IN THREE MAJOR AREAS DESCRIBED IN THIS PART, the Bush administration manipulated the Constitution, federal statutes, and international laws and treaties. In some instances, it even appears that the administration made up the law. However, whether it manipulated the law or made it up, the result was the same. The administration's cynical attitude toward the rule of law led to policies that had terrible human consequences.

INTRODUCING THE TERM *ENEMY COMBATANT* TO CIRCUMVENT THE LAW

After 9/11, for the first time in American history, the government placed two American citizens, Yaser Hamdi and Jose Padilla, and a lawful American resident, Ali al Marri, in isolation, keeping them incommunicado for nearly three years in a naval brig, subjecting them to prolonged sensory deprivation and torture, and holding them without charges, without a hearing, and without access to a lawyer. The administration's justification for the treatment of these American citizens and a lawful resident—in violation of due process and the Constitution—was that these men, just like the men held in Guantanamo, were "enemy combatants" in the War on Terror.

Enemy combatant sounds like a legal term, but it is not. *Enemy combatant* has no meaning in international law. The term did not meaningfully exist in American law before the administration introduced it in spring 2002 as a descriptor of the men captured after September 11, 2001. Until then, the universe of combatants, as recognized by the Geneva Conventions and international law, consisted of two categories: lawful combatants—those entitled to prisoner of war (POW) status—and unlawful combatants, who were not so entitled. That is all.

Since 9/11, the term *enemy combatant* has become part of our American lexicon. And because the administration and the media have repeated this term so often, it has gained a life of its own. Thus, what

began as a generic term describing someone who fights for the other side or a synonym for the legally recognized term *unlawful combatant*[1] has been used to circumvent the Geneva Conventions and the rule of law. *Enemy combatant* is a weasel term,[2] introduced by the administration to manipulate the law.

Of course, one could say that the administration was acting not like a weasel but like a fox in introducing a new term as a substitute for the legitimate terms *lawful combatant* and *unlawful combatant*. Certainly, the administration would argue that national security required bold moves to save the nation, and unless we classified the captives using the new term, we could not have interrogated them as harshly as we needed to obtain necessary intelligence. However, the United States has always taken pride in adhering to the rule of law. Nations around the world looked to us to take the high moral ground when it came to the treatment of others. Either we are a nation of laws or a nation of men and women. If we are to be a nation of laws, we must follow the rule of law consistently and not abandon it when times get tough.

The United States is a signatory to the Geneva Conventions (GC), the humanitarian law that protects combatants. The conventions were designed to create a legal framework for the humane treatment of all combatants. The conventions lay the foundations for the laws of war. The Third Geneva Convention (GC3) sets out the rights and protections of what are universally recognized as lawful combatants, or prisoners of war (POWs). While on the battlefield, lawful combatants may kill and be killed. A nation may not prosecute or punish a lawful combatant for a lawful act of war. However, a nation may prosecute and convict a lawful combatant who commits a war crime, such as rape, provided the combatant receives a fair trial.[3]

The Fourth Geneva Convention sets out the rights and protections of "civilians," a term of art that describes combatants who are not lawful combatants and thus by default would be unlawful combatants. The term *unlawful combatant* does not appear in the GC but is widely understood as covering all combatants who are not lawful combatants. Unlawful combatants are not authorized to be on the battlefield. An example of an unlawful combatant is a spy or saboteur. This category also includes civilians who have taken a direct part in hostilities on their own without being integrated into the regular armed forces or into militias or volunteer corps that meet the requirements for POWs. Guerrillas, insurgents, terrorists, or members of a terrorist group in a war zone would be considered unlawful combatants under this defini-

tion,[4] although the administration could choose to treat them as criminals and prosecute them in the criminal justice system. Unlawful combatants enjoy fewer protections than do lawful combatants (POWs). But they, like lawful combatants, must be treated humanely.

According to GC3, a member of a nation's armed forces is a lawful combatant and would be considered a prisoner of war if captured. Thus, a U.S. soldier who is captured on the battlefield during war would be a lawful combatant, or POW. Similarly, a member of the armed forces of any other nation, such as Germany, Japan, China, Vietnam, Iran, and Iraq, would be a lawful combatant.

Prisoner of war is the favored status for detainees. Nations are required to treat prisoners of war with care. POWs are not required to reveal more than their name, rank, serial number, and date of birth. They have the right to be quartered in accommodations equal to those of the detaining nation's armed forces and to be provided with sufficient food, water, and clothing. They are also permitted to retain articles of personal use and to receive medical care and access to mail, among other things. We Americans would expect, even demand, that any of our soldiers who are captured be treated as POWs.

We could assume that a Taliban soldier who was a member of the armed forces of Afghanistan would also be a lawful combatant. In fact, immediately following 9/11, Secretary of State Colin Powell and members of the State Department urged the administration to treat Taliban soldiers as lawful combatants and, accordingly, prisoners of war.[5] However, President Bush took his cues from other members of the administration, including the Department of Justice and the Office of the Vice President, and initially designated Taliban soldiers as unlawful combatants.[6]

The reasoning the administration used in claiming that the Taliban soldiers did not qualify as lawful combatants was based on a reading of Article 4 of the Third Geneva Convention. The third convention defines who is a lawful combatant or prisoner of war. It reads, in essential part, as follows:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

   (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, 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 a 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.[7]

A reading of the first paragraph of Article 4 indicates that prisoners of war are "persons belonging to one of the following categories," and includes members of the armed forces, such as the Taliban who fought for Afghanistan. However, the administration has argued that for someone to qualify as a lawful combatant he must qualify under both parts (1) and (2). But, as one can see, there is no conjunction—there is no *and*—between (1) and (2), and the first paragraph says quite clearly "one of the following categories."

