration – William H. Taft IV (2001-2005)*, in SCHARF & WILLIAMS, SHAPING FOREIGN POLICY, *supra* note 20, at 130.

23. OFFICE OF PROF’L RESPONSIBILITY REPORT, *supra* note 3, at 260.

24. For the full text of the Four Conventions and the Additional Protocols, *see* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

25. *See* SANDS, *supra* note 6, at 33; *see also* MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 332-33 (2009).

26. The Conventions primarily govern conflicts between States, while the Additional Protocols establish further obligations for non-international armed conflicts (civil wars). The United States has ratified the four Conventions but has not ratified the Additional Protocols.

particular, the Conventions, through Common Article 3, set forth the rights of persons “taking no active part” in an armed conflict, including freedom from torture and inhumane treatment, limits on interrogation, and access to judicial process.²⁷

When seeking to develop a legal framework for the detention and treatment of suspected terrorists, John Yoo believed “[t]he candid approach would be to admit that our old laws and policies did not address this new enemy [al Qaeda].”²⁸ Acting according to this perspective, Yoo drafted a series of legal memoranda, which concluded that under international law the protections of the Geneva Conventions did not apply to Afghanistan, to the Taliban, or to members of al Qaeda. These conclusions were supported by White House Counsel Gonzales and submitted to the President for his approval.

On January 9, 2002, Yoo authored a key OLC memorandum, providing legal arguments to support Bush administration officials’ assertions that the Geneva Conventions did not apply to al Qaeda and Taliban detainees from the war in Afghanistan.²⁹ On January 22, 2002, Yoo authored a second memorandum responding to White House Counsel Gonzales’s request for the Department of Justice’s views concerning the effect of international treaties and federal law on prisoners held by U.S. forces in Afghanistan.³⁰ The OLC memorandum advised that the president had “sufficient grounds to find that these treaties do not protect members” of al Qaeda or the Taliban militia. Importantly, the memorandum also concluded that “customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the U.S. military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause.”³¹

27. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

28. YOO, *supra* note 18, at 47; *see also id.* at 22.

29. Memorandum from John Yoo, Deputy Ass’t Att’y Gen., to William J. Haynes, Gen. Counsel of the Dep’t. of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

30. Memorandum from Jay S. Bybee, Ass’t Att’y Gen., to Alberto Gonzalez, Gen. Counsel to the President, and William J. Haynes, Gen. Counsel of the Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf (written by John Yoo).

31. *Id.* at 36.

Repeating the arguments contained in Yoo's memoranda, on January 25, 2002, Gonzales sent a memorandum to President Bush, which opined that the president should declare the Taliban and Al Qaeda outside the coverage of the Geneva Conventions.³² This, Gonzales pointed out, would keep American interrogators from being exposed to the War Crimes Act, a 1996 law that makes it a federal crime to cause a grave breach of the Geneva Conventions or a violation of Common Article 3, which prohibits torture or other inhumane treatment.³³ Gonzales's memorandum also argued that the new paradigm of the "war" against terrorism "places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors," and thus the Geneva Conventions' strict limitations on the questioning of enemy prisoners were "obsolete" and even "quaint."³⁴

When he learned of the Gonzales memorandum, Secretary of State Colin Powell quickly prepared his own memorandum for the White House, stating that the advantages of applying the Geneva Conventions to the Afghan detainees far outweighed those of their rejection.³⁵ Powell explained that declaring the Conventions inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops." He added that it would "undermine public support among critical allies," who might be less inclined to turn over suspected terrorists.

Secretary Powell's memorandum was accompanied by a legal memorandum from State Department Legal Adviser William Taft, which concluded that the Geneva Conventions did apply to the conflict with the Taliban, as well as to al Qaeda, because they were part of the conflict with the Taliban. The Taft memorandum found that the United States was bound by customary international law and that such law required that detainees be treated humanely and that they were entitled to many of the rights contained in the Conventions.³⁶ Finally, the Taft memorandum also opined that it is important for the United States to confirm "the United States bases

32. Alberto R. Gonzalez Memo, *supra* note 9.

33. *Id.*; *see also* 18 U.S.C. § 2441(d)(1) (2000).

34. Alberto R. Gonzalez Memo, *supra* note 9, at ii.

35. Memorandum from Colin L. Powell, U.S. Sec'y of State, to Alberto R. Gonzales, Gen. Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in Appendix: The White House Torture Memoranda*, 37 CASE W. RES. J. INT'L L. 615 (2006).

