Introduction

Years before any of the abuses and allegations of torture had been leveled against the Bush Administration's detention programs within the War on Terror, the President had activated the White House's Office of Legal Counsel in order to determine the potential legality of a planned regime of coercive interrogation which would be used on detainees classified as "unlawful enemy combatants."[1] The White House counsel in turn made the same request of the Justice Department's Office of Legal Counsel as well as the Legal Counsel of Department of Defense. What came from these several legal memorandums over the course of three years was a strongly limited view of the power of International treaties, US statutes, or the Courts to regulate the substantive dealings of the military acting under the implied War-Powers authority of the President. By utilizing a unitary executive theory[2] of the President's powers during war, the memorandums' main contribution was to give the Bush administration their initial confidence that any interrogation program they established would be safe-guarded from adverse legal scrutiny or defeat by the hands of opponents in both American and International courts.

The OLC acts as the official think-tank of the Executive Branch, whose lawyers issue authoritative legal analysis on any legal topic whenever they are asked in order to establish or clarify the federal government's position on specific issues.[3] These OLC opinions written between the years of 2001 and 2003 (**Appendix I**) were the actual legal doctrine or position of the United States at the time of their writing. While they were completely classified, these memos were the intellectual and legal foundations for the establishment of the Military Tribunal System and the Detention regimes typified by the Guantanamo Bay detention camp in Cuba and Abu Ghraib military prison in Iraq. Between the period of September 2001 to April 2003, these memorandums significantly furthered the administration's pursuit to redefine the War on Terror as an exceptional conflict with little legal precedent which necessitated drastic discretionary presidential authority.

The most significant opinions were written by John Yoo by request of the White House. He was an attorney in the OLC under John Bybee and later the OLC's head attorney. Yoo's arguments were then built upon and expanded with substantive policy suggestions by various Executive Branch lawyers from the likes of Jay Bybee, David Addington, Alberto Gonzalous, Richard Armitage, and even former Secretaries Colin Powell (State), and Donald Rumsfeld (Defense). Very few of the memos expressed contrarian positions, and over a year and half what developed was a dramatically different approach in military detention operations.

The hundreds of pages of memos yield a determination that the Geneva Conventions did not apply to foreign terrorist groups such as the Taliban and Al Qaeda,[4] therefore making coercive interrogation legally acceptable. With a harsher interrogation system came the ability of the detention authority to qualify a detainee's treatment based on their performance within prolonged periods of questioning and coercion. [5] The arguments set-forth expand the President's authority under his implied War Powers under the Constitution to such an extant that even the Congress' power of oversight and prohibitive legislation or the Supreme Court's power of judicial review were challenged, "The Power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President." [6] These memoranda contain the initial arguments for why detainees should have no legal appeal within the US based on the fact that the Guantanamo Bay Naval Base is not the soverign teritory of the United States and therefore no Circuit Court would have jurisdiction over cases arising there. [7] They also created an extremely narrow interpretation of various prohibitions and case law regarding torture and "cruel and unusual punishment," creating hypothetical defenses for officers whom perform torture "unintentionally" or in "good faith."[8] And finally, found within the memoranda analyzed in this study is an explicitly enumerated "Interrogation Menu," which lists a series of tactical techniques which could be used as a regime of lowering detainees' resistance to months and years of protracted interrogations by Military Intelligence and CIA officers. (**Appendix II**)

While evidence of detainee abuse within the War on Terror is by now well documented by scores of scholarlyand governmental accounts,[9] this study delves into how legal re-interpretations allowed for this level of acknowledged abuse. As well as being a stepping stone to clearly illegal conduct against prisoners in places such as Abu Ghraib,[10] the memoranda reveal that the early legal conception of the rights of the particular class of detainees called "unlawful enemy combatants" was one that systematically allowed for coercive interrogation as part of a pre-established program. Once the Justice Department had made the big strides in asserting the inapplicability of the Geneva Conventions as well as the substantive protections of other prohibitory torture statutes and treaties, the Defense Department was then able to contemplate techniques which would be illegal if used against an American citizen or a member of the armed forces of any particular country. Much of these legal intrepretaions generated by the Bush administration have either been later resciended by the OLC[11] or struck down within recent cases heard before the Supreme Court,[12] yet the underlying "enhanced interrogation techniques" have not been similiarly renounced.[13] A quick summary of the faulty memorandum conclusions and their refutation within this study can be seen in Appendix III.

