

# Anatomy of Bush's tort

By Ray McGovern

*'No', the President yelled in the narrow conference room, 'I don't care what the international lawyers say, we are going to kick some ass'*

THE prose of the recently leaked report of the International Committee of the Red Cross on torture seems colourless. It is at the same time obscene — almost pornographic.

The 41-page ICRC report depicts scenes of prisoners forced to remain naked for long periods, sometimes in the presence of women, often with their hands shackled over their heads in "stress positions" as they are left to soil themselves.

The report's images of sadism also include prisoners slammed against walls, locked in tiny boxes, and strapped to a bench and subjected to the drowning sensation of waterboarding.

How could it be that we Americans tolerate the kind of leaders who would subject others to systematic torture — yes, that's what the official report of the international body charged with monitoring the Geneva agreements on the treatment of prisoners concludes — torture.

Over the past week I have been asked to explain how this could have happened; who authorised the torture in our name? The Red Cross report lacks the earmarks of rogues or "rotten apples" at the bottom of some barrel.

This is what I have been telling those who ask:

Rather than Harry Truman's famous motto on his Oval Office desk, "The Buck Stops Here", this was a case of "The Buck Starts Here". President George W Bush set the tone and created the framework, with strong support from Vice President Dick Cheney and Defence Secretary Donald Rumsfeld.

The first hints of what was in store came from the President himself in the White House bunker late on Sept 11, 2001, at a meeting with his closest national security advisers after his TV address to the nation about the terrorist attacks that morning.

The vengeful bunker mentality prevailing at that meeting comes through clearly in the report of one of the participants, Richard Clarke in his book, *Against All Enemies*. Describing the President as confident, determined, forceful, Clarke provides the following account of what President Bush said:

"We are at war... Nothing else matters. ... Any barriers in your way, they're gone."

When, later in the discussion, Secretary Rumsfeld noted that international law allowed the use of force only to prevent future attacks and not for retribution,

Bush nearly bit his head off.

"No", the President yelled in the narrow conference room, "I don't care what the international lawyers say, we are going to kick some ass."

**'Taking the gloves off':** In the weeks that followed, the air in Washington hung heavy with demons of retribution. Afghanistan was invaded in October 2001, and during a prisoner uprising on Nov. 25, a CIA officer was killed there.

A young American citizen, John Walker Lindh, was discovered among the prisoners in the area. There was not the slightest evidence that Lindh had anything to do with the killing.

But documents show that US Joint Special Operations troops were told that the office of the Defence Secretary's counsel (William J Haynes II, was Pentagon general counsel at the time) had authorised an Army intelligence officer

(Because she protested, Radack was fired as Justice Department legal ethics advisor, put under criminal investigation, and even added to the "no-fly" list.)

**End-run around Geneva:** But the Bush administration was just getting started.

On Jan. 18, 2002, White House Counsel Alberto Gonzales advised the President that the Justice Department had issued a formal legal opinion concluding that the Geneva Convention III on the Treatment of Prisoners of War (GPW) does not apply with respect to Al Qaeda.

Gonzales added that he understood that Bush had "decided that GPW does not apply and, accordingly, that Al Qaeda and Taliban detainees are not prisoners of war under the GPW."

On Jan 19, 2002, Defence Secretary Rumsfeld told combat commanders that the President had "determined that Al Qaeda and Taliban indi-

obscured what was to come.

The lawyers argued that it was "appropriate" and "consistent with military necessity" to waive Geneva regarding the treatment of Al Qaeda and Taliban detainees, but they inserted assurances that the prisoners would be treated "humanely" and "in a manner consistent with the principles of GPW."

**Powell rebuffed:** Brushing aside Powell's objections, President Bush adopted the Gonzales/Addington language and signed a memorandum to that effect on Feb 7, 2002. The memo went to Vice President Cheney, Secretary of State Powell, Defence Secretary Rumsfeld, Attorney General John Ashcroft, Chief of Staff to the President Andrew Card, Director of Central Intelligence George Tenet, Assistant to the President for National Security Affairs Condoleezza Rice, and Joint Chiefs Chairman Gen Richard Myers.