36. Memorandum from William H. Taft, IV, The Legal Adviser, Dep't of State, to Alberto R. Gonzalez, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *reprinted in* 37 CASE W. RES. J. INT'L L. 615 app. (2006).

its conduct not just on its policy preferences but on its international legal obligations.”³⁷

On February 7, 2002, the President signed an executive memorandum accepting the legal conclusion of the OLC that the Geneva Conventions did not apply to the conflict with al Qaeda as it was not a High Contracting Party to the Conventions. The memorandum provided that although legal authority existed to suspend the application of the Conventions as between the United States and Afghanistan, he would not do so at that time, and that the Geneva Conventions would apply to the conflict with the Taliban. The memorandum further concluded that Common Article 3 of the Geneva Conventions did not apply to al Qaeda and Taliban detainees as “the relevant conflicts were international in scope, and common Article 3 applies only to ‘armed conflict not of an international character.’”³⁸ With respect to Taliban detainees, the memorandum concluded they “[were] unlawful combatants and, therefore, [did] not qualify as prisoners of war under Article 4 of Geneva.”³⁹ And, because the Geneva Conventions did not apply to the conflict with al Qaeda, “al Qaeda detainees also do not qualify as prisoners of war.”⁴⁰

The presidential memorandum did, however, provide that “[a]s 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.”⁴¹ As recounted by William Taft, in the months following the president’s decision, the Legal Adviser’s office drafted a lengthy memorandum “which concluded that because our policy was to treat the al Qaeda and Taliban detainees consistent with the requirements of the Geneva Conventions, the question of whether they were entitled to this as a matter of law was moot.”⁴² According to Taft, the “L” memorandum expressed the continuing view that “customary international law required that the detainees in any event be treated humanely and had certain of the rights set out in the Conventions.”⁴³

37. *Id.* at 2.

38. *Id.* at 2(c).

39. Memorandum from George W. Bush, President, to Richard B. Cheney, Vice President, et al., Humane Treatment of al Qaeda and Taliban Detainees, ¶ 2(d) (Feb. 7, 2002), available at www.torturingdemocracy.org/documents/20020207-2.pdf (alteration in original).

40. *Id.*

41. *Id.* at 3.

42. Taft, *supra* note 22, at 129-30.

43. *Id.* at 130.

The State Department Legal Adviser was under the impression that because it was official U.S. policy to treat the detainees consistent with the protections provided in the Geneva Conventions, they were in fact being accorded those protections. As explained by William Taft, “it developed, however, that at the same time we were working on our memorandum . . . the Department of Justice lawyers were working separately with the lawyers at the Department of Defense to authorize certain departures from the Conventions’ terms in the treatment of the detainees, particularly with regard to methods of interrogation.”⁴⁴ According to Taft, “My staff and I were not invited to review this work and we were, indeed, unaware that it was being done.”⁴⁵

By shifting the obligation to adhere to the Geneva Conventions from a legal obligation to a policy determination, the stage was set for the circumvention of the protections provided in the Conventions. As noted by Legal Adviser William Taft above, international law is intended to be durable, whereas policy determinations can easily and quickly change.

As will be discussed immediately below, the protections offered by the Geneva Conventions were in fact quickly diluted through a series of additional legal memoranda prepared by the OLC. Once the U.S. government had determined that the Geneva Conventions were not legally binding in relation to the al Qaeda and Taliban detainees, it laid the foundation for the creation of a law-free zone at Guantanamo Bay; it removed the safeguard against inhumane treatment, leaving only the outermost standards relating to torture in place; it evaded limits on imprisonment—opening the possibility for indefinite detention; it eliminated standard military procedures, such as Article 5 hearings to determine the combatant/non-combatant status of detainees; and it removed due process protections, paving the way for military commissions that would not be required to meet even minimal standards.

C. Presidential Power, Necessity, and the Limits of Torture

Once the prohibitions on interrogations afforded by the Geneva Conventions were deemed inapplicable, the Bush Administration was faced with the question of to what extent U.S. military and intelligence personnel could employ coercive measures to extract information from detainees. In particular, the U.S. government had to decide whether it could lawfully employ techniques which one might commonly consider to be torture.

44. *Id.*

45. *Id.*

The United Nations Convention against Torture sets forth states' obligations to protect persons against state-sponsored torture.⁴⁶ The Convention defines state-sponsored torture as actions inflicting severe physical or mental pain or suffering for the purpose of obtaining information. The Convention calls on states to implement effective measures to prevent acts of torture, to prosecute nationals who commit acts of torture, and to provide effective redress to individuals subjected to illegal acts of torture. The Convention also prohibits states from turning a person over to another state where he or she is likely to be subjected to torture. The United States is a party to the Torture Convention and implements the Convention through a domestic statute making torture a federal crime.⁴⁷

On August 1, 2002, the OLC issued two crucial memoranda, drafted by Yoo and signed by Assistant Attorney General Jay Bybee, dealing with the torture issue. The first, addressed to White House Chief Counsel Gonzales, asserted that the obligations under the Torture Convention did not apply to conduct outside of the territory of the United States, and that the Torture Convention prohibited only the most extreme forms of intentionally inflicted harm, namely those causing the most severe physical pain tantamount to death or organ failure, or psychological forms of pressure that cause permanent or prolonged mental harm. The memorandum further noted that this narrow ban applies only when interrogators specifically intend such harms but not when they are seeking information to defend the nation from attack.⁴⁸ Importantly, the memorandum also declared that under the doctrine of "necessity," the president could supersede national and international laws prohibiting

46. For the full text of the United Nations Convention Against Torture, *see* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

47. *See* 18 U.S.C. §§ 2340, 2340A, 2340B (2006).