Who are Subject to Military Detention?

Only 14 days after September 11th attacks, the Justice Department's Office of Legal Counsel issued a memorandum which intrepreted the President's War Powers under the Constitution as being broad enough to allow for widely discreationary actions and determinations, "Force can be used both to retaliate for those attacks, and to prevent and deter future assualts on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and Pentagon: *the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be linked to the September 11 incidents*, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people... Niether statute [the War Powers Resolution for Authorization to use Military Force] can place any limits on the President's

determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of response." (Yoo, September 25th memo)(emphasis added)[14]

This initial OLC analysis proved for the President that he possesed the requisite authority not only to continually review/expand on the identity and nature of the enemy, but also what was an appropriate response therof. This memorandum viewed Congress' Joint Resolution giving "Authorization to Use Military Force" to the President against those "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks,"[15] as merely guidance not precluding broader action against organizations/persons that were not even directly involved with 9/11. While Congress specifically gave the President the authority only to attack those responsible for the 2001 attacks, the September 25th memo explicitly expands Congress' authorization based solely on the view that President's war powers during times of emergency allow for unlimited discreation despite specific legislative qualification, "In exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable." (September 25th memo)[16]

Relying on this self-asserted executive authority, the President then issued an Executive Order (Military Order of Novemeber 13th 2001) declaring that the War on Terror would necessitate programs of detention and military trial which wouldn't have to apply "the principles of law and the rules of evidence generally recognized... in the United States."[17] Instead, the President designated Secaratary Defense Rumsfeld as the arbitrar of detainee treatment and trial to "take all necessary meaures to ensure that any individual subject to this order is detained."[18]

The Military Order echoes the September 25th memo's expansion of the War on Terror beyond Al Qaida or the Taliban within the order's section defining "individual subject to this order":

1. there is reason to believe that such individual, at relevant times,
   i. is or was a member of the organization known as al Qaida;

   ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preperation therefor, that have caused, threaten to cause, or have as their aim to cause, injury, to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

iii. Has knowingly harbored one or more individuals described in subparagaphs (i) or (ii).”[19]

This expansion of the War on Terror beyond those responsible for 9/11 to any individuals, groups, or supporters of beligerancy against the US represents a deprepancy between what the OLC memorandums argue and what President Bush was actually doing. While much of the legal thrust of the early memorandums rest on the assumption that the only type of persons they would be detaining would either be Al Qaida and Taliban, the expansive delination of people subject to detention under the November Military Order is much broader and various. None of the memorandum which set forth agruements for the inapplicability of Genvea to detainees seem to acknowledge the fact that the War on Terror would be targeting much more than just al Qaida or Taliban members in Afghanistan, and thus do not have anything to say about other types of belligerents whom are neither al Qaida or Taliban members but which have still come into the custody of the DoD under the auspcisous of the War on Terror. This discrepency will become more significant once the memorandums' treatment of Geneva inapplicability is discussed.

Why the Genevea Conventions don't Apply.

Found throughout the four Geneva Conventions are specific prohibitions against torturous, coercive, inhumane and degrading treatment. Of great importance to the current topic is the Third Geneva Convention (Geneva III), which deals exclusively with the treatment of Prisoners of War.[20] Geneva III lays out a detailed substantive procedure of how Prisoners of War (POWs) are to be held and treated. Most starkly opposed to the subsequent War on Terror detention scheme is Geneva III's explicit prohibition against coercive interrogation, “Every prisoner of war, when questioned on the subject, is bound to give *only* his surname, first names and rank, date of birth, and army, regimental, personal or serial number... No physical or mental torture, nor any other form of coercion, may be inflicted on prosoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened.” (Geneva III, Art. 17) Not only is questioning beyond

name and rank impermissable, but prisoners are to be treated humanely without being subjected to "physical mutilation... acts of violence or intimidation and against insults and public curiosity" (Art. 13), mainting their "full civil capacity which they enjoyed at the time of their capture" without the "restrict[ion of their] exercise." (Art. 14) While there are more detailed provisions which are also in conflict with the Military detention regime, these three provisions are at face both important substantive content of Geneva III but also antithetic to the type of detainment and interrogation that the Bush administration sought to give to captured persons within the War on Terror.

