THE BUSH ADMINISTRATION TORTURE MEMO SCANDAL

THE MEMOS (all in PDF format):

Memo of Patrick F. Philbin and John C. Yoo, Office of Legal Counsel, Department of Justice, to William J. Haynes, II, General Counsel, Department of Defense, "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," 28 December 2001.

Memo of John C. Yoo and Robert J. Delahunty, Office of Legal Counsel, Department of Justice, to William J. Haynes, II, General Counsel, Department of Defense, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," 9 January 2002. (Also here: Yoo's Memo on Avoiding the Geneva Convention Restrictions)

> These two memorandums from the Justice Department, both written by John C. Yoo, a University of California law professor who was serving in the department, provided arguments to keep United States officials from being charged with war crimes for the way prisoners were detained and interrogated. The memorandums, principally the one written on January 9, provided legal arguments to support Bush administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan.

Memo of Alberto R. Gonzales, Counsel to the President, to President George W. Bush, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 25 January 2002. (Also here: Gonzales's Memo to Bush)

> White House Counsel Alberto R. Gonzales, in a memorandum to President Bush, said that the Justice Department's advice in the January 9 memorandum was sound and that Mr. Bush should declare the Taliban and Al Qaeda outside the coverage of the Geneva Conventions. That would keep American officials from being exposed to the federal War Crimes Act, a 1996 law that carries the death penalty.

Memo of William H. Taft, IV, The Legal Adviser, Department of State, to Alberto R. Gonzales, Counsel to the President, "Comments on Your Paper on the Geneva Convention," 2 February 2002. (Also here: Taft's Memo on the Dangers of Rejecting the Geneva Conventions)

> A memorandum from William H. Taft, IV, the State Department's legal adviser, to Mr. Gonzales warned that the broad rejection of the Geneva Conventions posed several problems. "A decision that the conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the conventions in the event they are captured." An attachment to this memorandum, written by a State Department lawyer, showed that most of the administration's senior lawyers agreed that the Geneva Conventions were inapplicable. The

attachment noted that C.I.A. lawyers asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

Report of the International Committee of the Red Cross, "On the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation," February, 2002.

This report by the Red Cross warns that the Geneva Convention, to which the United States is a signatory, requires that all prisoners in Iraq be considered prisoners of war and treated accordingly.

Memo of Jay S. Bybee, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," 1 August 2002. (Also here: Bybee's Justice Department Memo on Torture, Letter by Bybee on Torture to White House Counsel)

This memorandum provided a justification for using torture to extract information from al Qaeda operatives. It provides very narrow definitions of torture that were devised to allow interrogators to evade being charged with that offense. The legal defintions in this memo allowed President Bush to claim that the United States "does not conduct torture," and "follows the law because we are a nation of laws."

"Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," Department of Defense, 6 March 2003.

This report, prepared by a Defense Department legal task force, drew on the January 2002 and August 2002 memos to declare that President Bush was not bound by either an international treaty prohibiting torture or by a federal anti-torture law, because he had the authority as commander in chief to approve any technique needed to protect the nation's security. This report also said that executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons, including a belief by interrogators that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful."

Memo from Secretary of Defense Donald H. Rumsfeld to Gen. James T. Hill, "Counter-Resistance Techniques in the War on Terrorism," 2 April 2003. (Also here: Rumsfeld's Memo on Interrogation Techniques)

A memorandum from Secretary of Defense Donald H. Rumsfeld to Gen. James T. Hill outlines 24 permitted interrogation techniques, 4 of which were considered stressful enough to require Mr. Rumsfeld's explicit approval. Defense Department officials say it did not refer to the legal analysis of the month before.

NEWS REPORTS:

Double Standards?

A Justice Department memo proposes that the United States hold others accountable for international laws on detainees--but that Washington did not have to follow them itself

(Photo) An interrogation room at Guantanamo Bay. The Bush administration has said that detainees questioned there are not protected by the Geneva Conventions.

By Michael Isikoff
Investigative Correspondent
Newsweek
May 21, 2004 (Updated: May 25, 2004)
http://www.msnbc.msn.com/id/5032094/site/newsweek/

In a crucial memo written four months after the September 11, 2001, terror attacks, Justice Department lawyers advised that President George W. Bush and the U.S. military did not have to comply with any international laws in the handling of detainees in the war on terrorism. It was that conclusion, say some critics, that laid the groundwork for aggressive interrogation techniques that led to the abuses at the Abu Ghraib prison in Iraq.

The draft memo, which drew sharp protest from the State Department, argued that the Geneva Conventions on the treatment of prisoners of war did not apply to any Taliban or Al Qaeda fighters being flown to the detention center at Guantanamo Bay, Cuba, because Afghanistan was a "failed state" whose militia did not have any status under international treaties.

But the Jan. 9, 2002 memo, written by Justice lawyers John Yoo and Robert J. Delahunty, went far beyond that conclusion, explicitly arguing that no international laws&emdash;including the normally observed laws of war&emdash;applied to the United States at all because they did not have any status under federal law.

"As a result, any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of Al Qaeda and the Taliban," according to a copy of the memo obtained by NEWSWEEK.   A copy of the memo is being posted today on NEWSWEEK's Web site.

At the same time, and even more striking, according to critics, the memo explicitly proposed a de facto double standard in the war on terror in which the United States would hold others accountable for international laws it said it was not itself obligated to follow.

After concluding that the laws of war did not apply to the conduct of the U.S. military, the memo argued that President Bush could still put Al Qaeda and Taliban fighters on trial as war criminals for violating those same laws. While acknowledging that this may seem "at first glance, counter-intuitive," the memo states this is a product of the president's constitutional authority "to prosecute the war effectively."

The two lawyers who drafted the memo, entitled "Application of Treaties and Laws to Al Qaeda and Taliban Detainees," were key members of the Justice Department's Office of Legal Counsel, a unit that provides legal advice to the White House and other executive-branch agencies. The lead author, John Yoo, a conservative law professor and expert on international law who was at the time deputy assistant attorney general in the office, also crafted a series of related memos&emdash;including one putting a highly restrictive interpretation on an international torture convention&emdash;that became the legal framework for many of the Bush administration's post-9/11 policies. Yoo also coauthored another OLC memo entitled "Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba," that concluded that U.S. courts could not review the treatment of prisoners at the base.

Critics say the memos' disregard for the United States' treaty obligations and international law paved the way for the Pentagon to use increasingly aggressive interrogation techniques at Guantanamo Bay&emdash;including sleep deprivation, use of forced stress positions and environmental manipulation&emdash;that eventually were applied to detainees at the Abu Ghraib prison in Iraq. The customary laws of war, as articulated in multiple international treaties and conventions dating back centuries, also prohibit a wide range of conduct such as attacks on civilians or the murder of captured prisoners.

Kenneth Roth, the executive director of Human Rights Watch, who has examined the memo, described it as a "maliciously ideological or deceptive" document that simply ignored U.S. obligations under multiple international agreements. "You can't pick or choose what laws you're going to follow," said Roth. "These political lawyers set the nation on a course that permitted the abusive interrogation techniques" that have been recently disclosed.

When you read the memo, "the first thing that comes to mind is that this is not a lofty statement of policy on behalf of the United States," said Scott Horton, president of the International League for Human Rights, in an interview scheduled to be aired tonight on PBS's "Now with Bill Moyers" show. "You get the impression very quickly that it is some very clever criminal defense lawyers trying to figure out how to weave and bob around the law and avoid its applications."

At the time it was written, the memo also prompted a strong rebuttal from the State Department's Legal Advisor's office headed by William Howard Taft IV. In its own Jan. 11, 2002, response to the Justice draft, Taft's office warned that any presidential actions that violated international law would "constitute a breach of an international legal obligation of the United States" and "subject the United States to adverse international consequences in political and legal fora and potentially in the domestic courts of foreign countries."

