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## Torture: When will we ever learn?

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Field Notes from a Battleground

Part 1 of 2

Aeschylus tells us that we can learn, with the following:

God, whose law it is that he who learns must suffer. And even in our sleep pain that cannot forget, falls drop by drop upon the heart, and in our own despair, against our will, comes wisdom to us by the awful grace of God.

I have carried that passage in my wallet for more than a decade, and believe it's because of the hope it provides, that I might not otherwise have. But I always want to add to the passage: "if we're lucky — very, very lucky."

Having lived for 72 years now, I don't see that we have learned much of anything. We are still killing and tormenting each other, sometimes in the most barbaric ways, over religious beliefs (or not), political power, territory, wealth and prestige. And just in the past few weeks the subject of torture has returned to the news in different ways. I have written about torture in this space before, perhaps to excess, and will venture to write some more today. For I believe that torture has no place in America, and that we should put it behind us once and for all. We are too good for that, or at least we should try to be.

In my last two-part column we saw how the heroic Jack Goldsmith took the daring step — he was aware of no prior instance when even one Office of Legal Counsel (OLC) legal opinion had been withdrawn within a single administration — of withdrawing two of the notorious Yoo-Bybee "torture memos" during his brief stint as head of the OLC in the Bush White House. Alas, when Goldsmith in July 2004 withdrew the most infamous memo of them all — the Aug. 1, 2002, Jay Bybee to Alberto Gonzales marvel of legal legerdemain (written by John Yoo) titled "Standards of Conduct for Interrogation under 18 U.S.C. Secs. 2340-2340A," he understood the price he had to pay, and submitted his resignation at the same time.

Hallelujah, imaginative legal justifications for torture are gone! But not so fast. The White House began casting about for the "right kind" of OLC chief — no mistakes this time — and kept trying until they found their man. In this way, Steven G. Bradbury became the acting head of the OLC.

He soon issued three new memoranda, which Horton describes as "in many respects more appalling than the Yoo-Bybee memos...." Two of these (no surprise) focused on the application of 18 U.S.C. Secs. 2340-2340A — the Torture Act provisions so ignominiously dealt with by Yoo and Bybee in the Aug. 1, 2002, memo withdrawn by Goldsmith — to the interrogation of high-value detainees. The first memo, dated May 10, 2005, and directed to John A. Rizzo, senior deputy general counsel of the CIA (as the other two were), described in excruciating detail<sup>13</sup> "enhanced interrogation techniques" (EITs), including waterboarding, then analyzed each under the Torture Act. The second replied to an obvious question: What happens when you hit a detainee with a number of these techniques at once? The third memo, dated May 30, 2005, dealt with the same EITs, but under a different set of legal standards, those contained in Article 16 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In all three, Bradbury concluded that the EITs did not violate the legal standards being considered.

In April 2009, Philip Zelikow, Condoleezza Rice's former policy representative to the National Security Council Deputies Committee on intelligence and terrorism issues, wrote of gaining access to the memos in May 2005, shortly after they issued, in "The OLC 'torture memos:' thoughts from a dissenter." Zelikow wanted to focus not just on waterboarding, but on the whole program, which "developed 'interrogation plans' to disorient, abuse, dehumanize, and torment individuals over time."

The plans employed the combined, cumulative use of many techniques of medically monitored physical coercion. Before getting to waterboarding, the captive had already been stripped naked, shackled to ceiling chains keeping him standing so he could not fall asleep for extended periods, hosed periodically with cold water, slapped around, jammed into boxes, etc. Sleep deprivation is most important.

According to the first Bradbury memo, sleep deprivation could be prolonged by the CIA for 180 hours, when eight hours of sleep would be allowed before further sleeplessness could be inflicted.

Though Zelikow correctly focused on the entire program, not just on waterboarding, I pause to consider that single technique. All three Bradbury memos relied on a characterization of waterboarding that could bring Christopher Hitchens hurtling back from his newly inhabited grave to smite the author (except that Hitchens chose to donate his body to medical research). That is, the memos insistently speak of inducing "the sensation of drowning" with the water board. Hitchens, the brilliant essayist and legendary provocateur who famously got the military to waterboard him, makes his point in "Believe Me, It's Torture":

"You may have read by now the official lie about this treatment, which is that it 'simulates' the feeling of drowning. This is not the case. You feel that you are drowning because you are drowning — or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure."