48. *See* Memorandum from Jay Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 3-5, 42-46 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf [hereinafter Bybee, Standards] (written by John Yoo); *see generally* GOLDSMITH, *supra* note 2, at 145 (discussing how OLS interpreted the term "torture" too narrowly). The memorandum advised that any interrogation methods that do not violate the prohibition on torture found in domestic law, 18 U.S.C. §§ 2340-2340A, which required intent, also do not violate obligations under the Torture Convention because of the United States' understanding attached to the Convention. The memorandum also advised that interrogators could inflict pain and suffering on detainees up to the level of causing "organ failure" without violating the domestic and international prohibition on torture and cruel, inhumane, or degrading treatment. The OLC derived its definition of torture from a statute that authorized benefits for emergency health conditions, using the phrase "severe pain" as a possible indicator of an emergency condition that might cause serious harm if not immediately treated.

torture.⁴⁹ This has come to be referred to as the “ticking time bomb exception.” The memorandum also found that for it to be a war crime, torture must be committed against someone protected by the Geneva Conventions, and the United States had established that al Qaeda and the Taliban did not have this protection.

The second August 1 OLC memorandum, which responded to a request from the CIA, addressed the legality of specific interrogation tactics to be used against Abu Zubaydah, a high-level al Qaeda operative who the CIA believed was withholding information regarding terrorist networks in the United States and Saudi Arabia. The CIA was convinced that Zubaydah knew of plans to conduct attacks against U.S. interests, but that he had become accustomed to less-aggressive interrogation techniques and would not disclose the necessary information unless extraordinary techniques were employed.⁵⁰ The memorandum reviewed ten types of proposed interrogation techniques including walling, insects placed in a confinement box, cramped confinement, stress positions, sleep deprivation, and water boarding.⁵¹ The memorandum reasoned that none of the proposed techniques came within the threshold of “severe pain or suffering” or mental pain. In particular it found that “the water board is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.”⁵² Based on its conclusion that mental harm comes only from prolonged duration (months or years), the memorandum opined that water boarding should not be prohibited.⁵³ Abu Zubaydah was subsequently water boarded eighty-three times in August 2002.⁵⁴

Two months later, on October 11, 2002, the Commander of Guantanamo Bay, Major General Michael Dunlavey, sent a memorandum to the Pentagon requesting that the U.S. military be granted similar authority to use aggressive interrogation techniques that were originally designed to simulate abusive tactics used by our enemies against our own

49. See Bybee, Standards, *supra* note 48, at 39-41.

50. Memorandum from Jay Bybee, Assistant Attorney Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Interrogation of al Qaeda Operative, 1 (Aug. 1, 2002), available at <http://www.derechos.org/nizkor/excep/zubaydah.pdf> [hereinafter Bybee, Interrogation].

51. Ten types of action are proposed: (1) Attention grasp, (2) Walling, (3) Facial hold, (4) Facial slap, (5) Cramped confinement, (6) Wall standing, (7) Stress positions, (8) Sleep deprivation, (9) Insects placed in a confinement box, and (10) Waterboarding. *Id.* at 2.

52. *Id.* at 11.

53. *Id.*

54. See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 19, 2009, available at www.nytimes.com/2009/04/20/world/20detain.html.

soldiers, including tactics used by the Communist Chinese to elicit false confessions from U.S. military personnel. These included “stress positions,” “exploitation of detainee fears,” “removal of clothing,” “hooding,” “deprivation of light and sound,” “deprivation of sleep,” and “water boarding.” Dunlavey’s memorandum stated that the existing techniques permitted by the Army Field Manual 34-52 had been exhausted, and that some detainees (in particular, Mohammed al Qahtani, a Saudi Arabian believed to be the twentieth 9/11 hijacker) had more information that was vital to U.S. national security.

At this point the professional military lawyers began to raise serious concerns about the treatment being accorded detainees, and in particular concerning the proposed methods of interrogation. In response to General Dunlavey’s requests, the Chairman of the Joint Chiefs of Staff General Richard Myers solicited the views of the several branches of the military. All stated their opposition to the proposed extraordinary interrogation techniques. The senior lawyer for the Air Force cited “serious concerns regarding the legality of many of the proposed techniques.” The Chief of the Army’s International and Operational Law Division wrote that the techniques “cross the line of ‘humane’ treatment” and would “likely be considered maltreatment” under the Uniform Code of Military Justice and “may violate the torture statute.” The senior lawyer of the Marine Corps stated that the requested techniques “arguably violate federal law, and would expose our service members to possible prosecution.”⁵⁵

At this time, the State Department Legal Adviser remained shut out of the process. It is worth speculating whether if “L” had joined the campaign on the side of the professional military lawyers, this combined effort might have been sufficient to steer U.S. policy back within the framework of international law.