"The United States has long accepted that customary international law imposes binding obligations as a matter of international law," reads the State Department memo, which was also obtained by NEWSWEEK. "In domestic as well as international fora, we often invoke customary international law in articulating the rights and obligations of States, including the United States. We frequently appeal to customary international law." The memo then cites numerous examples, ranging from the U.S. Army Field Manual on the Law of Land Warfare ("The unwritten or customary law of war is binding upon all nations," it reads) to U.S. positions in international issues such as the Law of the Sea.

But the memo also singled out the potential problems the Justice Department position would have for the military tribunals that President Bush had recently authorized to try Al Qaeda members and suspected terrorists. Noting that White House counsel Alberto Gonzales had publicly declared that the persons tried in such commissions would be charged with "offenses against the international laws of war," the State Department argued that the Justice position would undercut the basis for the trials.

"We are concerned that arguments by the United States to the effect that customary international law is not binding will be used by defendants before military commissions (or in proceedings in federal court) to argue that the commissions cannot properly try them for crimes under international law," the State memo reads. "Although we can imagine distinctions that might be offered, our attempts to gain convictions before military commissions may be undermined by arguments which call into question the very corpus of law under which offenses are prosecuted."

The Yoo-Delahunty memo was addressed to William J. Haynes, then general counsel to the Defense Department. But administration officials say it was the primary basis for a Jan. 25, 2002, memo by White House counsel Gonzales&emdash;which has also been posted on NEWSWEEK's Web site&emdash;that urged the president to stick to his decision not to apply prisoner-of-war status under the Geneva Conventions to captured Al Qaeda or Taliban fighters. The president's decision not to apply such status to the detainees was announced the following month, but the White House never publicly referred to the Justice conclusion that no international laws&emdash;including the usual laws of war&emdash;applied to the conflict.

One international legal scholar, Peter Spiro of Hofstra University, said that the conclusions in the memo related to international law "may be defensible" because most international laws are not binding in U.S. courts. But Spiro said that "technical" and "legalistic" argument does not change the effect that the United States still has obligations in international courts and under international treaties. "The United States is still bound by customary international law," he said.

One former official involved in formulating Bush administration policy on the detainees acknowledged that there was a double standard built into the Justice Department position, which the official said was embraced, if not publicly endorsed, by the White House counsel's office. The essence of the argument was, the official said, "it applies to them, but it doesn't apply to us."

But the official said this was an eminently defensible position because there were many categories of international law, some of

which clearly could not be interpreted to be binding on the president. In any case, the general administration position of not applying any international standards to the treatment of detainees was driven by the paramount needs of preventing another terrorist attack. "The Department of Justice, the Department of Defense and the CIA were all in alignment that we had to have the flexibility to handle the detainees&emdash;and yes, interrogate them&emdash;in ways that would be effective," the official said.

Memo offered justification for use of torture

Justice Department gave advice in 2002

By Dana Priest and R. Jeffrey Smith
The Washington Post
June 07, 2004
http://www.msnbc.msn.com/id/5159903/

In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in President Bush's war on terrorism, according to a newly obtained memo.

If a government employee were to torture a suspect in captivity, "he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network," said the memo, from the Justice Department's office of legal counsel, written in response to a CIA request for legal guidance. It added that arguments centering on "necessity and self-defense could provide justifications that would eliminate any criminal liability" later.

The memo seems to counter the pre-Sept. 11, 2001, assumption that U.S. government personnel would never be permitted to torture captives. It was offered after the CIA began detaining and interrogating suspected al Qaeda leaders in Afghanistan and elsewhere in the wake of the attacks, according to government officials familiar with the document.

The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques.

Bush administration officials say flatly that, despite the discussion of legal issues in the two memos, it has abided by international conventions barring torture, and that detainees at Guantanamo and elsewhere have been treated humanely, except in the cases of

abuse at Abu Ghraib prison in Iraq for which seven military police soldiers have been charged.

Still, the 2002 and 2003 memos reflect the Bush administration's desire to explore the limits on how far it could legally go in aggressively interrogating foreigners suspected of terrorism or of having information that could thwart future attacks.

In the 2002 memo, written for the CIA and addressed to White House Counsel Alberto R. Gonzales, the Justice Department defined torture in a much narrower way, for example, than does the U.S. Army, which has historically carried out most wartime interrogations.

Avoiding legal accountability

In the Justice Department's view -- contained in a 50-page document signed by Assistant Attorney General Jay S. Bybee and obtained by The Washington Post -- inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says, "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

By contrast, the Army's Field Manual 34-52, titled "Intelligence Interrogations," sets more restrictive rules. For example, the Army prohibits pain induced by chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under mental torture, the Army prohibits mock executions, sleep deprivation and chemically induced psychosis.

Human rights groups expressed dismay at the Justice Department's legal reasoning yesterday.

"It is by leaps and bounds the worst thing I've seen since this whole Abu Ghraib scandal broke," said Tom Malinowski of Human Rights Watch. "It appears that what they were contemplating was the commission of war crimes and looking for ways to avoid legal accountability. The effect is to throw out years of military doctrine and standards on interrogations."

But a spokesman for the White House counsel's office said, "The president directed the military to treat al Qaeda and Taliban humanely and consistent with the Geneva Conventions."

Mark Corallo, the Justice Department's chief spokesman, said "the department does not comment on specific legal advice it has provided confidentially within the executive branch." But he added: "It is the policy of the United States to comply with all U.S. laws in the treatment of detainees -- including the Constitution, federal statutes and treaties." The CIA declined to comment.

The Justice Department's interpretation for the CIA sought to provide guidance on what sorts of aggressive treatments might not fall

within the legal definition of torture.

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"While we cannot say with certainty that acts falling short of these seven would not constitute torture," the memo advised, ". . . we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law."

"For purely mental pain or suffering to amount to torture," the memo said, "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Examples include the development of mental disorders, drug-induced dementia, "post traumatic stress disorder which can last months or even years, or even chronic depression."

Wartime authority

Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to case severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute."

In 2003, the Defense Department conducted its own review of the limits that govern torture in consultation with experts at the Justice Department and other agencies. The aim of the March 6, 2003, review, conducted by a working group that included representatives of the military services, the Joint Chiefs of Staff and the intelligence community, was to provide a legal basis for what the group's report called "exceptional interrogations."

Much of the reasoning in the group's report and in the Justice Department 2002 memo overlap. The documents, which address treatment of al Qaeda and Taliban detainees, were not written to apply to detainees held in Iraq.

In a draft of the working group's report, for example, Pentagon lawyers approvingly cited the Justice Department's 2002 position that domestic and international laws prohibiting torture could be trumped by the president's wartime authority and any directives he issued.

At the time, the Justice Department's legal analysis, however, shocked some of the military lawyers who were involved in crafting the new guidelines, said senior defense officials and military lawyers.

"Every flag JAG lodged complaints," said one senior Pentagon official involved in the process, referring to the judge advocate generals who are military lawyers of each service.

"It's really unprecedented. For almost 30 years we've taught the Geneva Convention one way," said a senior military attorney. "Once you start telling people it's okay to break the law, there's no telling where they might stop."

A U.S. law enacted in 1994 bars torture by U.S. military personnel anywhere in the world. But the Pentagon group's report, prepared under supervision of General Counsel William J. Haynes II, said that "in order to respect the President's inherent constitutional authority to manage a military campaign . . . [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

Defining torture

The Pentagon group's report, divulged Monday by the Wall Street Journal and obtained by The Post, said further that the 1994 law barring torture "does not apply to the conduct of U.S. personnel" at Guantanamo Bay.

