



2012

The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side

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Georgetown Public Law and Legal Theory Research Paper No. 12-054


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49 Hous. L. Rev. 53-69 (2012)

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ARTICLE

THE TAIN OF TORTURE: THE ROLES OF LAW AND POLICY IN OUR DESCENT TO THE DARK SIDE

*David Cole**

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I. INTRODUCTION

Philip Zelikow has provided a fascinating account of how officials in the U.S. government during the “War on Terror” authorized torture and cruel treatment of human beings whom they labeled “high value al Qaeda detainee[s],” “enemy combatants,” or “the worst of the worst.”¹ Professor Zelikow

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1. Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1, 22–24 (2012) (providing an in-depth analysis of the decisions made by the Bush Administration in implementing interrogation policies and practices in the period immediately following September 11, 2001); see Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(1), 120 Stat. 2600, 2601 (formerly codified at 10 U.S.C. § 948a(1) (2006)) (defining “unlawful enemy combatant”), *invalidated in part by* Boumediene v. Bush, 533 U.S. 723 (2008); Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques

appears to lay blame primarily on the Central Intelligence Agency (CIA), although in truth, there was plenty of blame to go around.² CIA officials, without expertise or experience in interrogation, insisted that they needed to use physical coercion when, in fact, other methods of interrogation were working—just not getting them the answers they thought, often wrongly, that they should be hearing.³ Justice Department lawyers wrote legal memos that authorized what should have been unthinkable, twisting the law to conform to what the CIA wanted to do, rather than instructing the CIA to conform its conduct to law.⁴ The officials responsible for policy—including President George Bush, Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld—apparently failed even to ask the most rudimentary question of policy: not just whether it is *legal* to strip captives naked, slam

that May be Used in the Interrogation of a High Value al Qaeda Detainee 1, 4–5 (May 10, 2005), available at <http://justice.gov/olc/docs/memo-bradbury2005-3.pdf> (conducting a legal analysis of the Central Intelligence Agency's (CIA) interrogation techniques for a "high value" detainee); Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Dep't of Def., to Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal 1–4 (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (explaining the procedure for determining "enemy combatant" classification); Katharine Q. Seelye, *Some Guantánamo Prisoners Will be Freed, Rumsfeld Says*, N.Y. TIMES, Oct. 23, 2002, at A14 (quoting Secretary of Defense Donald Rumsfeld for the characterization of the detainees at Guantánamo Bay as "the worst of the worst" (internal quotation marks omitted)).

2. Zelikow, *supra* note 1, at 11, 26–27; see also S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, at xix (Comm. Print 2008) (discussing the approval of "aggressive interrogation techniques" by Secretary of Defense Rumsfeld and other senior officials at the Department of Defense); Memorandum from Behavioral Analysis Unit, Fed. Bureau of Investigation, to Raymond S. Mey et al., Counterterrorism Gen. Counsel, GTMO-INTEL 2 (May 30, 2003), available at <http://action.aclu.org/torturefoia/released/022306/1261.pdf> (discussing the willingness of the Defense Intelligence Agency and the Defense Humint Services to use questionable interrogation techniques).

3. See INDEP. PANEL TO REVIEW DOD DET. OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 7–8 (2004) (reporting that "authorities at Guantanamo requested approval of stronger interrogation techniques to counter tenacious resistance by some detainees"); James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 598–99 (2010) (noting the dissent among government officials over the use of enhanced interrogation techniques when prior methods of questioning produced similar results); Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT'L L. 89, 104 (2007) (explaining that "the CIA had little organizational capability or experience in the interrogation of hostile captives"); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Interrogation of al Qaeda Operative 1–2 (Aug. 1, 2002) [hereinafter Bybee Memorandum], available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf>.

4. See S. COMM. ON ARMED SERVS., *supra* note 2, at xxvi–xxvii (concluding that the Department of Justice's Office of Legal Counsel memos "distorted the meaning and intent of anti-torture laws, [and] rationalized the abuse of detainees in U.S. custody").

them against walls, hit them repeatedly, force them into painful stress positions for hours at a time, and suffocate them through waterboarding, but whether it is *good policy* to do so.⁵ And, by all accounts, no one in a position of responsibility seems to have asked whether the tactics authorized were moral or consistent with our fundamental constitutional values.