A reading of the next paragraph indicates that members of a militia or other volunteer corps, including organized resistance movements, who are not formally members of a nation's armed forces may also qualify as lawful combatants if they fulfill certain additional legal requirements: being commanded by a person responsible for subordinates, having a fixed distinctive sign identifying them as combatants, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.

Historical context and treaty language appear to support the view that members of the regular armed forces are entitled to protection without regard to the four criteria. However, the position has not been unanimous. International law commentators, scholars, and governments have at times disagreed as to whether members of the armed forces, by virtue of being members of the armed forces, are POWs as defined by subsection (1) or whether they must also meet all four of the criteria under subsection (2).[8] Unfortunately, countries change their stance when it serves their interests.

Because it suited their position, the Bush administration argued that

the requirement of meeting these four additional requirements was a necessary part of the definition of lawful combatant and that Taliban and al Qaeda combatants did not meet all four of these elements. The administration pointed particularly to (b), arguing that Taliban and al Qaeda combatants did not have a fixed distinctive sign recognizable at a distance. That is, they did not wear uniforms, and their turbans were not unique to the combatants because all men in the country wore turbans. The administration also contended that the combatants, particularly the al Qaeda soldiers, did not meet requirement (d), conducting their operations in accordance with laws and customs.

Designating the Taliban as unlawful combatants could have been a reasoned legal position, since people disagree on how GC3 should be interpreted and whether the four additional conditions apply. But months later, the administration went much further, entering territory where there was no law to support its position. With no official notification or explanation, the administration substituted the term *enemy combatants* for *unlawful combatants* as a descriptor of the detainees at Guantanamo Bay. Beyond the fact that the term *enemy combatant* was not a recognized legal term, the administration never officially acknowledged the inconsistency between its initial designation of the captives as unlawful combatants and its subsequent designation of the same captives as enemy combatants.

As unlawful combatants, the Taliban would still have recognized protections under the GC. But in classifying them as enemy combatants, the administration intended that these men be put outside the reach of the GC. Consequently, any protections the administration gave them would be by largesse alone and not guaranteed under the GC.

Unlike Taliban soldiers, members of al Qaeda are not the armed forces of any country. Accordingly, many scholars who interpret the GC characterize al Qaeda members as unlawful combatants without even reviewing the four other conditions. Of course, al Qaeda members who land on our shores could also be tried as common criminals.[9] Initially, President Bush declared that al Qaeda members were comparable to Taliban soldiers and would be designated unlawful combatants.[10] A few months later, the administration reclassified al Qaeda members as enemy combatants, like the Taliban.

Under Article 5 of the Third Geneva Convention (GC3), if there is doubt as to whether a combatant qualifies as a lawful combatant, the person must be treated as a lawful combatant and POW until a competent tribunal determines his status.[11] President Bush declared that

there was no doubt as to the status of either the Taliban soldiers or the al Qaeda members. Hence there was no need for a hearing to determine whether the detainees qualified as POWs or even as unlawful combatants. Instead, they were all designated as enemy combatants.[12] Accordingly, although we held Article 5 hearings during the Vietnam War and the Persian Gulf War, the administration never held hearings pursuant to GC3 Article 5 when it captured combatants, including Taliban soldiers, in Afghanistan.[13]

Lawful and unlawful combatants constitute the universe of combatants. There is nothing else.[14] There are no black holes. *Enemy combatant* has never existed as a legal term in international law. The term has no legal meaning under the Geneva Conventions. The International Committee of the Red Cross (ICRC), the protective body and foremost interpreter of the GC, wrote that the GC applies to all the detainees "regardless of how such persons are called."[15]

Under the GC, a nation may hold both lawful defendants and unlawful defendants until hostilities have ended. The logic behind this requirement is that the country wants to be certain that the combatants do not return to the battlefield. Thus, had the administration followed the rule of law and adhered to the GC—whether they classified the detainees as lawful or unlawful combatants—the administration could have held all of them until the end of the War on Terror.[16] It is uncertain when the war will end, but the administration was certainly entitled to hold the detainees during ongoing combat operations and hostilities.

The administration also hoped to avoid the application of Common Article 3 (CA3) of the GC. The article is called a common article because it is common to all four Geneva Conventions. CA3 requires that all detainees be treated humanely. Outrages upon personal dignity, cruel, humiliating, and degrading treatment, and of course, torture are forbidden by CA3. The Supreme Court recognized the critical importance of applying, at minimum, CA3 to all detainees, when it ruled in 2006 that the minimum protections of CA3 applied to al Qaeda fighters.[17] CA3 also requires a due process trial and sentencing by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

In manipulating or even making up the law by introducing the term *enemy combatant,* the administration not only intended to circumvent the GC and thereby mistreat detainees without legal consequences. High officials in the administration had a more personal motivation:

powerful administration officials believed that denying that the detainees were protected by the GC would shield them from liability should future prosecutors charge them with war crimes. That is, the officials figured that if there was no law to protect the detainees, mistreating them would not be a violation of law. In an in-house memorandum, Attorney General John Ashcroft wrote: "[A] Presidential determination against treaty applicability [i.e., that the Geneva Conventions did not apply to the detainees] would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees."[18]

