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This newsletter on the crime policy process in Washington is bi-weekly when Congress is in session, irregularly otherwise. The website: [www.crimeletter.net](http://www.crimeletter.net) has past editions, useful links, assistance on participation, and a [subscription form](#). Please feel free to forward it to anyone interested. Because of House and Senate recesses, the next edition will be on July 9, 2004.

### **The “Torture Memo:”**

Below is the first paragraph of the infamous 50 page memo prepared by an unnamed group of Justice Department lawyers for White House Counsel Alberto Gonzales in 2002. The entire memo can be read online by going to [www.washingtonpost.com](http://www.washingtonpost.com) and on the *questions* line, type in “torture guidelines.”

“You have asked for our Office’s views regarding the standards of conduct under the (U.N.’s) Conventions Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically *intended* (italics mine) to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture. . .”

Excerpts from the second paragraph include: “. . . for an act to constitute torture . . . it must inflict pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. . . . mental pain or suffering to amount to torture . . . must result in significant psychological harm of significant duration, e.g. lasting for months or even years. . . . the mental harm also must result from one of the predicate (prohibited) acts listed in the statute, namely: threats of imminent death, . . . physical torture, . . . psychological torture; . . . physical pain as a means of psychological torture; use of drugs (to) disrupt the senses, or fundamentally alter the individual’s personality. . . . We conclude that the statute . . . prohibits only extreme acts.”

Human rights groups like the International Committee of the Red Cross and Human Rights Watch have been clear and adamant that illegal torture, as defined by the U.N. Convention and the Geneva Conventions, includes degrading and dehumanizing conduct of the kind revealed by the photos of the Abu Ghraib scandal. The Justice Department 2002 memo clearly lowers the bar for acceptable torture as a means of interrogation, or setting prisoners up for interrogation. This memo also introduces intent as the requisite standard for torture, that is,

the torturer determines what is acceptable pain, and degrading and inhumane. The Abu Ghraib MP's thought what they were doing was not extreme, even funny.

### **The Heat is Turned Up on the Iraqi Prison Scandal:**

Consider this picture. The Senate Judiciary Committee is meeting in Room 226 of the Dirksen Senate Office Building. It is an Oversight Hearing on various issues concerning the Department of Justice, and AG John Ashcroft is the sole witness. He is seated at a table in front of an elevated curved platform with 19 seats for the 10 Republicans and nine Democrats on this prestigious committee. In the middle is the chair, Orrin Hatch (R-Utah). To his right are the Republicans, to his left the Democrats, each in order of seniority. In other words, the two party's leadership is in the middle, directly facing Ashcroft, and the more junior members are to the outside.

It is June 8, 2004, and on that morning newspaper's front page was a story summarizing the Justice Department memo of above—discovered and revealed by the press, especially the Wall Street Journal, not given up by the Justice Department, or found by any of the many official investigations underway—and giving new definition to the Iraqi prison scandal. The issue has become: how far up the chain of command does knowledge and responsibility go for the abuse? On this day the chain of command has gone pretty far up indeed. [*Let's remember, the memo was from Ashcroft's office to the President.*] The room is packed, TV cameras on all sides. I am in standing room—for three hours.

But wait, there's something strange here! To the left of Chairman Hatch are the Democratic big guns: Patrick Leahy (Vt.), the ranking member, Ted Kennedy (Mass.), Joe Biden (Del.), Herb Kohl (Wi.), Dianne Feinstein (Cal.), Chuck Schumer (NY), Richard Durbin (Il.), and the most junior member, John Edwards (NC), handsome as the devil and smiling. Only Russ Feingold (Wi.) was missing. Strange!

On Hatch's right are—empty seats! No Chuck Grassley (Ia.), no Arlen Specter (Pa.), no John Kyl (Az.), no Lindsey Graham (SC), a rising star for holding the administration accountable. Only at the end of the table sat some junior members, Jeff Sessions (Al.), Saxby Chambliss (Ga.), John Cornyn (Tx.), and Larry Craig (Id.). Those empty seats stood out in a crowded hearing room.