It also said the anti-torture law did apply to U.S. military interrogations that occurred outside U.S. "maritime and territorial jurisdiction," such as in Iraq or Afghanistan. But it said both Congress and the Justice Department would have difficulty enforcing the law if U.S. military personnel could be shown to be acting as a result of presidential orders.

The report then parsed at length the definition of torture under domestic and international law, with an eye toward guiding military personnel about legal defenses.

The Pentagon report uses language very similar to that in the 2002 Justice Department memo written in response to the CIA's request: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network," the draft states. "In that case, DOJ [Department of Justice] believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions."

The draft goes on to assert that a soldier's claim that he was following "superior orders" would be available for those engaged in "exceptional interrogations except where the conduct goes so far as to be patently unlawful." It asserts, as does the Justice view expressed for the CIA, that the mere infliction of pain and suffering is not unlawful; the pain or suffering must be severe.

A Defense Department spokesman said last night that the March 2003 memo represented "a scholarly effort to define the perimeters of the law" but added: "What is legal and what is put into practice is a different story." Pentagon officials said the group examined at

least 35 interrogation techniques, and Rumsfeld later approved using 24 of them in a classified directive on April 16, 2003, that governed all activities at Guantanamo Bay. The Pentagon has refused to make public the 24 interrogation procedures.

Staff writer Josh White contributed to this report.

Memo Offered Justification for Use of Torture

Justice Dept. Gave Advice in 2002

By Dana Priest and R. Jeffrey Smith
Washington Post Staff Writers
Tuesday, June 8, 2004; Page A01
http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html

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The memo seems to counter the pre-Sept. 11, 2001, assumption that U.S. government personnel would never be permitted to torture captives. It was offered after the CIA began detaining and interrogating suspected al Qaeda leaders in Afghanistan and elsewhere in the wake of the attacks, according to government officials familiar with the document.

The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques.

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Justice memo approved torture of al-Qaida

The document was later used in a Pentagon report regarding Guantanamo Bay rules.

By Dana Priest and R. Jeffrey Smith
The Washington Post
Tuesday, June 8, 2004
http://www.heraldnet.com/stories/04/06/08/wir_torture001.cfm

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The 2002 memo, for example, included the interpretation that "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture." The memo named seven techniques that courts have considered torture, including severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person.

"While we cannot say with certainty that acts falling short of these seven would not constitute torture," the memo advised, " ... we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law."

"For purely mental pain or suffering to amount to torture," the memo said, "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years."

U.S.'s Ashcroft Won't Release or Discuss Torture Memo

June 8, 2004
http://quote.bloomberg.com/apps/news?pid=10000103&sid=aynk7_r_cQik&refer=us

(Bloomberg) -- U.S. Attorney General John Ashcroft, warned that he might be risking a contempt citation from Congress, told lawmakers he won't release or discuss memoranda that news reports say offered justification for torturing suspected terrorists.

Democratic members of the Senate Judiciary Committee asked Ashcroft about reports in the Wall Street Journal, the Washington Post and the New York Times that the Justice Department advised the White House in 2002 and 2003 that it might not be bound by U.S. and international laws prohibiting torture. Ashcroft said he wouldn't reveal confidential advice he gave to President George W. Bush or discuss it with Congress.

"This administration rejects torture," Ashcroft said as he refused to answer whether he personally believes torture can be justified under certain circumstances. Bush "has not directed or ordered any conduct that would violate the Constitution of the United States," any U.S. laws or any international treaties, Ashcroft said.

The Washington Post, citing a Justice Department memo, said government lawyers told the White House in August 2002 that torturing captured al-Qaeda members abroad may be justified in the war on terrorism.

Senator Joseph Biden, a Delaware Democrat, challenged Ashcroft to say whether he was invoking executive privilege in refusing to give Congress the Justice Department memos. Ashcroft said he wasn't invoking executive privilege.

"You might be in contempt of Congress, then," Biden replied. "You have to have a reason. You better come up with a good rationale."

Senator Edward Kennedy, a Massachusetts Democrat, held up copies of some of the photographs that have been released that depict abuses against inmates at Abu Ghraib prison near Baghdad. Seven U.S. military police soldiers have been charged in the abuses.

"This is what directly results when you have that kind of memoranda out there," Kennedy said.

Ashcroft disagreed. "The kind of atrocities" depicted in the photographs "are being prosecuted by this administration," he said. "They are being investigated by this administration. They are rejected by this administration."

He also challenged the lawmakers on whether their questions were appropriate. "We are at war," Ashcroft said. "And for us to begin to discuss all the legal ramifications of the war is not in our best interest, and it has never been in times of war."

LEGAL OPINIONS

Lawyers Decided Bans on Torture Didn't Bind Bush

By NEIL A. LEWIS and ERIC SCHMITT

The New York Times
June 8, 2004
http://www.nytimes.com/2004/06/08/politics/08ABUS.html

WASHINGTON, June 7 &emdash; A team of administration lawyers concluded in a March 2003 legal memorandum that President Bush was not bound by either an international treaty prohibiting torture or by a federal antitorture law because he had the authority as commander in chief to approve any technique needed to protect the nation's security.

The memo, prepared for Defense Secretary Donald H. Rumsfeld, also said that any executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons.

One reason, the lawyers said, would be if military personnel believed that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful."

"In order to respect the president's inherent constitutional authority to manage a military campaign," the lawyers wrote in the 56-page confidential memorandum, the prohibition against torture "must be construed as inapplicable to interrogation undertaken pursuant to his commander-in-chief authority."

Senior Pentagon officials on Monday sought to minimize the significance of the March memo, one of several obtained by The New York Times, as an interim legal analysis that had no effect on revised interrogation procedures that Mr. Rumsfeld approved in April 2003 for the American military prison at Guantánamo Bay, Cuba.

"The April document was about interrogation techniques and procedures," said Lawrence Di Rita, the Pentagon's chief spokesman. "It was not a legal analysis."

Mr. Di Rita said the 24 interrogation procedures permitted at Guantánamo, four of which required Mr. Rumsfeld's explicit approval, did not constitute torture and were consistent with international treaties.

The March memorandum, which was first reported by The Wall Street Journal on Monday, is the latest internal legal study to be disclosed that shows that after the Sept. 11 terrorist attacks the administration's lawyers were set to work to find legal arguments to avoid restrictions imposed by international and American law.

A Jan. 22, 2002, memorandum from the Justice Department that provided arguments to keep American officials from being charged with war crimes for the way prisoners were detained and interrogated was used extensively as a basis for the March memorandum on avoiding proscriptions against torture.

The previously disclosed Justice Department memorandum concluded that administration officials were justified in asserting that the Geneva Conventions did not apply to detainees from the Afghanistan war.

Another memorandum obtained by The Times indicates that most of the administration's top lawyers, with the exception of those at the State Department and the Joint Chiefs of Staff, approved of the Justice Department's position that the Geneva Conventions did not apply to the war in Afghanistan. In addition, that memorandum, dated Feb. 2, 2002, noted that lawyers for the Central Intelligence Agency had asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

The March memo, a copy of which was obtained by The Times, was prepared as part of a review of interrogation techniques by a working group appointed by the Defense Department's general counsel, William J. Haynes. The group itself was led by the Air Force general counsel, Mary Walker, and included military and civilian lawyers from all branches of the armed services.

The review stemmed from concerns raised by Pentagon lawyers and interrogators at Guantánamo after Mr. Rumsfeld approved a set of harsher interrogation techniques in December 2002 to use on a Saudi detainee, Mohamed al-Kahtani, who was believed to be the planned 20th hijacker in the Sept. 11 terror plot.