On January 25, 2002, Alberto Gonzales, the White House counsel at the time, wrote a similarly self-serving statement to the president regarding the protection of administration officials: "The consequences of a decision to adhere to what I understand to be your earlier determination that the GC3 does not apply to the Taliban . . . substantially reduces the threat of domestic criminal prosecution under the War Crimes Act."[19] Gonzales explained that some language in the conventions, such as "outrages upon personal dignity" and "inhuman treatment," was "undefined . . . and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GC3." He was further concerned that "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act, which made it a crime to treat detainees inhumanely or commit an outrage upon personal dignity]. Your determination [that GC3 does not apply] would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution."[20]

- Gonzales's fear was well justified. After the Supreme Court ruled in 2006 in *Hamdan v. Rumsfeld* that Common Article 3 applied to the treatment of detainees,[21] Gonzales contacted Republican lawmakers. He asked them to pass legislation that would shield U.S. personnel from detainee lawsuits and other possible prosecutions that might seek to enforce Common Article 3 violations through the federal War Crimes Act.[22] The Military Commissions Act of 2006 included a provision, drafted by the administration, that retroactively protects

American officials from prosecution under the War Crimes Act for any crimes they may have committed after 9/11, including certain "cruel, inhuman or degrading treatment" that might have been a crime under the earlier version of the War Crimes Act.[23]

- The first time that the term *enemy combatant* officially appeared in a government document was in the February 2002 federal district court decision in *Coalition of Clergy v. Bush*.[24] In dismissing the habeas petition, Judge Matz described the detainees as "aliens" and "enemy combatants."[25] It is not apparent where Judge Matz found the term *enemy combatant* to use in his opinion, and or why he used it. A search of the documents filed in the case failed to reveal any document that used this term to describe the detainees. Erwin Chemerinsky, the lawyer for the Coalition of Clergy, does not recall that the government attorneys ever used the term during legal arguments. During the oral arguments, the government described the detainees as "enemy aliens," but not as enemy combatants. Perhaps the judge's clerks or even the judge himself had independently decided to use the term, since it was present in the zeitgeist at that time, including in the local popular press.[26]

That spring, administration officials began describing all captives and detainees as enemy combatants. The media embraced the term without question. From the time the administration first used the term *enemy combatant* in spring 2002 until fall 2006, the term was a moving target. The Department of Defense and the administration strapped disparate, even inconsistent, definitions to the term depending on litigation strategies and other executive requirements.[27] The administration gave it one definition in arguing a case to the Supreme Court, another when defining the men in Guantanamo, and a third when arguing a later case before the Supreme Court. During these first four years of use, Congress never legally sanctioned the term.

The term *enemy combatant* did not receive congressional legislative recognition until October 2006, when Congress enacted the Military Commissions Act. In the act, Congress pasted the words *lawful* and *unlawful* to the term *enemy combatant,* as in "lawful enemy combatant" and "unlawful enemy combatant."[28] Nevertheless, the term *enemy combatant* continues to haunt these times. The congressional definitions are not equivalent to the internationally recognized terms—

lawful combatant and *unlawful combatant*—that are defined by the Geneva Conventions and accepted and valued by the international community.

JUSTIFYING HARSH INTERROGATIONS AND TORTURE AS AN INSTRUMENT OF NATIONAL POLICY

The Fifth Amendment to the Constitution provides that the government may not deprive a person of liberty without due process of law. *Liberty* is a key term here. The government may not divest an individual of his or her liberty without first affording that person a fair hearing before an impartial judge. In other words, the government must prove its accusations before punishing the defendant.

The right to liberty also appears in another context. If the government engages in behavior toward an individual that "shocks the conscience," it has violated that individual's liberty. The 1952 case *Rochin v. California* sets the standard. After breaking into a man's bedroom, three Los Angeles sheriff deputies found the partly dressed man sitting on his bed, his wife lying beside him. The deputies spied two capsules on a nightstand. When they asked what the capsules were, the man put them in his mouth. The officers jumped on him and attempted to extract the capsules. When that did not work, they handcuffed him and took him to a hospital. At the direction of one of the sheriffs, a doctor forced an emetic solution through a tube into the man's stomach. The man vomited up the capsules, which contained morphine.[29] The Supreme Court ruled that the means the deputies used to extract the capsules from the defendant "shocks the conscience" and is "bound to offend even hardened sensibilities." The court described the sheriff deputies' behavior as "close to the rack and screw" and indicated that it is "offensive to human dignity." In noting that the "Constitution is intended to preserve practical and substantial rights, not to maintain theories," Justice Frankfurter concluded that the sheriffs' conduct clearly violated due process of law. That U.S. Supreme Court decision over fifty years ago reflected what we, as Americans, have always believed: we care how we treat others, even bad people.

The Eighth Amendment to the Constitution forbids cruel and unusual punishment. Beheading or quartering a defendant would be both cruel and unusual. The Supreme Court has banned the execution of juveniles and the execution of the mentally retarded because nearly all civilized nations in the world have banned the execution of such individuals,

and hence it would be cruel and unusual. Another meaning of *cruel and unusual* is that the "punishment should fit the crime." The Supreme Court has banned the death penalty for rape, ruling that the penalty is not proportional to the crime.

