

Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2006

Unitariness and Myopia: The Executive Branch, Legal Process and Torture

Cornelia T. Pillard
Georgetown University Law Center, pillardn@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/187

81 Ind. L.J. 1297-1312 (2006)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

 Part of the Constitutional Law Commons

GEORGETOWN LAW
Faculty Publications



February 2010

Unitariness and Myopia: The Executive Branch, Legal Process and Torture

81 Ind. L.J. 1297-1312 (2006)

Cornelia T. Pillard
Professor of Law
Georgetown University Law Center
pillardn@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/187/

Posted with permission of the author

Unitariness and Myopia: The Executive Branch, Legal Process, and Torture

CORNELIA PILLARD*

INTRODUCTION

The executive branch's oft-unnoticed role in interpreting and applying the Constitution and laws was vividly apparent in 2004 as a result of the American torture scandals. National and international outrage exploded in response to photographs circulated around the world showing United States military personnel at the notorious Iraqi prison, Abu Ghraib, grinning as they degraded and terrorized naked and hooded Iraqi prisoners. The story is still not fully told, but it seems clear that the executive branch's approach to the law—domestic and international—is among the causes of the torture scandal. An August 1, 2002 secret opinion of the Office of Legal Counsel (OLC), the executive's definitive legal advisor, gave an unnaturally narrow definition of "torture" in the federal Anti-Torture Statute, limiting it to situations in which "[t]he victim . . . experience[s] intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."[1] As Dean Harold Koh observed in his keynote address at this symposium, horrors that Saddam Hussein is alleged to have inflicted on his people are not "torture" under this definition.[2] The longstanding legal and cultural prohibition against torture lost its hold on United States personnel at Abu Ghraib, Guantánamo, and elsewhere. In the hands of the executive branch, the rule of law failed.

That failure was predictable in an administration whose legal decision making bespeaks prerogatives of power more than limitations of law. Hand-picked political appointees collaborated secretly on the Torture Memo, driving directly to a desired bottom line. The function of that legal opinion clearly was not to provide thorough, balanced and candid legal advice to government decision-makers, but was instead to immunize federal actors against possible legal sanctions. The executive personnel involved eschewed open, deliberative legal processes and diverse inputs, and failed to draw on varied forms of expertise available within the executive branch. This Symposium asks how sources and processes of law might better promote legal constraint and avoid repetition of the kinds of legal decisions that contributed to the torture scandals. In my view, the torture debacle was born in part of ideologically

---

* Professor, Georgetown University Law Center. She served as Deputy Assistant Attorney General in the Office of Legal Counsel from 1998 to 2000. The author thanks Dean Lauren Robel and Professor Dawn Johnson of the Indiana University School of Law–Bloomington for hosting and organizing this symposium.

1. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice 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, 2001), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 176 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Torture Memo].

2. Harold Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006).

driven myopia. It might have been avoided had the executive systematically welcomed different views and fostered dissent in the legal decision making process, and had any resulting change in the government's legal position on coercive interrogation been promptly subjected to public scrutiny when it was rendered in 2002.

There are times when, if the executive does not impose legal constraint on itself, nobody can, as the recent mistreatment of detainees so starkly demonstrates. The Administration of President George W. Bush has repeatedly claimed power that, it asserts, is not subject to judicial review and even in some cases is beyond the reach of Congress to regulate. As strong as the tendency remains in the United States to associate law-making only with the legislatures and courts, it is now as clear as ever that the reach and limits of the law also depend significantly on the executive's own approach to interpreting and applying legal norms. How the executive expounds the law that potentially restrains its military and intelligence personnel and civilian contractors, among others, is of enormous practical importance to the reality and reputation of the United States as a law-abiding nation.[3]

The goal of fostering dissensus in the executive branch faces different challenges than it does in the courts or Congress. The courts and Congress operate largely in public, openly receiving input from many quarters. They contain multiple decision makers and speak through multi-vocal bodies that inevitably reflect various perspectives. And they are exclusively devoted to making and interpreting legal norms. Executive branch legal deliberation and decisions, by contrast, are generally non-public, both during the period leading up to the decision, and, often, once a decision is made. The executive, at least in an important theoretical sense, is unitary and univocal, with the President as the sole person with authoritative, final say over executive decisions. Finally, for the executive, unlike the other branches, law is not the primary product; the executive is geared to accomplishing a wide array of pragmatic ends beyond legal decision making.

Given those characteristics, maintaining the salience of legal constraints within the executive branch is intrinsically challenging, and especially so in times of war or national security crisis. From the viewpoint of the executive, law can seem to be an inconvenient obstacle to the executive's ability to get things done. The United States since September 11, 2001, has been in combat in Afghanistan and Iraq and has waged what President Bush has termed a "global war against terrorism," in which focusing on legality can be viewed as twiddling one's thumbs while Rome burns. As FDR's attorney general, Francis Biddle, famously remarked, "The Constitution has not greatly bothered any wartime President."[4] Neither, it seems, is the Commander-in-Chief these days greatly bothered by federal statutes or international law.

Just as the soldier's proving ground is combat, however, the law's real test comes when it is hardest to stand firm. The government's approach to law in times of war or other national crisis is an important indicator of our nation's character. The very idea of fighting for national survival is closely linked to law. If our nation were not genuinely a constitutional democracy, committed to liberty and equality, in which the

---

3. *See generally* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Dawn Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105.

4. FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

HeinOnline -- 81 Ind. L.J. 1298 2006

government is constrained by law and accountable to the people, it would be a nation less worthy of our patriotism. If, under pressure, we sink to the level of those we scorn by using torture, thuggery and police-state tactics to "win" at all costs, then we betray our deepest principles and victory becomes meaningless.[5]

What promotes legality on the part of government under strain? This Article looks to the role of intra-executive processes in facilitating well-reasoned, legitimate conclusions on questions like the one addressed in this symposium: What are the legal authorities and limits governing coercive interrogation tactics? Admittedly, even the best legal processes are no guarantee of good substantive outcomes. Many critics would disagree with the substance of the executive's August 1, 2002, legal position on coercive interrogation no matter how it was derived.[6] And even were all the best processes faithfully adhered to in developing the government's legal position on torture, it is conceivable that the executive would have come to the same bottom line. The value we place on fair process in the judicial system, however, is emblematic of how, more generally, effective processes remain important to both the content of legal outcomes and the public's willingness to accept them.[7] As Justice Felix Frankfurter wrote, "[t]he history of liberty has largely been the history of the observance of procedural safeguards."[8]

Permitting diverse views and encouraging critique during the process of deliberation and decision making is a principal structural challenge of executive branch legalism. The importance of assuring that a robust range of views are brought to bear on legal decision making is underscored by what we know about the risks of leaving the law in the hands of like-thinking people. Many of those risks were understood by the Founders, and the separation of powers is one artifact of their appreciation of the rights-protecting potential of pluralistic structures.[9] In the context of one-party dominance of the three branches, however, the rights-protecting effect of separation of powers is reduced.[10] That effect is further diminished regarding matters of national

---

5. *See generally* Mark Danner, *Abu Ghraib: The Hidden Story*, N.Y. REV. OF BOOKS, Oct. 7, 2004, at 44 (detailing the Abu Ghraib torture scandals and explaining how the terrorists and insurgents cannot win militarily, but score points when the United States adopts tactics that lessen support for the U.S. and foster more opposition to the U.S. and its policies); Jane Mayer, *Annals of the Pentagon: The Memo*, NEW YORKER, Feb. 27, 2006, at 32, 37–41 (quoting Alberto Mora, former General Counsel of the Navy, and Lawrence Wilkerson, former Chief of Staff to Secretary of State Colin Powell, to the effect that the Administration ignored important national values in their efforts to keep the country safe).

6. *See, e.g.*, Koh, *supra* note 2, at 1149; David Luban, Essay, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

7. *See generally* Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994) (arguing based on empirical studies that fair decicionmaking process is a powerful determinant of people's willingness to accept decisions even when they disagree with the substance of those decisions); David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 90 (David Luban, ed., 1983) (arguing that the adversary system, despite its flaws, remains preferable to the available alternatives).

8. McNabb v. United States, 318 U.S. 332, 347 (1943).

9. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

10. *See* Daryl J. Levinson, *Empire-Building Government In Constitutional Law*, 118 HARV. L. REV. 915, 952 (2005) ("Whatever psychological inclination federal officials might have to

security and war, which trigger partially unreviewable power in the political branches. Following 9/11, with Republicans dominating all three branches and war ongoing, risks of governmental myopia ran high.

Recent social science bears out the Framers' intuitions, also highlighting the importance of dissensus. New empirical studies on "group polarization" are strikingly relevant to executive branch legal decision making in the absence of diverse inputs. Group polarization is what happens when like-minded people get together to discuss an issue. They tend to come out thinking a more extreme version of what they thought going in.[11] Even persons acting in complete good faith are more likely to err when they deliberate only with people with whom they already are predisposed to agree.

By many accounts, a hallmark of the administration of George W. Bush has been the aggressive *elimination* of dissensus.[12] This administration has employed extraordinary secrecy, side-railed civil servants and others who do not toe the party line, and proceeded by means of results-oriented, top-down rather than bottom-up decisional processes.[13] If executive branch legal analysis has any chance of being objective and standing up to scrutiny, however, the decisions should emerge out of a range of dissonant inputs, and should include not only spokespersons for broad executive power, but also perspectives of people specifically devoted to protecting individual rights.

---

root for the home team [i.e., their own branch], more pressing political incentives push them in other directions. Political party affiliation, for example, seems to be a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch.").

11. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 89–90 (2000).

12. In a major two-part, front-page article, for example, the New York Times described how after 9/11 the United States "legal strategy took shape as the ambition of a small core of conservative administration officials" from which "military lawyers were largely excluded" and with which "foreign policy officials had little influence." Tim Golden, *Threats and Responses: Tough Justice; After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004 at A1 [hereinafter Golden, *Threats and Responses* Part I]; Tim Golden, *Threats and Responses: Tough Justice; Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004 at A1 [hereinafter Golden, *Threats and Responses* Part II]. In that respect, the administration departed sharply from established processes under which "[f]or half a century since the end of World War II, most major national-security initiative had been forged through interagency debate." Golden, *Threats and Responses* Part I, *supra.* In the deliberations over whether to establish military commissions to try al Qaeda suspects, for example, the *Times* reported that "[w]hole agencies were left out of the discussion. So were most of the government's experts in military and international law." *Id. See, e.g.*, Dana Priest & Robin Wright, *Cheney Fights for Detainee Policy*, WASH. POST, Nov. 7, 2005, at A1 (observing that "public dissent is strongly discouraged by the White House"); R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1 (describing internal executive branch deliberations over legal standards for detainee treatment that "generally excluded potential dissenters").