Also pertinent to detainee treatment is the Common Article III, which is found in all four Conventions. The Common Article, is called such because it is the third article of all three Geneva conventions. It doesn't carry the same detailed meaning of the rest of the Conventions, but serves as a general prohibition against torture and maltreatment against detainees which act as a minuimum level of treatment which is invoked when the rest of the Conventions may not apply. It consists of four general prohibitions, which are: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking hostages; (c) outrages upon personal dignity, in particular, humiliating and degarding treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." (Geneva Conventions, Common Article Three)

A quick pursueal of the the list of Interrogation Methods developed by the Defense Department to be used against detainees (included in Appendix II) would show that many of the proposed provisions either violate the nature of sections (a) or (b) of Common Article Three or Articles 13 and 14 of Geneva III. Taken in light of the prohibition of questioning in Article 17 of Geneva III, *all* of the proposed techniques would be illegal, for the only truly permissable function of a Geneva POW camp is the holding of the enemy forces until the duration of the conflict. Yet, the memorandums initially make no claim about the legality of their proposed methods of interrogation and detention and instead

rely solely on the fact that the people they are capturing, Taliban and al Qaida members, are not protected under any aspect of the Geneva Conventions.

The discussion of lthe legality of the interrogation methods cannot be resolved without the determination that the applicable provisions of the Conventions apply. The majority of OLC opinions preoccupy themselves entirely upon the question of the Geneva's applicability, and it is not until the "2003 Defense Department Working Group on Detaineee Treatment" report that a real substantive look at the methods is employed. Both Common Article Three and Geneva III (Article 4) have parts which stipulate when its provisions are to be applied. John Yoo's January 9th, 2002 memorandum entitled "Application of Treaties and Laws to Detainees," is the first memo in the series of OLC decisions dealing with detainee affairs which make such a claim.

In order for the an entity to be protected as a full POW under Geneva III, it's nature must either fit into Articles II or IV therein. The relvant part of Article II states, "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...They shall futhermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."[21] Thus if you are a solider of a State that is a signatory and observer of the Geneva Conventions, then you are entitled POW treatment. Article IV of the Geneva III also allows for entities of non-High Contracting to qualify for POW treatment if they meet certain requirements, "(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict... provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: a) that of being commanded by a person responsible for his subordinates; b) that of having fixed distinctive sign recognizable at a distance; c) that of carrying arms openly; d) that of conducting their operations in accordance with the laws and customs of war."[22] Subsections a-d represent what can be called the basic Laws of War; if a party is not part of a clear command structure, wears no recognizable uniform, conceals their weapons or purposefully attacks

civilians, then such a force would be thought not to follow the Laws of War and not be entitled to Geneva protection. On the otherhand subsections a-d of Article IV do allow for entities who are not necessarly part of High Contracting Party to be treated as POWs if they follow the basic rules of war.

The January 9th opinon makes short thrift of these jurisdictional provisions, quickly arguing that members of al Qaida cannot be defined as being POWs under Geneva III Art. II or IV or even under Common Article III. Obviously, as the memo points out the nature of al Qaida as a "non-governmental terrorist organization composed of members from many nations"[23] denies al Qaida the priveledge of being considered a "High Contracting Party" in Article II terms. Also since al Qaida tactics are intriniscally against the laws of war they do not qualify under Article IV, "Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare."[24]

More abstractly, the memorandum then makes the leap of denying the Taliban the classification of being the government of Afghanistan. As acknowledged, Afghanistan had been a signatory of all four Geneva conventions and thus it was not Instead, based on the determination of the State Department and DoD the OLC opinion treats Afghanistan as being a "failed state," during the time of American invasion and thus the Taliban is treated merely as a faction. The memorandum defines a failed state as "generally characterized by the collapse or near-collaspe of State authority... characterized by the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy."[27] Yoo asserts that the Taliban's government was just such a failed state, having had only Pashtun support within the government and also being subserviant to interests of nacro-traffic and al Qaida's Osama bin Laden than to its own whims.