Mr. Rumsfeld suspended the harsher techniques, including serving the detainee cold, prepackaged food instead of hot rations and shaving off his facial hair, on Jan. 12, pending the outcome of the working group's review. Gen. James T. Hill, head of the military's Southern Command, which oversees Guantánamo, told reporters last Friday that the working group "wanted to do what is humane and what is legal and consistent not only with" the Geneva Conventions, but also "what is right for our soldiers."

Mr. Di Rita said that the Pentagon officials were focused primarily on the interrogation techniques, and that the legal rationale included in the March memo was mostly prepared by the Justice Department and White House counsel's office.

The memo showed that not only lawyers from the Defense and Justice departments and the White House approved of the policy but also that David S. Addington, the counsel to Vice President Dick Cheney, also was involved in the deliberations. The State Department lawyer, William H. Taft IV, dissented, warning that such a position would weaken the protections of the Geneva Conventions for American troops.

The March 6 document about torture provides tightly constructed definitions of torture. For example, if an interrogator "knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith," the report said. "Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his control."

The adjective "severe," the report said, "makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be `severe.' " The report also advised that if an interrogator "has a good faith belief his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture."

The report also said that interrogators could justify breaching laws or treaties by invoking the doctrine of necessity. An interrogator using techniques that cause harm might be immune from liability if he "believed at the moment that his act is necessary and designed to avoid greater harm."

Scott Horton, the former head of the human rights committee of the Association of the Bar of the City of New York, said Monday that he believed that the March memorandum on avoiding responsibility for torture was what caused a delegation of military lawyers to visit him and complain privately about the administration's confidential legal arguments. That visit, he said, resulted in the association undertaking a study and issuing of a report criticizing the administration. He added that the lawyers who drafted the torture memo in March could face professional sanctions.

Jamie Fellner, the director of United States programs for Human Rights Watch, said Monday, "We believe that this memo shows that at the highest levels of the Pentagon there was an interest in using torture as well as a desire to evade the criminal consequences of doing so."

The March memorandum also contains a curious section in which the lawyers argued that any torture committed at Guantánamo would not be a violation of the anti-torture statute because the base was under American legal jurisdiction and the statute concerns only torture committed overseas. That view is in direct conflict with the position the administration has taken in the Supreme Court, where it has argued that prisoners at Guantánamo Bay are not entitled to constitutional protections because the base is outside American jurisdiction.

Kate Zernike contributed reporting for this article.

Bush Didn't Order Any Breach of Torture Laws, Ashcroft Says

By NEIL A. LEWIS
The New York Times
June 9, 2004
http://www.nytimes.com/2004/06/09/politics/09TORT.html

WASHINGTON, June 8 &emdash; Attorney General John Ashcroft, whose subordinates have written confidential legal memorandums saying the administration is not bound by prohibitions against torture, told a Senate committee on Tuesday that President Bush had "made no order that would require or direct the violation" of either international treaties or domestic laws prohibiting torture.

Appearing before the Senate Judiciary Committee, Mr. Ashcroft was questioned about a cascade of recently disclosed memorandums in which lawyers from his department as well as those from the Defense Department and other agencies provided legal arguments that inflicting pain in interrogating people detained in the fight against terrorism did not always constitute torture.

In heated exchanges with Democrats on the committee, Mr. Ashcroft refused to provide several of the memorandums, saying they amounted to confidential legal advice given to the president and did not have to be shared with Congress.

For the nearly three hours of Mr. Ashcroft's appearance, the committee room became the stage for a debate that has ranged across all three branches of the government since the attacks of Sept. 11, 2001, about the proper reach of a president's power in wartime.

Senator Edward M. Kennedy, a Massachusetts Democrat who is a committee member, challenged Mr. Ashcroft on his unwillingness to release the memorandums and said that the reported abuses of Iraqi prisoners at the Abu Ghraib prison were the inevitable outcome of the administration's efforts to find ways to evade legal responsibility.

Mr. Kennedy cited one of the memorandums reported in newspapers on Tuesday that concluded President Bush was not bound either by international treaties prohibiting torture or by federal anti-torture law because as commander-in-chief Mr. Bush was responsible for protecting the nation.

"In other words, the president of the United States has the responsibility," Mr. Kennedy said, holding up a photograph of prisoners cowering before American guards and dogs at Abu Ghraib. "We know when we have these kinds of orders, what happens. We get the stress test, we get the use of dogs, we get the forced nakedness that we've all seen on these and we get the hooding. This is what you get with those kind of memoranda out there."

The administration has responded to the memorandums by saying they were merely legal opinions offered as policies were being formulated.

"First of all," Mr. Ashcroft said, "this administration opposes torture," adding that the "kind of atrocities displayed in the photographs are being prosecuted by this administration."

Mr. Ashcroft strove to make a distinction between memorandums that may have provided theoretical legal justifications for torture

and his assertion that there had never been any directive that actually authorized its use.

But the memorandums, by their numbers and their arguments &emdash; aimed at justifying the use of interrogation techniques inflicting pain by spelling out instances when this did not legally constitute torture and the inapplicability of international treaties &emdash; have produced outrage from international human rights groups and members of Congress, mostly Democrats.

Over the past few weeks, The New York Times, Newsweek, The Washington Post and The Wall Street Journal have disclosed memorandums that show a pattern in which administration lawyers set about devising arguments to avoid constraints against mistreatment and torture.

Mr. Ashcroft's appearance before the committee had been scheduled before most of the memorandums were disclosed, and he looked deeply uncomfortable under the harsh questioning.

He said several times that critics consistently failed to take into account that the United States was at war.

Mr. Kennedy challenged Mr. Ashcroft, telling him he could not withhold the memorandums from Congress unless there was an invocation of executive privilege, something only the president himself can do. Mr. Ashcroft seemed uncertain when he was asked if he had spoken to the president about invoking it.

He eventually said he was not invoking the privilege but that it was simply not good policy to openly debate what powers a president had in wartime.

Senator Joseph R. Biden Jr., Democrat of Delaware, in a heated exchange with Mr. Ashcroft, asked him if he believed torture was ever justified. When he first declined to answer, Mr. Biden accused him of being evasive, and Mr. Ashcroft replied: "You know I condemn torture. I don't think it's productive, let alone justified."

But Mr. Biden persisted, saying: "There's a reason why we sign these treaties: to protect my son in the military. That's why we have these treaties, so when Americans are captured they are not tortured. That's the reason in case anybody forgets it."

One of the recently published memorandums, dated March 6, 2003, provides elaborate and tightly constructed definitions of torture in an effort to to allow interrogators to avoid being charged with that offense. For example, if an interrogator "knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith," the report said. "Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his control."

Another memorandum, written in August 2002 and disclosed Tuesday by The Washington Post, appeared to establish a basis for the use of torture for senior Al Qaeda operatives in custody of the C.I.A. That memorandum was written by Jay S. Bybee, then the associate attorney general. Mr. Bybee, now a federal appeals court judge in California, did not respond to telephone messages.

Mr. Ashcroft said proof that the administration was opposed to torture in practice, despite any legal memorandums, could be seen in the establishment of a task force to prosecute charges of abuse against United States contractors and soldiers.

While most Republican committee members defended Mr. Ashcroft, Senator Larry Craig, an Idaho Republican, told Mr. Ashcroft that he was disturbed by the growing power of the executive branch.

"I hope that in the end," Mr. Craig said, "Saddam Hussein will not have taken away from us something that our Constitution, in large part, granted us, and that we have it taken away in the name of safety and security."

THE MEMORANDUMS

Documents Build a Case for Working Outside the Laws in Interrogations

NEIL A. LEWIS
The New York Times
June 9, 2004
http://www.nytimes.com/2004/06/09/politics/09TTEX.html

JANUARY, 2002 -- A series of memorandums from the Justice Department, many of them written by John C. Yoo, a University of California law professor who was serving in the department, provided arguments to keep United States officials from being charged with war crimes for the way prisoners were detained and interrogated. The memorandums, principally one written on Jan. 9, provided legal arguments to support administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan.