13. *See, e.g*, Mayer, *supra* note 5, at 38–40 (describing how, in developing its legal position on interrogation of detainees, the administration let a few lawyers close to Vice President Cheney "hijack" the process, kept legal memos secret even from high ranking military personnel, and cut out of the decision-making loop persons who expressed skepticism, as well as experts with detailed knowledge of the Nuremberg history, the laws of war, and the Geneva Conventions).

HeinOnline -- 81 Ind. L.J. 1300 2006

There are several different ways to foster consideration of a range of views in executive legal decision making. Some would require institutional changes, but many are familiar. The various procedural or structural safeguards discussed here can be redundant of one another, and need not all operate fully in any particular decision-making process to assure adequate dissensus. When all are absent or compromised, however, as appears to have been the case with the Torture Memo, it is predictable that legal advice will be less tested, objective, and sound.

This article identifies four processes or structures that can contribute towards healthy dissensus. The first is transparency. When the executive makes public the fact that an important legal issue is under consideration, it permits input, analysis, and critique from the media, the electorate, lobbyists, nongovernmental organizations, Congress, and the academy. Second, intra-branch consultation can tap into the internal diversity of components and personnel within the executive branch. Even when decision making remains nonpublic so external critiques are absent, intra-executive consultation can be a source of healthy skepticism of proposed executive legal decisions. Third, and relatedly, consulting civil service employees, and not only political appointees, can add to diversity and dissensus, because in many ways the political and institutional perspectives, knowledge base, and culture of the civil service differ from those of political appointees. Finally, designated boards, commissions, and officers within or overseeing the executive should be charged with taking an arms-length view to help to forestall and to respond to any executive action that might be unwise, unlawful, or even corrupt.

I. TRANSPARENCY

The Bush Administration, as Professor Kinkopf emphasizes,[14] has taken governmental secrecy to new lows. The risks attending policy that is made in the deep shadows are illustrated by the Torture Memo. The corresponding benefits of sunshine are shown by the way that the Memo's numerous defects became apparent after the memo was leaked and was subjected to widespread scrutiny (and virtually universal condemnation).[15] After the public, the press, and other independent commentators had had a chance to analyze and critique the executive's legal analysis, its flaws became clear in ways that the lawyers in the executive branch themselves may not have appreciated at the time they rendered the advice, and certainly did not adequately account for in the Memo itself.[16] In response to the devastating critiques, the

14. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006).

15. The Abu Ghraib torture scandals broke in Spring of 2004. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 43–44. The executive, in a June press briefing by White House Counsel Alberto Gonzales, Department of Defense General Counsel William Haynes, and other high-ranking executive lawyers, denounced the Torture Memo as containing "[u]nnecessary, over-broad discussions[,] . . . abstract legal theories," and as being "subject to misinterpretation," but insisted that they had not been "relied upon by decision-makers." Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto, and Army Deputy Chief of Staff for Intelligence Keith Alexander (June 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.

16. For early critiques of the Torture Memo once it became public, see Kathleen Clark &

Administration eventually withdrew the August 2, 2002, memo and issued a revised version.[17]

Given the enormous practical and ethical importance of the Torture Memo, it should be of grave concern that the memo was never intended to be publicly disclosed, and would have remained secret but for leaks. As emphasized in the OLC Principles drafted by a group of nineteen alumni of that office, executive branch legal opinions, and especially opinions that depart from prior executive branch legal positions as the Torture Memo did, should be subject to a strong presumption in favor of prompt publication.[18] It is only when they are disclosed that legal opinions can be subjected to scrutiny by the media, the academy, and the public.

A system of executive advice-giving in which the substance of, and rationales for, important legal advice is made public is a very different system, however, from the one that has long been in place at the White House and the Department of Justice. There is a strong felt need within the executive—a need with constitutional dimensions under *United States v. Nixon*[19] —to keep the legal advising process confidential. The Office of Legal Counsel makes discretionary decisions to publish some, but by no means all, of its opinions. In many cases, OLC gives the White House significant legal advice quickly, orally, in confidence, and such oral advice is typically not even memorialized in writing, let alone published.

The option of oral advice-giving points to a tension that OLC would face were it routinely to make its written opinions public. A presumption favoring publication, even after a lapse of time, likely would encourage more requesters to eschew written opinions, instead seeking oral advice. OLC might seek to plug that hole by refusing to give advice orally, at least without written memorialization. Such a practice might, however, slow down the legal advising process, perhaps intolerably, and also might deter the seeking of legal advice from OLC at all. Resort to OLC is often useful and prudent, and OLC ordinarily is consulted on any major constitutional question the executive confronts, but there are many other sources from which the president may seek legal advice. If OLC were to become too troublesome by insisting on written, public advice-giving, it could quickly fall out of the loop. That result might be more detrimental to the legal advising process than the existing practice, even taking into account the costs of secrecy. Although an OLC presumption in favor of publication is important and is a policy that I favor, it is no panacea.

Even were it routinely done, moreover, publication of legal advice once rendered does not by any means fully resolve problems of executive branch secrecy; secrecy at

---

Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3; Ruth Wedgewood & R. James Woolsey, *Opinion, Law and Torture*, WALL ST. J., June 28, 2004, at A10.

17. *See* Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), *available at* http://www.justice.gov/olc/dagmemo.pdf [hereinafter Revised Torture Memo].