Two other argument laid out for the Taliban not truly being the government of Afghanistan is due to the fact they only controlled an estimated 90% of the country at the point of invasion, and only three countries in the world even recognized them as a legimitate force. These last points are problematic since it could not be said that the fact that the Taliban was not acknowledged by the rest of

the world precludes the fact that it still couldn't be the government of Afghanistan of the time. Indeed the Geneva III's Article IV has another class of fighters in which could be POWs if they followed the conduct of war as described above, "(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining authority."[26]

This failed state arguement over the inapplicabile nature of the Taliban to the Geneva Conventions is cursory at best. The argument also highlights one of the Treaty-application memorandums recurrent weakness of lack of real knowledge of the nature of al Qaida or Taliban in which they were intrepreting. The time of memo's writing was early 2002, at which time there was little reliable fact-based information on the nature of the Taliban or al Qaida and their conduct from the battlefield for the OLC to center its conclusions on. The January 9th memorandum acknowledges this deficiency openly toward the end of its arguement, "We want to make clear that this Office does not have access to all the facts related to the activites of the Taliban militia and al Qaeda in Afghanistan."[27]

Outside of the protection of Geneva III, entities may still be protected from the more general provisions of the Common Article III, yet it is contingent on the fact that the conflict is "not of an international character occuring in the terrority of one of the High Contracting Parties."

All Conventions were approved by the Senate and signed by the President in 1955, constituting a part of US law. Yet it wasn't until the passage of the War Crimes Act[21] in 1998 that breaches to the Geneva Conventions were given actual penalties under the US criminal code.

Appendix I – List of Memorandums

All of the following Memorandums have been subsequently leaked by news report or declassified in around the middle of 2005. They were accessed through their aggraget publication in: *The Torture*

Papers: The Road to Abu Ghriab. Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York:Cambridge University Press, 2005.

The memos found therein and used/discussed within this paper is as follows:

(1) John Yoo, Memorandum Opinion For Timothy Flanigan, The Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorits and Nations Supporting Them," September 25, 2001;

(2) John Yoo and Patrick Philbin, Memorandum for William J. Haynes, II General Counsel, Department of Defense, RE "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," December 28, 2001;

(3) John Yoo and Robert Delabunty, Memorandum for William J. Haynes II General Counsel for Department of Defense, RE "Application of Treaties and Laws to al Qaeda and Taliban Detainees," January 9, 2002;

(4) Sec. Of Defense Donald Rumsfeld, Memorandum for Chairman of the Joint Chiefs of Staff, Subject: "Status of Taliban and Al Qaeda," January 19, 2002;

(5) Jay S. Bybee, Memorandum for Alberto R. Gonzales Counsel to the President, and William J Haynes II General Counsel of the Defense Department, RE "Application of Treaties and Laws to al Qaeda and Taliban Detainees," January 22, 2002;

(6) Alberto R. Gonzales, Memorandum for the President, Subject: "Decision RE Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," January 25, 2002;

(7) President George W. Bush, "Memorandum for Vice President, et al, Subject: "Humane Treatment of al Qaeda and Taliban Detainees," Feburary 7, 2002;

(8) John S. Bybee, Memorandum for William J. Haynes II General Counsel of Department of Defense, RE "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," February 26, 2002;

(9)John S. Bybee, Memorandum for Alberto Gonzales Counsel to the President, RE "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002;

(10) Diane E. Beaver, Department of Defense, Memorandum for Commander, Joint Task Force 170, Subject: "Legal Brief on Proposed Counter-Resistance Strategies," October 11, 2002;

(11) Department of Defense Working Goup Report, "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003.

Appendix II – Enhanced Interrogation Methods

1. **Direct:** Asking straightorward questions.
2. **Incentive/Removal of Incentive:** Providing a reward or removing a priviledge, above and beyond those that are required by the Geneva Convention, from detainees.
3. **Emotional Love:** Playing on the love a detainee has for an individual or group.
4. **Emotional Hate:** Playing on the hatred a detainee has for an individual or group.
5. **Fear up Harsh:** Significantly increasing the fear level in a detainee.
6. **Fear up Mild:** Modereately increasing the fear level in a detainee.
7. **Reduced Fear:** Reducing the fear level in a detainee.
8. **Pride and Ego Up:** Boosting the ego of a detainee.
9. **Pride and Ego Down:** Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.
10. **Futility:** Invoking the feeling of futility of a detainee.
11. **We Know All:** Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.
12. **Establish Your Identity:** Convincing the detainee that the interrogator has mistaken the detainee for someone else.

