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Ten Terrible Truths About The CIA Torture Memos

by Andy Worthington

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Andy Worthington, author of *The Guantánamo Files*, analyzes ten particularly disturbing facts to emerge from the four memos, purporting to justify the use of torture by the CIA, which were issued by the Justice Department's Office of Legal Counsel (OLC) in August 2002 and May 2005, and released by the Obama administration last week.

The OLC, as the *New York Times* explained in September 2007, holds a uniquely influential position, as it "interprets all laws that bear on the powers of the executive branch. The opinions of the head of the office are binding, except on the rare occasions when they are reversed by the attorney general or the president." The legal opinions were, therefore, regarded as a "golden shield" by the administration, although, as lawyer Peter Weiss noted after I last wrote about the Bush administration's war crimes, "it cannot be binding if it violates the constitution, or a *jus cogens* prohibition of international law, e.g. torture, or, perhaps, if it was made to order for the executive, as you demonstrate it was."

1) The "torture memos" (August 2002)

The first of the four memos (PDF), dated August 1, 2002, is a companion piece to the notorious "Torture Memo" of the same day (PDF), leaked in the wake of the Abu Ghraib scandal, which, notoriously, attempted to redefine torture as the infliction of physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," or the infliction of mental pain which "result[s] in significant psychological harm of significant duration e.g. lasting for months or even years."

These definitions were justified as legitimate attempts to interpret what the memo's authors — OLC lawyer John Yoo and Assistant Attorney General Jay S. Bybee — regarded as imprecision in the wording of the prohibition against torture in the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as implemented by Sections 2340-2340A of title 18 of the United States Code, which defines torture as any act committed by an individual that is "specifically intended to inflict severe physical or mental pain or suffering … upon another person within his custody of physical control."

In their attempts to justify the use of torture by U.S. forces, Yoo and Bybee not only sought to redefine "severe pain or suffering" and "severe mental pain or suffering"; they also sought to nullify the concept of "specific intent" by providing a defense for anyone whose actions were undertaken "in good faith," and, in addition, noted, "Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign."

The "torture memo" was disturbing enough in and of itself, of course, and in particular because it provided so much of the justification for the horrendous mistreatment of prisoners that followed, in Guantánamo, Afghanistan and Iraq, but until last week the contents of the second memo — authorizing the use of specific torture techniques for the CIA to use on the supposed "high-value detainee" Abu Zubaydah — had never even been glimpsed, although we knew much of what it contained from the reports of Red Cross interviews with the 14 "high-value detainees" transferred to Guantánamo in September 2006 — including, of course, Abu Zubaydah and Khalid Sheikh Mohammed (KSM) — which were first reported by Jane Mayer, and featured prominently in her book *The Dark Side*, and were then analyzed in detail by Mark Danner for the *New York Review of Books*, in an article published last month, and a follow-up article, accompanied by the Red Cross report itself (PDF), that was published two weeks ago.

In the 18-page memo, John Yoo and Jay Bybee approved the use of ten techniques prohibited in the Army Field Manual, which eschews physical violence, and, instead, lays out a series of psychological maneuvers to secure cooperation. When applied with patience by skilled interrogators, these techniques (which are, essentially, also followed by several intelligence agencies including the FBI) are demonstrably effective, and have, for years, served to demonstrate that the U.S. is capable of operating without resorting to the use of torture, but the Bush administration ignored their effectiveness, introducing torture into the military and the CIA, and sidelining those, like the FBI, who had actually begun to achieve results with both Abu Zubaydah and some of the Guantánamo prisoners without resorting to the use of torture.

The ten techniques — whose use is minutely micro-managed with a chillingly cold attention to detail — include a handful of physical tactics which, to my mind, seem mild compared to the widespread physical violence that accompanied detention in the "war on terror" ("attention grasp," "facial hold," and "facial slap (insult slap)"), and a more insidious form of violence ("walling"), which involves repeatedly hurling prisoners against a false wall. Much more disturbing are the use of stress positions, sleep deprivation, confinement in small boxes, waterboarding, and — straight out of George Orwell's *1984* — a proposal to prey on Zubaydah's fear of insects by placing an insect into his "confinement box."

