

The Interrogation Memos: Shall We be Clueless on Terrorism?

by

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“Protecting the civil rights of all Americans.”

Introduction

Raging members of Congress, agitated TV commentators, and hyperventilating bloggers are calling for prosecution of Bush Administration officials they allege broke the law and committed war crimes in participating in what they allege was illegal “torture” of captured high level terrorists. President Obama himself has denounced Bush interrogation policies as torture, and ordered an end to all such interrogations in his administration. But he has declined to prosecute or even investigate any of the CIA operatives who carried out such interrogations under the Bush Administration, on the grounds that they were just acting under orders and with the legal approval of more senior Bush officials.

So the focus has turned to those more senior Bush officials, and, in particular, on the lawyers from the Office of Legal Counsel in the U.S. Justice Department who wrote legal memos concluding that the enhanced interrogation techniques, including waterboarding, used on the captured terrorists were legal under applicable U.S. law. One commentator on a CNN broadcast, Lanny Davis, called for the prosecution of former Vice-President Dick Cheney, on the grounds that Cheney has defended the Bush interrogation policies too vigorously.

We have reviewed the four challenged legal memos. As we will discuss below, they add up to 124 single spaced pages of careful legal reasoning reviewing all applicable statutes, treaties, cases, and word definitions, and applying that law to a thorough discussion of the CIA’s enhanced interrogation techniques utilized under President Bush. We find not only that these memos involve a thorough, well-reasoned, praiseworthy legal effort and analysis. We find that their conclusions are correct under applicable law.

We also discuss below the enhanced interrogation techniques utilized and their results. The most controversial of these techniques, waterboarding, was used on just three of the most high level detainees who were all senior terrorist leaders involved in high level attacks on Americans and U.S. targets, and who had information regarding planned future attacks. Contrary to some uninformed media commentary, this waterboarding technique has a history of being highly effective in the most difficult interrogations. It was so in these cases, as we will also show below, resulting in information that stopped at least two planned terrorist attacks on American soil that would have killed thousands of Americans. It also produced extensive operational information regarding Al Qaeda that enabled American officials in cooperation with our allies to disrupt and shut down international Al Qaeda networks, and consequently stop untold additional terrorist attacks.

This waterboarding was used on these three senior terrorists involved in attacks on America only after lesser techniques were tried and failed. Moreover, it was used only after evaluations by medical and psychiatric experts, and conducted only with the presence and supervision of such experts, to ensure that the practice did not remotely

involve infliction of “severe physical or mental pain or suffering,” which is what is prohibited as torture under U.S. law.

Given the moral heinousness of the three mass murderers targeted with this waterboarding technique, the laudable results of the technique in saving thousands of innocent American lives, and the protections and safeguards involved in the application of the technique, we find the moral calculus that labels the Bush Administration’s use of this technique as impermissible torture to be inexplicably perverted. It is those who are asserting this libel against America who are undermining America’s standing in the world and promoting the recruitment of additional terrorists (though ample numbers of terrorists seem to have been recruited before the CIA interrogated any of them).

Moreover, we find that in these circumstances the suggested, unprecedented prosecution of the lawyers who authored the thorough, carefully reasoned legal memos finding this waterboarding practice to be legal under U.S. law to be extremist and offensive, offensive to American political traditions, and to the social fabric that holds us together as Americans. We note that after the 9/11 attacks, the Bush Administration did not seek to impose blame or retribution on the Clinton Administration, even though Clinton’s Deputy Attorney General Jamie Gorelick and Attorney General Janet Reno were responsible for the policy of maintaining a strict wall of separation between American intelligence agencies and law enforcement, which ultimately prevented American officials from stopping the 9/11 attacks. To the contrary, Gorelick was appointed as a prized member of the 9/11 Commission that investigated the attacks and recommended reforms to prevent them from happening again, including reversing Gorelick’s policy of strict separation between American intelligence and law enforcement.

There are risks inherent in pursuing a course that seeks on hindsight to criminalize policy initiatives of a prior Administration. Zealots rarely understand that the witchhunt they delight in pursuing today can (and frequently does) come back to haunt in the future. Yet, turnabout is fair play, particularly among politicians. Should there be another deadly terrorist attack on American soil that could potentially kill hundreds of thousands of Americans in gruesome fashion with nuclear, biological or chemical weapons, will not the precedent of the present outcry for prosecutions provide the foundation for similar scrutiny of those current officials whose policy or administrative mistakes may cause the failure to prevent the attack? Might the public fury against these current officials be all the greater after 7 years under the prior leadership without a single terrorist incident occurring in the U.S.? The more far-fetched the present clamour (and it is pretty far-fetched), the less content will be needed to justify the pursuit of similar vendettas in the future.

Moreover, those who accuse former government officials of breaking the law in committing war crimes are engaging in libel per se for which they may be sued and held legally liable.

Applicable Law

The Legal Definition of Torture

Torture in American law is defined at 18 U.S.C. Sect. 2340, which states,

“As used in this chapter—

(1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

Victoria Toensing, former Chief Counsel for the Senate Intelligence Committee, explains, “Congress required, in order for there to be a violation of the law, that an interrogator specifically intend that the detainee suffer prolonged physical or mental suffering as a result of the prohibited conduct.”¹ She elaborates that our courts,

“have interpreted ‘severe’ physical or mental pain or suffering to require extreme acts: The person had to be shot, beaten or raped, threatened with death or removal of extremities, or denied medical care....The European Court of Human Rights in the case of *Ireland v. United Kingdom* (1978) specifically found that wall standing (to produce muscle fatigue), hooding, and sleep and food deprivation were not torture.”² (See discussion below regarding the CIA’s enhanced interrogation techniques).