18. *Guidelines for the President's Legal Advisors*, *reprinted in* 81 IND. L.J. 1345 (2006). Although the OLC Torture Memo did not depart from a specific prior OLC position on coercive interrogation as such, its casting aside of the *Youngstown* framework and its claim of sweeping commander-in-chief powers were plainly understood by the Torture Memo's defenders as well as its detractors as articulating a new legal paradigm.

19. 418 U.S. 683 (1974).

HeinOnline -- 81 Ind. L.J. 1302 2006

the front end, before an opinion is formulated, is in many ways even more troubling. Executive branch lawyers in OLC and the White House Counsel's office frequently formulate advice without the public even knowing that an issue is pending. Prior public scrutiny and participation in the debates over legislation in Congress is a bedrock aspect of the legitimacy of that body's legal decision making. For the courts, too, adversary briefing and public argument—often including amicus briefs by parties whose views differ from the litigants'—are key structural guarantees of fair, fully informed legal rulings. The legal deliberations of the executive branch, in contrast, are covered by *Nixon*'s constitutionally grounded executive privilege, obviating any requirement of such advance public crossfire.

Secret executive legal decision making creates a legitimacy gap. Democratic accountability is often pointed to as a feature that lends special weight to executive and congressional legal decision making; when it functions properly, public accountability can help to compensate for the political branches' lack of some features, like carefully structured adversary process, upon which public trust in the courts depends. It might even give political branches a legitimacy advantage over the more politically insulated, life-tenured federal bench. *Secret* executive legal decision making, however, cuts off public accountability. That accountability is further truncated when *conduct* taken pursuant to secret legal advice is also intended to remain secret. If the government can reverse course on the legal standards governing coercive interrogation, for example, and then go out and ratchet up the levels of abuse applied to detainees thousands of miles away behind closed doors in prisons and detention centers, there can be no public evaluation and response, and so no public accountability, regarding such conduct. The Torture Memo became public as a result of a leak, and the abuses at Abu Ghraib became known only after the press obtained unauthorized photos taken by military personnel at the site. The belated public accountability that resulted—which depended on illicit leaking, failed to forestall egregious harm to detainees, and immeasurably damaged the reputation of the United States at home and abroad—is hardly a model of the kind of healthy political accountability often cited as a legitimizing force for political-branch legal interpretation.

The absence of contending views from outside the executive branch places executive legal decisions at greater risk of myopia. Just as it is difficult to imagine that a judge acting alone would routinely do as good of a job deciding cases as a judge who has had the benefit of briefing and oral argument, it is likewise problematic that executive decision makers often lack the benefit of full presentation of pros and cons by well informed experts. To the extent that executive legal decision making cannot or will not occur in public, with all the input and scrutiny publicity brings, it is all the more critical that other aspects of executive process ensure robust intra-executive dissensus on important legal issues.

II. CONSULTATION WITH DIVERSE ENTITIES WITHIN THE EXECUTIVE

Where the executive branch does not seek diverse public inputs into its legal deliberations and keeps decisions secret, one imperfect proxy for public scrutiny is confidential input from a diverse array of executive branch components. It should be a routine precursor to OLC or White House Counsel decision making on substantial questions—as it is in the Solicitor General's office—to seek the views of any other entity within the executive branch with relevant expertise. The Department of State, the Department of Defense's Judge Advocate General Corps ("JAG Corps"), and the

Criminal Division at the Department of Justice, for example, have historical experience and legal and practical expertise closely bearing on the question of the legality of uses of extreme pressure to extract confessions from detainees in the name of national security. It appears in retrospect that they were not consulted.[20] The process of drafting the Torture Memo to address CIA concerns, and of developing related advice applicable to the military reportedly "included only proponents of broad executive power and unilateralism in foreign policy; it excluded lawyers from the State Department, who were associated with Secretary of State Colin Powell's more multilateral, internationalist approach."[21] Further, "the memoranda were not reviewed by attorneys in the Justice Department's Criminal Division or by career military lawyers with the Judge Advocate General Corps, who would have immediately recognized the erroneous analysis of the application of the Geneva Conventions."[22]

Lawyers in OLC should have known better themselves, but had OLC turned to the State Department Legal Advisor for input, the Torture Memo's sweeping commander-in-chief analysis might not have glaringly omitted even mere mention of the

---

20. *See generally* Mayer, *supra* note 5, at 41 (quoting former Navy General Counsel Alberto J. Mora, who stated that the State Department "was left off the bus" of legal decision making on interrogation of detainees, and mentioning no consultation with the Criminal Division); *see generally* Golden, *Threats and Responses* Part II, *supra* note 12 (referring to "the discontent of military foreign-policy and other officials who had been excluded from a role in shaping the policy after Sept. 11"); Golden, *Threats and Responses* Part I, *supra* note 12 (quoting a senior administration official's comment referring specifically to decisions about interrogation of detainees, the "[the Department of] State was cut out of a lot of this activity from February of 2002 on"); Smith & Eggen, *supra* note 12, at A1 (commenting that "State Department and military lawyers were intentionally excluded from these deliberations"). In a stunning display of cynicism, the Pentagon put together a Working Group to consider legal constraints on the military's questioning of detainees, appointed to the group vocal critics of the "new paradigm"—including Navy General Counsel Alberto J. Mora—and then issued a final, secret Working Group Report behind those critics' backs. That sham Working Group Report tracked OLC's approach, extending to the military the aggressively narrow views of constraints against torture that OLC initially developed with respect to the CIA. WORKING GROUP, DEP'T OF DEFENSE DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), *available at* http://www.ccr-ny.org/v2/reports/docs/Pentagon ReportMarch.pdf.