This latter technique was, apparently, never used, but the others all were, and the memo blithely attempted to dismiss long-standing proof that all can be regarded as torture by being satisfied with time limits imposed on imprisonment in the "confinement boxes," by declaring that the use of painful stress positions (on which no time limit seems to have been imposed) was only undertaken "to induce muscle fatigue," and by claiming that the well-chronicled mental collapse that can result from sleep deprivation would, instead, only involve mild discomfort that "will generally remit after one or two nights of uninterrupted sleep," even though, as Yoo and Bybee also noted, "You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time."

Justifying the use of waterboarding — a form of controlled drowning that was known to the honest torturers of the Spanish Inquisition as "tortura del agua," and that, in a previous incarnation of the United States (Vietnam), involved prosecuting U.S. soldiers for its use — Yoo and Bybee calmly approved of 20-minute sessions in which, presumably, the 20- to 40-second procedure was repeatedly as frequently as required, and shrugged off waterboarding's demonstrably well-documented use as a form of torture by noting that, in the U.S. military schools, where it is taught in the counter-interrogation program known as SERE (Survival, Evasion, Resistance, Escape), from which it was reverse-engineered for the "war on terror," it has never, according to "experts" consulted by the administration, produced "any adverse mental health effects."

2) The Bradbury memos (May 2005)

This assertion is, of course, monstrously untrue, as psychologist Jeffrey Kaye demonstrated in an article last week, but the underlying premise of the August 2002 memo — that, although torture was needed to "break" the CIA's prisoners, it was not actually torture because it did not inflict "severe physical or mental pain or suffering" — was spelled out much more clearly in May 2005, when the OLC's Principal Deputy Assistant Attorney General, Steven G. Bradbury, produced another three memos, also released last week (and available as PDFs here, here and here), which picked up where Yoo and Bybee had left off.

Over the course of 106 pages, as he attempted to interpret torture so that it did not contravene the Convention Against Torture and Sections 2340-2340A of Title 18 of the United States Code, Bradbury revisited much of the ground covered by Yoo and Bybee, but inadvertently made it even clearer than his predecessors had that there was a ludicrous gulf between, on the one hand, endorsing torture, and, on the other, attempting to claim that it would not cause either severe physical or mental harm.

As with the earlier memos, from my point of view the arguments about the techniques not causing severe physical pain were more plausible than those in which Bradbury attempted to argue that techniques derived from the SERE program — which are based on teaching soldiers to resist techniques designed to cause a complete mental collapse — do not cause severe mental pain or suffering. The very fact that SERE psychologists were so prominent in the CIA's torture program makes it clear that "learned helplessness" — involving the brutal training of prisoners to become dependant on their interrogators for every crumb of comfort in their wretched, tortured lives — was designed not just to cause them severe mental pain or suffering but to completely destroy them mentally. As Bradbury himself noted, when discussing the "conditioning techniques" that underpin the CIA prisoners' conditions of

confinement, “they are used to ‘demonstrate to the [detainee] that he has no control over basic human needs.’”

And yet, for page after page, Bradbury concluded that “nudity, dietary manipulation and sleep deprivation” — now revealed explicitly as not just keeping a prisoner awake, but hanging him, naked except for a diaper, by a chain attached to shackles around his wrists — are, essentially, techniques that produce insignificant and transient discomfort. We are, for example, breezily told that caloric intake “will always be set at or above 1,000 kcal/day,” and are encouraged to compare this enforced starvation with “several commercial weight-loss programs in the United States which involve similar or even greater reductions in calorific intake.”

In “water dousing,” a new technique introduced since 2002, in which naked prisoners are repeatedly doused with cold water, we are informed that “maximum exposure directions have been ‘set at two-thirds the time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature,’” and when it comes to waterboarding, Bradbury clinically confirms that it can be used 12 times a day over five days in a period of a month — a total of 60 times for a technique that is so horrible that one application is supposed to have even the most hardened terrorist literally gagging to tell all.