II. TORTURE AND CRUELTY: A MATTER OF LAW OR POLICY?

I agree with Professor Zelikow that the question of what is legal and the question of what is the right thing to do as a policy matter are not identical.⁶ The fact that Justice Department lawyers opined that waterboarding and other patently abusive tactics were “legal”⁷ should not have ended the discussion; it should at most have started the discussion. Professor Zelikow persuasively demonstrates that the *policy* case against adopting such tactics was and is strong: torture brings unclear benefits (as no one can truly know whether information obtained through torture could not have been obtained in some other way) and imposes clear, historically demonstrated costs.⁸ It delegitimizes the state that tortures, provides the best recruitment propaganda the enemy could possibly hope for, compromises cooperation with much of the rest of the world’s law enforcement and intelligence agencies, and erects nearly insuperable barriers to prosecuting those we torture for their own terrorist acts.⁹ It also, I might add, debases our culture and violates our own first principles. In the words of John McCain, “it is not about who *they* are[;] [i]t is about

5. See *id.* at xiii–xv (explaining that Department of Defense officials sought to use the interrogation techniques employed in the Survival Evasion Resistance and Escape training programs); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1225–26 (2005) (showing that policy questions were excluded from consideration in analyzing the legality of the CIA’s interrogation methods); Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Sources: Top Bush Advisors Approved ‘Enhanced Interrogation,’* ABCNEWS (Apr. 9, 2008), <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1> (explaining that the “Principals Committee” that approved interrogation techniques included top Bush Administration officials).

6. Zelikow, *supra* note 1, at 5.

7. Bybee Memorandum, *supra* note 3, at 18.

8. See Zelikow, *supra* note 1, at 27–29, 36 (explaining that a policy analysis of the proposed interrogation techniques would have shown “significant intelligence costs from tormenting prisoners”).

9. See Jeannine Bell, “*Behind This Mortal Bone*”: *The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 356–57 (2008) (contrasting studies showing the effectiveness of torture compared to other interrogation techniques); Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5209–17 (2009) (analyzing the unintended consequences of U.S. interrogation and counterterrorism policies that permitted the torture of detainees).

who *we* are.”¹⁰ These latter concerns may partake of morality rather than policy, but they are equally important concerns. So Professor Zelikow is certainly correct that even if the tactics the Bush Administration authorized were legal, there were many good policy arguments against adopting them.

Professor Zelikow faults the high-level officials who approved of these tactics—who, as far as we know, included at least Bush, Cheney, Rumsfeld, Tenet, Ashcroft, Gonzales, and Rice.¹¹ He writes with a great deal of empathy for the pressures these and other officials were under and, at times, seems to suggest that the combination of the CIA’s claim that their interrogators needed to employ these tactics, the Justice Department’s assurance that the tactics were legal, and the perceived mandate to do everything necessary to avert another attack left these officials with no real choice.¹² Yet, at other times, Professor Zelikow seems to imply that if there had been a policy review, rather than merely a legal and operational assessment, the result might have come out differently.¹³

I’m not convinced of the latter point. After all, it is not as if the policy arguments Professor Zelikow marshals were or are new, hard to find, or difficult to understand. They have been advanced for decades in debates about torture. They are reflected

10. 151 CONG. REC. 17,233 (2005) (statement of Sen. John McCain) (emphasis added).

11. Zelikow, *supra* note 1, at 22–27; *Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part I): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 65 (2008) (statement of Marjorie Cohn, Professor of Law, Thomas Jefferson School of Law, President, National Lawyers Guild) (stating that “Dick Cheney, Condole[e]zza Rice, Donald Rumsfeld, Colin Powell, George Tenet and John Ashcroft met in the White House and micromanaged the torture by approving . . . waterboarding”); Memorandum from Alberto R. Gonzales, Counsel to the President, to President Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS 118 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

12. See Zelikow, *supra* note 1, at 23–24 (discussing the events leading up to the decision by President Bush to approve the use of harsh interrogation techniques); see also Bybee Memorandum, *supra* note 3, at 1–2 (explaining to CIA officials that waterboarding would not violate 18 U.S.C. § 2340A); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees 1–2 (July 20, 2007) [hereinafter Bradbury Memorandum], *available at* <http://www.justice.gov/olc/docs/memo-warcrimesact.pdf> (explaining the CIA’s position that the use of interrogation methods such as waterboarding were “necessary . . . to obtain critical intelligence” and “assist in preventing future terrorist attacks”).

13. Zelikow, *supra* note 1, at 29–30 (raising possible policy objections against the use of coercive interrogation methods).

in the findings of official commissions that have studied the use of torture and other coercive interrogation tactics in such countries as the United Kingdom and Israel.¹⁴ The United States consulted and worked closely with these countries as it developed its response to the terrorist attacks of September 11.¹⁵ The arguments, in other words, did not need to be put in a policy memorandum to be considered. They were in the very air that the modern legal and intelligence world breathes. It is not credible that Rice, Gonzales, Tenet, Bush, and Cheney were not familiar with these policy arguments. It seems much more likely that they simply were not convinced. In their calculus, the costs were worth the putative benefits—one benefit being, no doubt, that they could say that they took “tough” measures in order to do “everything they could” to protect Americans. So while Professor Zelikow is correct that the question of what is the right thing to do should not be reduced to whether a particular option is legal,¹⁶ he overestimates the role that these policy arguments might have played.