JAN. 25, 2002 -- Alberto R. Gonzales, the White House counsel, in a memorandum to President Bush, said that the Justice Department's advice in the Jan. 9 memorandum was sound and that Mr. Bush should declare the Taliban and Al Qaeda outside the coverage of the Geneva Conventions. That would keep American officials from being exposed to the federal War Crimes Act, a 1996 law that carries the death penalty.

JAN. 26, 2002 -- In a memorandum to the White House, Secretary of State Colin L. Powell said the advantages of applying the

Geneva Conventions far outweighed their rejection. He said 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 also said it would "undermine public support among critical allies."

FEB. 2, 2002 -- A memorandum from William H. Taft IV, the State Department's legal adviser, to Mr. Gonzales warned that the broad rejection of the Geneva Conventions posed several problems. "A decision that the conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the conventions in the event they are captured." An attachment to this memorandum, written by a State Department lawyer, showed that most of the administration's senior lawyers agreed that the Geneva Conventions were inapplicable. The attachment noted that C.I.A. lawyers asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

AUGUST, 2002 -- A memorandum from the Office of Legal Counsel in the Justice Department provided a rationale for using torture to extract information from Qaeda operatives. It provided complex definitions of torture that seemed devised to allow interrogators to evade being charged with that offense.

MARCH, 2003 -- A memorandum prepared by a Defense Department legal task force drew on the January and August memorandums to declare that President Bush was not bound by either an international treaty prohibiting torture or by a federal anti-torture law because he had the authority as commander in chief to approve any technique needed to protect the nation's security. The memorandum also said that executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons, including a belief by interrogators that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful.'

APRIL, 2003 -- A memorandum from Secretary of Defense Donald H. Rumsfeld to Gen. James T. Hill outlined 24 permitted interrogation techniques, 4 of which were considered stressful enough to require Mr. Rumsfeld's explicit approval. Defense Department officials say it did not refer to the legal analysis of the month before.

DEC. 24, 2003 -- A letter to the International Committee of the Red Cross over the signature of Brig. Gen. Janis Karpinski was prepared by military lawyers. The letter, a response to the Red Cross's concern about conditions at Abu Ghraib, contended that isolating some inmates at the prison for interrogation because of their significant intelligence value was a "military necessity," and said prisoners held as security risks could legally be treated differently from prisoners of war or ordinary criminals.

OTHER MEMORANDUMS -- Some have been described in reports in The Times and elsewhere, but their exact contents have not been disclosed. These include a memorandum that provided advice to interrogators to shield them from liability from the Convention Against Torture, an international treaty and the Anti-Torture Act, a federal law. This memorandum provided what has

been described as a script in which officials were advised that they could avoid responsibility if they were able to plausibly contend that the prisoner was in the custody of another government and that the United States officials were just getting the information from the other country's interrogation. The memorandum advised that for this to work, the United States officials must be able to contend that the prisoner was always in the other country's custody and had not been transferred there. International law prohibits the "rendition" of prisoners to countries if the possibility of mistreatment can be anticipated.

Memo on Torture Draws Focus to Bush

Aide Says President Set Guidelines for Interrogations, Not Specific Techniques

By Mike Allen and Dana Priest
Washington Post Staff Writers
Wednesday, June 9, 2004; Page A03
http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html

The disclosure that the Justice Department advised the White House in 2002 that the torture of al Qaeda terrorist suspects might be legally defensible has focused new attention on the role President Bush played in setting the rules for interrogations in the war on terrorism.

White House press secretary Scott McClellan said yesterday that Bush set broad guidelines, rather than dealing with specific techniques. "While we will seek to gather intelligence from al Qaeda terrorists who seek to inflict mass harm on the American people, the president expects that we do so in a way that is consistent with our laws," McClellan said.

White House Counsel Alberto R. Gonzales said in a May 21 interview with The Washington Post: "Anytime a discussion came up about interrogations with the president, . . . the directive was, 'Make sure it is lawful. Make sure it meets all of our obligations under the Constitution, U.S. federal statutes and applicable treaties.' "

An Aug. 1, 2002, memo from the Justice Department's Office of Legal Counsel, addressed to Gonzales, said that torturing suspected al Qaeda members abroad "may be justified" and that international laws against torture "may be unconstitutional if applied to interrogation" conducted against suspected terrorists.

The document provided legal guidance for the CIA, which crafted new, more aggressive techniques for its operatives in the field. McClellan called the memo a historic or scholarly review of laws and conventions concerning torture. "The memo was not prepared to provide advice on specific methods or techniques," he said. "It was analytical."

Attorney General John D. Ashcroft yesterday refused senators' requests to make public the memo, which is not classified, and would not discuss any possible involvement of the president.

In the view expressed by the Justice Department memo, which differs from the view of the Army, physical torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." For a cruel or inhuman psychological technique to rise to the level of mental torture, the Justice Department argued, the psychological harm must last "months or even years."

A former senior administration official involved in discussions about CIA interrogation techniques said Bush's aides knew he wanted them to take an aggressive approach.

"He felt very keenly that his primary responsibility was to do everything within his power to keep the country safe, and he was not concerned with appearances or politics or hiding behind lower-level officials," the official said. "That is not to say he was ready to authorize stuff that would be contrary to law. The whole reason for having the careful legal reviews that went on was to ensure he was not doing that."

The August memo was written in response to a CIA request for legal guidance in the months after Sept. 11, 2001, as agency operatives began to detain and interrogate key al Qaeda leaders. The fact that the memo was signed by Jay S. Bybee, head of the Office Legal Counsel, who has since become a federal judge, and is 50 pages long indicates that the issue was treated as a significant matter.

"Given the topic and length of opinion, it had to get pretty high-level attention," said Beth Nolan, commenting on the process that was in place when she was President Bill Clinton's White House counsel, from 1999 to 2001, and, previously, when she was a lawyer in the Office of Legal Counsel.

Unlike documents signed by deputies in the Office of Legal Counsel, which are generally considered by federal agencies as advice, a memorandum written by the head of the office is considered akin to a legally binding document, said another former Office of Legal Counsel lawyer.

The former administration official said the CIA "was prepared to get more aggressive and re-learn old skills, but only with explicit assurances from the top that they were doing so with the full legal authority the president could confer on them."

Critics familiar with the August 2002 memo and another, similar legal opinion given by the Defense Department's office of general counsel in March 2003 assert that government lawyers were trying to find a legal justification for actions -- torture or cruel and inhumane acts -- that are clearly illegal under U.S. and international law.

"This is painful, incorrect analysis," said Scott Norton, chairman of the international law committee of the New York City Bar Association, which has produced an extensive report on Pentagon detentions and interrogations. "A lawyer is permitted to craft all sorts of wily arguments about why a statute doesn't apply" to a defendant, he said. "But a lawyer cannot advocate committing a criminal act prospectively."

The August 2002 memo from the Justice Department concluded that laws outlawing torture do not bind Bush because of his constitutional authority to conduct a military campaign. "As Commander in Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy," said the memo, obtained by The Washington Post.

Critics say that this misstates the law, and that it ignores key legal decisions, such as the landmark 1952 Supreme Court ruling in Youngstown Steel and Tube Co v. Sawyer, which said that the president, even in wartime, must abide by established U.S. laws.

Torture memo

http://normblog.typepad.com/normblog/

The leaked Justice Department memo (http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html) adds to the worries that arose out of the Abu Ghraib scandal concerning how far up the chain of command responsibility for abuse of prisoners may have gone:

The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques.

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In the 2002 memo, written for the CIA and addressed to White House Counsel Alberto R. Gonzales, the Justice Department defined torture in a much narrower way, for example, than does the U.S. Army, which has historically carried out most wartime interrogations.