While housed in the naval brig in Charleston, South Carolina, Jose Padilla, along with American citizen Yaser Hamdi and legal resident Ali al Marri, was subjected to prolonged sensory deprivation and profound long-term isolation, hooded, short-shackled, and kept in stress positions for lengthy periods, deprived of sunlight for months, and observed by cameras around the clock. This treatment violates the Fifth Amendment due process clause because it shocks the conscience of most individuals. It also amounts to cruel and unusual punishment under the Eighth Amendment, although the Eighth Amendment applies to punishment *after* conviction, and these detainees were not charged, much less tried and convicted, before being subjected to this abusive behavior.

In 1984, the U.S. government signed and ratified the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).[30] This treaty makes no distinction between torture and cruel, inhuman, and degrading treatment. However, when President Reagan signed the treaty, he reserved the right to interpret the section on cruel, inhuman, and degrading treatment in light of the prohibitions in the Constitution, particularly the Fifth and Eighth Amendments.[31] As a result of the reservation, the government can now make, and has made, the argument that in the United States' interpretation of the law, there is a difference between torture and cruel, inhuman, and degrading treatment. Consequently, although torture is always expressly forbidden both by the CAT treaty and by federal statutes enacted pursuant to the treaty, not all cruel, inhuman, and degrading treatment is unlawful and expressly forbidden under American law. Only cruel, inhuman, and degrading treatment that violates the Fifth Amendment (treatment that shocks the conscience) or the Eighth Amendment (cruel and unusual punishment) is in violation of the treaty as understood by American law.[32] The Bush administration pounced on this distinction, stretching it to irrational limits.

In addition, the federal laws enacted pursuant to the treaty that make it a crime for Americans to torture someone outside the country do not refer to cruel, inhuman, and degrading treatment; they only prohibit torture.[33] The administration thus asserts that since the statute only bars torture and says nothing about cruel, inhumane, and degrad-

ing treatment, American agents—such as the CIA—are not necessarily bound by any laws other than the requirement not to torture. Since the definition of torture is malleable, CIA agents have had lots of room to mistreat a detainee. The administration argued that although it conducted harsh, or "enhanced," interrogations, these interrogations did not constitute torture.

Moreover, since there is no clear test for what constitutes "shocking the conscience," a case-by-case determination is required. Thus, when someone accuses the administration of cruel, inhuman, and degrading treatment, the administration can respond that its conduct does not shock the conscience—especially when it is dealing with the "worst of the worst." That is, what shocks the conscience for an average detainee does not necessarily do so when the detainee is a terrorist. Shocking the conscience becomes a relative test.

Immediately after September 11, 2001, the administration was intent on securing the nation from further attack and, in the process, catching and disarming terrorists. But when the military seized suspected terrorists and others, the administration had no specific policies in place as to how to effectively interrogate the captives. Instead, they looked elsewhere for assistance.

A program created by the Air Force and funded by the Pentagon at the end of the Korean War taught pilots how to withstand torture if captured. It was known as SERE, an acronym for Survival, Evasion, Resistance and Escape.[34] The government expanded the program to the army and navy after the Vietnam War. Following the attacks of 9/11, psychologists who were familiar with SERE "sought to reverse-engineer" the program.[35] That is, rather than teaching how to defend against these techniques, the new training program was designed to apply these harsh techniques to detainees. The psychologists trained interrogators in the SERE techniques, who then applied the techniques in Guantanamo.[36] The administration also looked to countries like Egypt and Syria for advice on harsh interrogation techniques.

The Torture Memos

The issue of how to interrogate for intelligence information had come to a head on March 28, 2002, when the administration caught Abu Zubaydah, believed to be a senior lieutenant to Bin Laden, in Pakistan.[37]

The administration considered Zubaydah a pipeline to al Qaeda, and the CIA intended to mine him for as much intelligence as they could gather. The administration was considering interrogation techniques that might be regarded as torture. To protect its personnel from engaging in unlawful practices, the administration asked the Department of Justice to identify permissible interrogation techniques and to authorize the interrogators' conduct.[38]

Lawyers in the Office of Legal Counsel (OLC) in the Department of Justice drafted memoranda that officially justified and approved torture techniques. Military lawyers signed off on a list of acceptable harsh or enhanced interrogation techniques, many of which could be interpreted as not only cruel and inhumane but torture.

The interrogation techniques authorized by the DOD included prolonged interrogations (up to twenty hours a day); prolonged standing; sleep deprivation (allowing a detainee to rest briefly then repeatedly awakening him for up to four days in succession); stomach slaps; face slaps; use of dogs and other "aversions" to create increasing anxiety,[39] placement of a hood over the detainee's head during questioning, and holding a detainee in isolation for up to thirty days.[40] The OLC narrowly defined torture to permit an additional range of undisclosed practices, including waterboarding.

John Yoo, a University of California Berkeley law professor, was the deputy assistant general in the DOJ's Office of Legal Counsel immediately following September 11. In response to a request from Alberto Gonzales, counsel to the president, and other administration officials, Yoo drafted a letter and a memorandum that narrowly defined torture as rising to the level of organ failure or death under U.S. law[41] and international law pursuant to the CAT treaty. In essence, the letter and memo were designed to provide official and legal authority for the CIA to conduct harsh interrogations, even torture of detainees. John Yoo signed the letter. His supervisor, Jay Bybee, signed the memorandum. Both were dated August 1, 2002. Yoo also drafted and signed a second memorandum, written to William J. Haynes, the general counsel of the Department of Defense. This memo, dated March 14, 2003, was designed to provide the military with legal authority similar to that provided in the earlier documents for the CIA.[42]

The OLC is the legal arm of the Department of Justice. Lawyers in the OLC provide legal opinions for the attorney general, the president, and necessarily, the nation. The opinions can be canceled or terminated only by the president, the attorney general, or the OLC itself.