Noting that the U.N. Treaty prohibiting torture also defined it as, “severe pain and suffering, Toensing continues,

¹ Victoria Toensing, “Critics Still Haven’t Read the Torture Memos,” *Wall Street Journal*. May 16-17, 2009, p. A11.

² *Id.*

“The Justice Department witness for the Senate treaty hearings testified that ‘torture is understood to be barbaric cruelty...the mere mention of which sends chills down one’s spine.’ He gave examples of ‘the needle under the fingernail, the application of electrical shock to the genital area, the piercing of eyeballs....’ Mental torture was an act ‘designed to damage and destroy the human personality.’”³

The Geneva Conventions

The Geneva Conventions by their own terms apply to fighters who wear uniforms identifying the authority they are fighting for, are part of organized military units, carry their weapons openly, and abide by the laws and customs of war, which includes not hiding among civilian populations.⁴

Those who meet these requirements are legally entitled to thorough protections as Prisoners of War (POWs) if captured. They must be adequately fed, clothed and housed, and provided essential medical care. Their interrogations are also strictly regulated, with a legal right for POWs not to provide any further information beyond name, rank and serial number. POWs also cannot be prosecuted as criminals for participating in military operations covered by the Geneva Conventions.

The legal restrictions on POW interrogations are embodied in the U.S. Army Field Manual, which specifies the sharply limited interrogation techniques that U.S. military personnel may apply to foreign military personnel captured in the field of battle. This Field Manual presumes that those captured by U.S. military forces are covered by the protections of the Geneva Conventions. Standard U.S. military personnel are consequently not even trained in interrogation techniques outside the Army Field Manual. But as discussed further below, the Army Field Manual does not embody the legal limits for interrogation techniques for all U.S. government operations, especially those conducted by the CIA, contrary to much uninformed, but nevertheless highly inflamed commentary. As former CIA Director Michael Hayden and former Attorney General and federal Judge Michael Mukasey write,

“The limits of the Army Field Manual are entirely appropriate for young soldiers, for the conditions in which they operate, for the detainees they routinely question, and for the kinds of tactically relevant information they pursue. Those limits are not appropriate, however, for more experienced people in controlled circumstances with high value detainees. Indeed, the Army Field Manual was created with awareness that there was an alternative protocol for high-value detainees.”⁵

³ Id.

⁴ Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, Article 4.

⁵ Michael Hayden and Michael B. Mukasey, “The President Ties His Own Hands on Terror,” *Wall Street Journal*, April 17, 2009, p. A13.

Terrorists such as those affiliated with Al Qaeda and others do not qualify for the legal protections under the Geneva Conventions. They do not wear uniforms identifying the authority they are fighting for, do not carry their weapons openly, and do not abide by the laws and customs of war, particularly by hiding among civilian populations, and expressly targeting innocent civilians for their violent terrorist attacks aimed at the death of those civilians. Indeed, the fundamental methodological operations of terrorism are consciously designed to attack civilization outside the legal boundaries of warfare, precisely because terrorist organizations are not capable of combating the military forces of civilization. Those who nevertheless insist on treating terrorists as if they fall within the legal bounds of war, or even worse as if they fall under the common criminal law, would leave civilized nations vulnerable to terrorist strategies and attacks. This mistake arises primarily because these uninformed advocates do not understand the full scope of the Law of War, as discussed further below.

The Law of War

Those fighters who do not qualify for the protections of the Geneva Conventions fall under the common Law of War, which has developed over centuries of civilization, and was formally adopted as part of U.S. military law in 1789. Such fighters are aptly termed “illegal combatants” precisely because they do not themselves comply with the Law of War, and so do not qualify for legal protections such as the Geneva Conventions.

Illegal combatants include spies, saboteurs (especially those attacking civilian targets), and terrorists. They have historically been tried and punished under specially established military tribunals. Their interrogations have not been limited under the Geneva Conventions, though such interrogations still must comply with other restrictions under U.S. law.

As the Supreme Court explained in *Ex Parte Quirin*, 317 U.S. 1, 14 (1942),

“By universal agreement and practice the law of war draws a distinction between the armed forces of a country and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals....Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars.”

These distinctions have been maintained throughout our history. During the Revolutionary War, British Major John Andre was captured out of uniform behind the lines of American forces, on a mission to obtain secret information from the traitor General Benedict Arnold. General George Washington appointed a military tribunal that tried and convicted Andre as a spy outside the Law of War, and, therefore, not entitled to the protections of a POW. The tribunal concluded, “Major Andre...ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations...he ought to suffer death.” 317 U.S. 31. Andre was hanged under the orders of General Washington.

As another historical example, during the Civil War Confederate Captain Robert Kennedy “was shown to have attempted, while in disguise, to set fire to the City of New York,” and consequently was convicted by a military tribunal “on charges of acting as a spy and violations of the law of war ‘in undertaking to carry on irregular and unlawful warfare.’” *Id.* The sentence was again death by hanging.