More importantly, Professor Zelikow too quickly moves from law to policy. The Bush Administration did not simply adopt a bad policy option; it affirmatively violated the law. Torture and cruel, inhuman, and degrading treatment of prisoners are not just bad policy options—they are illegal. Indeed, the purpose of Common Article 3 of the Geneva Conventions, which prohibits all cruel and humiliating treatment of detainees,¹⁷ and of the

14. See HCJ, 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97, 1043/99 Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1473, 1477–89 [1999] (Isr.) (discussing the legality of interrogation methods employed by the Israeli General Security Service and the policy implications examined by the Commission of Inquiry); COMMITTEE OF PRIVY COUNSELLORS, REPORT TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, Cm. 4901, at 1–8 (U.K.) (examining whether the interrogation techniques inflicted upon suspected terrorists comport with international human rights obligations).

15. KRISTIN ARCHICK, CONG. RESEARCH SERV., RS 22030, U.S.-EU COOPERATION AGAINST TERRORISM 3 (2011); see Robert D. Blackwill & Walter B. Slocumbe, *A True Ally in the Middle East*, L.A. TIMES, Oct. 31, 2011, at A13 (discussing the U.S.–Israel relationship in combating terrorism); Daniel B. Shapiro, U.S. Ambassador to Isr., Address at the Institute of National Strategic Studies (Sept. 8, 2011), available at <http://israel.usembassy.gov/amb09082011.html> (explaining that the “close U.S.–Israel relationship proved invaluable to American officials aiming to establish the most efficient and reliable counter-terrorism posture”).

16. Zelikow, *supra* note 1, at 5; see Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57, 74–75 (2009) (explaining that the Bush Administration failed to take into account moral and policy questions embodied in the Geneva Conventions).

17. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Third Geneva Convention, Common art. 3].

Convention Against Torture (CAT), which prohibits both torture and “cruel, inhuman or degrading treatment,”¹⁸ is to take these options off the policy table. It is true, of course, that the fact that an initiative is *legal* does not necessarily resolve whether it is good *policy*. But the more critical point here was the obverse: the fact that an option is *illegal* does necessarily resolve (by premitting) the policy question—cruelty and torture are simply not available policy options.

The Bush Administration went wrong in the torture controversy not just in choosing the wrong policy, but in violating the law. And not just any law. The norm against torture and cruel treatment of detainees, in or outside of war, is as fundamental a legal and moral precept as mankind has ever identified. International law treats the prohibition on torture as having the status of *jus cogens*, reserved for those few fundamental prohibitions that can never justifiably be contravened—like genocide or slavery.¹⁹ There are plenty of policy arguments against genocide. But we would not say that Hitler’s error was that he failed to entertain the full range of policy considerations raised by exterminating the Jews.

Because the tactics deployed violated the law, a major share of responsibility for the United States’ descent into torture and cruelty must be laid at the feet of the lawyers—in the first instance, John Ashcroft as Attorney General; Alberto Gonzales as White House counsel; David Addington, Legal Counsel to the Vice President; and John Yoo and Jay Bybee, the lawyers in the Office of Legal Counsel who wrote the first memos authorizing these tactics.²⁰ But the blame should not stop there. Any lawyer

18. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

19. BLACK’S LAW DICTIONARY 937 (9th ed. 2009) (defining *jus cogens* as “[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted”); *see, e.g.*, Graham Ogilvy, *Belhas v. Ya’alon: The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT’L BUS. & L. 169, 176 (2009) (“The Nuremberg trials following World War II outlined many crimes that have traditionally been held to be violations of *jus cogens* norms; genocide, enslavement, and other inhuman acts were found to be so offensive to the human condition, they subjected the Nuremberg defendants to the jurisdiction of the court regardless of Germany’s assent to the authority of the tribunal. U.S. courts, as well as international treaties, have long recognized the prohibition against torture as part of customary international law, and have since come to consider it a peremptory norm.” (footnote omitted)).