21. W. Bradley Wendell, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70 (2005). Marty Lederman recounts in a detailed blog posting that

> traditionally OLC would solicit the views of the State Department before rendering any advice on an issue such as this, and would reject the State Department Legal Adviser's views only after extremely careful consideration. In this case, it appears that OLC did not even consult the State Department—even though the State Department actually implements the CAT [Convention Against Torture] in connection with extradition cases, and has regulations that are used to implement the statutory definition of "torture." *See* 22 C.F.R. 95.1. The 2002 [Torture Memo] does not so much as mention such regulations, or any State Department practice with respect to the CAT.

Marty Lederman, Understanding the OLC Torture Memos (Part I), Jan. 7, 2005, http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html

22. Wendell, *supra* note 21, at 70.

paradigmatic *Steel Seizure* case.[23] The State and Defense Departments also were likely more attuned than the Memo's drafters appeared to be to the risks that a narrow reading of legal prohibitions against torture could create for our own personnel overseas.[24] Those departments' experience with the challenges of effectively communicating legal norms to thousands of U.S. personnel operating in the field and assuring compliance with those norms might also have helped them to impress upon the Memo's authors the likelihood that reopening settled norms would cause confusion and invite abuse. The Departments of State and Defense also, no doubt, could have helped to assess risks that other nations might seek to prosecute U.S. officials for engaging in torture, cruel, inhuman, or degrading treatment.

Had lawyers at State and in the Criminal Division been consulted, they might have provided a welcome counterpoint to the impulse to define torture as narrowly as possible, to interpret the executive's unilateral power exceedingly broadly, and to reason away potential individual culpability for acts of torture or other extreme cruelty. The Torture Memo's conclusions that several defenses to any criminal prosecution for torture would be available, including expansively articulated defenses of "necessity" and "self defense," [25] would almost certainly have raised important objections from career prosecutors in the criminal division, when such defenses had historically and consistently—and generally to the satisfaction of prosecutors—been read extremely narrowly.

In sum, the expertise of various parts of the executive branch would have been highly relevant to the interpretation of the legal authorities governing interrogations of detainees. The Torture Memo's authors should have welcomed input and met objections from those diverse sources within the executive branch. Their failure to do so may account for some of the Memo's defects.

III. CONSULTATION WITH CAREER PROFESSIONALS

Another axis of diversity within the executive, which crosscuts the various executive branch entities, is the career professional military and civilian service. The presence within government of a nonpolitical, professional stratum of legal personnel that carries over from one administration to the next, assures that not everyone within the executive branch will be politically aligned with the current administration. Apart from their (typically moderate) politics, career professional lawyers also tend to have deeper substantive expertise and a more long-term, institutionally grounded outlook than political appointees.

When Yoo wrote and Bybee signed the August 2002 Torture Memo, apparently seeking to provide legal protection for CIA personnel to use as much coercion against detainees as they could without facing prosecution, there were clear prohibitions in federal statutes, policies and international law against inhumane treatment of detainees. The federal Anti-Torture Statute, which applies to CIA as well as Defense Department

---

23. Youngstown Sheet & Tube v. Sawyer (*Steel Seizure*), 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

24. *See, e.g.*, Golden, *Threats and Responses* Part I, *supra* note 12 (referring to then-Secretary of State Colin Powell's concerns that "troops could be put at risk if the United States disavowed the [Geneva] conventions in dealing with the Taliban").

25. *See* Torture Memo, *supra* note 1, at 173.

personnel, defines as torture any treatment of someone in the government's custody or control that is "specifically intended to inflict severe physical or mental pain or suffering."[26] The Uniform Code of Military Justice, which applies to armed services, defines as felonies cruelty, oppression, maltreatment, and assault or threats.[27] The Third Geneva Convention, which has been incorporated into the U.S. Army Field Manual and accepted as U.S. policy for over fifty years, states that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."[28] The Fourth Geneva Convention prohibits the torture of civilians.[29] Article 3, common to all the Geneva Conventions ("Common Article 3"), provides that, in an armed conflict not of an international character "persons taking no active part in the hostilities," including people placed out of combat by reason of detention "or any other cause" must be treated "humanely."[30] Common Article 3 expressly forbids "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment" and "cruel treatment and torture."[31] It is a debated legal question whether Common Article 3 applies as a matter of treaty law to the conduct of al Qaeda,[32] but the standards of Common Article 3 are, in any event, well established customary international law which the United States for half a century has applied as a baseline protection in conflicts in Korea, Vietnam, Panama, Bosnia, Haiti, and Somalia.[33] It has been reported that the drafters of the Torture Memo did not, however, consult with JAG Corps lawyers,[34] who surely would have protested the

---

26. 18 U.S.C. §§ 2340–2340A (2000).

27. 10 U.S.C. § 893, art. 93 (2000) ("cruelty toward, or oppression or maltreatment of, any person subject to [one's] orders"); *id.* § 928, art. 128 (2000) (assault or "offer with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated").

28. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; *see* DEPARTMENT OF THE ARMY FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 93 (1956) [hereinafter ARMY FIELD MANUAL].

29. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 287; ARMY FIELD MANUAL 27-10.

30. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135

31. *Id.*

32. *Compare* Hamdan v. Rumsfeld, 415 F.3d 33, 41–42 (D.C. Cir. 2005) (pending on writ of certiorari, 126 S.Ct. 622 (Nov 07, 2005) (No. 05-184) (finding Common Article 3 inapplicable) *with id.* at 44 (Williams, J., concurring) (disagreeing with panel majority's determination that Common Article 3 does not apply, but concurring on grounds that claims under Common Article 3 should be deferred until conclusion of proceedings against Hamdan).

33. Martin S. Lederman, Visiting Professor of Law, Georgetown University Law Center, Speech at the Indiana University School of Law–Bloomington Symposium: War, Terrorism, and Torture (Oct. 7, 2005) [hereinafter Lederman remarks] (transcript on file with the *Indiana Law Journal*).

34. *See, e.g.*, Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (reporting that career military lawyers' forceful objections to cramped reading of Geneva Conventions' applicability to U.S. interrogations were ignored by their politically appointed superiors); Neil Lewis, *Ex-Military Lawyers Object to Bush Cabinet Nominee*, N.Y. TIMES, Dec. 16, 2004, at A36; *see also supra* note 20.

HeinOnline -- 81 Ind. L.J. 1306 2006

Torture Memo's sidestepping of those legal authorities, and would likely have offered sophisticated legal and practical arguments to back up their objections.[35]

Nor did the career OLC legal staff write an initial draft of the Torture Memo for their political superiors, as OLC standard procedures would have contemplated; most of the career lawyers seem to have been unaware that the project was underway. They learned about it when the rest of the nation did in the spring of 2004, when it was reported in the press.[36] The principal drafter of the memo was OLC Deputy Assistant Attorney General John Yoo, a law professor at the University of California's Boalt Hall School of Law who was on leave in order to accept that political appointment. Yoo had already developed his own unusual views of the President's Commander-in-Chief power as extremely broad,[37] and of international treaties as having less binding force than commonly thought.[38] Also strikingly unusual was that David Addington, Vice President Cheney's Chief of Staff, helped to draft the OLC Torture Memo. If the Torture Memo had been developed through ordinary procedures within the OLC, or had been offered for review within that office with a view toward garnering candid, critical review, perhaps it would not have taken two years' time and untold damage before it was repudiated.[39]

Career lawyers such as those in the JAG Corps and OLC may offer a more dispassionate view than do political appointees. They may also be more predisposed to take a longer-term view and one more attuned to the institutional interests of the government than the partisan interests of the current administration.[40] A failure to consult lawyers who have relevant subject matter expertise, especially those who are most familiar with the interplay between legal norms and practical effects on the ground, is not only unwise but is arguably also an error of some constitutional dimension. The executive's *expertise* in national security and foreign affairs is one of

---

35. *See generally*, Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT'L LAW 811 (2005) (article by former JAG Corps lawyer detailing legal errors in executive legal position on torture); Col. Richard B. Jackson, *Stick to the High Ground*, ARMY LAW., July 2005, at 2 (article by JAG Corps lawyer arguing against aggressively reading legal prohibitions against torture aggressively to achieve temporary gain through coercive interrogation, because in virtually all cases, actionable intelligence from conduct publicly perceived to be torture is not worth the loss of moral high ground).

36. Marty Lederman, a former OLC Attorney-Advisor, noted in his remarks introducing this symposium panel that, although he worked at OLC when the Torture Memo was written, he and other OLC career lawyers remained unaware at the time that the project was underway. Lederman remarks, *supra* note 33.

37. *See, e.g.*, John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1178–79 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295 (1996).

38. *See, e.g.*, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

39. *See* Revised Torture Memo, *supra* note 17.

40. *See generally* Thomas Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 85–104, 108 (1998) (arguing that career government lawyers may be more independent and also tend to take to heart the longer-term institutional interests of the government, thereby helpfully moderating the tendencies of political appointees).

HeinOnline -- 81 Ind. L.J. 1307 2006

the core rationales for judicial deference to the executive on such matters. The executive should not enjoy the leeway of judicial deference without the discipline of working with and accounting for the expert views of career personnel, such as those in the State Department and the Department of Defense.[41]

There are good reasons for the enhanced political responsiveness and accountability of political appointees, and career lawyers do not by any means always offer better legal advice. The point is, rather, that the risks of group polarization and of weak analysis due to blind spots are exacerbated when diverse perspectives and kinds of expertise are not brought to bear on legal questions as important as the United States' stance on coercive interrogation. A hallmark of the Bush Administration's management style has reportedly been to cut career lawyers out of the decisional loops. In the case of the Torture Memos, it appears that approach had enormous costs for the detainees, the Administration, and the country as a whole.

Realistically, however, more than just an OLC commitment to publication and intra-executive consultation with political and career personnel would be necessary to forestall repetition of the kinds of errors the Torture Memo exemplifies. Minimizing the risk of repetition of a debacle like the torture scandal would further require individual-rights watchdogs within the executive branch. An orientation toward minimizing legal constraint and maximizing executive power is part of what led the executive into trouble, as key decision makers worked quietly to evade rather than forthrightly to meet the arguments of potential internal skeptics.[42] These were not the actions of an executive that placed respect for the basic legal rights of all human beings at the heart of its affirmative mission, but the work of a government that treats those rights only as potential *external* limits on its national security powers.[43] Avoiding the Torture Memo's pathology would require that the executive *internalize*—ideally through carefully designed structural mechanisms—constraint in the name of individual rights.