Finally, during World War II, a Nazi submarine landed 4 German soldiers on Long Island, New York, “carrying with them a supply of explosives, fuses, and incendiary and timing devices.” 317 U.S. 21. They buried their uniforms and proceeded inland in civilian dress. A few days later, another Nazi submarine similarly landed another 4 German soldiers near Jacksonville, Florida, who proceeded inland in the same way. *Id.* All 8 were captured by the FBI either in New York or Chicago. They all had been trained in sabotage near Berlin, and they were sent to destroy war industries and war facilities in the United States by sabotage.

President Franklin Roosevelt appointed a military commission which tried and convicted them, condemning them to the sentence of death. This was upheld by the Supreme Court in *Ex Parte Quirin, supra*, with the executions following shortly.

The recent decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) did not change these long standing distinctions between those covered by the Geneva Conventions entitled to POW status and protections, and illegal combatants such as terrorists not entitled to such protections. The majority there ruled that because of a federal statute regarding military tribunals amended to refer to “international law and custom,” military tribunals even for illegal combatants are required to maintain minimum legal standards of the Geneva Conventions regarding rules of procedure and evidence. While we think the majority opinion was corrupted by political considerations, and was intellectually eviscerated on legal grounds by the dissenters, even the majority did not rule that the Geneva Conventions now apply to terrorists by their own terms across the board. In any event, *Hamdan* was decided after the legal memos at issue here were written, and the majority’s ruling was sharply disputed by 4 sitting Supreme Court Justices.

UN Convention Against Torture

The United States is a party to an international treaty entitled The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or

Punishment (hereafter “UN Convention”). The federal torture statute discussed above, and various other federal and state criminal laws not applicable here, satisfy obligations under the treaty in regard to torture. The Senate, in ratifying the treaty, adopted a reservation to Article 16, which is the provision that prohibits other cruel, inhuman or degrading treatment or punishment. The reservation provides, “[T]he United States considers itself bound by the obligation...only insofar as the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendment to the Constitution of the United States.” This reservation limits the obligations of Article 16 of the treaty upon the United States under international law.

The treaty, therefore, does not prohibit the United States from imposing other treatment or punishment, besides torture, not already prohibited by the Constitution. This was the policy intentionally adopted by the Senate in agreeing to the treaty, to ensure that the treaty would not unduly limit actions the United States might have to take to defend the nation and its people.

The test the courts have used as to whether government conduct violates these amendments is whether the conduct “shocks the conscience.” *Rochin v. California*, 342 U.S. 165 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Such conduct has been defined as conduct that is “arbitrary in the constitutional sense” in that it amounts to the “exercise of power without any reasonable justification in the service of a legitimate government objective.” *Id.* at 846. The Court in *Lewis* further explained, “[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” *Id.* at 849. Whether conduct is “justifiable by any government interest or objective” depends in part on the importance of the interest.

The CIA’s enhanced interrogation program clearly survives this test. It is conducted in the service of the government interest or objective of defending the American people against mass murder by terrorists, arguably the most important government interest or objective of all. This is confirmed by the discussion below showing the limitations and restrictions placed upon the enhanced interrogation program and the results of that program. The numerous safeguards in the program adopted to ensure that it does not cause any severe pain or prolonged suffering also discussed below further establish that it does not “shock the conscience.” In addition, the fact that the U.S. uses the same techniques as in the enhanced interrogation program on its own troops for training purposes further establishes that such techniques do not “shock the conscience.”

In addition, the Supreme Court has repeatedly held that constitutional rights do not apply to aliens outside the United States. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Company*, 299 U.S. 304 (1936); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Zadvydas v. Davis*, 533 U.S. 678 (2001). Since Article 16 of the treaty is limited to prohibiting conduct that violates the

Constitution, it does not apply to U.S. interrogations of aliens in Guantanamo Bay or in other, foreign countries.

Indeed, by its own terms, Article 16 only applies to conduct by a government on “territory under its jurisdiction.” As applied to the United States, that means within the geographic territory of the United States, where the federal government exercises de facto authority as a government. As a legal matter, therefore, the restrictions of Article 16 again would not apply to an interrogation program conducted by the United States at Guantanamo Bay, or in other, foreign countries. While this is not a morally satisfying argument, it is a legal defense against a charge of illegality where none of the challenged conduct took place within U.S. territory. The other arguments above explain why the CIA enhanced interrogation program would nevertheless not violate the treaty in any event.

The Enhanced Interrogation Program

Who Was Subject to Enhanced Interrogation?

The enhanced interrogation techniques were used during the Bush Administration only on those who were determined to be High Value Detainees, which was defined as

“a detainee who, until time of capture, we have reason to believe (1) is a senior member of al Qai’da or an al Qai’da associated terrorist group...;(2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing such terrorist actions..., or assisting the al Qai’da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.”⁶

Former CIA Director Hayden and former Attorney General Mukasey write, “Of the thousands of unlawful combatants captured by the U.S., fewer than 100 were detained and questioned in the CIA program. Of those, fewer than one-third were subject to any of the [enhanced interrogation] techniques...”⁷

Only three of these individuals were subjected to the final interrogation stage of waterboarding. One of these was Khalid Sheik Mohammad (KSM), who was the operational mastermind behind the September 11, 2001 attacks. KSM was captured by Bush Administration officials in Pakistan with the help of that nation’s government. Even before his capture, the CIA considered him to be one of al Qaeda’s “most important leaders...based on his relationship with Usama Bin Laden and his reputation among the al Qai’da rank and file.”⁸ After 9/11, KSM assumed “the role of operations chief for al

⁶ II, p. 6

⁷ Hayden and Mukasey, *supra*.

