

an online magazine

the **TomWeekly.com**

[back to HOME PAGE](#)

The False Legal Justification and Ineffectiveness of Torture

Used by the United States Government

Herschel S. Krustofski (a.k.a. Tom Ersin)

June 17, 2008

The False Legal Justification and Ineffectiveness of Torture Used by the United States Government

"We are not going to torture, period," said Attorney General Alberto Gonzales in 2005. . . . "[But] I'm not going to get into a discussion about specific methods of questioning people" (Kennedy, 2005). In 2004 the Intelligence Science Board, created by President Bush, reiterated the findings of a 1956 Defense Department report. The board determined that enhanced interrogation techniques (including waterboarding) constituted torture, were ineffective, were amateurish, and wasted resources by regularly eliciting false confessions (Shane, 2007, June 3 & 6).

The administration continues to employ these methods despite the results of their own advisory board study. George W. Bush has endeavored to exempt their use from the law by narrowly redefining torture, sometimes secretly, and far out of line with any other accepted international or previous U.S. benchmarks. Torture or ill-treatment of detainees is illegal under U.S. and international law. America has periodically affirmed this throughout the 20th and 21st centuries, but the Bush White House continues to rationalize its legality. Additionally, torture is ineffective and counterproductive; it produces false information, wastes resources, and strengthens the enemy. Therefore the United States Government should not permit torture by any definition.

The accurate meanings of words are important in a lawful and moral society because words can be manipulated to change meanings. This administration has handled the legality of torture through the manipulation of words, often obscuring and negating definitions in an attempt to exempt itself from obeying the law and honoring agreements.

After World War II, it became necessary for the countries of the world to agree on certain human rights (and definitions thereof) during times of war. This was accomplished in Switzerland in 1949. In Part I, Article 3, the Third Geneva Convention established rules for the treatment of prisoners of war and defined torture as: “. . . *cruel treatment . . . outrages upon personal dignity . . . humiliating and degrading treatment* [italics added].” And in 1985 the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Part I, Article 1, defined torture as: “. . . *severe pain or suffering, whether physical or mental* [italics added]”

The guidelines and definitions for proscribing torture cannot change with U.S. administrations according to Human Rights Watch, a prominent international human rights organization. The laws of the United States and the international community are clear: they are intended to protect any individual in custody, under any circumstances, from any form of torture. They grant this protection whether the U.S. is in a state of peace, emergency, or war. It does not matter whether the individual is a citizen or a non-citizen nor how the government classifies that individual, for example, unlawful combatant, enemy combatant, security detainee, protected person, enemy belligerent, or prisoner of war. “The prohibition against torture and ill-treatment is absolute” (“Summary of International,” 2004).

Starting immediately after 9/11, the Bush administration tried to justify harsh interrogation methods and exemption from due process for Al Qaeda and the Taliban. The White House argued that according to international guidelines these detainees did not wear proper uniforms or represent a recognized country; therefore, they were enemy combatants not entitled to POW status. But a clear reading of the Geneva rules

contradicts this. At minimum the U.S. never held tribunals in Afghanistan, which are required to determine a prisoner's legal status. And photographs of U.S. operatives in civilian garb, shown to be without *proper uniforms*, further refuted these exemptions (Grey, 2006, p. 216).

George W. Bush's White House has attempted to circumvent the laws against torture in several ways, including renditioning: the transporting of detainees to other countries for harsh questioning. Renditioning enables a country to feign compliance with the law while allowing friendly foreign governments to mine intelligence using torture that is illegal in the home country. In December 2004 while making his first reference to the subject, President Bush told the *New York Times* that "torture is never acceptable, nor do we hand over people to countries that do torture." But on April 28, 2005, the president added an important phrase: "We operate within the law, and we send people to countries where *they say* [italics added] they're not going to torture the people." With the addition of two words, Bush had inoculated his administration against the letter of the law, if not the spirit (Grey, 2006, pp. 214-215).

In response to the use of renditioning, the European Court of Human Rights issued a sweeping final ruling on February 28, 2008. The Grand Chamber voted unanimously that the practice of renditioning is internationally illegal. Specifically the Court said, "A government may not deport an individual to a state where he may be at risk of torture or other ill-treatment" ("Ban Stays Absolute," 2008). This was a setback to the administration's public torture policy goal of exempting itself from the law by confusing its actions and reasoning, manipulating words and terms, and nullifying international agreements.