Despite the concerns raised by the senior lawyers of the military services, on November 27, 2002, Jim Haynes, the Pentagon’s chief lawyer (and a member of the “War Council”), sent a one-page memorandum to Secretary of Defense Rumsfeld, recommending that he approve the techniques requested by Guantanamo Bay. A few days later, on December 2, 2002, Secretary Rumsfeld signed off on Haynes’ recommendation.⁵⁶ By December 30, 2002, the interrogators at Guantanamo Bay were employing the extraordinary interrogation techniques (including hooding, removal of clothing, stress positions, twenty-hour interrogations, and use of dogs) on

55. S. ARMED SERVICES COMM., INQUIRY, *supra* note 15, at xviii.

56. *Id.* at xix.

Mohammed al Qahtani and several other detainees.⁵⁷ In January 2003, these same techniques were being used at the U.S. detention center at Bagram Airfield in Afghanistan, and eventually migrated to the Abu Ghraib detention facility in Iraq.⁵⁸

During this period, Navy General Counsel Alberto Mora intensively engaged with Haynes concerning his reservations about the interrogation techniques that had been approved for Guantanamo Bay, opining that they “could rise to the level of torture,” and “could threaten Secretary Rumsfeld’s tenure and could even damage the Presidency.”⁵⁹ He prepared a memorandum to that effect, which he threatened to sign unless he heard definitively that the use of the techniques had been suspended.

In part as a result of Mora’s concerns/threats, Secretary Rumsfeld signed a memorandum rescinding authority for the techniques on January 15, 2003. That same day, Rumsfeld directed the establishment of a “Working Group” to review the interrogation techniques and requested another legal opinion from OLC in light of the objections that had been raised.⁶⁰ Importantly, the working group did not include the State Department Legal Adviser.

On March 14, 2003, John Yoo provided an OLC memorandum to the Working Group that repeated much of what the first Bybee memorandum had said six months earlier about the definition of torture.⁶¹ In addition, it advised that interrogators could not be prosecuted by the Justice Department for using interrogation methods that would otherwise violate the law because federal criminal laws of general applicability do not apply to properly authorized interrogations of enemy combatants undertaken by military personnel in the course of armed conflict. The basis for this finding was that “such criminal statutes, if they were misconstrued to apply to the

57. *See id.* at xx.

58. *See id.* at xxii-iii. In his “insider’s account of the war on terror,” John Yoo dismisses the migration theory as “an exercise in hyperbole and partisan smear.” YOO, *supra* note 18, at 168. According to the bipartisan Senate Committee Report, however, “The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO [Guantanamo Bay].” S. ARMED SERVICES COMM., INQUIRY, *supra* note 15, at xxix.

59. S. ARMED SERVICES COMM., INQUIRY, *supra* note 15, at xxi; *id.* at 107.

60. *Id.* at xxi.

61. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel of the U.S. Dep’t of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States [hereinafter Military Interrogation of Alien Unlawful Combatants Held Outside the U.S. Memo], available at www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

interrogation of enemy combatants, would conflict with the Constitution's grant of the commander in chief power solely to the president."⁶²

Yoo's March 14 memorandum also asserted that based on the U.S. reservation to the Convention against Torture, "the United States' obligation extends only to conduct that is 'cruel and unusual' within the meaning of the Eighth Amendment or otherwise 'shocks the conscience' under the Due Process Clauses of the Fifth and Fourteenth Amendments."⁶³ In response to the State Department Legal Adviser's earlier assertions concerning customary international law, the memorandum argued that customary international law could not impose a standard that differs from U.S. obligations under the Convention against Torture, and those obligations must be narrowly interpreted through U.S. domestic law. The memorandum went further to assert that, "[i]n any event, our previous opinions make clear that customary international law is not federal law and that the President is free to override it at his discretion."⁶⁴ The memorandum concluded with a reaffirmation and possible expansion of the ticking time bomb exception by noting that necessity or self-defense could provide defenses to a prosecution based on allegations that an interrogation method might violate any of the various criminal prohibitions.⁶⁵

Armed with the new OLC memo, on April 16, 2003, Secretary Rumsfeld authorized twenty-four specific interrogation techniques for use at Guantanamo Bay. In addition, the secretary's memorandum stated that "if, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee." Rumsfeld subsequently approved specific requests for hooding, sensory deprivation, and "sleep adjustment."⁶⁶

According to the December 2008 Senate Armed Services Committee Report, "senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."⁶⁷ The Committee found that the Secretary of Defense's authorization of aggressive interrogation tactics were a direct cause of detainee abuse at Guantanamo Bay and contributed to the use of abusive

62. *Id.* at 1.

63. *Id.*

64. *Id.* at 2.

65. *Id.* at 74-80.