⁸ IV, p. 7.

Qai'da around the world.”⁹ KSM planned further attacks within the United States both before and after 9/11.

A second detainee subjected to waterboarding was Abu Zubaydah. Before his capture, Zubaydah was “one of Usama Bin Laden’s key lieutenants,” third or fourth highest ranking member of Al Qaeda.¹⁰ He was involved in every major operation carried out by Al Qaeda, including 9/11.¹¹ As early as 2002, the CIA reported the following about Zubaydah,

“He has served as Usama Bin Laden’s senior lieutenant. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda’s training camp in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda’s coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda’s counterintelligence officer and has been trusted to find spies within the organization.”

“Zubaydah has been involved in every major terrorist operation carried out by al Qaeda. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.”

“...[I]t is believed Zubaydah wrote al Qaeda’s manual on resistance techniques...Zubaydah stated during interviews that he thinks of any activity outside of jihad as ‘silly.’ He has indicated that his heart and mind are devoted to serving Allah and Islam through jihad and he has stated that he has no doubts or regrets about committing himself to jihad. Zubaydah believes that the global victory of Islam is inevitable...[H]e continues to express his unabated desire to kill Americans and Jews.”¹²

The third detainee subjected to waterboarding was Abd Al-Rahim Al-Nashiri. He is reportedly the mastermind behind the bombing of the USS Cole, which killed 17 U.S. sailors in October, 2000. He is reported to have received personal approval of his bombing plan and cash to carry it out from bin Laden himself. After this success, he

⁹ Id.

¹⁰ Id., p. 6

¹¹ Id.

¹² I, p. 7

became head of Al Qaeda operations in the Persian Gulf and the Gulf states, including Saudi Arabia. In this capacity, he reportedly organized the terrorist attack on the Limburg oil tanker in October, 2002. Just like with the Cole bombing, a boat laden with explosives rammed into the tanker and exploded. About 90,000 barrels of oil leaked into the Gulf of Aden as a result, and international shipping through the Persian Gulf, including the majority of the world's oil supply, was shut down for a time. A public statement from Osama bin Laden took credit for Al Qaeda for the attack.

The Enhanced Interrogation Techniques

The following are the techniques involved in the CIA enhanced interrogation program.

1. Dietary Manipulation. The detainee is supplied only with commercial liquid meals in place of normal food, resulting in a bland, unappetizing diet. However, the diet is nutritionally complete in terms of calories, vitamins, nutrition and liquidation.

2. Nudity. The detainee is kept naked throughout the interrogation. Articles of clothing are provided as an instant reward for cooperation. Temperature is required to be maintained at least at 68 degrees F.

3. Attention Grasp. The interrogator grasps the detainee by the collar with both hands, and pulls the detainee towards him. Gets the detainee's focused attention.

4. Walling. The detainee is stood with his back to a flexible, false wall. The interrogator grabs the detainee and pushes him into the wall, which gives but emits a loud, disturbing sound. The detainee's head and neck are supported with a rolled hood in a C-collar around the back of the neck, which prevents whiplash.

5. Facial Hold. The interrogator grabs the detainee by either side of the face and holds the head immobile while speaking to him.

6. Facial Insult Slap. The interrogator slaps the side of the detainee's face with an open hand. The purpose here is not to inflict physical pain, but to induce shock, surprise and humiliation.

7. Abdominal Slap. The interrogator strikes the abdomen of the detainee with the back of his open hand between the navel and the sternum. The interrogator may not punch the detainee with a closed fist. The purpose of this technique is again not to inflict physical pain, but to focus the detainee on the need to answer the interrogator's questions and to dislodge detainee expectations that he will not be touched.

8. Cramped Confinement. The detainee is placed in a dark, confined space, small enough to restrict his movement. In a space where the detainee can stand up or sit down, the confinement is limited to no more than 8 hours at a time, and 18 hours total in a 24

hour period. In a space only big enough for the detainee to sit down, confinement is limited to 2 hours at a time.

9. *Wall Standing*. The detainee is forced to stand near a wall with his feet spread at shoulder width, and his arms outstretched with fingers resting on the wall and supporting his body weight. The detainee is restrained from moving his feet or hands. The purpose of this technique is to induce the discomfort of temporary muscle fatigue.

10. *Stress Positions*. The detainee is forced to remain standing or seated in various positions for periods of time which, again, produces temporary muscle fatigue.

11. *Water Dousing*. Cold water is poured on the detainee to create discomfort. The minimum water temperature is 41 degrees and the minimum room temperature is 64 degrees. The maximum exposure is 20 minutes at these temperatures before drying and rewarming, though exposure can last up until one hour at warmer temperatures. The procedure is designed and monitored to avoid hypothermia or other negative health results.