20. CONDOLEEZZA RICE, NO HIGHER HONOR 104–05 (2011); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT’L L. 811, 827 (2005); Scott Shane & David Johnston, *Lawyers Agreed on the Legality of Brutal Tactic*, N.Y. TIMES, June 7, 2009, at A1.

worth his salt who was advising on these issues should have recognized that these tactics were illegal—so you'd have to include William Haynes II, General Counsel to the Department of Defense; John Rizzo, Acting General Counsel to the CIA; John Bellinger, who was advising National Security Advisor Condoleezza Rice when she approved the tactics; and the many lawyers in the Office of Legal Counsel who allowed the tactics to continue under their watch—including Jack Goldsmith, Daniel Levin, and Stephen Bradbury.²¹ Why was it that not one of these lawyers was willing to say no to patent cruelty and torture? Goldsmith came closest; he temporarily suspended authorization for waterboarding after the CIA Inspector General reported that its application had gone beyond that authorized in the August 2002 memo.²² But Goldsmith did not suspend approval for any of the other cruel, inhuman, and degrading tactics.²³ And the review process he shepherded ultimately produced a 2004 Office of Legal Counsel memorandum signed by Dan Levin, Goldsmith's successor, that used more politic language than John Yoo but secretly authorized the CIA to continue to use all the same tactics Yoo and Bybee had initially approved.²⁴

Why should it have been obvious that these tactics were illegal? I have analyzed the legal arguments in detail in my book, *The Torture Memos: Rationalizing the Unthinkable*,²⁵ so I'll just touch on them briefly here. In order to give the CIA the green

21. RICE, *supra* note 20, at 104; Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT'L L. 405, 406 (2009); Daniel Kanstroom, *Introduction: Law, Torture, and the "Task of the Good Lawyer"—Mukasey Agonistes*, 32 B.C. INT'L & COMP. L. REV. 187, 191 (2009); Shane & Johnston, *supra* note 20; Bybee Memorandum, *supra* note 3, at 11.

22. Ruth Blakeley, *Dirty Hands, Clean Conscience? The CIA Inspector General's Investigation of "Enhanced Interrogation Techniques" in the War on Terror and the Torture Debate*, 10 J. HUM. RTS. 544, 553–54 (2011); Shane & Johnston, *supra* note 20.

23. Shane & Johnston, *supra* note 20.

24. See generally Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen., Office of Legal Counsel, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm> (describing torture in vague terms and arguing that specific intent would be “unlikely” to be found “if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering”); see also M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639, 647–48 (2009) (arguing that the Levin memo allowed for the tactics approved by Yoo in 2002 to continue); Shane & Johnston, *supra* note 20.

25. See generally THE TORTURE MEMOS 19–31 (David Cole ed., 2009) (arguing that the “Torture Memos” misapplied the law in order to justify torture).

light, the Justice Department first had to find that none of these tactics constituted torture. The initial August 2002 memo did that by reasoning that torture is limited to the specifically intended infliction of extreme pain of the kind associated with organ failure or death.²⁶ Any pain short of that would not be torture, and under the “specific intent” requirement, even the infliction of pain reaching or exceeding that level would not be torture if the interrogator intended to inflict pain just short of that line.²⁷ (What, by the way, is the level of pain associated with death? Surely it is fundamentally unknowable, as we cannot ask dead people how they would rate their pain on a scale of one to ten. Moreover, general observation would tell us that some people die in terrible pain, while others seem to die at peace, almost painlessly.)

The August 2002 memo further argued that even if pain of sufficient severity to constitute torture was inflicted, the President as Commander in Chief could not be constrained by law in how he chooses to engage the enemy; in other words, that when it comes to directing interrogation of the enemy, he is above the law.²⁸ And the August 2002 memo argued that an interrogator who tortured could invoke self-defense, even if he faced no imminent threat from the man strapped to the waterboard and virtually choking to death.²⁹ Arguments like these should have set off alarm bells. They did not—at least not until they were leaked to the *Washington Post* and disclosed to the public.³⁰ Once the August 2002 memo became public, the Administration felt obliged to retract it.³¹ The fact that they could not for a moment defend in public what they had all accepted without question in secret is compelling evidence that they failed to meet their ethical responsibilities as lawyers.

But that is not all. The lawyers also had to get around the fact that the CAT and the Geneva Conventions, both treaties that the United States helped draft and has signed and ratified,

26. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 1 (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

27. *Id.* at 3–4.

28. *Id.* at 33–39.

29. *Id.* at 42–46.

