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From: Harris, Robert K
Sent: Monday, June 07, 2004 10:52 AM
To: Legal-L-HRR-dl; Legal-L-NESA-dl; Legal-L-PM-dl; Cummings, Edward R (Main State); Witten, Samuel M; Malionek, Tom V
Cc: Kozak, Michael G; Lagon, Mark P; DRL-MLA; IO-SHA-DL; Thessin, James H; Schwartz, Jonathan B [Legal]; Taft IV, William H.
Subject: FW: Torture Convention and other treaties - Iraq

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-----Original Message-----
From: Malionek, Tom V
Sent: Monday, June 07, 2004 9:36 AM
To: Allder, Lois L; Blanck Jr, John I; Cook, Daphne W; Dalton, Robert E; Gorove, Katherine M; Haines, Avril D; Harris, Robert K
Subject: Torture Convention and other treaties - Iraq

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Pandora's box comes to mind ...

Wall Street Journal, June 7, 2004 - pg. 1

Pentagon Report Set Framework For Use Of Torture

Security or Legal Factors Could Trump Restrictions, Memo to Rumsfeld Argued

By Jess Bravin, Staff Reporter Of The Wall Street Journal

Bush administration lawyers contended last year that the president wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department.

The advice was part of a classified report on interrogation methods prepared for Defense Secretary Donald Rumsfeld after commanders at Guantanamo Bay, Cuba, complained in late 2002 that with conventional methods they weren't getting enough information from prisoners.

The report outlined U.S. laws and international treaties forbidding torture, and why those restrictions might be overcome by national-security considerations or legal technicalities. In a March 6, 2003, draft of the report reviewed by The Wall Street Journal, passages were deleted as was an attachment listing specific interrogation techniques and whether Mr. Rumsfeld himself or other officials must grant permission before they could be used. The complete draft document was classified "secret" by Mr. Rumsfeld and scheduled for declassification in 2013.

The draft report, which exceeds 100 pages, deals with a range of legal issues related to interrogations, offering

definitions of the degree of pain or psychological manipulation that could be considered lawful. But at its core is an exceptional argument that because nothing is more important than "obtaining intelligence vital to the protection of untold thousands of American citizens," normal strictures on torture might not apply.

The president, despite domestic and international laws constraining the use of torture, has the authority as commander in chief to approve almost any physical or psychological actions during interrogation, up to and including torture, the report argued. Civilian or military personnel accused of torture or other war crimes have several potential defenses, including the "necessity" of using such methods to extract information to head off an attack, or "superior orders," sometimes known as the Nuremberg defense: namely that the accused was acting pursuant to an order and, as the Nuremberg tribunal put it, no "moral choice was in fact possible."

According to Bush administration officials, the report was compiled by a working group appointed by the Defense Department's general counsel, William J. Haynes II. Air Force General Counsel Mary Walker headed the group, which comprised top civilian and uniformed lawyers from each military branch and consulted with the Justice Department, the Joint Chiefs of Staff, the Defense Intelligence Agency and other intelligence agencies. It isn't known if President Bush has ever seen the report.

A Pentagon official said some military lawyers involved objected to some of the proposed interrogation methods as "different than what our people had been trained to do under the Geneva Conventions," but those lawyers ultimately signed on to the final report in April 2003, shortly after the war in Iraq began. The Journal hasn't seen the full final report, but people familiar with it say there were few substantial changes in legal analysis between the draft and final versions.

A military lawyer who helped prepare the report said that political appointees heading the working group sought to assign to the president virtually unlimited authority on matters of torture -- to assert "presidential power at its absolute apex," the lawyer said. Although career military lawyers were uncomfortable with that conclusion, the military lawyer said they focused their efforts on reining in the more extreme interrogation methods, rather than challenging the constitutional powers that administration lawyers were saying President Bush could claim.

The Pentagon disclosed last month that the working group had been assembled to review interrogation policies after intelligence officials in Guantanamo reported frustration in extracting information from prisoners. At a news conference last week, Gen. James T. Hill, who oversees the offshore prison at Guantanamo as head of the U.S. Southern Command, said the working group sought to identify "what is legal and consistent with not only Geneva [but] ... what is right for our soldiers." He said Guantanamo is "a professional, humane detention and interrogation operation ... bounded by law and guided by the American spirit."