66. S. ARMED SERVICES COMM., INQUIRY, *supra* note 15, at xxii.

67. *Id.* at xii.

tactics in Afghanistan and Iraq.⁶⁸ Specifically with respect to the memoranda written by the OLC, the Report states: “Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.”⁶⁹

By interpreting away the obligations of the Torture Convention, the U.S. Government opened itself up to the possibility that its military and intelligence personnel might cross the line, and that abuses would migrate from the highly monitored Guantanamo interrogation center to detention facilities in Afghanistan and Iraq. According to William Taft, it is “highly regrettable that the Legal Adviser’s Office was not involved in the legal work following the decisions in February 2002”; had “L” been involved, “several conclusions that were not consistent with our treaty obligations under the Convention against Torture and our obligations under customary international law would not have been reached.”⁷⁰

II. REALIGNING U.S. INTERROGATION POLICY AND INTERNATIONAL LAW

In late 2003 and 2004, U.S. policy began to haltingly realign with international law. This realignment was driven by greater public awareness of the conditions of detention of suspected terrorists, personnel change at the OLC, the intervention of Congress and the Supreme Court, and the reengagement of “L.”

A. OLC Rescinds the Yoo Memo

In October 2003 Jack Goldsmith became head of the Department of Justice’s Office of Legal Counsel. Early in his tenure Goldsmith withdrew the controversial August 1, 2002 and March 14, 2003 OLC opinions that described what constituted prohibited acts of torture and whether the federal torture statute would apply to U.S. military interrogations of “unlawful enemy combatants.”⁷¹ Goldsmith explained that he rescinded the torture memoranda because he thought the memoranda “rested on cursory

68. *Id.* at xxviii.

69. *Id.* at xxvii.

70. Taft, *supra* note 22, at 130.

71. GOLDSMITH, *supra* note 2, at 141-60.

and one-sided legal arguments,” and were “legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary.”⁷²

Goldsmith, however, did not rescind the second August 1, 2002 OLC memorandum, issued to the CIA, which concluded that specific proposed techniques including water boarding were compatible with international law.⁷³ Goldsmith left the memorandum to the CIA in place in order to provide CIA personnel with what Goldsmith describes as a “golden shield”⁷⁴ that would protect them against prosecutions under the Federal War Crimes Act (implementing U.S. obligations under the Geneva Conventions) and the Federal Anti-Torture Act (implementing U.S. obligations under the Torture Convention).⁷⁵ The effect was, however, to permit the continued and expanded use of water boarding and other abusive techniques by CIA interrogators. Goldsmith also drafted a March 19, 2004 memorandum, which opined that it was legal for the United States to seize noncitizens from Iraq or other territory over which it exercises de facto control and transfer them for purposes of interrogation in other countries. This memorandum provided legal cover for the CIA’s controversial policy of “rendition.”⁷⁶

B. Legislative and Judicial Responses

In 2005, the U.S. Congress passed the Detainee Treatment Act (popularly known as the McCain amendment),⁷⁷ which provided that detainees held in U.S. military custody were entitled to the protections of

72. *Id.* at 149, 151. According to John Yoo, notably, the 2004 OLC memo that replaced Yoo’s 2002 work contained a footnote saying that “all interrogation methods that earlier opinions had found legal were still legal.” YOO, *supra* note 18, at 183.

73. GOLDSMITH, *supra* note 3, at 155-56.

74. *Id.* at 144. In explaining why he did not rescind the August 1, 2002 Yoo/Bybee memorandum to the CIA, Goldsmith writes: “And in contrast to my sense of the Defense Department techniques [which Goldsmith believed would be legally justified under proper legal analysis], I wasn’t as confident that the CIA techniques [including waterboarding] could be approved under a proper legal analysis. I didn’t affirmatively believe they were illegal either, or else I would have stopped them. I just didn’t know yet. And I wouldn’t know until we had figured out the proper interpretation of the torture statute, and whether the CIA techniques were consistent with that proper legal analysis.” *Id.* at 155-56.

75. Yoo has asserted that Goldsmith’s withdrawal of Yoo’s 2002 opinion was merely “for appearances’ sake” to divert public criticism in the immediate aftermath of the Abu Ghraib controversy. “In the real world of interrogation policy nothing had changed.” YOO, *supra* note 18, at 182-83.

76. This approach has been described as a “roadmap to the outsourcing of torture and other forms of abuse” to Egypt, Jordan, Morocco, Saudi Arabia, Yemen, & Syria. José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 210-11, 213 (2006).

77. Pub. L. 109-148, 119 Stat. 2680, 2739-44 (2005), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>. To avoid the President’s threatened veto, the Detainee Treatment legislation was revised before enactment to exempt the CIA from its requirements and to stipulate that detainees do not have a right to challenge their detention in U.S. court.

the Geneva Conventions. While the McCain amendment ended extraordinary interrogation by members of the U.S. armed forces, it did not apply to CIA personnel, and as a result the interrogations of high-level al Qaeda operatives were moved under the control of the CIA.

Meanwhile, in 2004, 2006, and 2008, the U.S. Supreme Court issued a trio of decisions on the detainee issue that began to swing the pendulum back in line with international legal standards and away from unfettered presidential power in the war on terrorism. In 2004, the Court decided the case of *Rasul v. Bush*, rejecting by a 6-3 majority the president's contention that Guantanamo Bay was outside of the jurisdiction of U.S. courts, and ruling that detainees there must be provided access to legal assistance and given judicial review of the legality of their detention.⁷⁸ The Bush administration sought to implement the *Rasul* decision by establishing a Combatant Status Review Tribunal at Guantanamo Bay to determine on a case-by-case basis the status of the Guantanamo Bay detainees.⁷⁹ The Combatant Status Review Tribunal process did not, however, provide the detainees assistance of counsel or any means to find or present evidence to challenge the government's case, and was later overturned by the Supreme Court.

