

Memos show Bush administration sanctioned torture

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Justice Department and CIA memos recently obtained by the American Civil Liberties Union confirm once again that high-ranking members of the Bush administration sanctioned torture.

The most important memo, dated August 1, 2002 and signed by then-Assistant Attorney General Jay S. Bybee, relies upon an absurd definition of torture tailored to provide a pseudo-legal cover for methods that the Central Intelligence Agency, the recipient of the memo, was already executing.

According to the memo, obtained by the ACLU through the Freedom of Information Act, so long as CIA operatives acted “in good faith” and under the “honest belief” that their interrogation techniques would not cause “prolonged mental harm,” then the methods could not be construed as torture and agents would be protected from legal sanction. The memo asserts that torture could only be defined as such acts that take place for no other purpose than the infliction of severe mental or physical trauma. In other words, if the purported aim of the interrogation techniques was to elicit information—for example regarding terrorist activities—then the methods used could not be defined as torture, no matter how brutal.

The memo was evidently a response by the Justice Department to a CIA request for legal advice, and aimed to lessen the agency’s fears that its personnel might face prosecution for torture. “You [the CIA] have asked this Office’s views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of the United States Code,” the document begins.

It is very likely that the original document openly discussed particular methods of torture (the “certain proposed conduct” to which the memo refers) but the vast bulk of the 17-page memo (http://www.aclu.org/pdfs/safefree/cia_3686_001.pdf) has been blacked out by Justice Department censors.

Nonetheless, the few lines and paragraphs left extant paint a damning portrait of an administration deliberately engaged in an attempt to circumvent legal restrictions against torture. “This is a critical piece of the story,” said Jameel Jaffer of the ACLU. “This is the most explicit statement out there that the CIA waterboarded prisoners because the Justice Dept. authorized them to do so.”

The memo concedes that the law in question, Section 2340A, “makes it a criminal offense ‘for any person outside of the United States [to] commit[] or attempt[] to commit torture.’” The document then relates verbatim the Section’s definition of torture as “an act by a person operating under the color of law specifically intended to inflict severe mental or physical pain or suffering ... upon a person in his custody or physical control.”

A fairly straightforward, and from the perspective of the Bush administration altogether too limiting, definition of torture.

To circumvent these limitations, the memo authored a series of semantic distortions, what Herman Schwartz, professor of law at American University, calls an “out-and-out-fraud.” The Justice Department document describes “severe” pain, for example, as “difficult for the individual to endure and of an intensity akin to the pain accompanying serious physical injury.” This definition opens the door to horrific interrogation methods, as the references to what an individual can “endure” and “serious physical injury” make clear. Indeed, on the same day the document was composed, Bybee sent a memorandum to then-White House Counsel Alberto Gonzalez defining torture as “extreme acts” similar to “organ failure, impairment of bodily function or even death.”

But the document’s most cynical argument, and the one that would appear to provide a *carte blanche* for all sorts of torture, is its discussion of intent. “To violate the statute,” the document argues, “an individual must have

the *specific intent* to inflict severe pain or suffering” [emphasis added]. Since the ostensible “intent” of state-executed torture is not to inflict pain for its own sake, but instrumentally, to compel cooperation, this pseudo-legal ploy would in fact have the effect of legalizing any physical or mental abuse that had any purpose whatsoever. Indeed, the document assures the CIA that, “based on the information you have provided us, we believe those carrying out these procedures would not have the specific intent to inflict severe pain or suffering.”

In a phone interview with the *Washington Independent*, Jaffer referred to the Justice Department’s contention as “sweeping,” offering the following metaphor: “A bank robber tortures a bank manager to get the combination to a vault. He argues that the torture was not to inflict pain, but to get the combination. Every torturer has a reason other than to cause pain ... If you’re going to let people off the hook for an intention other than to cause pain, you’re not going to be able to prosecute anyone for torture.”

The document’s argumentation is as tangled as it is dishonest. “As we explained in our recent opinion,” the Justice Department memo asserts, “an individual must have the specific intent to cause prolonged mental harm in order to have the specific intent to inflict severe mental pain or suffering ... As we indicated above, a good faith belief can negate this element. Accordingly, if an individual conducting an interrogation has a good faith belief ... that individual lacks the requisite specific intent.” And so on.

The ACLU also obtained two other documents that, although highly redacted, reveal that the effort to permit and justify torture was a central preoccupation of the Bush administration. One is a January 28, 2003 letter from CIA director George Tenet discussing “enhanced” interrogation techniques. The other, undated document, evidently refers back to the August 1, 2002 memo, and reveals that waterboarding—simulated drowning—was one of the specific practices that the Department of Justice determined was not torture.

In response to the new revelations, the Justice Department claims that Bybee’s legal opinion has been withdrawn for three years, and insists that the interrogation methods sanctioned by the Bush administration do not violate the law. However, the Bush administration has not clarified what “enhanced” methods are still in use. The CIA purports to have banned waterboarding in 2006. However, the method may be used with the approval of the attorney general, the CIA,

and the president.

The Tenet letter is of potentially great legal significance because in it he stipulates that a record of each interrogation using enhanced methods must be kept. “In each interrogation session in which an Enhanced Technique is employed,” he wrote, “a contemporaneous record shall be created setting forth the nature and duration of each such technique employed, the identities of those present.” It is possible, therefore, that extensive documentation, and perhaps video or audio footage, of the CIA torture of terrorism suspects exists.

Sen. Patrick Leahy (D-Vermont), chairman of the Judiciary Committee, subpoenaed the August 1, 2002 memo last year. The Bush administration did not cooperate with the subpoena, and Leahy evidently failed to pursue the matter further.

Meanwhile a human rights organization that shared the Nobel Peace Prize in 1997 for its work in combat zones, Physicians for Human Rights, called for an investigation into torture and war crimes by US government officials. Allen Keller, a spokesman for the group, testified Thursday before a US House of Representatives hearing about the treatment of prisoners at Guantanamo Bay, as well as in Iraq and Afghanistan.

PHR has recently issued a study entitled, “Broken Laws, Broken Lives: Medical evidence of torture by US personnel and its impact,” with a preface by retired US Army General Antonio Teguba, who conducted the first official investigation into the abuse of prisoners at Abu Ghraib. Teguba wrote in the preface that there was “no longer any doubt that the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”



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