Gen. Hill said Mr. Rumsfeld gave him the final set of approved interrogation techniques on April 16, 2003. Four of the methods require the defense secretary's approval, he said, and those methods had been used on two prisoners. He said interrogators had stopped short of using all the methods lawyers had approved. It remains unclear what actions U.S. officials took as a result of the legal advice.

Critics who have seen the draft report said it undercuts the administration's claims that it recognized a duty to treat prisoners humanely. The "claim that the president's commander-in-chief power includes the authority to use torture should be unheard of in this day and age," said Michael Ratner, president of the Center for Constitutional Rights, a New York advocacy group that has filed lawsuits against U.S. detention policies. "Can one imagine the reaction if those on trial for atrocities in the former Yugoslavia had tried this defense?"

Following scattered reports last year of harsh interrogation techniques used by the U.S. overseas, Sen. Patrick Leahy, a Vermont Democrat, wrote to National Security Adviser Condoleezza Rice asking for clarification. The response came in June 2003 from Mr. Haynes, who wrote that the U.S. was obliged to conduct interrogations "consistent with" the 1994 international Convention Against Torture and the federal Torture Statute enacted to implement the convention outside the U.S.

The U.S. "does not permit, tolerate or condone any such torture by its employees under any circumstances," Mr.

Haynes wrote. The U.S. also followed its legal duty, required by the torture convention, "to prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," he wrote.

The U.S. position is that domestic criminal laws and the Constitution's prohibition of cruel and unusual punishments already met the Convention Against Torture's requirements within U.S. territory.

The Convention Against Torture was proposed in 1984 by the United Nations General Assembly and was ratified by the U.S. in 1994. It states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," and that orders from superiors "may not be invoked as a justification of torture."

That prohibition was reaffirmed after the Sept. 11 attacks by the U.N. panel that oversees the treaty, the Committee Against Torture, and the March 2003 report acknowledged that "other nations and international bodies may take a more restrictive view" of permissible interrogation methods than did the Bush administration.

The report then offers a series of legal justifications for limiting or disregarding antitorture laws and proposed legal defenses that government officials could use if they were accused of torture.

A military official who helped prepare the report said it came after frustrated Guantanamo interrogators had begun trying unorthodox methods on recalcitrant prisoners. "We'd been at this for a year-plus and got nothing out of them" so officials concluded "we need to have a less-cramped view of what torture is and is not."

The official said, "People were trying like hell how to ratchet up the pressure," and used techniques that ranged from drawing on prisoners' bodies and placing women's underwear on prisoners heads -- a practice that later reappeared in the Abu Ghraib prison -- to telling subjects, "I'm on the line with somebody in Yemen and he's in a room with your family and a grenade that's going to pop unless you talk."

Senior officers at Guantanamo requested a "rethinking of the whole approach to defending your country when you have an enemy that does not follow the rules," the official said. Rather than license torture, this official said that the report helped rein in more "assertive" approaches.

Methods now used at Guantanamo include limiting prisoners' food, denying them clothing, subjecting them to body-cavity searches, depriving them of sleep for as much as 96 hours and shackling them in so-called stress positions, a military-intelligence official said. Although the interrogators consider the methods to be humiliating and unpleasant, they don't view them as torture, the official said.

The working-group report elaborated the Bush administration's view that the president has virtually unlimited power to wage war as he sees fit, and neither Congress, the courts nor international law can interfere. It concluded that neither the president nor anyone following his instructions was bound by the federal Torture Statute, which makes it a crime for Americans working for the government overseas to commit or attempt torture, defined as any act intended to "inflict severe physical or mental pain or suffering." Punishment is up to 20 years imprisonment, or a death sentence or life imprisonment if the victim dies.

"In order to respect the president's inherent constitutional authority to manage a military campaign ... (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his commander-in chief authority," the report asserted. (The parenthetical comment is in the original document.) The Justice Department "concluded that it could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the president's constitutional power," the report said. Citing confidential Justice Department opinions drafted after Sept. 11, 2001, the report advised that the executive branch of the government had "sweeping" powers to act as it sees fit because "national security decisions require the unity in purpose and energy in action that characterize the presidency rather than Congress."

The lawyers concluded that the Torture Statute applied to Afghanistan but not Guantanamo, because the latter lies within the "special maritime and territorial jurisdiction of the United States, and accordingly is within the

United States" when applying a law that regulates only government conduct abroad.