Next, in the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court held by a 5-3 majority that the military tribunals established by executive order to prosecute accused al Qaeda terrorists were unlawful because their procedures "violate both the Uniform Code of Military Justice and the four Geneva Conventions of 1949."⁸⁰ The Supreme Court confirmed that Common Article 3 of the Geneva Conventions applied to all Guantanamo detainees, whether they were Taliban or al Qaeda. "Common Article 3," wrote the Court, "affords some minimal protection, falling short of full protection under the Conventions, to individuals . . . who are involved 'in a conflict in the territory of' a signatory."⁸¹ The Court reached this conclusion by looking at the official commentaries to the Geneva Convention, which confirmed its wide scope. The Court invoked the *U.S. Army's Law of War Handbook*, which described Common Article 3 as "a minimum yardstick of protection in all conflicts, not just internal armed

78. *Rasul v. Bush*, 542 U.S. 466 (2004).

79. U.S. DEP'T OF DEF., DEPUTY SEC'Y OF DEF., ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL (2004), available at www.defenselink.mil/news/Jul2004/d20040707review.pdf.

80. *Hamdan v. Rumsfeld*, 548 U.S. 557, 560 (2006).

81. *Id.* at 562.

conflicts.”⁸² The Court also relied on decisions of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia.⁸³

Shortly thereafter, at the urging of President George W. Bush, the U.S. Congress responded by enacting the Military Commissions Act of 2006, which provided a legislative basis for military commissions to try unlawful enemy combatants at Guantanamo Bay and stripped the federal courts of jurisdiction to hear suits by enemy combatants relating to any aspect of their transfer, detention, treatment, trial, or conditions of confinement.⁸⁴ Two years later, in the case of *Boumediene v. Bush*, the Supreme Court declared parts of the Military Commissions Act unconstitutional, determined that the Combatant Status Review Tribunals were “inadequate,” and ruled that the 270 foreign detainees held for years at Guantanamo Bay have the right to appeal to U.S. civilian courts to challenge their indefinite imprisonment without charges.⁸⁵ Justice Anthony Kennedy, writing for the 5-4 majority, acknowledged the terrorism threat the United States faces, but he declared: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times.”⁸⁶

On January 14, 2009, Susan Crawford, the Bush administration-appointed Convening Authority of the U.S. Military Commissions and a former chief judge of the U.S. Court of Appeals for the Armed Forces, announced the dropping of charges against Mohamed al Qahtani, the detainee for whom the enhanced interrogation policy was originally designed. Without equivocation, Crawford declared, “We tortured al Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case [for prosecution].”⁸⁷

C. The Re-engagement of “L”

During the final years of the Bush administration, the State Department Legal Adviser, which had been frozen out of the initial legal/policy decisions, began to play an increasingly important role in seeking to “clarify and adopt a more robust legal framework for the

82. *Id.* at 631 n.63.

83. *Id.* at 611 n.40, 631 n.63.

84. Pub. L. 109-366, 120 Stat. 2600 (2006), available at www.loc.gov/tr/frd/Military_Law/pdf/PL-109-366.

85. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008).

86. *Id.* 128 S. Ct. at 2277.

87. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

detention, treatment, and prosecution of captured terrorists.”⁸⁸ The Legal Adviser was effective in working with the Secretary of State to persuade the president that most al Qaeda detainees should be moved from CIA custody to the military base at Guantanamo Bay, thereby bringing them within the coverage of the Detainee Treatment Act. The Legal Adviser was also able to convince the White House that the detainees at Guantanamo should be granted access to the International Committee of the Red Cross (“ICRC”), and the ICRC subsequently issued several reports that put pressure on the Bush Administration to make other reforms in its detention policies.⁸⁹ The Legal Adviser was also called on to fulfill the role of rebuilding relationships with America’s allies on the question of the application of international law in the war on terror.⁹⁰ In this regard the Legal Adviser initiated a series of bilateral and multilateral meetings and conferences designed to attempt to harmonize the approaches of America and its allies to developing an effective legal framework for combating terrorism. The Legal Adviser was also tasked with facilitating interaction between the ICRC and the White House, State Department, and the CIA.⁹¹

D. Changing of the Guard

In the years following the leaked publication of the torture memoranda and abuse photos from Abu Ghraib, the debate over the legal framework for the conduct of the war on terror had become so intense that it was regularly addressed on the campaign trail. During Barack Obama’s campaign, Greg Craig, then candidate Obama’s foreign policy adviser and later President Obama’s White House counsel, made clear during public presentations that the United States’ international legal obligations would set the foundation for the Obama administration’s policy decisions.⁹²

88. John B. Bellinger III, *The Bush (43rd) Administration – John B. Bellinger III (2005-2009)*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 143.