Consequently, the two memos provided exactly the kind of legal cover and powerful defense that the military and the CIA required. If ever the interrogators or their superiors were prosecuted for violating federal laws in torturing or otherwise harshly treating detainees, they could argue that they were adhering to the law of torture as defined and explained by their counsel, the OLC.

These documents have become known as the "torture memos." (Yoo and others may have written additional memoranda on torture that have not yet surfaced.) The torture memos are so named because their most egregious statements give license to torture in nearly every circumstance. Torture is defined in the August 1 memo as "the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[43] Anything less is not torture. The March 14 memo has similar language.

The torture memos further argue that as long as the interrogator's specific intent is not to torture, the torturer does not violate U.S. laws or treaties. "Thus," the August 1 memo reads, "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control."[44] Under this extraordinary interpretation, torture as a byproduct of the act of gathering intelligence is not actually torture. Only torture for its own sake would be forbidden. The March 14 memo has similar language.[45]

Yoo also wrote in the March 14 memo that the torture statute "does not preclude any and all use of drugs." He argued that mind-altering substances that do not "rise to the level of 'disrupting profoundly the senses or personality'" would not be precluded by interrogators unless the drugs or procedures "produce an extreme effect."[46] Over the years, detainees in Guantanamo have claimed that they were injected with drugs before interrogations. The military has denied these claims.[47]

The torture memos were approved by the Department of Justice, lawyers from the National Security Council, key congressional leaders, and CIA director George Tenet, who authorized the interrogation methods used by his agents.[48] The August 1 memo was in effect for nearly two years. The March 14 memo lasted a little over a year. On June 30, 2004, the new head of the Office of Legal Counsel, Jack

Goldsmith, now a Harvard law professor, withdrew the memoranda as vastly overreaching in their analyses of the law. However, in condemning the memos, Goldsmith did not condemn the types of treatment used by the interrogators. The interrogation tactics continued.

On December 30, 2004, acting assistant attorney general Daniel Levin quietly posted a revised memo on the administration's website.[49] The new memorandum rejected torture. However, it included a footnote indicating that the CIA's previous actions were not illegal, thereby assuring the interrogators that their previous, and even present, conduct would continue to be protected.[50] A few weeks before the new memo was posted, the president had appointed Alberto Gonzales, formerly the president's legal counsel, to replace John Ashcroft as attorney general. Gonzales was scheduled to appear before the Senate Judiciary Committee, which was to consider his appointment. The administration did not want the torture memo to be a point of contention in the confirmation hearings.

However, after Gonzales was confirmed as attorney general, the Department of Justice (DOJ) replaced the Yoo and Bybee letter and memorandum with a memorandum that endorsed an expanded version of the CIA's harsh treatment of detainees. The new memorandum "provided explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures." Later in 2005, the DOJ issued a second memorandum.[51] This second memo declared that none of the methods used by the CIA violated "cruel, inhumane and degrading treatment," the standard that was outlawed by international laws and treaties, including the Geneva Conventions, the Convention against Torture, and the International Covenant on Civil and Political Rights, as well as the McCain Amendment to the Detainee Treatment Act of 2005.[52]

Steven G. Bradbury, who was acting chief of the Office of Legal Counsel at the DOJ from summer 2005 through spring 2008, signed the memoranda. As the *New York Times* pointed out, "Never in history had the United States authorized such tactics."[53] One question that concerned interrogators was whether the approved techniques could be combined, since even approved techniques had such a "painful, multiplying effect when combined that they might cross the legal line."[54] Although we will not know until the administration releases these memoranda, it is not unlikely that, given the interrogators' concern, combining approved techniques may have been an acceptable practice.

In testimony before a House subcommittee in February 2008, Bradbury reiterated that pain needed to be both severe and long-lasting to be considered torture. "Something can be quite distressing, uncomfortable, even frightening," but "if it doesn't involve severe physical pain, and it doesn't last very long, it may not constitute severe physical suffering. That would be the analysis."[55]

As of June 2008, the two Bradbury memoranda were still in effect and had been confirmed by several recent memoranda. Over the years following the disclosure of the first torture memos, President Bush has repeatedly proclaimed that we do not torture.[56] In addition, the administration has announced that it has suspended or discontinued the most severe or extraordinary interrogation techniques.[57] Such statements by President Bush and the administration are in profound conflict with these two recently disclosed memoranda, as well as all the earlier torture memos.

Is Torture Ever Justified?

Although the CAT treaty specifies that no "exceptional circumstances whatsoever," including a state of war or any other public emergency, may be invoked as a justification for torture,[58] the administration has argued that there may be times when "harsh interrogations" save lives. During his administration, President Bush has alluded to circumstances where American lives have been saved by the capture and harsh interrogation of high-level detainees. However, he has not provided the public with any fact-based account of potentially violent acts halted as a result of harsh interrogation by American agents. The administration argued that it would not reveal intelligence information because it was classified. Certainly, the government should not reveal classified information, but classified information consists of the sources and the methods used to obtain the information. The events themselves are over. The administration could and should reveal what might have happened if we had not captured the terrorists. However, the Bush administration has kept such information, to the extent it exists, secret.