30. See Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 462–63 (2005).

31. *Id.*

make lesser forms of abuse illegal.³² The CAT prohibits any “cruel, inhuman, or degrading treatment.”³³ Common Article 3 of the Geneva Conventions bars any “cruel” or “humiliating” treatment.³⁴ Even if you think stripping a suspect naked, slamming him into walls, forcing him into painful stress positions, and waterboarding him is not torture, can anyone claim with a straight face that these tactics are not cruel, not inhuman, not degrading, and not humiliating? Would we ever accept such an argument if these tactics were employed against our troops? Initially, the Administration’s lawyers sought to avoid these more capacious legal prohibitions by simply declaring that they did not apply.³⁵ But when the Supreme Court ruled, in *Hamdan v. Rumsfeld*, that Common Article 3 applies to al Qaeda detainees,³⁶ and when it became clear that Congress would reaffirm, in the McCain Amendment, that the prohibition on “cruel, inhuman, and degrading” treatment applies to detainees held abroad,³⁷ the Justice Department’s lawyers opined that the tactics did not even contravene these prohibitions, either independently or even when imposed in combination.³⁸

The painfully strained character of these arguments reveals, in my view, that the lawyers failed to do their job. The job of a government lawyer is to say “no” when the law precludes a policy option that government officials would like to pursue. It is to measure the government’s desired initiative against the law objectively, to ensure that government action

32. See CAT, *supra* note 18, at 195; Third Geneva Convention, Common art. 3, *supra* note 17, at 3516; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 79–81 (2005) (discussing how officials were able to rationalize the definition of torture that the government adopted with the one contained in the Geneva Conventions and the CAT).

33. CAT, *supra* note 18, at 114, 116.

34. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

35. See Memorandum from Jack L. Goldsmith III, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention 23 (Mar. 18, 2004) [hereinafter Goldsmith Memorandum], available at <http://www.justice.gov/olc/2004/gc4mar18.pdf>.

36. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–30 (2006).

37. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2739, 2739 (2005) (codified as amended at 42 U.S.C. § 2000dd (2006)); MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RS22312, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 1 (2006).

38. Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES, Apr. 16, 2009, <http://www.nytimes.com/2009/04/17/us/politics/17detain.html>. See generally Bradbury Memorandum, *supra* note 12, at 11–14, 75 (concluding that the CIA’s interrogation techniques do not violate the War Crimes Act or Article 3 of the Geneva Convention).

conforms to the law, and not the other way around. In this instance, however, rather than holding the CIA to the dictates of the law, the lawyers perverted the law to rationalize the indefensible.

Responsibility, however, is not limited to the lawyers. It also lies with the Cabinet-level officials who signed off on the policy—including Bush, Cheney, Rumsfeld, Tenet, and Rice. These officials were not lawyers, but that is hardly an excuse on a matter such as this. The tactics employed were patently illegal. If Nixon's lawyers told him it was legal to break into the Democratic Party headquarters in the Watergate, or if Clinton's lawyers told him it was legal to lie under oath about his sexual affairs, would that be a defense? Some things speak for themselves. This is in that category.

III. ACCOUNTABILITY AND LEGAL VIOLATIONS

What does it matter, one might ask, whether the mistake was one of policy, as Professor Zelikow maintains, or of law, as I argue? We both agree that it was wrong, so why bicker about the details? The distinction is critical for this reason: if the decision to authorize the infliction of cruelty on helpless detainees was wrong only as a matter of policy, it leaves the question of whether to do so in the future an open one. Under some other set of circumstances, or perhaps more to the point, for another set of decisionmakers, the policy considerations might come out differently. If, by contrast, torture and cruelty were not just a mistake of policy, but *illegal*, these options would be off the table. And that is precisely where they should be.

Whether one views the more than five-year descent into official cruelty and torture as a bad policy judgment, illegal conduct, or both may also affect how the nation responds. In either event, an error of that magnitude and gravity warrants some sort of official review. But if, as I argue above, the conduct was affirmatively unlawful, the nation is *obligated* to pursue some sort of accountability. The rule of law means little if the nation's highest officials can violate it in secret for more than five years, brag about it in public once they leave office, and face no consequences whatsoever. Yet that is where we now apparently stand. The President and Vice President have admitted in their memoirs and book tours to personally authorizing illegal cruelty over an extended period of time, yet

the United States has done nothing to hold them accountable.³⁹ I do not believe that criminal prosecution is the right way to go—absent further evidence coming to light—largely because, for some of the reasons Professor Zelikow has identified, I can understand (even if I cannot condone) how decisions like this might have been made by persons acting in what they thought was the best interest of the nation and not in their own narrow self-interest. Prosecutorial discretion is built into the criminal law for a reason. Not every crime needs to be prosecuted.

But some sort of official accountability is nonetheless critical. My own view is that an official nonpartisan blue-ribbon commission, much like the 9/11 Commission Professor Zelikow directed, would be the best way to proceed.⁴⁰ Some sort of congressional statement might also be warranted. Civil suits holding individuals liable for monetary damages and establishing that the conduct was illegal would be another vehicle. Even review of the lawyers' misconduct by bar associations would be something. What is unacceptable, however, is the current collective failure to engage in any accountability undertaking. And I do mean to call it a *collective* failure, because if we, as the American people, let our leaders do this without any effort to hold them to account, we become complicit.