12. *Sleep Deprivation*. The detainee is deprived of sleep for a number of days. To achieve this, the detainee is shackled in a standing position with hands in front handcuffed to a chain attached to the ceiling, and feet shackled to a bolt on the floor. The detainee can move in a 2-3 foot diameter. The detainee is hand fed by interrogators, and wears an adult diaper which is changed when soiled. About a dozen detainees have been subjected to sleep deprivation in this way for more than 48 hours, 3 for more than 96 hours, and one for the maximum of 180 hours, or about a week. The detainee is continuously monitored for any adverse physical or health reactions, and no detainee has suffered any physical harm or injury due to this technique. Both the medical literature and experience establish that the detainee quickly recovers from the effects of this sleep deprivation after 8 hours of sleep.

13. *Waterboarding*. The detainee lies on a gurney inclined downward at a 15 degree angle, on his back with his head on the lower end. A cloth is placed over the detainee's face, and cold water is poured on the cloth from a few inches above. This must be stopped and the cloth removed after a maximum of 40 seconds. The body naturally reacts to this procedure with feelings of drowning and panic, even if the detainee can still physically breathe and knows it. But the waterboarding does not produce actual physical pain. Such applications of waterboarding may be done no more than 6 times in a maximum of 2 hours. A physician and a psychologist are present at all times during such waterboarding to monitor the detainee and stop the procedure if there is any sign of a severe reaction or severe physical distress.

Such waterboarding may only be used if (1) the CIA has credible intelligence that a terrorist attack is imminent, (2) there are substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack, and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack. As a result, this technique was used on only three terrorist

detainees during the Bush Administration, as discussed above. Despite uninformed public statements to the contrary with no basis or foundation, this technique has a long history of being very effective in obtaining the sought after information. It was in the three cases it was used during the Bush Administration, stopping actual planned terrorist attacks that would have killed thousands of innocent Americans, and yielding reams of additional information, as discussed further below.

The U.S. government has applied waterboarding to thousands of American military personnel during SERE (Survival, Evasion, Resistance, Escape) training over many years. Yet, there has not been one case of serious physical harm or prolonged mental harm.

Enhanced Interrogation Procedures

Prior to any enhanced interrogation, each detainee is first evaluated by medical and psychological professionals to ensure that they individually would not suffer any severe physical or mental pain or suffering as a result of any of the enhanced interrogation techniques. These examinations have resulted in some or all of the enhanced interrogation techniques being ruled out for some individuals because of their physical or mental condition. After enhanced interrogations begin, subsequent medical and psychological rechecks are performed on a regular basis to ensure the detainee's condition has not changed. During the enhanced interrogations, medical and psychological personnel are present at all times monitoring the practice to ensure that no severe physical or mental pain or suffering occurs, with authority to stop the interrogation if they think that line is being crossed.

Each new detainee is also interviewed and evaluated by trained and certified interrogators to determine if he possibly holds any information regarding future terrorist attacks or Al Qaeda operations, and if enhanced interrogation is needed to obtain that information. If the interrogation team believes so, it submits a plan for enhanced interrogation to CIA headquarters for specific review and approval. Before any enhanced interrogation can begin on any detainee, specific written approval is required from the Director of the DCI Counterterrorist Center, with the concurrence of the Chief of the CTC Legal Group.

The enhanced interrogation then begins with the milder techniques used first, escalating to the harsher techniques as needed. Additional approval from CIA headquarters is needed to continue the enhanced interrogation beyond 30 days. Additional specific approval is also needed to advance to the technique of waterboarding. Written records are kept of each enhanced interrogation practice and the results.

Results of the Enhanced Interrogation Program

The CIA has stated in writing that it believes that the intelligence acquired through such enhanced interrogations "has been a key reason why al-Qai'da has failed to

launch a spectacular attack in the West since 11 September 2001.”¹³ In particular, before their enhanced interrogations, KSM and Zubaydah had “expressed their belief that the general US population was ‘weak,’ lacked resilience, and would be unable to ‘do what was necessary’ to prevent the terrorists from succeeding in their goals.”¹⁴ But after enhanced interrogation with waterboarding “KSM and Abu Zubaydah have been pivotal sources because of their ability and willingness to provide their analysis and speculation about the capabilities, methodologies, and mindsets of terrorists.”¹⁵

The CIA explained how it builds intelligence from various sources, saying that it

“frequently uses the information from one detainee, as well as other sources, to vet the information of another detainee. Although lower level detainees provide less information than the high value detainees, information from these detainees has, on many occasions, supplied the information needed to probe the high value detainees further....[T]he triangulation of intelligence provides a fuller knowledge of Al-Qai’da activities than would be possible from a single detainee.”¹⁶

In other words, as the CIA has further explained, “even interrogations of comparatively lower-tier high value detainees supply information that the CIA uses to validate and assess information elicited in other interrogations and through other methods. Intelligence acquired from the interrogation program also enhances other intelligence methods, and it has helped to build the CIA’s overall understanding of al Qaeda and its affiliates.”¹⁷ As a result, while the “interrogations have led to specific actionable intelligence,” as discussed further below, they have also produced “a general increase in the amount of intelligence regarding al Qaeda and its affiliates.”¹⁸

Former CIA Director Hayden and former Attorney General Mukasey elaborate,

“Interrogation is conducted by using such obvious approaches as asking questions whose correct answers are already known and only when truthful information is provided proceeding to what may not be known. Moreover, intelligence can be verified, correlated and used to get information from other detainees, and has been; none of this information is used in isolation.”¹⁹

Most importantly, the enhanced interrogation of KSM led to the discovery of Al Qaeda’s planned “Second Wave,” a second 9/11 on the west coast, involving East Asian Al Qaeda operatives crashing a hijacked airliner into a building in Los Angeles, with the Library Tower usually mentioned as the target, the tallest building on the west coast. The CIA explained, “information obtained from KSM also led to the capture of Riduan bin

¹³ IV, p. 8.