In the Justice Department's view - contained in a 50-page document signed by Assistant Attorney General Jay S. Bybee and obtained by The Washington Post - inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says, "must

be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

By contrast, the Army's Field Manual 34-52, titled "Intelligence Interrogations," sets more restrictive rules. For example, the Army prohibits pain induced by chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under mental torture, the Army prohibits mock executions, sleep deprivation and chemically induced psychosis.

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In a draft of the working group's report, for example, Pentagon lawyers approvingly cited the Justice Department's 2002 position that domestic and international laws prohibiting torture could be trumped by the president's wartime authority and any directives he issued.

At the time, the Justice Department's legal analysis, however, shocked some of the military lawyers who were involved in crafting the new guidelines, said senior defense officials and military lawyers.

"Every flag JAG lodged complaints," said one senior Pentagon official involved in the process, referring to the judge advocate generals who are military lawyers of each service.

"It's really unprecedented. For almost 30 years we've taught the Geneva Convention one way," said a senior military attorney. "Once you start telling people it's okay to break the law, there's no telling where they might stop."

A U.S. law enacted in 1994 bars torture by U.S. military personnel anywhere in the world. But the Pentagon group's report, prepared under the supervision of General Counsel William J. Haynes II, said that "in order to respect the President's inherent constitutional authority to manage a military campaign . . . [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

The Pentagon group's report, divulged yesterday by the Wall Street Journal and obtained by The Post, said further that the 1994 law barring torture "does not apply to the conduct of U.S. personnel" at Guantanamo Bay.

The Defense Department is denying that the memo had any influence on policy and practice. They need to be able to back that denial up. Can they?

Torture Memo

http://archive.salon.com/politics/war_room/2004/06/09/mustreads/

Torture probe focus turns to Bush

"First of all," Attorney General John Ashcroft told senators on Tuesday, "this administration opposes torture." His proof? The administration is prosecuting cases of torture and mistreatment of prisoners at Abu Ghraib prison. So far, six Army prison guards await court-martial and a seventh has pleaded guilty. Meanwhile, the evidence continues to mount showing the administration built a case that torture is within the legal bounds of its power in the war on terror. Ashcroft refused to release an August 2002 memo -- which is not classified -- when asked for it on Tuesday by senators. But a Pentagon report based in part on the logic presented in the DOJ memo, that President Bush is above domestic and international laws of torture when it comes to interrogating terror suspects, is online here.

The Washington Post today reports that the DOJ memo Ashcroft won't release turns the focus on the role President Bush has played in setting the rules for interrogations of terrorism suspects.

"A former senior administration official involved in discussions about CIA interrogation techniques said Bush's aides knew he wanted them to take an aggressive approach."

"'He felt very keenly that his primary responsibility was to do everything within his power to keep the country safe, and he was not concerned with appearances or politics or hiding behind lower-level officials,' he said. 'That is not to say he was ready to authorize stuff that would be contrary to law. The whole reason for having the careful legal reviews that went on was to ensure he was not doing that.'"

"The August memorandum was written in response to a CIA request for legal guidance in the months after Sept. 11, 2001, as agency operatives began to detain and interrogate key al Qaeda leaders. The fact that the memo was signed by Jay S. Bybee, head of the Office Legal Counsel, who has since become a federal judge, and is 50 pages long indicates that the issue was treated as a significant matter."

"'Given the topic and length of opinion, it had to get pretty high-level attention,' said Beth Nolan, commenting on the process that was in place when she was President Bill Clinton's White House counsel, from 1999 to 2001, and, previously, when she was a lawyer in the Justice Department's Office of Legal Counsel."

Rummy's office said: 'Take the gloves off'

The Los Angeles Times reports that as early as 2001, when Johnny Walker Lindh was captured in Afghanistan, military intelligence officers said they were instructed by Donald Rumsfeld's office to "take the gloves off" in questioning him.

"What happened to Lindh, who was stripped and humiliated by his captors, foreshadowed the type of abuse documented in photographs of American soldiers tormenting Iraqi prisoners at Abu Ghraib."

"At the time, just weeks after the Sept. 11 terrorist attacks, the U.S. was desperate to find terrorist leader Osama bin Laden. After Lindh asked for a lawyer rather than talk to interrogators, he was not granted one nor was he advised of his Miranda rights against self-incrimination. Instead, the Pentagon ordered intelligence officers to get tough with him."

"The documents, read to The Times by two sources critical of how the government handled the Lindh case, show that after an Army intelligence officer began to question Lindh, a Navy admiral told the intelligence officer that 'the secretary of Defense's counsel has authorized him to 'take the gloves off' and ask whatever he wanted.' Lindh was being questioned while he was propped up naked and tied to a stretcher in interrogation sessions that went on for days, according to court papers. In the early stages, his responses were cabled to Washington hourly, the new documents show."

Justice Dept. Memo Says Torture 'May Be Justified'

By Dana Priest
Washington Post Staff Writer
Sunday, June 13, 2004
http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html

Today washingtonpost.com is posting a copy of the Aug. 1, 2002, memorandum (PDF) "Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," from the Justice Department's Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush.

The memo was the focus of a recent article in The Washington Post.

The memo was written at the request of the CIA. The CIA wanted authority to conduct more aggressive interrogations than were permitted prior to the terrorist attacks of Sept. 11, 2001. The interrogations were of suspected al Qaeda members whom the CIA had apprehended outside the United States. The CIA asked the White House for legal guidance. The White House asked the Justice Department's Office of Legal Counsel for its legal opinion on the standards of conduct under the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment.

The Office of Legal Counsel is the federal government's ultimate legal adviser. The most significant and sensitive topics that the federal government considers are often given to the OLC for review. In this case, the memorandum was signed by Jay S. Bybee, the head of the office at the time. Bybee's signature gives the document additional authority, making it akin to a binding legal opinion on government policy on interrogations. Bybee has since become a judge on the 9th U.S. Circuit Court of Appeals.

Another memorandum, dated March 6, 2003, from a Defense Department working group convened by Defense Secretary Donald H. Rumsfeld to come up with new interrogation guidelines for detainees at Guantanamo Bay, Cuba, incorporated much, but not all, of the legal thinking from the OLC memo. The Wall Street Journal first published the March memo.

At a recent Senate Judiciary Committee hearing, senators asked Attorney General John D. Ashcroft to release both memos. Ashcroft said he would not discuss the contents of the Justice and Pentagon memos or turn them over to the committees. A transcript of that hearing is also available.

President Bush spoke on the issue of torture Thursday, saying he expected U.S. authorities to abide by the law. He declined to say whether he believes U.S. law prohibits torture. Here is a link to the transcript of the president's press conference, which included questions and answers on torture.

The Post deleted several lines from the memo that are not germane to the legal arguments being made in it and that are the subject of further reporting by The Post.

Aides Say Memo Backed Coercion for Qaeda Cases

By DAVID JOHNSTON and JAMES RISEN
The New York Times
June 27, 2004
http://www.nytimes.com/2004/06/27/international/middleeast/27MEMO.html

WASHINGTON, June 26 &emdash; An August 2002 memo by the Justice Department that concluded interrogators could use extreme techniques on detainees in the war on terror helped provide an after-the-fact legal basis for harsh procedures used by the C.I.A. on high-level leaders of Al Qaeda, according to current and former government officials.

The legal memo was prepared after an internal debate within the government about the methods used to extract information from Abu Zubaydah, one of Osama bin Laden's top aides, after his capture in April 2002, the officials said. The memo provided a legal foundation for coercive techniques used later against other high-ranking detainees, like Khalid Shaikh Mohammed, believed to be

the chief architect of the attacks of Sept. 11, 2001, who was captured in early 2003.