Other countries have managed to pursue accountability through commissions of inquiry. When the United Kingdom, in its early responses to Irish Republican Army violence, adopted widespread administrative detention and used physical coercion to compel detainees to talk, the Prime Minister appointed a committee, headed by a former Law Lord, Lord Parker, to investigate and report on the matter.⁴¹ Within a year, the Parker Committee issued its report, detailing what had happened and concluding that the use of cruel and coercive tactics was illegal.⁴² Similarly, when Canadian citizen Maher Arar was rendered to

39. See GEORGE W. BUSH, DECISION POINTS 170 (2010) (describing Bush's decision to approve "enhanced interrogation techniques" on Khalid Sheikh Mohammed); DICK CHENEY WITH LIZ CHENEY, IN MY TIME 358–63 (2011) (describing Cheney's viewing of photographs of Americans abusing Iraqi detainees yet seeking not to hold anyone accountable).

40. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, at xiii, xv (2004), available at <http://www.911commission.gov/report/911Report.pdf>.

41. COMMITTEE OF PRIVY COUNSELLORS, *supra* note 14, at 1–3.

42. See *id.* at 21 (asserting that deviating from the Geneva Convention will "both gravely damage [the United Kingdom's] reputation and deal a severe blow to the whole world movement to improve Human Rights").

Syria by U.S. officials on the basis of erroneous information that Canadian authorities had provided, Canada established a commission, again headed by an esteemed judge, to investigate the matter.⁴³ The Arar Commission issued a 1,200 page report, exonerating Arar and condemning Canadian officials' roles in the affair.⁴⁴ The Canadian Parliament issued a formal apology to Arar, and Canada paid Arar 11.5 million Canadian dollars for the injuries he sustained.⁴⁵ No one went to prison in either the United Kingdom or in Canada, but these commissions played a critical role in officially accounting for what went wrong and in labeling it illegal. That process in turn can help to shape the legal culture around torture and to reduce the chance that it will happen again. In the United Kingdom, there is today a broad consensus that torture is never justifiable.⁴⁶ By contrast, here in the United States polls frequently reflect an evenly divided response on whether torture is sometimes warranted.⁴⁷ As things now stand in the United States, torture remains a policy option.

IV. THE LAW AND POLICY OF DETENTION AND TARGETING

The role of law and policy with respect to detention and targeting is more complicated than with respect to torture and cruelty. Here, there is no absolute prohibition. In peacetime, detention without charges and summary execution are, of course, generally impermissible, short of exceptional circumstances like quarantine or self-defense, respectively. But in an armed conflict, detention and killing without trial are routine. Indeed, they are the two principal mechanisms for incapacitating the enemy. So unlike torture and cruel treatment, which have no place in war or peace, detention and targeting have a legitimate place in wartime. The difficulty is in defining what that place is and where the boundaries lie between war and peace.

43. COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR 14 (2006).

44. *Id.* at 28, 35, 362–63.

45. Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A5.

46. See *The 'Ticking Bomb' Problem*, BBC, http://bbc.co.uk/ethics/torture/ethics/tickingbomb_1.shtml (last visited Mar. 4, 2012) ("In Britain, 72% oppose torture in any circumstances—a reflection of the strong antipathy towards such practices in Western Europe.").

47. See *Americans Divided on Justifying Torture*, ANGUS REID PUBLIC OPINION (June 11, 2009), http://www.angus-reid.com/polls/36304/americans_divided_on_justifying_torture/ (providing results from a telephone interview poll illustrating that Americans are divided on what circumstances may justify the use of torture).

As with torture and cruelty, detention and targeting raise both legal and policy questions. Even if indefinite detention and targeted killings are legally justifiable under certain circumstances, there may be sound policy reasons not to use those tactics. But what is critical, above all, is that these exercises of official power be guided by *law*, not just by policy. The central flaw in the Bush Administration's initial detention program at Guantánamo was precisely that it sought to evade law. The prison was built in Guantánamo Bay, Cuba, in part because the Administration thought it was beyond the reach of American law.⁴⁸ The Administration denied that the Geneva Conventions applied to al Qaeda detainees.⁴⁹ It fiercely resisted calls for fair hearings and judicial review.⁵⁰ When the Supreme Court interpreted the habeas corpus statute to govern the indefinite detention of human beings held at Guantánamo,⁵¹ the Administration convinced Congress to amend that law to deny the detainees habeas corpus.⁵² Habeas corpus is nothing less than the vehicle by which law is brought to bear on detention.⁵³ In *Boumediene v. Bush*, the Court ruled that, even acting together, Congress and the President could not place detainees at Guantánamo beyond the law.⁵⁴