Advocates for torture in limited circumstances point to the superficially persuasive "ticking-time-bomb" scenario in support of their position that torture is sometimes necessary in the modern state: the police capture a suspected terrorist who allegedly knows of a bomb about to go off in Manhattan. At minimum, the advocates argue, we must be permitted to torture him to save thousands of lives. That trade-off

in lives seems compelling, and many people are convinced. However, there are much larger and more fundamental issues at stake. We are not talking about whether we as individuals will torture; we are talking about state-sanctioned torture. If our child was kidnapped and we had the kidnapper in hand, many of us would do whatever is necessary to find our child and return her home safely. In the ticking-time-bomb scenario, more than one child is at stake. But unlike the parent who acts individually, the ticking-time-bomb example requires the participation of state actors. The question then is: who will be the state actors and who will give them permission? Will there be specially trained interrogators supervised in a chain of command? Perhaps something like a "torture police" squad? And who will monitor the torture to ensure that the policy is implemented "fairly"?[59]

Other problems arise when torture is sanctioned by the state. Undoubtedly, some people reveal genuine information when they are tortured. It is equally true that many people will say anything to stop the torture. Torturers know to go slowly, to give the victim time to feel the torture before he passes out from the pain. As the torture progresses, the victim tends to break down. Ironically, the longer it takes to obtain the information, the less immediate the ticking-time-bomb scenario becomes.

Professor Alan Dershowitz at Harvard argues for "torture warrants": If we are holding a suspected terrorist, the police apply to the local judge for a torture warrant, similar to the police applying to a local judge for a search warrant. If the judge does not issue the torture warrant, the police officer is not lawfully permitted to torture. Dershowitz's argument is that, as with search warrants, this procedure brings the rule of law into play so that the torture is not done outside the system. However, in his scenario you still have the situation where the state is sanctioning torture through its judges.

Moreover, judges may not provide an adequate defense against unnecessary torture. Even if the judge is uncomfortable with the situation, what judge wants to be the one who did not "save the nation" because he or she refused to issue a warrant? Judges tend to trust the police and the policy makers, since the police and policy makers have access to the critical evidence necessary to make these decisions. Even if one concludes that torture is sometimes necessary, will judges provide an unyielding line of protection to guarantee that torture is not applied to the wrong person? In addition, to legitimately torture someone, we must pass legislation that authorizes torture. And the legislation must be able to withstand challenges of being in violation of the Fifth

Amendment (due process, right to liberty) and the Eighth Amendment (cruel and unusual punishment). Finally, are we prepared to say that in the United States, a country that espouses freedom and liberty, torture is no longer considered morally wrong?

The key issue that underlies these questions is this: have we reached a point in our evolution where it is legitimate to torture suspected terrorists in the belief that we are saving civilized society? We are not merely talking about one person who holds the code to a bomb. As soon as we permit him to be tortured, we open the door to a slightly different scenario where torture may again seem acceptable. Ultimately, civilized society declines in direct relation to the ascendancy of torture.

ASSERTING ABSOLUTE POWER AS COMMANDER-IN-CHIEF

John Yoo and others in the administration, at the urging of top policy makers, asserted in the torture memos the absolute, unrestricted, unlimited powers of the executive, in his role as commander-in-chief, to torture if necessary. In justifying the administration's power to authorize torture when necessary, John Yoo operated on a principle that is fundamental to the theory of government espoused by Bush-Cheney administration: unlimited and unconstrained executive power. This theory of executive power served the administration well in validating its actions post 9/11, underlying John Yoo's definition of torture in the torture memos. In his memos, John Yoo promoted the administration's core belief that the executive branch is first among equals when it comes to separation of powers. In his view, the other two branches of government, Congress and the judiciary, must defer to the executive, especially in times of war. In that vein, Yoo wrote, any effort by Congress to apply U.S. laws that prohibit torture and inhuman treatment "in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants would be unconstitutional."[60]

In fact, both the August 1 and March 14 memos assert that "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."[61] The March 14 memo added, "Even if an interrogation method arguably were to violate a criminal statute, the Justice Department could not bring a prosecution because the statute would be unconstitutional" in its application to the executive.[62] It is

believed that David Addington, Vice President Dick Cheney's close associate and chief of staff, collaborated with Yoo on the August 1 memo.[63] Cheney was the architect of the administration's executive power theory.

To many constitutional scholars, Yoo and others who worked with him on the memo were overreaching, providing an extreme view and an incorrect analysis of presidential power. In fact, as constitutional scholars understand, Congress has many more wartime powers, enumerated in the Constitution, than the president. Congress alone has the power to declare war. Congress is authorized to raise, support, and maintain the army and navy. The president would be helpless to command his military without monies from Congress. In addition, Yoo's theory of the unitary power of the executive has no foundation in the Constitution or in any Supreme Court decision. In fact, the opposite is true: the Supreme Court has issued decisions that hold against his position. But Yoo's memos ignore those decisions in trying to create law and analysis consistent with the administration's overriding belief in executive power and executive privilege.