The full text of the memo was made public by the White House on Tuesday without explanation about why it was written or whether its standards were applied. Until now, it has not been clear that the memo was written in response to the C.I.A.'s efforts to extract information from high-ranking Qaeda suspects, and was unrelated to questions about handling detainees at Guantánamo Bay or in Iraq.

The memo suggested that the president could authorize a wide array of coercive interrogation methods in the campaign against terrorism without violating international treaties or the federal torture law. It did not specify any particular procedures but suggested there were few limits short of causing the death of a prisoner. The methods used on Mr. Zubaydah and other senior Qaeda operatives stirred controversy in government counterterrorism circles and concern over whether C.I.A. employees might be held liable for violating the federal torture law.

While the memo appeared to give the C.I.A. wide latitude in adopting tactics to interrogate high-level Qaeda detainees, it is still unclear exactly what procedures were used or the extent to which the memo influenced the government's overall thinking about interrogations of other terror detainees captured in Afghanistan and elsewhere.

The officials said the memo illustrated that the Bush administration, in the months after the September 2001 attacks, was urgently looking for ways to force senior Qaeda detainees to disclose whether they knew of any future terrorist attacks planned against the United States.

The memo, which is dated Aug. 1, 2002, was a seminal legal document guiding the government's thinking on interrogation. It was disavowed earlier this week by senior legal advisers to the Bush administration who said the memo would be reviewed and revised because it created a false impression that torture could be legally defensible.

In repudiating the memo in briefings this week, none of the senior Bush legal advisers whom the White House made available to reporters would discuss who had requested that the memo be prepared, why it had been prepared or how it was applied. On Friday, the Justice Department and C.I.A. would not discuss the origins of the memo, but in the past officials at those agencies have said that the interrogation techniques used on detainees were lawful and did not violate the torture statute, which generally forbids inflicting severe and prolonged pain.

The memo was addressed to Alberto R. Gonzales, the White House counsel, and signed by Jay S. Bybee, then the head of the Justice Department's Office of Legal Counsel. It said the document was an effort to define "standards of conduct" under international treaties and federal law. The memo concluded that a coercive procedure could not be considered torture unless it caused pain equivalent to that accompanying "serious physical injury, such as organ failure, impairment of bodily function or even death."

The Justice Department was asked to prepare the memo about the time of Mr. Zubaydah's capture in April 2002, the officials said, in an effort to clarify the permissible limits of interrogation because of questions raised by the treatment of Mr. Zubaydah and a few other Qaeda operatives then in custody. It remains unclear what role Attorney General John Ashcroft played in the debate over interrogation techniques or in the preparation of the memo, but Justice Department officials said he did not review it before it was sent to the White House.

Mr. Zubaydah, who managed Al Qaeda's worldwide recruiting system for Mr. bin Laden's training camps in Afghanistan, was one of the first high-level detainees captured after the Sept. 11 attacks. The full extent of the tactics used during his interrogation are still not publicly known, but the methods provoked the concerns within the C.I.A. about possible violation of the federal torture law. That law makes it a crime for an American operating overseas under governmental authority to torture anyone under his control. The tactics also raised concerns at the F.B.I., where some agents knew of the techniques being used on Mr. Zubaydah.

It is known that some Qaeda leaders were deprived of sleep and food and were threatened with beatings. In one instance a gun was waved near a prisoner, and in another a noose was hung close to a detainee.

Mr. Mohammed was "waterboarded" &emdash; strapped to a board and immersed in water &emdash; a technique used to make the subject believe that he might be drowned, officials said.

In the end, administration officials considered Mr. Zubaydah's interrogation an example of the successful use of harsh interrogation techniques. Most notably, they said, he helped identify Mr. Mohammed as the principal architect of the September 2001 hijacking plot and was the source of information about Jose Padilla, who was arrested in May 2002 in what officials said was a nascent plot to develop a dirty bomb using radiological materials.

Since Mr. Zubaydah's capture, another dozen to two dozen high-level Qaeda operatives have been taken into custody in a classified C.I.A. interrogation program.

An article in Sunday's Washington Post reported that the C.I.A. had suspended the use of the extreme interrogation tactics at the agency's detention facilities around the world pending a review by Justice Department and other administration lawyers, although the decision does not apply to military prisons such as the one at Guantánamo Bay. A C.I.A. spokesman declined to comment on the report.

The Bybee memo, the officials said, was not intended to support the use of aggressive techniques on less important captives held at Guantánamo Bay, or on Iraqi captives held at Abu Ghraib and other prisons in Iraq. In addition, some of the officials said they wanted to explain the background of the memo because they hoped to dispel the impression that Mr. Bybee, now a judge on the United States Court of Appeals for the Ninth Circuit, was a rogue advocate of potentially unlawful torture tactics. Instead, they said,

Mr. Bybee and other lawyers who helped prepare the memo were trying to explore the boundaries of what the law might allow in the context of high-level Qaeda detainees.

The officials said the memo followed a series of exchanges between the C.I.A. and the Justice Department over the legality of specific techniques used on detainees not long after the Bush administration had decided to keep them out of the American judicial system and treat them as unlawful combatants who would not be protected by the Geneva Conventions, which bar harsh treatment of prisoners of war.

At the time of the Sept. 11 attacks, the Bush administration did not have an established infrastructure or legal framework for handling terrorism detainees. But after the attacks, the administration decided that terrorism should be considered a national security issue rather than a law enforcement matter, and Mr. Bush turned to the C.I.A., rather than the F.B.I., to take the lead in the detention and questioning of captured Qaeda leaders.

Mr. Bybee's memo provided sweeping legal authority for a wide range of interrogation techniques to be used on Qaeda operatives. To be regarded as torture, the memo said, mental pain must also be caused by "threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party." The memo added that the use of drugs under certain circumstances during interrogations would be permitted, as long as their effects fell short of what it described as legally prohibited: the "profound disruption of the senses or personality." The memo then explained at length that the definition of the word "profound" allowed for a broad interpretation of what measures were acceptable short of that.

"By requiring that the procedures and the drugs create a profound disruption, the statute requires more than that the acts forcibly separate or rend the sense or personality," it said. "Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality."

WORD FOR WORD

Defining Torture: Russian Roulette, Yes. Mind-Altering Drugs, Maybe.

By KATE ZERNIKE
The New York Times
June 27, 2004

http://www.nytimes.com/2004/06/27/weekinreview/27word.html

If all the memos released by the White House last week in response to the prison abuse scandal in Iraq, none have been more incendiary than the so-called torture memo, dated Aug. 1, 2002, and written by Jay S. Bybee, the assistant attorney general in charge of the Office of Legal Counsel at the Justice Department.

The department and the White House have distanced themselves from the document. But the memorandum's antiseptic discussion of the definition of torture is likely to continue to fuel the debate. Following are a few excerpts.

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The memo starts by explaining that some acts may be "cruel, inhuman or degrading" but not constitute torture under Section 2340, the federal law criminalizing torture. To rise to the level of torture, it argues, the acts must be of an extreme nature, specifically intended to inflict severe pain or suffering, mental or physical. But the statute is vague on the meaning of "severe," so the authors try to construct one.

In the absence of such a definition, we construe a statutory term in accordance with its ordinary and natural meaning. The dictionary defines severe as "unsparing in exaction, punishment or censure" or "inflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as severe pain, anguish, torture" "extremely violent or grievous, severe pain" "of pain, suffering, loss, or the like: grievous, extreme" and "of circumstances hard to sustain or endure." Thus the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

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A good model, the memo suggests, can be found in statutes regulating what kind of emergency medical conditions qualify for payments of health benefits.

Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure or the permanent impairment of a significant body function. These statutes suggest that "severe pain" as used in Section 2340, must rise to a similarly high level, the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure or serious impairment of body functions in order to constitute torture.

