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## ***Washington Post* publishes memo implicating White House in torture of prisoners**

**By Joseph Kay**  
**17 June 2004**

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A Justice Department memo from August of 2002 leaked to the *Washington Post* and published by that newspaper on June 13 constitutes prima facie evidence that the US government adopted a policy of torture in connection with its so-called “war on terrorism” and its operations in Afghanistan and Iraq.

The memo gives the lie to the official claim that responsibility for the use of torture against Iraqi prisoners held by the US at Abu Ghraib prison rests with a few “bad apples” among rank-and-file military guards. The torture of prisoners has been carried out with the knowledge and approval of officials at the highest levels of the Bush administration.

White House officials decided to employ torture with full knowledge that they were violating longstanding and specific prohibitions against such methods under both international and US law.

The memo was written for Alberto Gonzales, the counsel for the president, and prepared by officials in the Justice Department. On Sunday night the *Washington Post* posted on its web site a draft version dated August 1, 2002 and entitled “Re: Standards of Conduct for Interrogation under 18 USC Sections 2340-2340A.” It is signed by Assistant Attorney General Jay Bybee. According to the *Post*, it was commissioned by the CIA. But the fact that it is addressed to Gonzales links it directly to President George W. Bush.

The memo specifically addresses legislation (Sections 2340 and 2340A of Title 18 of the United States Code) adopted by the US government in 1994 in

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accordance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). CAT is an international treaty negotiated under the Reagan administration that calls for all signatories to implement laws banning torture.

The purpose of the memo is to concoct a legal pretext for circumventing the anti-torture laws and provide the administration with a degree of legal cover for actions that are defined under international law as war crimes. The August 1, 2002 memo was accompanied by another Justice Department memo advancing the specious argument that individuals alleged by the US to be members of Al Qaeda or other terrorist groups are not covered by the Geneva Conventions.

When news of the August, 2002 memo first emerged last week, Attorney General John Ashcroft, in testimony before the Senate Judiciary Committee, flatly refused to provide committee members with copies. The fact that the memo was leaked to the *Washington Post* and the newspaper decided to publish it is an indication of the enormous divisions that have emerged within the state apparatus and the Bush administration itself over the government's foreign policy in general, and the occupation of Iraq in particular.

### **An assertion of presidential dictatorship**

The authors of the memo set out to accomplish two goals. First, they seek to define torture in the most restricted manner possible, thereby allowing a wide variety of actions traditionally held to be violations of international laws against torture. Second, they seek to provide a blanket rationale for employing any and all methods deemed useful for extracting information from alleged terrorist detainees. In this connection, the Justice Department lawyers assert that US laws banning torture may be unconstitutional. They make this assertion by claiming that the US president, as commander-in-chief, wields unlimited powers in time of war.

The implications of this pseudo-legal and pseudo-constitutional claim cannot be overstated. It implies not only unlimited powers of the executive branch to wage war abroad, but also the right of the president to assume dictatorial powers at home—in utter disregard of constitutional safeguards for civil liberties and constitutional provisions for legislative and judicial oversight of the executive branch.

Given that the government, with the support of both the Democratic and Republican parties, has declared the US to be engaged in a global “war on terror” of indeterminate duration, the assertion of untrammelled war-time

presidential powers is tantamount to the assertion of a permanent presidential dictatorship.

### **A tortured defense of torture**

According to the memo, even the most inhumane forms of mental and physical abuse do not rise to the level of “torture.” One wonders whether the authors of the memo would be so pettifogging in their legalistic arguments if they were subjected to the methods that they seek to whitewash.

They write: “Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”

According to the memo, this conclusion comes from an analysis of the word “severe” in the language of Section 2340A, which defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering.”

Since the statute does not define “severe,” the authors turn to legislative context, citing a use of the word from legislation governing...health benefits! Here we find that severe implies “(1) serious jeopardy, (2) serious impairment of bodily functions, or (3) serious dysfunction of any bodily organ or part.”

The memo states, “Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain...Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function.”

According to the memo, even the infliction of severe physical pain does not constitute a violation of the law, which, the authors claim, requires that the infliction of such pain be the “specific intent” of the individual engaging in the act. “If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his action, but no more, he would have acted only with general intent...As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent.”

With regard to mental torture, the memo notes that according to the law it

applies only to cases involving “prolonged mental harm,” which is caused by or results from one of four specific acts listed in the statute.

The following extraordinary phrasing sums up the tenor of the memo as a whole: “A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm...We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state [intention] with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state [intention] must be present with respect to prolonged mental harm.”

In other words, torture is not torture if the specific intent is merely to, for example, administer mind-altering substances that destroy the individual’s personality. The torturer must actually specifically intend to inflict prolonged mental harm. If the person committing the act has a “good faith belief” that such harm will not result, then his actions do not constitute torture.

The purpose of these and other sophistries—in the course of which the authors expound on the meaning of “other,” “disrupt,” “profound,” and “immanent”—is obvious: to increase the arsenal of legal defenses against charges of torture and make it difficult to prosecute the perpetrators.

The authors note that while CAT calls on signatories to implement legislation prohibiting torture, it only urges countries to take steps to prevent “other cruel, inhuman and degrading treatment” and does not call for a ban on these actions. Since torture is only the most “severe” form of such treatment, the memo concludes that neither the treaty nor the statute prohibits a wide array of possible actions. Most of the actions depicted in the photographs taken at the Abu Ghraib prison would not be considered torture under the definition provided in the memo.

The memo then proceeds to argue that even where the perpetrator commits actions sufficiently heinous to qualify as “torture,” there are a number of legal arguments that can be mustered in the torturer’s defense. On these issues, the memo speaks for itself:

“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...Any effort

to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional... Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”

Further, the memo argues, “Foremost among the objectives committed to the trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because ‘the circumstances which may affect the public safety’ are not ‘reducible within certain determinate limits, it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.’”

And later: “As we have made clear in other opinions involving the war against al Qaeda, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack.”

These are extraordinary arguments. According to the Justice Department, Congress can enact no legislation that would limit the discretion of the president in the prosecution of war. Since the country is supposedly at war as a consequence of the attacks of September 11—though no declaration of war has been enacted and there is no indication of precisely who the enemy is—no restrictions are permitted on the way the president chooses to handle individuals captured in the course of this war. If the torture—or, for that matter, slaughter—of prisoners is deemed by the president to be necessary to advance the war effort, neither the Congress nor the people have any right to oppose him.

In fact, the qualification that the country is at war and that the prisoners are enemy combatants is entirely meaningless, since the administration has delegated to itself the right to determine when the country is at war and who constitutes the enemy. There is, in principle, nothing to prevent the president from ordering the seizure and torture or murder of American citizens, on the grounds that they are “enemy combatants.” In fact, the government has already asserted its right to seize US citizens and imprison them for life, without bringing charges or allowing them access to lawyers or the courts, in the cases of Jose Padilla and Yasser Hamdi.

The publication of this memo further demolishes the attempts of the political and media establishment to portray the war in Iraq as a struggle to “liberate” the Iraqi people and “democratize” the Middle East. The real character of U. S. foreign policy is summed up in the means the government is prepared to utilize to accomplish its aims: torture and criminality.

Those engaged in the planning of these operations are fully aware of the illegality of their actions. This is precisely why such pseudo-legal memos are necessary. Moreover, the emergence of such memos highlights the significance of the refusal of the US government to join international legal bodies such as the International Criminal Court. Those who wield power know precisely that their actions fall under the category of war crimes, for which they can be prosecuted.

Those who are carrying out these policies are war criminals and should be tried as such.

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