Indeed, the torture memos are not the only instances where the administration has asserted the supremacy of the executive. Although many other instances are not directly related to the War on Terror, they nevertheless reflect the administration's pervasive belief that it has the power to do whatever it wants without interference from the courts or Congress, a belief that has informed the administration's actions throughout its tenure, including the War on Terror. An example related to the War on Terror is the president's belief that he has the executive authority to eavesdrop on the telephone calls and e-mails of American citizens inside the United States without obtaining court-approved search warrants, the usual process required under federal statutes and the Fourth Amendment.[64] Prior to the attacks on 9/11, federal agencies were required to obtain warrants from a specialized and historically secret Foreign Intelligence Surveillance Court, created under the 1978 Foreign Intelligence Surveillance Act (FISA), before conducting domestic surveillance.[65] However, in 2002, President Bush signed a secret order permitting the National Security Agency to monitor the international phone calls and e-mails of people, including American citizens, inside the United States without the required warrants. The Bush administration argued that it needed to act quickly to monitor threats to the safety of the United States and did not have time to obtain the search warrants.[66] The administration also believed it had the inherent

authority to conduct such warrantless surveillance without interference by Congress.

Anther example of executive supremacy occurred when bills were sent to the White House. President Bush often drafted a "signing statement" to accompany his signing of the bills. The statements provided his interpretation of the legislation and, to the extent that he believed the legislation interfered with his interpretation of the president's powers or violated the Constitution, he offered understandings, reservations, and even challenges indicating that he might refuse to execute or enforce some provisions of the legislation. However, the president's job is to execute the law. If he does not like the legislation, he is given the power to veto it. He is not given the power under the Constitution to refuse to enforce the law. A highly publicized example occurred in 2005, when Bush signed the McCain Amendment banning cruel, inhumane, and degrading treatment of detainees but reserved the right to ignore the ban under his power as commander-in-chief.

The strategy of attaching signing statements was devised by current Supreme Court justice Samuel Alito when he was deputy assistant attorney general in the Office of Legal Counsel under President Reagan.[67] However, President George W. Bush has provided more signing statements than all previous presidents combined.[68] As of January 2008, President Bush has issued 157 signing statements.[69]

Similarly, the Bush administration severely cut back on Bill Clinton's policies of open government and release of documents to the public. Attorney General John Ashcroft reversed the policy of the Clinton administration by impeding the release of information under the Freedom of Information Act. The new policy directed federal agencies that disclosure "should be made only after full and deliberate consideration of the institutional, commercial and personal privacy interests that could be implicated by disclosure of the information."[70] This policy superseded a presumption of disclosure policy established by his predecessor, Janet Reno.[71] Whereas Reno required federal agencies to justify withholding documents from the public, Ashcroft said that the DOJ would defend agency decisions not to release information unless the decisions lacked a sound legal basis. Although Ashcroft's order came within weeks after 9/11, the attacks did not prompt the new policy so much as provide a public reason for it. From the start of its term, the administration was intent on establishing a policy of withholding information from the public.

Constitutional scholars look to Justice Robert H. Jackson's concur-

ring opinion in a 1952 Supreme Court decision, the *Youngstown Steel* case, when defining the separation of powers—and particularly the balance between the executive and Congress. In *Youngstown,* the court ruled that President Truman did not have the authority to seize steel mills during the Korean War to avoid what the president believed would have been a crippling union strike with a major impact on defense contractors and the economy.[72] In his concurring opinion, Justice Jackson, one of the wisest justices to sit on the bench and the lead prosecutor at the Nuremberg trials after World War II, identified three distinct categories to illustrate the executive's powers vis-à-vis those held by Congress.

Jackson recognized that the president's powers are at its zenith when the president acts with the express or implied authorization of Congress. In that situation, the president acts with all the powers he possesses in his own right plus what Congress delegates. The middle ground occurs where Congress has been silent on an issue. In that situation, the president relies on his own independent powers, although there is a "zone of twilight" where Congress and the president may have concurrent authority or where the power is uncertain. The president is at his nadir where the president acts inconsistently with the wishes of Congress. In those circumstances, the president can only rely upon his own powers minus any powers that Congress has.

Since the president shares war powers with Congress, courts and constitutional scholars have long held that the president does not have the authority to ignore congressional acts that address actions in wartime. Thus, according to Justice Jackson's analysis and contrary to John Yoo's memos, when Congress passes a law that the military cannot torture, the president cannot disregard the law and direct the military to torture. The president is not above the Constitution. The president can neither disregard a law that interferes with his powers nor interpret the law as he wishes. In writing a legal opinion for his superiors, John Yoo had an obligation to inform his superiors of how his views and analysis differed from those of Justice Jackson as well as those of other judges and even of constitutional scholars.

In both the August 1 and the March 14 memos, Yoo writes as if his analysis is effortless and without doubt. This kind of writing is effective in an advocacy brief to a court, but it is not appropriate in an objective advisory memorandum to his superiors, his clients. To make intelligent decisions, the client must be correctly informed of the law. To the extent that there is a conflict, tension, or divergence in the law,

the lawyer must advise the client of the circumstances and inform the client of alternative positions. John Yoo did not inform his client that courts and constitutional scholars have disagreed with his interpretation; he presented the law as if his were the only acceptable interpretation. He owed his superiors a more reasoned and balanced opinion. And in the case where the government is the client, one can argue that the advisor has a heightened responsibility to be as accurate as possible, so that the government always acts lawfully, ethically, and pursuant to the Constitution.