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Turning to the matter of what constitutes severe mental pain, the memo notes that the statute prohibits torture caused by mind-altering substances, which the authors take to mean drugs. But, the memo argues, this doesn't rule out all drugs.

Instead, it prohibits the use of drugs that "disrupt profoundly the sense or the personality." By requiring that the procedures and the drugs create a profound disruption, the statue requires more than that the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities or fundamentally alter his personality.

The authors say they cannot find a definition of profound mental disruption in mental health literature or United States law, so they offer some examples of their own.

Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about thin previously of interest to the individual. This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds and words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; inability to recognize and identify objects such as chairs or pencils despite normal vision functioning. Moreover, we think that pushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a "profound disruption."

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The torture statute also says that severe mental pain can result from the threat of imminent death, the authors note. Imminent, however, is the operative word.

Threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty it will occur. Indeed, timing is an indicator of certainty that the harm will befall the defendant. Thus, a vague threat that someday the prisoner might be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death.

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The authors then look to the federal Torture Victims Protection Act to see how it defines torture. They note that the courts have not given lengthy analysis on this subject. But at least seven acts consistently reappear in decisions about violations of the law, suggesting to the authors at least seven firm examples of torture.

1) Severe beatings using instruments such as iron barks, truncheons and clubs; 2) threats of imminent death, such as mock executions; 3) threats of removing extremities; 4) burning, especially burning with cigarettes; 5) electric shocks to genitalia or threats to do so; 6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and 7) forcing the prisoner to watch the torture of others. While we cannot say with certainty that acts falling short of these seven would not constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law.

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In an appendix, the memo lists several cases in which American courts have ruled that the victim was tortured. One case describes what happened to three Americans who were held as hostages in Lebanon. They sued the government of Iran for its role in their kidnapping.

Plaintiff was kidnapped at gunpoint. He was beaten for several days after his kidnapping. He was subjected to daily torture and threats of death. He was kept in solitary confinement for two years. During that time, he was blindfolded and chained to the wall in a 6-foot-by-6-foot room infested with rodents. He was shackled in a stooped position for 44 months, and he developed eye infections as a result of the blindfolds. Additionally, his captors did the following: forced him to kneel on spikes; administered electric shocks to his hands; battered his feet with iron bars and struck him in the kidneys with a rifle; struck him on the side of his head with a hand grenade, breaking his nose and jaw; placed boiling tea kettles on his shoulders; and they laced his food with arsenic.

The memo ends by noting two cases in which courts ruled there was no torture.

The plaintiff was held for eight days in a filthy cell with drug dealers and an AIDS patient. He received no food, no blanket and no protection from other inmates. Prisoners murdered one another in front of the plaintiff. The court flatly rejected the plaintiffs claim that this constituted torture.

COMPLETE COVERAGE

A Guide to the Memos on Torture

By THE NEW YORK TIMES

http://www.nytimes.com/ref/international/24MEMO-GUIDE.html

The New York Times, Newsweek, The Washington Post and The Wall Street Journal have disclosed memorandums that show a pattern in which Bush administration lawyers set about devising arguments to avoid constraints against mistreatment and torture of detainees. Administration officials responded by releasing hundreds of pages of previously classified documents related to the development of a policy on detainees.

2002

JANUARY A series of memorandums from the Justice Department, many of them written by **John C. Yoo**, a University of California law professor who was serving in the department, provided arguments to keep United States officials from being charged with war crimes for the way prisoners were detained and interrogated. The memorandums, principally one written on Jan. 9, provided legal arguments to support administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan.

RELATED SITES
Yoo's Memo on Avoiding Geneva Conventions (PDF document)

JAN. 25 Alberto R. Gonzales, the White House counsel, in a memorandum to **President Bush**, said that the Justice Department's advice in the Jan. 9 memorandum was sound and that Mr. Bush should declare the Taliban and Al Qaeda outside the coverage of the Geneva Conventions. That would keep American officials from being exposed to the federal War Crimes Act, a 1996 law that carries the death penalty.

RELATED SITES
Gonzales's Memo to Bush (PDF document)

JAN. 26 In a memorandum to the White House, Secretary of State **Colin L. Powell** said the advantages of applying the Geneva Conventions far outweighed their rejection. He said 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 also said it would "undermine public support among critical allies."

RELATED SITES
Powell's Memo to White House (PDF document)

FEB. 2 A memorandum from **William H. Taft IV**, the State Department's legal adviser, to Mr. Gonzales warned that the broad rejection of the Geneva Conventions posed several problems. "A decision that the conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the conventions in the

event they are captured." An attachment to this memorandum, written by a State Department lawyer, showed that most of the administration's senior lawyers agreed that the Geneva Conventions were inapplicable. The attachment noted that C.I.A. lawyers asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

RELATED
Taft's Memo on Rejection of Geneva Conventions (PDF document)

FEB. 7 In a directive that set new rules for handling prisoners captured in Afghanistan, **President Bush** broadly cited the need for "new thinking in the law of war." He ordered that all people detained as part of the fight against terrorism should be treated humanely even if the United States considered them not to be protected by the Geneva Conventions, the White House said. Document released by White House.

RELATED SITES
Bush's Directive on Treatment of Detainees (PDF document)

AUGUST A memorandum from **Jay S. Bybee**, with the Office of Legal Counsel in the Justice Department, provided a rationale for using torture to extract information from Qaeda operatives. It provided complex definitions of torture that seemed devised to allow interrogators to evade being charged with that offense.

RELATED SITES
Justice Dept. Memo on Torture (PDF document)
Letter by Author of Memo on Torture to White House Counsel

Dec. 2 Memo from Defense Department detailing the policy for interrogation techniques to be used for people seized in Afghanistan. Document released by White House.

RELATED SITES
Defense Dept. Memo on Afghanistan Detainees (PDF document)

2003

MARCH A memorandum prepared by a Defense Department legal task force drew on the January and August memorandums to declare that **President Bush** was not bound by either an international treaty prohibiting torture or by a federal anti-torture law because he had the authority as commander in chief to approve any technique needed to protect the nation's security. The

memorandum also said that executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons, including a belief by interrogators that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful.'

APRIL A memorandum from Secretary of Defense **Donald H. Rumsfeld** to **Gen. James T. Hill** outlined 24 permitted interrogation techniques, 4 of which were considered stressful enough to require Mr. Rumsfeld's explicit approval. Defense Department officials say it did not refer to the legal analysis of the month before.

RELATED SITES
Rumsfeld's Memo on Interrogation Techniques (PDF document)

DEC. 24 A letter to the International Committee of the Red Cross over the signature of **Brig. Gen. Janis Karpinski** was prepared by military lawyers. The letter, a response to the Red Cross's concern about conditions at Abu Ghraib, contended that isolating some inmates at the prison for interrogation because of their significant intelligence value was a "military necessity," and said prisoners held as security risks could legally be treated differently from prisoners of war or ordinary criminals.

Other Memorandums

Some have been described in reports in The Times and elsewhere, but their exact contents have not been disclosed. These include a memorandum that provided advice to interrogators to shield them from liability from the Convention Against Torture, an international treaty and the Anti-Torture Act, a federal law. This memorandum provided what has been described as a script in which officials were advised that they could avoid responsibility if they were able to plausibly contend that the prisoner was in the custody of another government and that the United States officials were just getting the information from the other country's interrogation. The memorandum advised that for this to work, the United States officials must be able to contend that the prisoner was always in the other country's custody and had not been transferred there. International law prohibits the "rendition" of prisoners to countries if the possibility of mistreatment can be anticipated.

Neil A. Lewis contributed to this report. Online Document Sources: Findlaw.com and National Security Archive, George Washington University (gwu.edu)

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