Administration lawyers also concluded that the Alien Tort Claims Act, a 1789 statute that allows noncitizens to sue in U.S. courts for violations of international law, couldn't be invoked against the U.S. government unless it consents, and that the 1992 Torture Victims Protection Act allowed suits only against foreign officials for torture or "extrajudicial killing" and "does not apply to the conduct of U.S. agents acting under the color of law."

The Bush administration has argued before the Supreme Court that foreigners held at Guantanamo have no constitutional rights and can't challenge their detention in court. The Supreme Court is expected to rule on that question by month's end.

For Afghanistan and other foreign locations where the Torture Statute applies, the March 2003 report offers a narrow definition of torture and then lays out defenses that government officials could use should they be charged with committing torture, such as mistakenly relying in good faith on the advice of lawyers or experts that their actions were permissible. "Good faith may be a complete defense" to a torture charge, the report advised.

"The infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture," the report advises. Such suffering must be "severe," the lawyers advise, and they rely on a dictionary definition to suggest it "must be of such a high level of intensity that the pain is difficult for the subject to endure."

The law says torture can be caused by administering or threatening to administer "mind-altering substances or other procedures calculated to disrupt profoundly the sense of personality." The Bush lawyers advised, though, that it "does not preclude any and all use of drugs" and "disruption of the senses or personality alone is insufficient" to be illegal. For involuntarily administered drugs or other psychological methods, the "acts must penetrate to the core of an individual's ability to perceive the world around him," the lawyers found.

Gen. Hill said last week that the military didn't use injections or chemicals on prisoners.

After defining torture and other prohibited acts, the memo presents "legal doctrines ... that could render specific conduct, otherwise criminal, not unlawful." Foremost, the lawyers rely on the "commander-in-chief authority," concluding that "without a clear statement otherwise, criminal statutes are not read as infringing on the president's ultimate authority" to wage war. Moreover, "any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the commander-in-chief authority in the president," the lawyers advised.

Likewise, the lawyers found that "constitutional principles" make it impossible to "punish officials for aiding the president in exercising his exclusive constitutional authorities" and neither Congress nor the courts could "require or implement the prosecution of such an individual."

To protect subordinates should they be charged with torture, the memo advised that Mr. Bush issue a "presidential directive or other writing" that could serve as evidence, since authority to set aside the laws is "inherent in the president."

The report advised that government officials could argue that "necessity" justified the use of torture. "Sometimes the greater good for society will be accomplished by violating the literal language of the criminal law," the lawyers wrote, citing a standard legal text, "Substantive Criminal Law" by Wayne LaFave and Austin W. Scott. "In particular, the necessity defense can justify the intentional killing of one person ... so long as the harm avoided is greater."

In addition, the report advised that torture or homicide could be justified as "self-defense," should an official "honestly believe" it was necessary to head off an imminent attack on the U.S. The self-defense doctrine generally has been asserted by individuals fending off assaults, and in 1890, the Supreme Court upheld a U.S. deputy marshal's right to shoot an assailant of Supreme Court Justice Stephen Field as involving both self-

defense and defense of the nation. Citing Justice Department opinions, the report concluded that "if a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition," he could be justified "in doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network."

Mr. LaFave, a law professor at the University of Illinois, said he was unaware that the Pentagon used his textbook in preparing its legal analysis. He agreed, however, that in some cases necessity could be a defense to torture charges. "Here's a guy who knows with certainty where there's a bomb that will blow New York City to smithereens. Should we torture him? Seems to me that's an easy one," Mr. LaFave said. But he said necessity couldn't be a blanket justification for torturing prisoners because of a general fear that "the nation is in danger."

For members of the military, the report suggested that officials could escape torture convictions by arguing that they were following superior orders, since such orders "may be inferred to be lawful" and are "disobeyed at the peril of the subordinate." Examining the "superior orders" defense at the Nuremberg trials of Nazi war criminals, the Vietnam War prosecution of U.S. Army Lt. William Calley for the My Lai massacre and the current U.N. war-crimes tribunals for Rwanda and the former Yugoslavia, the report concluded it could be asserted by "U.S. armed forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful."

The report seemed "designed to find the legal loopholes that will permit the use of torture against detainees," said Mary Ellen O'Connell, an international-law professor at the Ohio State University who has seen the report. "CIA operatives will think they are covered because they are not going to face liability."

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