

Bush the Would-Be Torturer

Marjorie Cohn

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It's all falling into place. The Wall Street Journal has revealed that Bush's lawyers told him he can order that torture be committed with impunity. It is now official that George W. Bush is above the law.

As horror after horror emerged from Abu Ghraib prison, Americans exclaimed that this is not behavior befitting our great country. Many wondered how such atrocities could be perpetrated by United States citizens. We hoped that this was simply the behavior of a few bad apples run amok. But the dots have now been connected for us. Torture is sanctioned policy that comes from the top.

In a classified report prepared for Donald Rumsfeld in early 2003, a working group of lawyers appointed by the Defense Department's general counsel, William J. Haynes II, advised that Bush is not bound to follow United States laws that prohibit torture. Government agents who torture under orders from Bush won't be successfully prosecuted, according to the report, which is scheduled to be declassified in 2013.

Never mind that the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which makes it part of the supreme law of the land under our Constitution. Never mind that this treaty specifies that torture is never permitted, even in times of war. Never mind that Congress implemented this treaty by enacting a Torture Statute providing for 20 years, life in prison or, even the death penalty when the victim dies, for U.S. soldiers or civilians who engage in torture. And never mind that torture constitutes a war crime, for which our officials can be punished.

The Bush administration lawyers have created their own jurisprudence, which effectively holds the president is not bound to follow the law.

Extrapolating from the "necessity" defense in criminal law, Bush's lawyers counsel, in effect, that the end justifies the means. It's the proverbial ticking time bomb scenario. Torture the bastard to avert a terrorist attack. But not only is this illegal; it doesn't work. Senator John McCain says the tortured will rarely provide reliable information. This position has been affirmed by many of the prisoners released from Abu Ghraib who said they made up information to get the torture to stop.

Bush's legal experts also rehabilitated the "superior orders" defense. It didn't work for the Nazis at Nuremberg or Lt. William Calley who was prosecuted for the My Lai Massacre in Vietnam. That defense can only be asserted when the defendant was following a lawful order. An order to commit torture would be unlawful, as it would violate the Convention Against Torture and the Torture Statute.

But Haynes' team assures Bush his orders would be legal because he's the president and he's the highest law in the land (notwithstanding the Constitution, Congress and the Supreme Court). Indeed, one of the lawyers who prepared the report said the intention of the political appointees heading the working group was to realize "presidential power at its absolute apex."

The report was written in response to concerns by senior officers at the U.S. prison at Guantanamo Bay, Cuba. They advocated "a rethinking of the whole approach to defending your country when you have an enemy that does not follow the rules." Of course, we needn't follow the rules because we're the good guys.

Remember that in the course of trying to convince the American people that war with Iraq was necessary, Bush marshaled accusations that Saddam Hussein had tortured his people. But we have God - and Bush - on our side, so we're allowed to torture.

In late 2002, after the Washington Post revealed allegations of behavior of U.S. commanders that might amount to torture in Afghanistan, Human Rights Watch Executive Director Kenneth Roth wrote to Bush, saying that immediate steps must be taken "to clarify that the use of torture is not U.S. policy." Roth reminded Bush that, "U.S. officials who take part in torture, authorize it, or even close their eyes to it, can be prosecuted by courts anywhere in the world." The prohibition against torture is so basic, it is considered *jus cogens*, and is thus binding on all countries, even if they haven't ratified the Torture Convention.

The Bush administration has been emboldened to itself engage in serious human rights violations since the horrific attacks of September 11. Cofer Black, head of the CIA Counterterrorist Center in September, 2002, testified at a joint hearing of the House and Senate intelligence committee: "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11. After 9/11 the gloves came off." If Bush has his way - and the most electoral votes in November - those gloves will stay off.

There are some striking contradictions between Bush administration policy in the "war on terror" and the working group's rationalizations for Bush to authorize torture. The lawyers who prepared the report admitted that the Torture Statute applies to Afghanistan.

But they declared it does not cover our actions in Guantanamo because it is within the "territorial jurisdiction of the United States, and accordingly is within the United States." Yet, the Bush administration has denied these prisoners access to U.S. courts to challenge their detention precisely by claiming that the U.S. is not sovereign over Guantanamo Bay. Either the United States has jurisdiction over Guantanamo or it doesn't. You can't have it both ways.

The Ninth Circuit Court of Appeals decided that U.S. courts do have jurisdiction to hear the Guantanamo prisoners' complaints. That court was extremely alarmed at the government's assertion during oral argument that these prisoners would have no judicial recourse even if they were claiming the government subjected them to acts of torture. The Ninth Circuit said: "To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition." The court said this was "a position so extreme that it raises the gravest concerns under both American and international law."

By the end of June, the Supreme Court will decide whether U.S. courts have jurisdiction over the Guantanamo prisoners.

In December 2002, the United Nations General Assembly adopted a new anti-torture treaty after 10 years of negotiation. The Optional Protocol to the U.N. Convention against Torture will allow independent international and national experts to conduct regular visits to places of detentions within the States Parties, to assess the treatment of detainees and make recommendations for improvement. The treaty was adopted by a vote of 127 in favor, 4 against and 42 abstentions. The United States was joined by Nigeria, the Marshall Islands and Palau in opposing this treaty.

The legal advice which would permit Bush to order torture without sanction is consistent with his policy to ignore or denounce treaties and federal laws that don't comport with his program. Bush's unprecedented act of "unsigned" the International Criminal Court statute, and coercing Security Council resolutions and bilateral immunity agreements, are meant to ensure that neither he nor his top advisors ever become defendants in war crimes prosecutions. But under the well-

established laws of the United States, Bush would be a war criminal if he authorizes torture as recommended in the classified report.

Marjorie Cohn, is a contributing editor to **truthout**, a professor at Thomas Jefferson School of Law, executive vice president of the National Lawyers Guild, and the U.S. representative to the executive committee of the American Association of Jurists.

http://www.truthout.org/docs_04/060904A.shtml