### **Protect the President!**

This was a bizarre episode in a bizarre era. What was apparent to me was that Ashcroft—who Washington rumor has it will soon step down and cite reasons of health—and the Judiciary Committee Republicans who spoke were primarily interested in a partisan protection of the President. The Democrats were on a partisan hunting trip to get the President, and the "Torture Guidelines Memo" led to his door. Torture was going to be pinned on somebody. The Republicans glowed that the seven MP's would be vigorously prosecuted. The Democrats wanted bigger game, those who ordered it, or made the policy that encouraged it. Kennedy said it, "The President of the United States has the responsibility."

Under questioning, Ashcroft was asked to hand over to the Congress the memo in question, which, they said, justified torture (see it above). Ashcroft insisted that President Bush instructed all personnel, civilian and military, to obey the law. Leahy asked Ashcroft will this

administration prosecute torturers, not only those who did it but those who ordered it? Answer: we'll obey the law. Feinstein said he was changing the law (echoed by all the human rights groups). But in the end, after considerable parrying, Ashcroft refused to hand over to the Committee what had been in the morning paper, and is now online, and to which Biden said, after establishing that executive privilege did not attach, "Y'all are in contempt of Congress."

Of course the "enemy combatant" issue was there (we don't do torture but we could if we wanted to because al Qaeda is not an army), and the Democrats pointed out that Iraq was a signatory to the international conventions. Not mentioned, but also reported in the press, was another memo that Defense Secretary Donald Rumsfeld (also said to soon be leaving) had signed off on listing 24 types of torture that are acceptable under the current circumstances. It apparently included some of the techniques that we have seen and read about—dogs, stress positions, sensory deprivation, sleep deprivation—and like the Justice Department memo clearly went beyond the acceptable boundaries under the Geneva and Torture Conventions, at least according to human rights interpretations. Protecting that memo may have been Ashcroft's purpose.

All of this accumulates to the heat being turned up. What may be most important is that one Republican Judiciary Committee member, Larry Craig, did not join the Republican chorus that clearly wanted to localize the responsibility. Congressional Quarterly has reported that Leahy would like to find one Republican on the Committee to join the Democrats to make a 10-9 majority and issue a subpoena for the memo in question, and perhaps other "confidential" (as opposed to *classified*) information. Perhaps the "Rumsfeld Memo?"

*Congress has the power to inform itself to assist in legislation, and to find recalcitrant witnesses in contempt of Congress and send them to jail, for the duration of that sitting Congress, or up to two years. Apparently this has not happened since the McCarthy era of the 1950's when the House Un-American Activities Committee (HUAC) found Pete Seeger, members of the Hollywood 10, and many others in contempt for not naming names, and they did time in jail.*

*We might wonder if Congress would use that power to secure information that they mostly already have. Issuing a subpoena has the same consequence, and also requires 10 votes. If they did, the judicial officer who would have to carry out the mandate would be the U. S. Attorney General. Would John Ashcroft put himself in Jail? Democrats would probably rather use the issue politically.*

### **In the End, it will be Politics:**

Amid the forest of memos, one leaked 2003 Pentagon memo had President Bush claiming that the United States was not bound by international treaties on torture because of his role as Commander in Chief in confronting terrorism. And it so happens that this memo had been written by a lawyer named Jay Bybee, whom Bush has successfully appointed to the U.S. Court of Appeals. Indeed John Ashcroft repeatedly found a way to interject during his testimony: "We are at war." Now that has changed. The "torture memos" have now moved the issue to what torture means, and public opinion sits as the jury.

Investigations into the chain of command of responsibility have clearly gone beyond the smiling MP's with the cameras. Two colonels at the prison have been caught in the net of knowledge and responsibility, and one has said that he had no training in interrogations. The slipshod manner of both holding prisoners and interrogating them is evident. There will be administrative sanctions that could include two star generals. But interrogation techniques that are degrading, painful and inhumane have been approved by at least Rumsfeld, and the investigations are just getting started.

The important question is: does anyone care? Many commentators have written about how this scandal has caused the United States to lose its moral authority, and subsequently has weakened the American military, and its civilian authority, personified by the President and his administration. But for this to be a watershed moment, not only for military and foreign policy, but for American correctional administration (see CJWL # 7), public opinion has to be outraged by the blurring of moral lines that has actually made this country a participant in that most outrageous practice of governments, torture.