IV. STRUCTURES OF CRITIQUE AND DISSENT

In the aftermath of the terrorist attacks on the World Trade Center towers and the Pentagon on September 11, 2001, Congress and the President created a bipartisan

---

41. Indeed, the executive's failure to ground its decisions in that branch's distinctive information and expertise may prompt the Court to show those decisions less deference. *See generally* Rasul v. Bush, 542 U.S. 466 (2004) (rejecting claims of Bush Administration that Guantánamo detainees' habeas claims are nonjusticiable).

42. *See, e.g., supra* notes 12–13 and accompanying text.

43. As the torture scandals underscore, our nation's respect for individual rights is a critical aspect of the national security mission itself. There are a range of reasons why that is so. For example, international respect for and cooperation with the United States depend on our moral leadership. When the United States is seen as lawless, moreover, that plays into the hands of those who would recruit people to use violence against us. There also appears to be significant reason to doubt whether harsh interrogation techniques produce reliable intelligence. That is not to suggest, however, that if respect for individual rights were less well aligned with our national security interests, it would be any less imperative for the executive branch to shoulder responsibility for protection of individual rights.

HeinOnline -- 81 Ind. L.J. 1308 2006

National Commission on Terrorist Attacks Upon the United States.[44] Composed of five Republicans and five Democrats, that Commission (popularly known as the 9/11 Commission) conducted a far-reaching investigation and, in 2004, issued a lengthy and detailed report analyzing the attacks and our national vulnerability to them. In it, the Commission also made a few key recommendations, limiting itself to those matters it believed would be "most important," and "whose implementation can make the greatest difference."[45]

The 9/11 Commission Report came out before the torture scandal broke and it identified priorities which, had they been recognized and embraced earlier, perhaps could have averted that scandal. In one recommendation, the Commission states: "We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors."[46] In another, following a discussion of the importance of full and informed public debate on civil liberties implications of "the shifting balance of power to the government," the Commission recommends:

> The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially advances security and (b) that there is adequate supervision of the executive's use of the power to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.[47]

Third, the Commission expresses surprise that there is "no office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to assure that liberty concerns are appropriately considered," and concludes that "there should be a voice within the executive branch for these concerns."[48] The Commission thus recommends:

> At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.[49]

The Commission understood, even before the Abu Ghraib disclosures and the leak of the Torture Memo, the connection between the United States' moral leadership in the world, our humane treatment of people, and our approach to the rule of law. The Commission appreciated that the executive must bear the burden of justifying arrogations of power to itself; indeed, it would be difficult to justidy placing the burden elsewhere, given governmental secrecy and the executive's unique vantage point on

---

44. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002).

45. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT xviii (2004) [hereinafter 9/11 COMMISSION REPORT].

46. *Id.* at 376.

47. *Id.* at 394–395.

48. *Id.* at 395.

49. *Id.*

national security needs. The Commission also saw the glaring absence of an institutionalized voice within the executive branch to speak up for individual rights.

Some structural changes designed to assure such a voice for individual rights would be very easy to institute, and are suggested by the weaknesses of the process that produced the Torture Memo. In requesting OLC's advice, the administration sought not the best answer, but one that provided legal cover for maximum coercion of detainees. Individual rights will not likely be respected by lawyers whose assigned mission is to minimize them. If the administration had wanted to know and respect relevant legal constraints rather than to push past them, it would not have assigned the drafting of legal opinions exclusively to persons with clearly known views in line with preferred outcomes, as apparently occurred with the assignment of the memo to John Yoo to work closely with David Addington in the White House. Under a more neutral process, OLC makes full use of the range of talents and perspectives typically represented in its own legal staff. Where it must decide a particularly important question, as it did in the Torture Memo, OLC might even do well to institute a practice of assigning an Attorney-Advisor to each of the opposing sides in order to assure that all arguments are fully vetted. That kind of adversary presentation through use of a "devil's advocate" system is no guarantee of greater respect for individual rights or better outcomes, but it would increase their chances. An OLC lawyer who understood it to be her role to present the best case against a narrowing construction of the federal Anti-Torture Act might have at least assured that the appropriate governmental burden of justification was met, even if a different OLC lawyer's opposing arguments ultimately carried the day.

Crossfire internal to OLC may not suffice, however, to fully inform executive decision making where the individual-rights issues at stake are legally and factually complex. OLC is staffed with legal generalists, not individual-rights experts, and they typically lack particular familiarity with the institutional conditions that foster or, alternatively, help to prevent rights violations. OLC currently can draw (and, as discussed above, should have drawn) on the expertise of entities like the Departments of Defense and State for views on how best to protect the people's security *through* exercises of governmental power. OLC's analysis would be more likely to be objective and balanced, however, if it also could draw on special expertise of an executive-branch entity specifically dedicated to the protection of individuals *from* potential excesses of governmental power. As the 9/11 Commission understood, balance within the executive requires "a board within the executive branch" to oversee the government's "commitment to civil liberties."[50]

Viewed through the lens of the torture scandal, the Commission's recommendation was too narrow in referring only to "our" civil liberties—presumably those of Americans. The executive has a range of legal obligations to respect the humanity and legal rights, not just of United States persons, but of foreigners as well. The Commission's institutional insight, if extended to call for a board with authority to consider the civil liberties of *all* persons subjected to United States governmental power, could supply a cure for the defective processes that helped to produce the Torture Memo.[51]