The U.S. government also frequently operated in secret. In a December 2004 legal opinion (seven months after the atrocities at Abu Ghraib Prison were exposed by *60 Minutes II* and Seymour Hersh in a *New Yorker* article), Bush's Department of Justice stated publicly that it considered torture "abhorrent." The president appeared to accept inherent legal limits on authorizing harsh questioning methods of terrorist suspects. But two months later the DOJ issued another opinion, this time secretly. For the first time it provided authorization of the use of "a combination of painful physical and psychological tactics, including head-slapping, simulated drowning [waterboarding], and frigid temperatures." The CIA had never before used such harsh methods (Shane, Johnston, & Risen, 2007).

James B. Comey, deputy attorney general in February 2005, strongly objected to the secret authorization of the newly dubbed *combined effects*. Comey, who was in the process of resigning his position over several other legal disagreements with the White House, told colleagues that when the secret memorandum eventually became public they would be "ashamed" (Shane, Johnston, & Risen, 2007). Unfortunately for human rights proponents and the law, the Justice Department had too many Alberto Gonzaleses and not enough James Comeys.

The administration, however, could not indefinitely maintain total secrecy. The U.S. constitution allows and encourages the fourth estate to investigate government dealings. The media can demand access to White House documents to ascertain "What did the president know, and when did he stop knowing it" (National Lampoon, 1974). By December 2005 they modified their strategy and publicly redefined torture again,

ensuring, as always, that the latest definition did not include whatever methods the administration was authorizing.

In a speech on December 1, 2005, Attorney General Alberto Gonzales proclaimed, "We are not going to torture, period," adding that the President was firm on this declaration even if thousands of Americans were about to die, and they could be saved by torture-elicited information (Kennedy, 2005). Secretary of State Condoleezza Rice publicly stated on December 5, 2005, that the U.S. "does not permit, tolerate, or condone torture under any circumstances" ("Major Newspapers Reported," 2005).

Gonzales and Rice did **not** say that their definition of torture is inconsistent with international standards and violates the U.N. Convention Against Torture (as reported by *The New York Times* on December 7, 2005). They did **not** say that government officials and congressional members, including Senator John McCain (R-AZ), have assailed their definition. McCain's proposed outlawing of "*cruel, inhuman, and degrading treatment* [italics added] of persons in the detention of the U.S. government" had been promised a presidential veto. The administration did **not** say that Jeffrey Smith, former general counsel for the CIA (in an appearance on ABC's *World News Tonight*, December 5, 2005), averred that, "This administration, early on, defined torture so narrowly that activity could be conducted that everybody else regarded as torture." And finally, the White House did **not** say that (according to ABC News sources) Secretary Rice [and Attorney General Gonzales] can make the *no torture* claims because there exists a presidential finding secretly authorizing six enhanced interrogation methods (including waterboarding), which are not included in the administration's secret definition of torture ("Major Newspapers Reported," 2005).

The administration is still operating essentially under a definition laid out in several, now infamous, 2002 torture memos. Jay Bybee, a former Justice Department lawyer, concluded that it was only torture if it “resulted in organ failure, impairment of body function, or death” (Lithwick, 2006). John Yoo, a 34-year-old DOJ lawyer, defined torture as suffering commensurate with “death or organ failure.” Yoo also developed the term *enemy combatants* who were exempt from habeas corpus, due process of law, and the Geneva Conventions. These memos were withdrawn two years later under the harsh light of public scrutiny. But the White House, Defense Department, Justice Department, and military and intelligence officers had already used them to develop guidelines for interrogation policy (Richardson, 2008). They struck the remarks from the record, but the mind-set remained. John McCain says *torture*. George W. Bush says *enhanced interrogation techniques*. The United States Constitution says, “. . . nor cruel and unusual punishments inflicted” (*Constitution*, 1791).

The disturbing, formerly secret interrogation methods used at Abu Ghraib Prison and Guantanamo Bay Detention Center were instituted based on the suggestions, recommendations, and innuendo put out by the Bush administration. Shortly after 9/11, the White House began a series of communications with the DOJ and DOD requesting authorization to use interrogation techniques that were possibly inconsistent with American civil and military law and the Geneva Conventions. The White House received this authorization based on the idea of special circumstances—that under the special circumstances of the unique war on terror, the legal restrictions were not applicable.