¹⁴ IV, p. 9

¹⁵ Id.

¹⁶ Id.

¹⁷ Id., pp. 9-10.

¹⁸ Id., p. 10.

¹⁹ Hayden and Mukasey, *supra*.

Isomuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemaah Islamiyah cell tasked with executing the ‘Second Wave.’”²⁰

The CIA explained in more detail how this came about,

“KSM admitted that he had tasked Majid Khan with delivering a large sum of money to an al-Qaeda associate....Khan subsequently identified the associate (Zubair), who was then captured. Zubair, in turn, provided information that led to the arrest of Hambali....The information acquired from these captures allowed CIA interrogators to pose more specific questions to KSM, which led the CIA to Hambali’s brother, al-Hadi. Using information obtained from multiple sources, al-Hadi was captured, and he subsequently identified the Guraba cell....With the aid of this additional information, interrogations of Hambali confirmed much of what was learned from KSM.”²¹

Information obtained from KSM also foiled a terrorist plot to bring down the Brooklyn Bridge. Wiretaps of overseas phone calls by suspected terrorists turned up numerous references to the Brooklyn Bridge. FBI consultations with engineers determined that the suspension bridge was vulnerable to an attack with a powerful blowtorch used on the suspension cable rooted in a small building under the bridge. During enhanced interrogations, KSM identified Iyman Faris as involved with the Brooklyn Bridge plot. The FBI subsequently identified Faris and upon searching his apartment in New York City found engineering documents concerning the bridge, and a powerful blowtorch that could finish the job.

The enhanced interrogations of Zubaydah led to the capture of KSM in the first place. As Hayden and Mukasey explain, Zubaydah

“disclos[ed] information that led to the capture of Ramzi bin al Shibh, another of the planners of Sept. 11, who in turn disclosed information which – when combined with what was learned from Abu Zubaydah – helped lead to the capture of KSM and other senior terrorists, and the disruption of follow-on plots aimed at both Europe and the U.S.”²²

Zubaydah also provided detailed information regarding Al Qaeda’s “organizational structure, key operatives, and modus operandi,” and identified KSM as the mastermind behind the 9/11 attacks.²³ Zubaydah also “provided significant information on two operatives, [including] Jose Padilla who planned to build and detonate a dirty bomb in the Washington, DC area.”²⁴ Both KSM and Zubaydah also provided important information about al-Zarqawi and his terrorist network in Iraq killing U.S. troops. Zarqawi was subsequently killed in a U.S. air raid in June, 2006.

²⁰ Id.

²¹ Id.

²² Hayden and Mukasey, *supra*.

²³ Id.

²⁴ Id.

Finally, Hayden and Mukasey write, “As late as 2006, fully half of the government’s knowledge about the structure and activities of Al Qaeda came from those interrogations.”²⁵ In another article, former Bush Administration official Peter Wehner quotes George Tenet, CIA Director under both Clinton and Bush, as saying, “I know this [enhanced interrogation] program has saved lives. I know we’ve disrupted plots. I know this program alone is worth more than [what] the FBI, the [CIA], and the National Security Agency put together have been able to tell us.”²⁶ Wehner adds from former National Intelligence Director Mike McConnell, “We have people walking around in this country that are alive today because this process happened.”²⁷

Shockingly, while President Obama released the 4 legal memos discussing the legality of the enhanced interrogation techniques, he refuses to release the additional memos discussing what was learned as a result of those interrogation techniques. The released legal memos discuss the enhanced interrogation techniques in great detail, including the safeguards and precautions used by the CIA to ensure compliance with the law. Consequently, the released memos reveal to the terrorist enemy how to train for the enhanced interrogations if they are captured, greatly damaging the security of the American people. Given that this damage is already done, there is no good reason now not to release the additional memos confirming what was gained from those interrogations. Obama’s refusal to release those memos violates his campaign pledge to govern with transparency, and indicates an attempted cover up of the shortcomings of his ideologically rigid policy of ending the enhanced interrogations. Nevertheless, enough is already in the public record to show that those enhanced interrogations provided extremely valuable security intelligence that saved the lives of thousands of Americans.

Obama’s failure to release the additional memos completing the full story of the enhanced interrogation techniques and their results illustrates the point that a false statement is most effective when it is constructed based on partial truth. That is why the oath (or affirmation) that every witness takes in court requires “the truth, the whole truth, and nothing but the truth.”

Legal Analysis and the Interrogation Memos

The first of the 4 released interrogation memos was dated August 1, 2002, and signed by then Assistant Attorney General for the Office of Legal Counsel Jay Bybee. (Memo I). The memo is in response to a request from the Acting General Counsel of the CIA John Rizzo asking for a legal opinion as to the legality of the enhanced interrogation techniques the CIA wanted to apply to Abu Zubaydah.