3) The ticking time-bomb scenario

The Bradley memos are littered with fascinating snippets of information — “Careful records are kept of each interrogation,” for example — but one of the most revealing is the establishment that, although the array of techniques ”are not used unless the CIA reasonably believes that the detainee is a senior member of al-Qaeda or [its affiliates], *and* the detainee has knowledge of imminent terrorist threats against the USA or has been directly involved in the planning of attacks,” use of the waterboard is “limited still further, requiring credible intelligence that a terrorist attack is imminent … substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack; and [a determination that o]ther interrogation methods have failed to elicit the information [and that] other … methods are unlikely to elicit this information *within the perceived time limit for preventing the attack*”; in other words, the ticking time-bomb scenario, which, outside the world of Jack Bauer, has never actually occurred.

4) The relentless waterboarding of Abu Zubaydah and Khalid Sheikh Mohammed

I find this distortion of reality disturbing enough, but, having decided that this was indeed the case with Abu Zubaydah, KSM and one other prisoner, Abdul Rahim al-Nashiri, the CIA and its masters then decided that, in the case of Zubaydah, it was, as Bradley reveals in an extraordinarily telling passage, “necessary to use the waterboard ‘at least 83 times during August 2002,’” and “183 times during March 2003” in the interrogation of KSM.
These are mind-boggling figures, and, in addition, they seem to reveal not that each horrific round of near-drowning and panic, repeated over and over again, defused a single ticking time-bomb, but, instead, that it became a macabre compulsion on the part of the torturers, which led only to the countless false alarms reported by CIA and FBI officials who spoke to David Rose for *Vanity Fair* last December, or, as the author Ron Suskind reported in 2006, after Zubaydah “confessed” to all manner of supposed plots — against shopping malls,

banks, supermarkets, water systems, nuclear plants, apartment buildings, the Brooklyn Bridge, and the Statue of Liberty — "thousands of uniformed men and women raced in a panic to each target … The United States would torture a mentally disturbed man and then leap, screaming, at every word he uttered."

One sign that this is indeed the case comes in a disturbing footnote, in which Bradbury noted,

> This is not to say that the interrogation program has worked perfectly. According to the *IG Report* [a massive and unpublished internal report that was clearly critical of much of the program], the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information … on at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant, elements within CIA Headquarters still believed he was withholding information [passage redacted]. At the direction of CIA headquarters, interrogators therefore used the waterboard one more time on Zubaydah [passage redacted].

5) The crucial differences between SERE and CIA waterboarding

Furthermore, as another revealing footnote makes clear, the *IG Report* also noted that, "in some cases the waterboard was used with far greater frequency than initially indicated," and also that it was "used in a different manner" than the technique described in the DoJ opinion and used in SERE training. As the report explained, "The difference was in the manner in which the detainees' breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator … applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychiatrist/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is 'for real' and is more poignant and convincing."

Furthermore, the *IG Report* noted that the OMS, the CIA's Office of Medical Services, contended that "the experience of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant." Chillingly, the report continued, "Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe."

6) The 94 "ghost prisoners"

Another disturbing revelation of Bradbury's memos was the disclosure of the number of prisoners held in secret CIA custody — 94 in total — and the additional note that the agency "has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees." What's disturbing is not the number — CIA director Michael Hayden admitted in July 2007 that the CIA had detained fewer than 100 people at secret facilities abroad since 2002 — but the insight that this exact figure provides into the supremely secretive world of "extraordinary rendition" and secret prisons that exists beyond the cases of the 14 "high-value detainees" who were transferred to Guantánamo from secret CIA custody in September 2006.

It's unlikely that the Obama administration intended to highlight the case of these other prisoners — who can rightly be regarded as "America's Disappeared" — but it's clear that, although their existence was barely mentioned in the mainstream media, the revelation of this

official figure will only lead to calls for the administration to explain what happened to the other 80 prisoners.

7) Hassan Ghul

Whether "guilty" or not, the treatment of these men remains one of the dirtiest secrets in the "war on terror." Some (beyond the 14) may have also been transferred to Guantánamo, others are undoubtedly still held in Bagram, and others have been returned to the custody of their home countries — or, perhaps, to be disposed of in third countries. In addition, as a result of Obama's executive order, in January, compelling the CIA to close all secret prisons, it also seems probable that, if any of the 80 were still in secret prisons at the time, they too have since been spirited away to the custody of other countries.