The administration developed an unlawful interrogation policy based on the flawed authorization from the DOD and DOJ and a questionable national security

agenda. They have carefully anticipated protests from the world and within the U.S. and have assembled a brilliant network of rationalizations and prevarications to justify why the U.S. is exempt from the rules (Greenberg & Dratel, 2005, p. xvii). And when the agents in the field do cross even the Administration's liberal line, the White House has secured a level of plausible deniability. This is similar to when Ronald Reagan could honestly say that he was not aware of any arms-for-hostages deal with the Iranians in the 1980s—the White House staff did whatever it took to carry out the president's policies with an unspoken understanding to withhold "details" from the president.

In the waning days of 2006, President Bush succumbed to public pressure and signed a bill he had previously vowed to veto: the U.S. Senate Department of Defense Appropriations Act, 2006 (DOD Act), which contained the Detainee Treatment Act of 2005 (DTA), also known as the McCain Amendment. This amendment contained the language prohibiting "*cruel, inhuman, and degrading treatment*" [italics added] of prisoners or detainees (which was nearly identical to the Geneva Conventions wording). At first glance it seemed to be a major setback to the president's interrogation policy. But what went unnoticed until after the New Year's weekend was the posting of a *signing statement* accompanying the original act (Savage, 2006).

"The executive branch shall construe [the law] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief," Bush wrote, adding that this approach "will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks" (Savage, 2006).

A signing statement is an official document issued by the president to clarify his interpretation of a bill that he disagrees with, even though he is signing it. But many legal experts believe that President Bush used this signing statement along with others to exempt his administration from enforcement of the law he just signed—effectively nullifying it. A senior administration official speaking anonymously about the McCain amendment said that under special circumstances that may be critical to national security, the president reserves the right to use whatever level of interrogation methods he deems necessary. The official qualified this statement by saying that President Bush has two obligations: to uphold the law and to protect national security, and that the administration is not expecting these two obligations to conflict but recognizes that they could—in which case, national security must take precedence (Savage, 2006). In other words, his signing statement gives President Bush the authority to operate on a sliding scale. If the government perceives the suspect's information as weak, they will not use harsh techniques. But if a suspect has knowledge of the proverbial ticking time bomb, all limitations on torture and ill-treatment are suspended.

This begs the question: What value do law and precedent have in this Administration? The U.S. declared waterboarding illegal throughout the Vietnam War ("Major Newspapers Reported," 2005). America classified the current government (*enhanced interrogation*) methods as illegal violations of international standards: 1) when the Soviets used them during the cold war; and 2) again in 2004 by the White House's own Intelligence commission (Shane, 2007, June 6). But the White House ignores these facts. Furthermore, America willingly signed the Geneva Convention agreements and has upheld their principles in all previous armed conflicts even when it

was not strictly required. One obvious reason was to protect American captives from similar treatment. Moreover, research shows that harsh treatment of enemy prisoners motivates and hardens enemy fighters and creates additional support for them from previously neutral parties (Grey, 2006, p. 217).

If the Bush administration believes that their enhanced interrogation techniques do not constitute torture and are legal, why do they continuously obscure them? Granted, a measure of secrecy is necessary to fight the war on terror; but informing a bi-partisan panel of high-ranking members of Congress about the government's actual policy and actions would not compromise the policy. And that same panel could be consulted about the legal points. The government could establish a FISA (Foreign Intelligence Surveillance Act)-like court to review the legalities confidentially. The government could also publicly discuss the many non-secret aspects of torture policy. "No wonder the troops are confused. If the Attorney General [and the administration] won't say what constitutes torture, then how is the night shift at Abu Ghraib supposed to know?" (Kennedy, 2005).

Defense Department consultants stated in a 1956 report that Soviet methods of interrogation constituted torture and routinely produced false information (Shane, 2007, June 3). In 2004 the President's own Intelligence Science Board reasserted these findings, adding that the euphemistically labeled *enhanced interrogation techniques* adopted from the N.K.V.D.'s (later K.G.B.) cold war methods were amateurish and ineffective. Upon hearing these findings, Charles Morgan, a psychiatrist and government torture consultant asked, "How did something used as an example of what an unethical government would do, become something we do?" (Shane, 2007, June 6).