89. *Id.* at 144.

90. For a review of the views relating to the legality of the Guantanamo detentions and the treatment of detainees by the UN Secretary-General, the UN Special Rapporteurs on Torture and Arbitrary Detention, the U.K. House of Commons, the Int’l Comm. of the Red Cross, and the Inter-Am. C.H.R., see UN ECOSOC, Comm. On Human Rights, Situation of Detainees at Guantanamo Bay, UN Doc. E/CN.4/2006/120 (Feb. 15, 2006); Foreign Affairs Comm., Human Rights Annual Report 2005, 2004–05, H.C. 574, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/57402.htm>; Neil Lewis, *Red Cross Finds detainee Abuse in Guantanamo*, N.Y. TIMES, November 30, 2004, at A1; Inter-Am.C.H.R., Detainees at Guantanamo Bay, Cuba (March 12, 2002), available at http://www.photius.com/rogue_nations/guantanamo.html.

91. Bellinger, *supra* note 88, at 137.

92. See Greg Craig, Remarks at the Council of Foreign Relations Symposium on International Law and Justice, Session 2: U.S. Engagement in the International Legal System, (October 17, 2008), available at http://www.cfr.org/publication/17579/session_two.html.

Among other things, Craig stated that Obama would close the Guantanamo Bay detention facility and restore habeas corpus for those detainees, use either military courts martial or the federal courts to try detainees, enforce the prohibition on torture, and end the practice of secret detentions and the practice of extraordinary renditions.⁹³

Just two days into his presidency, on January 22, 2009, President Obama took an important step toward further realigning U.S. policies with international law by signing executive orders requiring the closure of the Guantanamo Bay facility within twelve months,⁹⁴ the dismantling of the CIA's network of secret prisons around the globe, and the prohibition on the CIA's use of coercive interrogation methods that deviate from the requirements of the Army Field Manual.⁹⁵ The executive order on Interrogations specifically prohibits U.S. government personnel or agents from relying on the Bush administration OLC memoranda in interpreting federal criminal laws, the Convention against Torture, or the requirements of Common Article 3 of the Geneva Conventions.⁹⁶

CONCLUSION

The Department of Justice's 2009 probe into the White House Torture Memos included the following observations under the heading "institutional concerns":

[W]e found that the review of the OLC memoranda within the Department and the national security arena was deficient. The memoranda were not circulated to experts on national security law in the Criminal Division, or to the State Department, which had an interest in the interpretation of treaties. Given the significance of the issue – opining on the CIA's use of . . . [extraordinary interrogation techniques] to gain intelligence in the absence of clear precedent on the issue – and the pressure of knowing that missed intelligence might result in another terrorist attack, the memoranda should have been circulated to all attorneys and policy makers with expertise and a stake in the issues involved.⁹⁷

93. James Risen, *The Executive Power Awaiting the Next President*, N.Y. TIMES, June 22, 2008, at Week in Review, <http://www.nytimes.com/2008/06/22/weekinreview/22risen.html>.

94. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

95. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009) available at <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>.

96. *Id.* at 4894.

97. OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 3, at 259-60.

It is particularly important to have the State Department Legal Adviser's input in such a case for several reasons. Unlike the lawyers involved in the "War Council," the State Department Legal Adviser must be confirmed by the Senate, which ensures that persons with radical conceptions of the law will not be appointed to the post. Second, the Legal Adviser's opinion draws on the expertise of 170 international legal experts in the office, many of whom have been in the government for many years. They therefore have both greater expertise in international law than attorneys in the Justice Department or White House, but also have more interactions with foreign counterparts and more experience regarding the effects of violation of international law on American foreign policy.

The positions taken by the State Department Legal Adviser and his counterparts in the military services during the Bush administration demonstrated that important bureaucratic players perceived the Geneva Conventions, the Torture Convention, and customary international law as applicable and binding. Like the Office of the State Department Legal Adviser,⁹⁸ the legal offices of the various military services were staffed by careerists who had internalized and absorbed a strong belief in the constraints and value of international law. General Richard Myers, the Chairman of the Joint Chiefs of Staff under George W. Bush, explained the nature of this culture of compliance in the following terms: "We train our people to obey the Geneva Conventions, it's not even a matter of whether it is reciprocated – it's a matter of who we are."⁹⁹

Importantly, these career lawyers were concerned about the repercussions of noncompliance with international law. They repeatedly warned about reciprocity costs and the prospects of prosecution for violating the international prohibition against torture. Of primary concern was the perceived effect on bilateral relations and long-term multilateral or systemic reciprocity.

"To maximize their legal influence, State Department Legal Advisers found that they had to be much more than gifted lawyers and administrators; they also had to be skillful and sometimes aggressive bureaucrats, unafraid to tackle the internecine turf battles that were inherent in the interagency process. Often the most important battle was simply to ensure that L had a proverbial 'seat at the table.'¹⁰⁰

98. Davis R. Robinson, *Department of State Legal Advisers' Roundtable*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 152 (describing L as "the moral conscience of American foreign policy").