It's clear, however, that justifying the disposal of these men without any accountability whatsoever would be intolerable even if they were all confirmed terrorists, and is only made more chilling because the "evidence" against them has never been made available at all, and because of the possibility that, as has been so prevalent in the "war on terror," grievous mistakes were made, and innocent men, or men with no significant connection with terrorism, were also swept up in the indiscriminating global dragnet that the Bush administration created in the wake of the 9/11 attacks.

A case in point, I believe, may be the only "ghost prisoner" mentioned by name in the Bradbury memos: "Gul," who is clearly Hassan Ghul, one of 39 suspected "ghost prisoners" mentioned in "Off the Record" (PDF), a report by several human rights groups that was issued in June 2007. Seized in northern Iraq in January 2004, Ghul was touted by the administration as a significant figure in al-Qaeda on his capture, and the memos revealed how particular techniques were applied to him because the interrogation team believed he "maintain[ed] a tough, Mujahidin fighter mentality and ha[d] conditioned himself for a physical interrogation."

Whether any of this was true or not is unknown. Although Ghul was listed as missing in "Off the Record," a British citizen, Rangzieb Ahmed, who was convicted of terrorist offences in the UK in December 2008, after being tortured in Pakistani custody, reported to the British human rights group Cageprisoners that, after two and a half years in secret CIA prisons, Ghul was transferred to Pakistani custody, and occupied the cell next to him in a prison in a safe house in Pakistan until January 2007, when he was moved to another unknown location.

From this brief report, it is impossible to know if Ghul was transferred to Pakistani custody because the CIA had downplayed his significance, or even if the U.S. administration had mistaken him for someone else and wanted to get rid of him, or if the CIA was still involved with his imprisonment, but had simply moved him to a secret facility that was ostensibly under the control of the Pakistanis, as part of an ongoing process of shifting "black sites" into less noticeable locations. Either way, his story shines a much-needed light on a largely overlooked corner of the "war on terror," and its sudden resurfacing, in Steven Bradbury's torture memos, will only increase calls for further investigations into the whereabouts of "America's Disappeared."

8) The important role of Jack Goldsmith in resisting the culture of torture

Now that these memos are out in the open, it is, I believe, important to look back at the role played by Jack Goldsmith, who took over from Bybee as the head of the OLC in October 2003. A supposedly "safe pair of hands," who, with Yoo, was regarded as "a leading proponent of the view that international standards of human rights should not apply in cases before U.S. courts," Goldsmith in fact turned out to be a nightmare for the administration, as he withdrew four pieces of legal advice — including the "torture memo" and a March 2003 memo approving the more general use of "enhanced interrogation techniques" — because he regarded them as "tendentious, overly broad and legally flawed."

As Goldsmith explained in September 2007 to Jeffrey Rosen of the *New York Times*, he concluded that the "torture memo" contained advice that "defined torture far too narrowly," and also took exception to the memo's claim that "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the commander in chief authority in the president," explaining that he believed that "this extreme conclusion" would "call into question the constitutionality of federal laws that limit interrogation, like the War Crimes Act of 1996, which prohibits grave breaches of the Geneva Conventions, and the Uniform Code of Military Justice, which prohibits cruelty and maltreatment." He added that he "found the tone of both opinions 'tendentious' rather than cautious and feared that they might be interpreted as an attempt to immunize government officials for genuinely bad acts."

When it came to withdrawing the "torture memo," Goldsmith was acutely aware that it would anger the administration, because it "provided the legal foundation for the CIA's interrogation program," and, as Rosen described it,

> He made a strategic decision: on the same day that he withdrew the opinion, he submitted his resignation, effectively forcing the administration to choose between accepting his decision and letting him leave quietly, or rejecting it and turning his resignation into a big news story. "If the story had come out that the U.S. government decided to stick by the controversial opinions that led the head of the Office of Legal Counsel to resign, that would have looked bad," Goldsmith told me. "The timing was designed to ensure that the decision stuck.