Here is how the White House did it. They repudiated the internationally accepted Geneva Conventions and the U.N. Convention Against Torture. They narrowly redefined torture as only those methods that result in "organ failure, impairment of body function, or death," then publicly proclaimed that, "We never torture." The administration suspended habeas corpus and Eighth Amendment prohibitions against cruel and unusual punishment for all detainees by redefining *prisoner of war*. And if the redefinitions did not hold up, they had presidential signing statements to exempt themselves from the laws they disagreed with.

One can rarely measure *right or wrong* in absolutes. A rational reading of the U.S. Constitution and the law, respect for the scientific method, and a basic sense of human decency are what society has to use in interpreting and administering justice. The Bush Administration has consistently ignored these elements during the war on terror. It has conducted itself illegally by manipulating the law with a myopic disregard for the treatment of future U.S. captives. The Bush commissioned Intelligence Science Board reaffirmed the illegality, ineffectiveness, and resource-wasting aspects of enhanced interrogation techniques, but the White House continues to rationalize support for their use. Torture, as defined by the U.S. or the U.N., does not produce good intelligence. By any neutral reading it is unlawful. Torture or ill-treatment of detainees is ineffective, it is illegal by national and world standards, and the United States government should not permit it—ever.

References

- The ban stays absolute. (2008, March 1). *Economist*, 386(8569), 63.
Retrieved May 27, 2008, from Academic Search Premier database.
- Constitution of the United States*. (1791).
Washington, DC: U.S. Government.
- Grey, S. (2006). *Ghost plane: The true story of the CIA torture program*.
New York: St. Martin's Press.
- Greenberg, K. J., & Dratel, J. L. (Eds.). (2005). *The torture papers: The road to Abu Ghraib*. New York: Cambridge University Press.
- Kennedy, R. F. (2005, December 6). The White House's tortured definition of torture.
Huffington Post. Retrieved May 21, 2008, from http://www.huffingtonpost.com/robert-f-kennedy-jr/the-white-houses-torture_b_11743.html
- Lithwick, D. (2006, September 13). Stream of consciousness. *Slate Magazine*.
Retrieved May 21, 2008, from <http://www.slate.com/id/2149564>
- Major newspapers reported Rice's denial that U.S. allows torture but didn't note administration's narrow definition. (2005, December 7).
Media matters for America. Retrieved May 21, 2008, from <http://mediamatters.org/items/200512070014>
- National Lampoon (Comedy troupe). (1974). *Missing White House tapes* [LP record album]. New York: Blue Thumb Records.
- Richardson, J. H. (2008, June). Is this man a monster? *Esquire*, 149(6), 126-152.
Retrieved May 30, 2008, from Academic Search Premier database.
- Savage, C. (2006, January 4). Bush could bypass new torture ban: Waiver right is

reserved. *Boston Globe*. Retrieved May 29, 2008, from http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/

Shane, S. (2007, June 3). Soviet style 'torture' becomes 'interrogation.'

New York Times. Retrieved May 7, 2008, from http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?_r=2&oref=slogin&oref=slogin

Shane, S. (2007, June 6). Scott Shane on U.S. interrogation techniques.

Fresh Air from WHYY [Radio interview]. Washington, DC: National Public Radio. Retrieved May 16, 2008, from <http://www.npr.org/templates/story/story.php?storyId=10763378>

Shane, S., Johnston, D., & Risen, J. (2007, October 4). Secret U.S. endorsement of severe interrogations. *New York Times*. Retrieved May 17, 2008, from <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?scp=10&sq=shane%2C+scott&st=nyt>

Summary of international and U.S. law prohibiting torture and other ill-treatment of persons in custody. (2004, May 24). *Human rights watch*.

Retrieved May 27, 2008, from <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>

Third Geneva Convention. (1949). *Convention (III) relative to the treatment of prisoners of war*. Geneva, 12 August 1949.

Geneva, Switzerland: Third Geneva Convention.

United Nations. (1985). *United Nations convention against torture, and other cruel, inhuman, or degrading treatment or punishment*. New York: United Nations.