99. SANDS, *supra* note 6, at 33. *See also* MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 332-33 (2009).

100. SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 211.

In a handful of notable occasions over the years the State Department Legal Adviser has been intentionally kept out of the decision making process, even on matters that turned entirely on interpretation of international law. This tended to happen when State Department officials from other bureaus or government officials from other departments or agencies foresaw that “L” would likely oppose a proposed course of action. As Davis Robinson, the State Department Legal Adviser during the Reagan Administration, put it: “[S]ome policymakers will on occasion assume the following attitude: ‘Oh, let’s not involve [L]. First, they are likely to say no. Second, they will take forever—they are so slow. And, if you’re not careful, once they get involved, they will run away with your store.’”¹⁰¹ State Department Legal Advisors have acknowledged the following cases in which “L” was cut out of the decision making process: the 1980s mining of Nicaraguan harbors¹⁰² and armed support for the Contras,¹⁰³ the 1990 kidnapping Dr. Alvarez-Machain from Mexico,¹⁰⁴ and as detailed in this article the adoption of policies related to treatment of detainees in the aftermath of the attacks on 9/11.¹⁰⁵

The same policy makers that cut the State Department Legal Adviser out of the decision-making process, however, display no hesitancy in seeking “L”’s assistance in crafting after-the-fact legal justifications for the decisions and actions taken. As Stephen Schwebel, a former Deputy Legal

101. Davis R. Robinson, *The Reagan Administration - Davis R. Robinson (1981-1985)*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 56.

102. Robinson, *supra* note 98, at 164 (“That was a contrast with the mining of the Nicaragua harbors where I’m sorry to say we knew absolutely nothing in advance But when it comes to use of force, I would argue, over the years, there’s been a lot of skepticism about including the lawyers – for example, in planning covert operations. As far as I know, in a covert operation international law still applies, so if someone’s going to undertake some secret operation involving the use of force, it’s better to have the legal argument in place before undertaking it.”).

103. Abe Sofaer, *Department of State Legal Adviser’s Roundtable*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 166 (“[W]hen they don’t ask us it’s almost always a disaster. I think you could do a chart and show that when the Legal Adviser was not consulted about some major use of force or some major foreign issue, it would often turn out to be an Iran-Contra or some other mistake of that scale. They don’t talk to us then because they don’t want to be told ‘no’”).

104. Abe Sofaer, *The Bush (41st) Administration - Edwin D. Williamson (1990-1993)*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 93 (“The *Alvarez-Machain* case is another example . . . of . . . the strong correlation between disastrous policies and failure to consult in advance with the international lawyers. In the *Alvarez-Machain* case, not only was the Legal Adviser’s office not consulted, but the Justice Department didn’t even consult the White House. They went ahead and seized this doctor from Mexico in a secret operation and brought him to the United States, took the case all the way up to the Supreme Court, and then lost the trial. It had a negative affect on our foreign policy, and several countries required that we provide assurances that we would not kidnap citizens from their territory.”).

105. Taft, *supra* note 22, at 129-30.

Adviser who later served as president of the International Court of Justice, once remarked: “The . . . [Legal Adviser] is always called in to pick up the pieces even if he was not influentially involved in the initial decision”¹⁰⁶ Thus, in relation to the mining of Nicaragua’s harbors, former Legal Adviser Davis Robinson said: “[As it turned out], all that the lawyers could contribute was assistance in after-the-fact containment of a train wreck. I remember one Secretary of State under whom I served stating: ‘I have only one rigid rule and that is, don’t ever let me be blindsided.’ I can only have wished that this sensible rule had applied to L as well.”¹⁰⁷

Former UK Legal Adviser Sir Frank Berman offers a comparative perspective on this problem:

Probably the most notorious incident where the UK Legal Adviser was deliberately cut out of the loop was the 1956 Suez invasion. But I would say that the lessons of that experience have generally been learned for the future. It is considered a cardinal sin within the U.K. Foreign Office to put up a policy submission that did not clearly recite that the Legal Adviser or his staff had been consulted, or that did not include an analysis of the legal questions that were relevant to the decision. If the submission did not contain this, then any legitimate senior official or minister would send it back for a complete analysis to know what the law stated.¹⁰⁸

The United States would do well to adopt a similar internal rule requiring the Legal Adviser’s input on policy matters involving international law. As Davis Robinson summed up: “The main lesson that I drew from my days in L is that, if the U.S. Government is to realize the full benefit of the potential contribution of its international lawyers, the lawyers need to participate from the beginning of a takeoff in policy and not just in a crash landing whenever things go wrong.”¹⁰⁹

106. Stephen M. Schwebel, *Remarks on the Role of the Legal Advisor of the US State Department*, 2 EUR. J. INT’L L. 132, 134 (1991).

107. Robinson, *supra* note 101, at 60.

108. Sir Frank Berman, *Foreign Legal Advisers’ Roundtable*, in SCHARF & WILLIAMS, *SHAPING FOREIGN POLICY*, *supra* note 20, at 178 (citation omitted).

109. Robinson, *supra* note 101, at 55.