The question is why Yoo presented such extreme views as if they were the norm. As a graduate of Yale Law School and a professor of law at University of California, Berkeley, a highly prestigious school, Yoo must have known that his views were singular and many people disagreed with them. In an interview Yoo gave after the March 14 memo was released to the public, he indicated that he wanted to avoid being "vague." His justification for taking a one-dimensional interpretation of the law on torture was that the people who had "to carry these things out" needed a clear line. He explained that "part of the job unfortunately of being a lawyer sometimes is you have to draw those lines. . . . I think I could have written it in a much more—we could have written it in a much more palatable way, but it would have been vague."[73] That is, the military and the CIA should be given clear instructions on what was lawful and what was not lawful.

However, as any law student would know, an advisor should not provide "clear" guidelines when the law is "vague" or, very likely, in opposition to the advisor's interpretation. Instead, the advisor should clearly articulate and inform the client of contrary authorities and address the conflicts. Even when a client asks a lawyer to justify an illegal action, as likely occurred here, the lawyer is ethically obligated to explain to the client the current state of the law and why the requested behavior is unlawful. By not providing a reasoned opinion accurately identifying the state of the law, Yoo supplied the administration with what it needed: an appearance and, essentially, a certification of legality. Yoo's advice made it easy for the highly regarded OLC to immunize CIA agents and the military.[74]

In response to being roundly criticized for providing such a severe definition of torture and giving the commander-in-chief absolute dominion in times of war, including the authority to torture with impunity, Yoo replied that "just because the statute says—that doesn't mean you have to do it. [T]here's still the moral question—after you've answered the

legal question—whether you should do it at all."[75] In other words, Yoo is saying that he just did his job as a lawyer. It was up to the military and the CIA to decide what to do with his interpretation of the law. He was not making policy, he asserted. He only prepared the legal basis for the policy.

Unfortunately, it is not that simple. His statements reflect the same attitude one hears from the personnel and even the top brass at Guantanamo and anywhere else in the military: "I am just doing my job. Someone else makes the policy." Similar words were spoken during the Nuremberg trials by the Nazi lawyers who provided the legal bases for Nazi war crimes and by the military brass who fought on behalf of the Nazis. These times are not equivalent to World War II, when over six million people were killed. But fewer numbers do not excuse the response, "I am only doing my job." That language should never be the excuse of a thoughtful person.

John Yoo's speaking style is similar to his writing. He uses simple, uncomplicated terms that appear seductively reasonable. His smooth, even tone draws the audience into accepting his surface premises. He can make the unconscionable seem reasonable. It is only when one delves deeper into what he is saying or one is familiar with the law he is ostensibly interpreting that his errors in legal reasoning and judgment become apparent.[76]

Perhaps inadvertently, Yoo included a revealing statement in his March 14, 2003, memo. For some time, there had been indications that Michael Chertoff, subsequently the secretary of the Department of Homeland Security (DHS), was involved in the drafting or review of the torture memos and in reviewing the legality of harsh interrogation techniques used in Guantanamo. At his hearing to become secretary of Homeland Security in February 2005, Chertoff denied any awareness of the techniques. He told the committee that he was not aware of meetings between the FBI and the DOJ's Criminal Division that occurred when he was the head of the Criminal Division—even though the meetings were attended by Chertoff's top deputy, his counsel, and two other senior criminal officials. At these meetings, the FBI raised questions about the harsh interrogation techniques at Guantanamo. In addition to denying knowledge of the meetings, Chertoff claimed that he was not informed of any torture practices at Guantanamo, and that he was unaware that the interrogation techniques were anything other than "kind of plain vanilla."[77]

Yoo's memo undermines Chertoff's testimony. In writing that the

criminal statutes of assault, maiming, and interstate stalking, as well as torture statutes, did not apply to the conduct of the military and the executive in times of war, Yoo wrote that the Criminal Division of the DOJ concurred in his analysis. The person in charge at the time was Michael Chertoff. Three months after this torture memo was signed and dated, the Senate approved him for a seat on the Court of Appeals for the Third Circuit. He resigned from the court on February 15, 2005, to become the director of DHS. John Yoo left the government in 2003 and rejoined the faculty at UC Berkeley School of Law as a tenured professor. Jay Bybee was confirmed as a judge on the Ninth Circuit Court of Appeals in March 2003. He remains relatively unscathed by the release of the memos.

On June 30, 2004, Jack Goldsmith, the new head of the Office of Legal Counsel, withdrew the memoranda. In a book he wrote after leaving the OLC, Goldsmith condemned the "extreme conclusion" taken in the August 2002 memo regarding the powers of the commander-in-chief, a conclusion that had "no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."[78] He further wrote that the memo "rested on cursory and one-sided legal arguments that failed to consider Congress's competing wartime constitutional authorities, or the many Supreme Court decisions potentially in tension with the conclusion." He added, "When one concludes that Congress is disabled from controlling the President, and especially when one concludes this in secret, respect for separation of powers demands a full consideration of competing congressional and judicial prerogatives, which was lacking in the interrogation opinions."

On January 4, 2008, the Human Rights Clinic at Yale Law School, along with San Francisco counsel, filed a lawsuit in San Francisco federal court on behalf of Jose Padilla and his mother against John Yoo. (The media were quick to point out that Yoo was a graduate of Yale Law School.) The complaint alleged that Yoo's torture memos provided much of the legal bases, justifications, and authorizations for the government's violation of Padilla's constitutional and statutory rights, including physical and mental abuse, prolonged sensory deprivation, and torture that Padilla suffered while in the naval brig.[79]