Hitchens had a pre-arranged signal to stop his torment. So ashamed was he at how quickly he gave the sign, Hitchens refused to disclose the number of seconds he lasted. As for the bottom line that Bradbury's memos struggled to elude, Hitchens was crystal clear: "I apply the Abraham Lincoln test for moral casuistry: 'If slavery is not wrong, nothing is wrong.' Well, then, if waterboarding does not constitute torture, then there is no such thing as torture."

Next time: Early in April, the Obama administration released a February 2006 legal memorandum by Zelikow, the high-ranking State Department lawyer, which concluded that several EITs violated Article 16 of the UN Convention on Torture; we will learn of the furor the memo created.

Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.

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Field Notes From A Battleground

**By** Charles R. Church

### Part 2 of 2

Last time, we learned about the three May 2005 legal memos written by the White House Office of Legal Counsel's Steven G. Bradbury which found the CIA's "enhanced interrogation techniques" legal. We will now discover the challenge by the State Department's Philip Zelikow to that position, and the controversy it incited.

As Scott Horton reported for Harpers, early in April the Obama Administration released "an important document relating to the Bush Administration's torture policies." It was a Feb. 16, 2006, memo by Zelikow — then, you recall, a high-ranking State Department lawyer and confidant of Condoleezza Rice — formerly classified "Top Secret" and titled: "The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture." Noting that the May 2005 Bradbury memos had concluded, and the State Department had agreed, that the Convention's Article 16 did not apply to CIA interrogations in foreign countries, Zelikow showed that the situation had changed.

As a matter of policy, the U.S. government publicly had extended the prohibition against cruel, inhuman or degrading treatment to all conduct worldwide. Then the McCain Amendment (found in the Detainee Treatment Act of 2005) expanded the application of Article 16 to conduct by U.S. officials anywhere in the world. Hence, the prohibitions of Article 16 "now do apply to the 'enhanced interrogation techniques' authorized for employment by the CIA."

Zelikow concluded that several of the techniques, singly or in combination, should be considered "cruel, inhuman or degrading treatment or punishment" under Article 16. When circulated in February 2006, his memo "caused senior figures in the Bush White House to go ballistic — they actually sought to collect and destroy all the copies," Horton reports.

As Zelikow so deftly summed up:

"The underlying absurdity of the administration's position can be summarized this way. Once you get to a substantive compliance analysis for 'cruel, inhuman and degrading' you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the OLC must argue, in effect, that the methods and conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail."

Horton thinks the Zelikow memo may provide important evidence in future criminal prosecutions arising out of the Bush-era torture programs, but I don't believe that. Just look at the reappearance, only a couple of weeks ago, of another round of debate over whether the EITs gave us important information, with former head of the CIA's clandestine service Jose Rodriguez arguing they did, and Sens. Diane Feinstein and Carl Levin claiming they did not.

This argument is not going to end any time soon. Rodriguez has written a book, "Hard Measures," that

soon will appear, and Sens. Feinstein and Levin rely on the nearly completed final report on the comprehensive review of the CIA's Detention and Interrogation Program to be issued by the Senate Select Committee on Intelligence. Committee staff has reviewed more than 6 million pages of records, and the final report is expected to exceed 5,000 pages. For now, the senators tell us that the statements by Rodriguez and others about the role of the CIA interrogation program in locating bin Laden are inconsistent with the CIA's own records.

While I am glad the Senate committee is so exhaustively researching the subject, its report will not determine whether we resume torturing alleged terrorists or not. For whether torture has ever produced important information is beside the point, I believe.

For me, it's not that torture never "works," but rather that the whole ball game is who we are, and what role we aspire to play in this world.

*Charles R. Church is an attorney practicing in Salisbury who for years has studied Guantanamo Bay detention, torture, habeas corpus and related issues.*

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