The memo amounted to an executive order, although it was not labelled as such. In it, the President alludes fulsomely to Justice Department opinions and recommendations, as well as "facts" supplied by the Defence Department.

Bush then takes clear responsibility for the decision to spurn Geneva: "I determine that common Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees. ... I determine that Taliban detainees ... do not qualify as prisoners of war under Article 4 of Geneva ... and that Al Qaeda detainees also do not qualify as prisoners of war."

The Feb 7, 2002, memo bears the Orwellian title "Humane Treatment of Al Qaeda and Taliban Detainees." In it, Bush lifts verbatim the language from the Gonzales/Addington memo of Jan. 25, 2002, and makes it his own.

Bush claimed, for example, "the war against terrorism ushers in a new paradigm (that) requires new thinking in the law of war."

Bush then tries to square a circle, directing (twice in the two-page memo) that "detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW."

**Smell smoke?** The smoking-gun memorandum of Feb 7, 2002, was released to the media, together with other documents, by Gonzales on June 22, 2004, but it did not receive the attention it deserved until recently.

On Dec 11, 2008, Sen Carl Levin, D-Michigan, and Sen. John McCain, R-Arizona, ranking members of the Senate Armed Services Committee, released, without dissent, the summary of their committee's report on the abuse of detainees.

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"to take the gloves off and ask whatever he wanted" of Lindh.

Despite urgent intervention by Justice Department ethics attorney Jesselyn Radack, Lindh was not properly read his rights. Instead, the FBI agent on the scene ad-libbed in an offhand way, "You have the right to an attorney. But there are no attorneys here in Afghanistan."

Lindh had been seriously wounded in the leg. Despite that, US troops put a hood over him, stripped him naked, duct-taped him to a stretcher for days in an unheated and unlit shipping container, and threatened him with death.

Parts of his humiliating ordeal were captured on film (a practice that became tragically familiar with the photos of Abu Ghraib).

In her book, *Canary in the Coalmine: Blowing the Whistle in the Case of John Walker Lindh*, attorney Radack comments that official documents pertaining to this case provide "the earliest known evidence that the Bush Administration was willing to push the envelope on how far it could go to extract information from suspected terrorists."

Individuals under the control of the Department of Defence are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."

Secretary of State Colin Powell asked the President to reconsider his decision and to conclude, instead, that the GPW does apply to both Al Qaeda and the Taliban. But Powell's protest was couched in bureaucratic politeness, rather than in anger and outrage.

The next step took the form of the fateful memorandum of Jan 25, 2002, signed by Alberto Gonzales but drafted by counsel to the Vice President David Addington. That memo outlined for the President "the ramifications of your decision and the Secretary's (Powell's) request for reconsideration."

It described a "new paradigm" that, the writers claimed "renders obsolete Geneva's strict limitations on questioning of enemy prisoners, and renders quaint some of its provisions."

Gonzales and Addington urged the President to disregard Powell's misgivings and move ahead. But they cloaked their argument in lawyerly language that

# rture paradigm

The report's first subhead was: Presidential Order Opens Door to Considering Aggressive Techniques, and the first words of the first sentence of the first paragraph were, "On Feb. 7, 2002, President Bush signed a memorandum stating..."

Referring to the "President's order", the first paragraph adds that "the decision to replace well-established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees."

"Conclusion Number One" of the Senate Armed Services Committee report states: "Following the President's determination (of Feb 7, 2002), techniques such as waterboarding, nudity, and stress positions ... were authorized for use in interrogations of detainees in US custody."

Once Bush had opened the door with his Feb 2, 2002, memo, other

took shape, senior officers and lower-level participants in the interrogations understood that the basis for the newly permitted harsh tactics stemmed from a presidential decision.