Goldsmith made it clear that he did not think that those involved in creating the torture memos were criminally culpable. In his book *The Terror Presidency*, published shortly after the *Times* interview, he explained that "the poor quality of a handful of very important opinions" written by Yoo, who was a close friend, was "probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House and Yoo's unusually expansive and self-confident conception of presidential power." He also went out of his way to defend White House counsel (and later attorney general) Alberto Gonzales and even David Addington, Dick Cheney's legal counsel (and later his chief of staff), the two figures outside the OLC who were most closely associated with the torture policy, explaining, "They thought they were doing the right thing." This was in spite of the fact that, as he also stated, "My conflicts" — and they were considerable conflicts, by his own account — "were all with Addington, who was a proxy for the vice president."

It is, however, impossible to square Goldsmith's opinions of these men with the significance of his actions. As Rosen stated, "In the past, the Office of Legal Counsel had occasionally changed its legal positions between presidential administrations to reflect different legal philosophies, but Goldsmith could find no precedent for the office withdrawing an opinion drafted earlier by the same administration — especially on a matter of such importance."

With this in mind, what Goldsmith's actions actually revealed was a desperate — and principled — need to withdraw opinions that were not just misguided, but fundamentally unlawful, and an equally desperate desire to shield Yoo, Gonzales, Addington — and, by extension, Dick Cheney — from the grave implications of his actions.

9) The importance of releasing the Justice Department's OLC report

From the above, I believe it is clear that Jack Goldsmith's attempts to prevent future war crimes while protecting those responsible for war crimes already committed was, and remains an untenable position, and this has been reinforced over the last few months, in reports about the results of a four-year investigation by the Justice Department's Office of Professional Responsibility (OPR), which was charged with looking at whether the legal advice in the crucial interrogation memos "was consistent with the professional standards that apply to Department of Justice attorneys."

According to *Newsweek*'s Michael Isikoff, who broke the story, a draft of the report, submitted in the final weeks of the Bush administration, caused anxiety among former Bush administration officials, because "OPR investigators focused on whether the memo's authors deliberately slanted their legal advice to provide the White House with the conclusions it wanted." A former Bush lawyer, speaking anonymously, added that he "was stunned to discover how much material the investigators had gathered, including internal e-mails and multiple drafts that allowed OPR to reconstruct how the memos were crafted."

I maintain, as I last stressed a month ago, that the release of the OPR report is of critical importance (especially in light of recent reports that it has been rewritten, or is being rewritten, to reach a less stark conclusion of wrongdoing), as it seems clear that it is the key to securing concrete proof of the involvement of Dick Cheney, David Addington and Alberto Gonzales in the creation of the torture memos.

As for Bybee, who became a 9th Circuit judge after leaving the OLC, calls for his impeachment are completely justified, and both John Yoo and Steven Bradbury should also face prosecution, as all three men have demonstrated that they were prepared, at the request of their masters, to provide whatever legal contortions they thought they could get away with in an attempt to justify the unjustifiable: to pretend that torture was not torture, and to endorse its use, in defiance of U.S. law.

10) Barack Obama must prosecute the torturers

And finally, although the Obama administration is to be congratulated for making the memos available, Barack Obama is, at present, in the same untenable position that Jack Goldsmith found himself in; that is to say, apparently committing himself to preventing future war crimes while protecting those responsible for war crimes already committed. It may indeed be appropriate for the administration to pledge, as Barack Obama did last week, that "those who carried out their duties relying in good faith upon legal advice from the Department of Justice … will not be subject to prosecution," but this is only acceptable if those responsible for implementing the policies obeyed by those who were only following orders are themselves held responsible.

Laws were broken and men were tortured not by some act of God, but because certain individuals decided that they were above the law, and that the absolute prohibition on the use of torture was an inconvenience that could be bypassed through the use of creative legal advice. Unlike the Bush administration's relentless semantic maneuvering, the words "absolute prohibition" — and the torture convention's insistence that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture" — are not negotiable.

Just as those who commit terrorist atrocities are criminals, and not warriors in a "Global war on terror," those who approve the use of torture — whatever its supposed rationale — are also criminals. Unlike Steven Bradbury, and John Yoo and Jay Bybee before him, law-abiding citizens will recognize that the newly released memos provide a glimpse into a horrendous world that "shocks the conscience," in which torture seems to have become an end in itself, and in which 94 men — most of whom have never even been identified — were judged to be guilty without a trial, were tortured and have since disappeared, their whereabouts unknown.