13. **Repetitition Approach:** Continuously repeating the same question to the detainee within interrogation periods of normal duration.
14. **File and Dossier:** Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.
15. **Mutt and Jeff:** A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.
16. **Rapid Fire:** Questionging in rapid successsion without allowing detainee to answer.
17. **Silence:** Staring at the detainee to encourage discomfort.
18. **Change of Scenary Up:** Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but not worse.)
19. **Change of Scenary Down:** Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not consitute a substantial change in environmental quality.
20. **Hooding:** This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.
21. **Mild Physical Contact:** Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.
22. **Dietary Manipulation:** Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and withoput intent to deprive subject of food or water, e.g., hot rations to MREs
23. **Environmental Manipulation:** Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.
24. **Sleep Adjustment:** Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.
25. **False Flag:** Convincing the detainee that individuals from a county other than the United States are interrogating him.
26. **Threat of Transfer:** Threatening to transfer the subject to a third country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon, nor would the threat include anhy information beyond the naming of the receiving country.)
27. **Isolation:** Isolating the detainee from other detainees while still complying with basic standards of treatment.
28. **Use of Prolonged Interrogations:** The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).
29. **Forced Grooming:** Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)
30. **Prolonged Standing:** Lengthy standing in a “normal” position (non-stress). This has been sucessful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.
31. **Sleep Deprivation:** Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed four days in successsion.
32. **Physical Training:** Requiring detainees to exercise (perform ordinary physical exercise actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two-hour period; not more than two cycles per 24-hour period. Assists in generating compliance and fatiguing the detainees. No enforced compliance.
33. **Face slap/Stomach slap:** A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice togeter. After the second time on a detainee, it will lose the

shock effect. Limited to two slaps per applicationl no more than two applications per interrogation.

34. **Removal of Clothing:** Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the envrionmental conditions are such that this technique does not injure the detainee.
35. **Increasing Anxiety by use of Aversions:** Introducing factors that of themselves create anziety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique reuires the commander to develop specific and detailed safeguards to insure detainee's safety.

(Department of Defense Working Goup Report, "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003. *The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005. 357-359)

Appendix III – Chart of Arguments

Memo	Major Arguments	Refutation
Yoo, John. *DRAFT: Memorandum for William J. Haynes, General Counsel of the Department of Defense. RE: Application of treaties and Laws to al Qaeda and Taliban Detainees* 1/9/02	✘ Common Article Three of the Geneva Conventions generally don't apply to al Qaeda & Taliban ✘ Even if they did, they are actionable within US Courts.	**Supreme Court in *Hamdan v. Rumsfeld* 2006-** "the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" 415 F. 3d, at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations." ***Conventions DO Apply.***
Bybee, Jay. *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense. RE Application of Treaties and Laws to al Qaeda and Taliban Detainees.* 1/22/02	✘ Military personnel and Civilians can use a Military Necessity argument under the authority of the "Commander and Chief" if being prosecuted under the War Crimes Statute for committing torture or "cruel, inhuman conduct" against detainees.	**UN Convention Against Torture signed by the USA in 1974 –** "Article 2: 2. No exception 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 of torture."
Gonzales, Alberto. *Memorandum for the President. Decision RE Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*. 1/25/02	✘ "Some of the language of Geneva is undefined, it prohibits 'outrages against personal dignity' and 'inhuman treatment.' it is difficult to predict what actions might be deemed to constitute violations."	Our understanding of the US' obligations under international law in regards to treatment of the accused is best followed by adhering to the Common Law provisions of the 5th, 8th and 14th Am.
Bybee, Jay. *Memorandum for Alberto R. Gonzales Counsel to the President. RE Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* . 8/1/02	✘ "Acts must be of an extreme nature to rise to the level of torture… We further conclude that certain acts may be 'cruel, inhuman and degrading, but still not produce pain and suffering requisite to satisfy 18 USC §2340"	Documentation and Investigations show that "Enhanced Interrogation Methods " used in unison over an extended period of time produce the effects of torture. "Torture is an extreme form of cruel and inhuman treatment."