---

50. *Id.*

51. The Commission's recommendation has been implemented only in a weakened form.

CONCLUSION

The executive will not naturally seek out dissensus on crucial legal questions. Dealing with doubters and critics can be tiresome and time consuming. Efficiency is an unquestioned value of enormous importance to executive functioning, and fostering dissensus hardly seems to be a recipe for streamlined decision making. On legal questions as momentous as the boundaries of torture and inhumane treatment of detainees, however, it is worth the trouble to indulge some inefficiency and seek varied inputs—even if they may ultimately prove unpersuasive. The President is, after all, not a monarch, however benign, but is constitutionally obligated to abide by the law. He cannot do that without deliberation informed by relevant legal sources and factors, and by the range of the executive's varied practical and institutional expertise. Especially in areas substantially beyond judicial review, effective proxies for public, adversary presentation that is so familiar in the court context are needed within the executive.

Stated that way, the conclusion might seem so uncontroversial as to be almost trivial. Yet such an approach to legal decision making has been strenuously resisted by this administration. That resistance derives from what is at best a deep disagreement about the nature of "the law" which the President is constitutionally obligated to "take care" to execute. To the extent that the administration embraces the Take Care Clause, it hews to a watered-down version: roughly, given the President's Commander-in-Chief power, the President executes "the laws" on issues of war or national security when he acts to protect the national interest as he understands it. A hallmark of this administration has been not constitutional legitimacy so much as realpolitik. Vice President Cheney, who personifies the administration's approach, made an impassioned speech against the recent bill to prevent inhumane treatment of terrorist detainees—a bill that sought to legislatively reinstate legal prohibitions that, before the Torture Memo, one might well have thought were already in place.[52] Cheney

---

After the 9/11 Commission Report appeared, President Bush established a civil liberties board by executive order. *See* Exec. Order No. 13,353, 3 C.F.R. 211 (2004) (establishing the President's Board on Safeguarding Americans' Civil Liberties). That board was widely criticized as merely advisory and lacking oversight powers, budget, office, and full-time leadership, for being staffed wholly internally through ex officio appointments from the very agencies to be monitored, for not being placed in the White House from where it could have commanded attention from multiple agencies, and for not conducting business in public by reporting to Congress. *See,e.g.*, Nat Hentoff, *Can Government Police Itself? An Essential But Flawed Initiative*, WASH. TIMES, Sept. 27, 2004, at A23; Richard Ben-Veniste & Lance Cole, *How to Watch the Watchers*, NEW YORK TIMES, Sept. 7, 2004, at A23. Congress, in turn, created a Privacy and Civil Liberties Oversight Board in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684 (2004). While stronger and more independent, the Congressional board, too, was seen to lack some important partisan balance, independence, powers, and financial support. *See, e.g.*, Patrick Yoest, *Privacy Board Inspired by 9/11 Commission May Be Underfunded, Neglected*, CQ HOMELAND SECURITY, Mar. 17, 2006, *available at* 2006 WLNR 4763803; *Reps. Shays, Maloney, Udall Fight For Stronger, Well-Funded Civil Liberties Board*, U.S. FED. NEWS, Mar. 16, 2006, *available at* 2006 WLNR 4791824. Its leaders were not confirmed until late winter 2006, and it is not clear that it has taken any action yet.

52. Daniel Klaidman & Michael Isikoff, *Cheney in the Bunker*, NEWSWEEK, Nov. 14, 2005, at 30, *available at* http://www.msnbc.msn.com/id/9938956/site/newsweek/.

reportedly invoked the now-familiar ticking time bomb scenario and argued that the prohibition could tie the President's hands and end up costing "thousands of lives," declaring, "[w]e have to be able to do what is necessary."[53] Under that theory, "[i]f dissent weakens resolve, then dissent should be curtailed."[54]

As the torture scandals were breaking, Lee Casey and David Rivkin, prominent supporters of the administration's approach to the war against terrorism argued that the administration was being unfairly accused of seeking to "skip prisoner rights" and as having "contempt for the rule of law."[55] In their view, whether the United States government should continue to use controversial "stress methods" of interrogation "is clearly a fit subject for a serious debate."[56] Before people insist on protections like POW status of all detainees, Casey and Rivkin caution, we should appreciate their potential costs in terms of intelligence information about future attacks. "It may be that, in the end, the American people will decide to pay this price," but should not do so without a "full understanding" of the nature of the decision.[57] The only problem with that analysis is that, if things had gone as the administration had planned, there would have been no public understanding and no debate. If the administration had succeeded in its efforts to secretly authorize greater coercion against detainees, we would never even have known that such a decision was at hand.

---

53. *Id.*; *see also* Daniel Benjamin, *President Cheney--His Office Really Does Run National Security*, SLATE, Nov. 7, 2005, http://www.slate.com/id/2129686/.

54. Eric Posner and Adrian Vermeuele use this phrase to describe what they label an "accommodation" approach to the Constitution during national emergencies, and contrast with a "strict enforcement" view. Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 606 (2003). It is I, not they, who suggest that the Bush administration has followed an accommodation approach in dispensing with dissent.

55. Lee A. Casey & David B. Rivkin, Jr., *POWs and Others*, NAT'L REV., June 14, 2004, at 30.

56. *Id.* at 31.

57. *Id.* at 32.