In a report on Abu Ghraib prisoner abuses, former Defence Secretary James Schlesinger indicated that Lt Gen Ricardo Sanchez, the top commander in Iraq, instituted a "dozen interrogation methods beyond" the Army's standard practice under the Geneva Convention.

Sanchez said he based his decision on "the President's memorandum", which he said allowed for "additional, tougher measures" against detainees, according to the Schlesinger report.

An FBI e-mail of May 22, 2004, from a senior FBI agent in Iraq stated that President Bush had signed an Executive Order approving the use of military dogs, sleep deprivation and other tactics to intimidate Iraqi detainees.

told-me-it-was-legal excuse, though the evidence is now clear that the Bush administration essentially stage-managed the Yoo-Bybee opinions.

For instance, when the Yoo-Bybee opinions were withdrawn by Bybee's OLC successor, Assistant Attorney General Jack Goldsmith, Addington and other administration officials successfully pressured Goldsmith to resign and then welcomed a new OLC chief, Steven Bradbury, who reinstated the key opinions in May 2005.

And - as the evidence built of illegal torture in 2006 - the Bush administration pushed the "Military Commissions Act" through the Republican-controlled Congress with phrasing that granted a degree of retroactive immunity.

The law states that "no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories".

That provision was interpreted as a broad amnesty for US officials, including President Bush and other senior executives who may have authorized torture, murder or other violations of human rights.

The law also granted Bush the authority "to interpret the meaning and the application of the Geneva Conventions".

However, there remain legal questions about whether the law's language would prevent prosecutions under pre-existing anti-torture laws.

The sudden appearance of the damning report by the International Committee of the Red Cross, initially given to the CIA's acting general counsel on Feb. 14, 2007, greatly complicates any rotten-apples-at-the-bottom-of-the-barrel-type disingenuousness.

In a departure from the usual diplomatic parlance, the ICRC minces not a word in referring to those who authorized torture. In the report itself, the Red Cross calls on current US authorities "to punish the perpetrators, where appropriate, to prevent such abuses from happening again".

What do you suppose is holding Attorney General Eric Holder back from appointing an independent prosecutor to investigate, with a view toward rubbing out, once and for all, this shameful stain on our collective conscience? COURTESY COUNTERPUNCH

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Once Bush had opened the door with his Feb 2, 2002, memo, other actions followed to implement the President's 'new paradigm'. White House lawyers worked with Deputy Assistant Attorney General John Yoo of the Office of Legal Counsel to develop constitutional theories about expansive presidential powers that effectively let Bush operate beyond the law

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The OLC traditionally is the office that tells presidents the limits of their constitutional authorities. However, in this case, Yoo collaborated with Gonzales, Addington and other White House lawyers in hammering out arguments that the administration could use to implement harsh interrogations of Al Qaeda suspects.

On Aug 1, 2002, Yoo and his OLC superior, Assistant Attorney General Jay Bybee, issued an opinion that so narrowly defined "torture" that it cleared the way for a variety of "enhanced interrogation techniques", including waterboarding, which creates a near-drowning experience.

**Top-down torture:** As the legal framework for Bush's torture policies

The FBI official sought guidance in confronting an unwelcome dilemma. He asked if FBI personnel in Iraq were required to report the US military's harsh interrogation of detainees when such treatment violated Bureau standards but fit within the guidelines of a presidential Executive Order.

In sum, abundant evidence indicates that the torture techniques applied in the jail cells and interrogation chambers - the "alternative set of procedures" about which Bush boasted publicly on Sept 6, 2006 - resulted directly from Bush's Feb 7, 2002, memo and implementing actions by his administration.

Interrogators also were egged on by comments from Bush, Cheney and Rumsfeld regarding the "tough" treatments they favored.

One fig leaf left covering the otherwise exposed role of Bush and his top aides remains the clever inclusion of the word "humane" in the memo that made possible what the International Committee of the Red Cross condemned as "inhuman" treatment of terror suspects in US custody.

There's also the Justice-Department-