The Guantánamo detention policies are now a matter of public record, governed by law, largely because the Supreme Court held that the detainees could challenge their detentions in court.⁵⁵ The subsequent habeas proceedings have created a jurisprudence of detention in which the Administration has had

48. See *Rasul v. Bush*, 542 U.S. 466, 497–98 (2004) (Scalia, J., dissenting) (“Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”); Tamara L. Huckert, *The Undetermined Fate of the Guantanamo Bay Detainees’ Habeas Corpus Petitions*, 9 GONZ. J. INT’L L. 236, 237 (2006).

49. Goldsmith Memorandum, *supra* note 35, at 23.

50. See Peter Irons, “*The Constitution Is Just a Scrap of Paper*”: *Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1096–98 (2005).

51. *Rasul*, 542 U.S. at 484.

52. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified as amended at 28 U.S.C. § 2241(e)(1) (2006)), *invalidated in part by Boumediene v. Bush*, 533 U.S. 723 (2008); JAMES P. PFIFFNER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* 108 (2008).

53. See *Boumediene*, 533 U.S. at 785 (recognizing the applicability of habeas corpus rights to various forms of proceedings).

54. See *id.* at 765 (“The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”).

55. *Id.* at 771.

to defend its position in public and under law.⁵⁶ As I have argued in some detail elsewhere,⁵⁷ there is a lawful role for preventive detention in the ongoing armed conflict with al Qaeda and the Taliban taking place in Afghanistan and the border regions of Pakistan. But the scope of that authority is a complex question, requiring imperfect analogies to established principles of humanitarian law governing traditional armed conflicts. The fact that those questions are now being addressed in a relatively transparent legal process has brought our detention policy, initially lawless, under law.

Killing the enemy is also permissible during armed conflict, but must be guided by law. Obama Administration officials have twice addressed the issue of targeted killings in public, and both times they have maintained that the government is acting lawfully in its use of force and, in particular, abiding by the laws of war.⁵⁸ The government's targeted killing policy, however, remains secret, leaving many questions about its legality unanswered.⁵⁹ How far does the targeting authority extend beyond the battlefield? To Yemen? Somalia? Elsewhere? Who can the President target? Can the President order the killing of foot soldiers for Al Shabab in Somalia, for example, even if they have never attacked the United States and are not particularly hostile to us, simply because some elements of Al Shabab may be sympathetic to al Qaeda? Does the government first have to exhaust alternative nonlethal means of incapacitation, such as capture?

56. See *id.* at 732; *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006); Richard M. Pious, *Prerogative Power in the Obama Administration: Continuity and Change in the War on Terrorism*, 41 PRESIDENTIAL STUD. Q. 263, 265 (2011).

57. See generally David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 711 (2009).

58. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-obrennan-strengthening-our-security-adhering-our-values-an> (“International legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.”); Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[I]t is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.” (emphasis omitted)).

59. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

What does it mean to claim that capture is not “feasible”? That it is impossible or just that capture would be too costly? Who measures the acceptable cost? On the battlefield, one is not required to exhaust all possibilities of capture; killing is permissible unless the enemy affirmatively and unambiguously surrenders or is *hors de combat*. But does an “exhaustion” requirement apply beyond the battlefield, in such places as Yemen or Somalia?

Must targeted killing be limited to stopping imminent attacks? If so, how is imminence defined? The Administration has suggested that imminence applies more loosely with respect to clandestine terrorist organizations; it is enough that they have the inclination to attack us at any time, and there need not be any actual immediate threat posed at the time the targeted killing is carried out.⁶⁰ But that would appear to define away the “imminence” requirement altogether, as any al Qaeda target would by definition pose an “imminent” threat. Finally, if we can agree on what the substantive criteria for killing in this armed conflict are, what processes are in place to minimize the risk that U.S. officials do not target the wrong people? (As the release of more than 600 of the 779 people once held at Guantánamo has shown, accurate determinations of combatant status are a challenge in the murky world of war with a clandestine organization.)⁶¹

These are all difficult questions. But one thing should be clear: they are all *legal* questions. The authority of the President to kill human beings by remote control halfway across the world

60. Brennan, *supra* note 58 (“[A] more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.”); see Savage, *supra* note 59 (describing the secret Office of Legal Counsel memo on the targeted killing of Anwar al-Awlaki that took a broad view of an “imminent” threat).