### **The Numbers:**

In public opinion polling conducted May 20-23, majorities of Democrats (52%), independents (56%), and Republicans (76%) all told CBS News interviewers that the media has spent too much time on stories about Iraqi prisoners being abused by U.S. soldiers. Combined, 61 % said the story had been over-covered, 32 % said the story had about the right amount of coverage, and just 6 % said it was given too little coverage. That over-covered number was up 12 % from two weeks earlier.

A May 13-14 poll for Newsweek gave Republicans better marks than Democrats in dealing with the Abu Ghraib scandal. In that poll 56 % of respondents found Democrats more interested in using the scandal for partisan gain than in getting the facts and making sure it didn't happen again (30%), and they said the same thing about Republicans 45 % to 39%. This issue does not have political legs.

So it may not help Democrats at the polls, but that does not mean there are no political repercussions. The current administration is wounded as it limps to the election year starting gate. Even if Bush is reelected Ashcroft, Rumsfeld, and Colin Powell will not be around, CIA Director George Tenet has already given the speech about wanting to spend more time with his family but he was fired, Dick Cheney is still facing energy policy inquiries, and all this is with a backdrop of more investigations that we can keep track of. In addition to Abu Ghraib, we await the 9-11 Commission (it will not be kind to the administration); a Grand Jury is hearing witnesses from the White House staff about the exposure of Valery Plame, wife of Ambassador Joe Wilson, a Bush critic, as a CIA operative (a federal crime), about which the President himself has hired a lawyer; another investigation is about Republican Senate aides swiping Democratic strategy memos, a crime; and yet another looks at ethics violations of House Republican leaders allegedly bribing Rep. Nick Smith to get his vote to pass the Medicare bill last fall; and lest we not forget Tom DeLay. The Republican Majority Leader, acknowledged as the most powerful Congressman, is being investigated by a home-state Texas Grand Jury as well as the House Ethics Committee for "bribery, extortion, fraud, money laundering, and abuse

of power.” The Hammer has been quietly making preparations to be replaced as Majority Leader if he is indicted.

And there are more problems for this administration. John Ashcroft’s Justice Department has one great selling point, namely, that since 9-11 nearly three years ago there have been no new terrorist attacks on American soil (except for anthrax). The rest of the world is another matter. That, however, may be over-shadowed by, to name a few problems, over 600 detainees in Guantanamo have yet to meet with their lawyers or have hearings scheduled; an unknown number of the original 5,000 or so Arab and Muslim men held without counsel of hearings are still waiting charges; the Zaccarias Moussaoui case is in trouble; and then there’s Jose Padilla, who inconveniently happens to be an American citizen. A U.S. Court of Appeals has already ordered him released and the government’s appeal will be heard by the Supreme Court this summer.

### **The DOJ Defends Itself:**

The number two man in the Justice Department is Deputy A.G. James Comey, whom rumor has it will replace John Ashcroft when he resigns for “reasons of health.” Comey is in charge of the Padilla case, and he recently called a news conference to inform the public of how dangerous this man is. He claims that it’s only a coincidence that it follows on the heels of the Abu Ghraib bad publicity. He told how Padilla had planned to blow up U.S. apartment buildings using natural gas.

Wait, isn’t that a new theory? Ever since his arrest two years ago at a Chicago airport the government has said that Padilla was orchestrating an al Qaeda plan to detonate a “dirty” (radioactive) bomb in an American city. Relying on this terrible plot, Bush declared him an enemy combatant and he has been held in a naval brig in South Carolina without access to his family, and until recently his court appointed lawyer. He has had no meaningful chance to defend himself, and apparently has been subject to sensory deprivation. What evidence there is against him has still been disseminated only in a summary, in the press, and has now changed from a dirty bomb to a clean bomb; and now the public, and the Supreme Court too if the justices watch the news, know of what he is accused, but nothing of his defense.