Memo I provides an extensive and thorough analysis of this question. It first discusses exactly what techniques the CIA plans to apply to Zubaydah (see discussion

²⁵ Hayden and Mukasey, *supra*.

²⁶ Peter Wehner, “Morality and Enhanced Interrogation Techniques,” April 27, 2009.

²⁷ *Id.*

above), and why. It then analyzes whether the techniques would result in the severe physical pain or suffering prohibited by the statute. The memo concludes on this point, “Even when all of the methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort.”²⁸

Memo I also analyzes whether the techniques would inflict severe mental pain or suffering within the meaning of the torture statute. The memo notes that the torture statute prohibits conduct producing “prolonged mental harm,” meaning “mental harm of some lasting duration.”²⁹ The memo concluded that a review of the medical literature and experience shows that “no evidence exists that [the enhanced interrogation techniques] produce prolonged mental harm.”³⁰

The memo adds,

“To violate the statute, an individual must have the specific intent to inflict severe mental pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering....[I]f a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent....A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering.”³¹

The memo concludes on this specific intent issue,

“[W]e believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. First, the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary indicates that it is not your intent to cause severe physical pain. The personnel on site have extensive experience with these specific techniques as they are used in SERE school training. Second, you have informed us that you are taking steps to ensure that Zubaydah’s injury [present when captured] is not worsened or his recovery impeded by the use of these techniques.”

“Third...the proposed techniques involving physical contact between the interrogator and Zubaydah actually contain precautions to prevent any serious physical harm to Zubaydah....”

²⁸ Assistant Attorney General Jay S. Bybee, “Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency”, Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, p. 11

²⁹ *Id.*, p. 15

³⁰ *Id.*, p.16

³¹ *Id.*

“Furthermore, no specific intent to cause severe mental pain or suffering appears to be present....The mental health experts you have consulted have indicated that the psychological impact of a course of conduct must be assessed with reference to the subject’s psychological history and current mental health status....A comprehensive psychological profile of Zubaydah has been created. In creating this profile, your personnel drew on direct interviews, Zubaydah’s diaries, observation of Zubaydah since his capture, and information from other sources....You have also informed us that you have reviewed the relevant literature on the subject, and consulted with outside psychologists....”

Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A [the torture statute].³²

The second interrogation memo was dated May 10, 2005, and signed by Principal Deputy Assistant Attorney General for the Office of Legal Counsel Stephen G. Bradbury. (Memo II). It responded to another request from CIA Senior Deputy General Counsel John Rizzo for a legal opinion as to the legality of the enhanced interrogation techniques the CIA wanted to apply to another high value detainee whose name seems to be redacted.

Memo II provided an even more detailed and comprehensive analysis of the issue than Memo I, stretching to 46 single spaced pages. It begins by noting that,

“Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law..., but also in international agreements, in centuries of Anglo-American law,...and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.”³³

Memo II quoted the report of the Senate Foreign Relations Committee recommending ratification of the UN Convention Against Torture, which said,

“The term ‘torture’ in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained, systemic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”³⁴

Memo II also quoted Professor John Langbein’s book, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977), which describes additional torture practices, “The commonest torture devices – strappado, rack, thumbscrews, legscrews –

³² Id., pp. 16-18.

³³ Principal Deputy Assistant Attorney General Stephen G. Bradbury, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency”, Office of Legal Counsel, U.S. Department of Justice, May 10, 2005.

³⁴ Id., p. 20.

worked upon the extremities of the body, either by distending or compressing them.”³⁵ Other torture practices mentioned included, “the ‘boot,’ which involved crushing of the victim’s legs and feet, repeated pricking with long needles....,”³⁶ and “‘cutting off...fingers, pulling out...fingernails,’ and electric shocks to the testicles.”³⁷

Memo II cited as well *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), which recognized torture as, among other things,

“severe beatings to the genitals, head and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim’s forehead; hanging the victim and beating him; extreme limitations of food and water, and subjection to games of ‘Russian Roulette’....”³⁸

As Memo II noted, “The devices and procedures historically used were generally intended to cause extreme pain while not killing the person being questioned (or at least not doing so quickly) so that questioning could continue.”³⁹ The CIA’s enhanced interrogation techniques did not involve anything like these practices (see discussion above).

Memo II also described “severe suffering” as denoting “a ‘state’ or ‘condition’ that must be ‘endured’ over time, that there is ‘an extended temporal element, or at least an element of persistence to the concept of physical suffering....a state or condition of physical distress, misery, affliction, or torment...that persists for a significant period of time.”⁴⁰

Memo II continued,

“Turning to the question of what constitutes ‘prolonged mental harm caused by or resulting from’ a predicate act, we have concluded that Congress intended this phrase to require mental ‘harm’ that has some lasting duration....First, the use of the word ‘harm’ – as opposed to simply repeating ‘pain or suffering’ – suggests some mental damage or injury....Second, to ‘prolong’ means to ‘lengthen in time,’ ‘extend in duration,’ or ‘draw out,’...., further suggesting that to be ‘prolonged,’ the mental damage must extend for some period of time.”⁴¹

The memo then thoroughly examined each of the individual enhanced interrogation techniques as described above, and concluded that “the authorized use of each of these techniques, considered individually, would not violate the prohibition that

³⁵ Id., p. 19.