61. See Charlie Savage, William Glaberson & Andrew W. Lehren, *Details of Lives in an American Limbo*, N.Y. TIMES, Apr. 25, 2011, at A1; James Warren, *Chicago Lawyers Caught Between Clients and Country*, N.Y. TIMES (Apr. 7, 2011), http://www.nytimes.com/2011/04/08/us/08cncwarren.html?_r=1. As this article was going to press, Attorney General Eric Holder gave a speech disclosing further details regarding the Administration’s legal theory for killing U.S. citizens abroad. Eric Holder, U.S. Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>. This speech offered the most extensive public defense of the Administration’s targeted policy, but still left many questions unanswered. See David Cole, *An Executive Power to Kill?*, NEW YORK REVIEW BLOG (Mar. 6, 2012), <http://www.nybooks.com/blogs/nyrblog/2012/mar/06/targeted-killings-holder-speech/>. The Office of Legal Counsel legal memorandum that reportedly authorized the killing of American citizen Anwar al-Awlaki remains secret, so many of the details of the policy remain obscure.

must be guided by law. The Obama Administration has claimed that its actions are fully consistent with the laws of war, as its lawyers understand them and as they apply to this relatively novel context.⁶² But the policy and its asserted justification remain veiled in secrecy. Our President recently successfully ordered the killing of a U.S. citizen, Anwar al-Awlaki, yet we do not even know under what legal authority he did so, or whether and to what extent that authority would allow him to order the killing of any of us.⁶³ In a democracy ruled by law, one man cannot have secret power to kill. If such an awesome power is indeed to be guided by law, and it must be, that law must be public. Yet, the Administration has refused to confirm or deny even that it has ordered targeted killings and has, therefore, refused to make public the legal memoranda that govern its practice.⁶⁴

There is a place for secrecy, of course. Particular initiatives must often be carried out in secret if they are to have any chance of success. But if we are a government of laws, then the general contours, substantive criteria, and procedural requirements of a program to kill should be a matter of public knowledge so that the citizenry, and indeed the world at large, can debate and assess them. This is important not only internally as a matter of democracy, but also externally, for our secrecy sets a dangerous precedent and breeds distrust. At the moment we hold a near monopoly on drones. But that will not last. Other countries have seen what drones can do and are seeking to develop their own.⁶⁵ If we think the use of drones by other nations should be governed by law, we should not be secretive about the limits international law imposes on us in using drones.

A transparent policy on drones is also critical to building trust and checking anti-American sentiment. The drone practice has caused widespread resentment among the populace in Pakistan.⁶⁶ The vision of U.S. planes constantly flying overhead,

62. Koh, *supra* note 58 (“We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts—in particular, detention operations, targeting, and prosecution of terrorist suspects—in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.”).

63. Savage, *supra* note 59.

64. *Id.*

65. Scott Shane, *Coming Soon: The Drone Arms Race*, N.Y. TIMES, Oct. 9, 2011, at A5.

66. Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drones as Cheaper War Tool*, N.Y. TIMES, Oct. 2, 2011, at A1.

ready to drop missiles at will, pursuant to a secret policy,⁶⁷ does not facilitate trust in the United States. If the policy were transparent and subject to public scrutiny, it might help build the trust the United States so desperately needs if it is to prevail in the long run in the struggle against opponents who use terrorism.

As with interrogation, the fact that detention and targeting must be guided by law does not mean that there are not also critically important policy questions raised by these measures. Dennis Blair, Director of National Intelligence under Obama, has argued that unilateral drone attacks in Pakistan have become so counterproductive, because the attacks are so widely resented, that we should abandon unilateral attacks there altogether.⁶⁸ That is a policy argument, not a legal argument. It is an important argument, just as are the policy arguments Professor Zelikow has advanced.

But I think it is equally, if not more important, that the state's resort to force and coercion be guided by law. That means the law will sometimes foreclose policy options. That also means that when we violate the law, we must pursue some form of accountability. And it means that when our government claims the authority to lock up human beings indefinitely without charges or trial, or to kill them outright, its authority to do so must be clearly and transparently constrained by law, publically set forth and defended. Many of the worst mistakes of the past decade could have been avoided had we not, in the name of policy ends, sought to evade the strictures of law.

67. See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 67–68 (2005) (arguing for the U.S. targeted killing policy to be in the public view); Mary Ellen O'Connell, *Killing Awlaki Was Illegal, Immoral and Dangerous*, CNNWORLD (Oct. 1, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous/> (raising questions about the use of drones and targeted killing).

68. Dennis C. Blair, *Drones Alone Are Not the Answer*, N.Y. TIMES, Aug. 15, 2011, at A21.