Comey admits his reason for the news conference was public relations, or trial by news conference. Even if the Supreme Court can overlook this blatant pre-trial prejudicial publicity with its intent to protect the Justice Department, Jose Padilla can never be brought to trial. Bush’s enemy combatant theory can not stand up for much longer. Sooner or later they all will be brought before some kind of tribunal, and then we will find out the long term consequences of Abu Ghraib on American criminal justice. This case may become a critical trial run for the commander-in-chief-can-do-anything theory.

### **The Legislative Response:**

The essential legislative battle will be next year, when the USA Patriot Act is up for reauthorization at the end of 2005, but it has already started. Whoever controls the White House and Congress will make a difference in how it plays out, but that will be the essential legislative test of the legitimacy of a range of terrorism era policies, from administrative warrants

and special courts to memos advising that the President's power overrides international treaties and even American legislation on abusive power over prisoners.

Senators have signaled that this contest is coming, and the President has made reauthorizing the Patriot Act an election year issue to run on. At this point, the key is the moderate Republicans, and there are signs that they are not happy with the Patriot Act. The beginning of this newsletter noted the absence of Republican Senators Grassley, Spector, DeWine, and Graham at the Judiciary Committee's Oversight Hearing on the Justice Department, which meant they were not there to defend the administration on what became the torture memos issue. Was their absence a breaking of ranks? Let's wait and see.

The Republican Larry Craig from Idaho was there, however, and he took the occasion to spin for his own bill, the Security and Freedom Ensured Act (SAFE Act), which amends Patriot Act to remove its roving wiretaps, secret searches, and strengthen the reasonableness standard for searches of business records, among other reforms. Of the 20 co-sponsors, four are Republican. Hearings have not been scheduled this year, and no comparable bill has been introduced in the House. Craig, who otherwise has strong conservative credentials, is throwing down the gauntlet for next year for somewhat of a confrontation with the Republican base, and possibly the President.

One Democrat, Richard Durbin of Illinois, is taking a different tact: the appropriations route. He has put an amendment on the pending Defense Department Authorization bill to affirm America's commitment not to engage in torture and require the defense secretary to provide Congress with compliance guidelines and standards. There is some question if Congress will ever pass a budget resolution this year, but if it does, this amendment has a good chance to survive.

And as this is written, a group of both Senators and Congressmen are at work on a new bill called the Civil Liberties Restoration Act. More on this in the next newsletter, but this bill tries to bring together what it calls basic principles of fairness, due process, and human rights, including our treatment of foreign nationals, even if we are under terrorist attack.

### **Other Legislation:**

There is not a whole lot of time left in the 108<sup>th</sup> Congress—with summer recesses and the two national conventions—but a backlog of criminal justice issues may be pushed through under the radar. Here are some of the key issues.

**A Hate Crimes Bill:** For years feminist and other liberal groups have been pushing for a second federal hate crimes law. The first was in 1968, and allows federal prosecution of crimes motivated by race, color, religion, or national origin. This one adds sexual orientation to the protected categories, which is the controversial part. In a deft maneuver, the sponsors had the bill attached to the Defense Authorization bill, like the torture bill. The amendment passed 65-33, because Senators intellectually in favor but fearful of a political backlash will be protected. Coming up is the Constitutional Amendment to ban gay marriages, which has political visibility. They had a chance to vote against violence against gays before they had to vote against allowing them to marry. It has bipartisan support, and the Armed Services Committee has promised to keep it in the defense bill. Any problems then? Yes, the U.S. House of Representatives.

**The Flag Burning Amendment:** Last year, as they do in every legislative session, two-thirds of the House passed on a Constitutional Amendment to criminalize burning the American flag; and usually every session the Senate kills the idea. This year may be different. Later this week the Senate Judiciary Committee plans to report out the amendment prohibiting “physical desecration” of the flag. The vote in the Senate to send the proposed amendment to the states, where it will surely pass, will be close.

Some others waiting in line are an anti-gang bill, the DNA testing bill, the Head Start reauthorization, another Victim’s Rights Amendment, and the three gun bills, civil immunity, the gun show loophole, and the assault weapons ban. The later will expire in September unless reauthorized, and a battle—with election campaign overtones—is expected. I am hearing nothing yet about a comprehensive prisoner reentry bill, in the works for years. The post Iraqi prison abuse scandal climate may change some things. Stay tuned.