Notes

[1]- As defined by the Military Commissions Act of 2006, an "unlawful enemy combatant" is: "(a)(i) a person who has engaged in hostilities or who
has purposefully and materially supported hostilities
against the United States or its co-belligerents who is
not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);
or
"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006,
has been determined to be an unlawful enemy combatant
by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the
President or the Secretary of Defense.
"(B) CO-BELLIGERENT.—In this paragraph, the term 'co-belligerent', with respect to the United States, means any State
or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against
a common enemy.
" - § 948a. Definitions, Military Commissions Act of 2006, PUBLIC LAW 109–366—OCT. 17, 2006.

[2] - Unitary Executive theory is a view of the President's authority under the constitution which vests all executive authority within the president, unfettered by the Legislative or Judicial branches of government. *See also,* September 25th OLC memorandum written by John Yoo: "The centralization of authority in the President alsone is particularly crucial in matters of national defense, war, and foreign policy, where a *unitary excutive* can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far *superior* to any other branch." (emphasis added.)

[3] – *USDOJ: Office of Legal Counsel Homepage.* US Department of Justice. 10 Oct. 2008. <http://www.usdoj.gov/olc/>

[4] - Yoo, John and Robert Delabunty. Memorandum for William J. Haynes II General Counsel for Department of Defense, RE "Application of Treaties and Laws to al Qaeda and Taliban Detainees." January 9, 2002. Dratel and Greenberg 38-79.

Bybee, Jay S. Memorandum for Alberto R. Gonzales Counsel to the President, and William J Haynes II General Counsel of the Defense Department, RE "Application of Treaties and Laws to al Qaeda and Taliban Detainees." January 22, 2002. Dratel and Greenberg 81-117.

Gonzales, Alberto R. Memorandum for the President, Subject: "Decision RE Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban." January 25, 2002. Dratel and Greenberg 118-121.

Dratel, Joshua L. and Karen J. Greenberg, eds.. *The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005.

[5] - Diane E. Beaver, Department of Defense, Memorandum for Commander, Joint Task Force 170, Subject: "Legal Brief on Proposed Counter-Resistance Strategies," October 11, 2002. Greenberg and Dratel 229-236

Department of Defense Working Goup Report, "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003. Dratel and Greenberg 286-359.

Dratel, Joshua L. and Karen J. Greenberg, eds.. *The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005.

[6] - Yoo, John. Memorandum Opinion for Timonthy Flanigan, The Deputy Counsel to the President: "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." US Department of Jusitce, Office of Legal Counsel. September 25, 2001.*The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005. (referred to as "the September 25th memo.)
The September 25th memo is filled with language championing Executive ascendency in times of war: "Given this context, it is clear that Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force." - pg 7;

[7]- John Yoo and Patrick Philbin, Memorandum for William J. Haynes, II General Counsel, Department of Defense, RE "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," December 28, 2001. *The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005. **Boumediene Case**

[8]- John S. Bybee, Memorandum for William J. Haynes II General Counsel of Department of Defense, RE "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," February 26, 2002. *The Torture Papers: The Road to Abu Ghriab.* Ed. Karen J Greenberg and Josuha L. Dratel. New York, New York: Cambridge University Press, 2005.

[9] – **Reports of Detainee Abuse**

[10] – **Abu Ghraib.**

[11] **- Cite new memo that replaces the August 2002 Bybee memo**

[12] **- War Powers cases that dash Bush Administration plans, Rasul, Hamdi, Hamdan, Boumediene**

[13] – **Newspaper account of continued use of Interrogation Methods.**

[14] **-** September 25th memo, pg 24.

[15] – Id., from note 32 on pg 24.

[16] - S.J. Res. 23. "Authorization for Use of Military Force." One Hundred Seventh Congress, United States.
10 - Bush, George. "Detention, Treatment, and Trial of certain Non-Citizens in the War Against Terrorism." Military Order of 11/16/01, Federal Register: November 16, 2001 (Volume 66, Number 222).

[17] – Bush, George W. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Military Order of November 13, 2001.

[18] - Id.

[19] – See Id. at II(a)(1).

[20] – The Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III")

[21] – War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997)