³⁶ Id.

³⁷ Id., p. 22.

³⁸ Id., p. 22.

³⁹ Id.

⁴⁰ Id., p. 23.

⁴¹ Id., p. 26.

Congress has adopted in [the torture statute].”⁴² In regard to waterboarding, Memo II noted that,

“[T]he CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain, or, in the professional judgment of doctors, is there any medical reason to believe they would have done so. Therefore, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause “severe physical pain.”⁴³

The memo added,

“[T]he physical distress caused by the waterboard would not be expected to have the duration required to amount to severe physical suffering. Applications are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24 hour period, and use of the technique is limited to at most 5 days during the 30-day period...Consequently, under these conditions, use of the waterboard cannot be expected to cause ‘severe physical suffering’ within the meaning of the statute, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause ‘severe physical suffering.’”⁴⁴

As to “severe mental pain or suffering,” Memo II explained,

“[T]here is no medical basis to believe that the technique would produce any mental effect beyond the distress that directly accompanies its use and the prospect that it will be used again. We understand from the CIA that to date none of the thousands of persons who have undergone the more limited use of the technique in SERE training has suffered prolonged mental harm as a result...[I]n the case of the two detainees who have been subjected to more extensive use of the waterboard technique, no evidence of prolonged mental harm has appeared in the period since the use of the waterboard on those detainees, a period which now spans at least 25 months for each...”⁴⁵

Memo II concluded as to waterboarding and mental health,

“[W]e believe that the panic brought on by the waterboard during the very limited time it is actually administered, combined with any residual fear that may be experienced over a somewhat longer period, could not be said to amount to the ‘prolonged mental harm’ that the statute covers. For these reasons, we conclude that the authorized use of the waterboard by adequately trained interrogators

⁴² Id., p. 28.

⁴³ Id., p. 44.

⁴⁴ Id., p. 45.

⁴⁵ Id., pp. 45-46.

could not reasonably be considered specifically intended to cause ‘prolonged mental harm.’”⁴⁶

The third interrogation memo was also dated May 10, 2005, also from Principal Deputy Assistant Attorney General for the Office of Legal Counsel Stephen G. Bradbury to CIA Senior Deputy General Counsel John Rizzo. (Memo III). This memo analyzed whether application of the enhanced interrogation techniques *in combination* would be legal, Memo II having analyzed only the application of each of the techniques *individually*. Memo III found nothing about the combination of the techniques that would change its opinion from Memo II, concluding,

“In view of the experience from past interrogations, the judgment of medical and psychological personnel, and the interrogation team’s diligent monitoring of the effects of combining interrogation techniques, interrogators would not reasonably expect that the combined use of the interrogation methods under consideration, subject to the conditions and safeguards set forth here and in [previous memos], would result in severe physical or mental pain or suffering within the meaning of [the torture statute].”⁴⁷

The memo added,

“We nonetheless underscore that when these techniques are combined in a real world scenario, the members of the interrogation team and the attendant medical staff must be vigilant in watching for unintended effects, so that the individual characteristics of each detainee are constantly taken into account and the interrogation may be modified or halted, if necessary, to avoid causing severe physical or mental pain or suffering to any detainee.”⁴⁸

The fourth and final memo was written on May 30, 2008 from Bradbury at Justice to Rizzo at the CIA and addressed whether the CIA’s enhanced interrogation techniques were legal under Article 16 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It recounted the same arguments as discussed above concerning why the CIA’s enhanced interrogation program does not violate the treaty.

These four memos each provide a comprehensive review of all applicable statutes, treaties, cases, and word definitions, and apply that law to the CIA’s enhanced interrogation techniques in a thorough, carefully reasoned analysis. We know of no legal precedent for finding such a legal memorandum to involve a criminal act. Surely the legal conclusions would not have to be correct to avoid any such criminal liability, for every case going to a final ruling involves at least one lawyer whose legal opinion is

⁴⁶ Id., p. 46.

⁴⁷ Principal Deputy Assistant Attorney General Stephen G. Bradbury, “Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency”, Office of Legal Counsel, U.S. Department of Justice, May 10, 2005 (Combined Use of Certain Interrogation Techniques), p. 68.

⁴⁸ Id.

found to be wrong by a judge, and we have not yet reached the point where the losing lawyer is adjudged to be a criminal as a result. But we nevertheless believe that the legal conclusions and opinions issued in these memos were correct under the law at the time, and should remain so to this day.

Conclusion

Rather than evidence of criminality, we conclude these legal memos show the CIA and the Bush Administration acting carefully to ensure that they complied with the law. We believe they show the CIA adopting comprehensive limitations, protections and safeguards on their enhanced interrogation techniques to make sure that they did not violate the law. We also conclude the record shows very careful and focused attention on protecting the American people from further terrorist attacks. Indeed, we think the Bush Administration would have breached their responsibilities to the American people if it had failed to take these steps to save thousands of innocents from mass murder, and that future Administrations should be held responsible for any such failures.

Moreover, on this record we think that those who are broadcasting around the world claims that America engaged in torture under the Bush Administration are libeling our country, and that it is they who are promoting the recruitment of additional terrorists. We find the suggested, unprecedented prosecution of the lawyers who authored these memos, or other suggested penalties such as disbarment, to be extremist and offensive.