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The Long Pursuit of Accountability for Bush’s Torture Program

by Andy Worthington
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In June 2004, in the wake of the Abu Ghraib scandal, a notorious memo from August 2002 was leaked. It was written by John Yoo, a lawyer in the Justice Department’s Office of Legal Counsel and it claimed to redefine torture and to authorize its use on prisoners seized in the “war on terror.” I had no idea at the time that its influence would prove to be so long-lasting.

Ten years and four months since it was first issued, that memo — one of two issued on the same day that will forever be known as the “torture memos” — is still protecting the senior Bush administration officials who commissioned it (as well as Yoo and his boss, Jay S. Bybee, who signed it).

Those officials include George W. Bush, former Vice President Dick Cheney, and their senior lawyers, Alberto Gonzales and David Addington. None of them should be immune from prosecution, because torture is illegal under U.S. domestic law and is prohibited under the terms of the UN Convention Against Torture, which the United States, under Ronald Reagan, signed in 1988 and ratified in 1994. As Article 2.2 states, unequivocally, “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.”

However, the architects of the torture program didn't care, and still don't care, because for them the disgraceful memos written by Yoo were designed to be a "golden shield," a guarantee that, whatever they did, they were covered, because they had legal advice telling them that torture was not torture.

Barack Obama came into office promising to ban the use of torture. His administration released the second Yoo and Bybee "torture memo" and three later "torture memos" from 2005 as part of a court case in April 2009. That, however, was the end of the Obama administration's flirtation with accountability. In court, every avenue that lawyers have tried to open up has been aggressively shut down by the government, citing the "state secrets doctrine," another "golden shield" for torturers, which prohibits the discussion of anything the government doesn't want discussed, for spurious reasons of national security.

The only other opportunity to stop the rot came three years ago, when an internal DoJ ethics investigation concluded, after several years of diligent work, that Yoo and Bybee were guilty of "professional misconduct" when they wrote and signed the memos. That could have led to their being disbarred, which would have been inconvenient for a law professor at UC Berkeley (Yoo) and a judge in the Ninth Circuit Court of Appeals (Bybee). It also might well have set off ripples that would have led to Bush and Cheney and their lawyers.

However, at the last minute a long-time DoJ fixer, David Margolis, was allowed to override the report's conclusions, claiming that both men were guilty only of "poor judgment," which, he alleged, was understandable in the aftermath of the 9/11 attacks, and which carried no sanctions whatsoever.

Thwarted in the United States, those seeking accountability have had to seek it elsewhere: in Spain; in Poland, where one of the CIA's "black sites" was located; and in Italy, where 23 Americans — 22 CIA agents and an Air Force colonel — were convicted in November 2009, in a ruling that was upheld on appeal in September this year, of kidnapping an Egyptian cleric, Abu Omar, and rendering him to Egypt, where he was tortured.

The United States has refused to extradite any of the men and women convicted in Italy, but the ruling is a reminder that not everyone around the world believes in Yoo's and Bybee's "golden shield."

Moreover, although senior Bush administration officials — Bush and Cheney themselves and Donald Rumsfeld — have so far evaded accountability, their ability to travel the world freely has been hampered by their actions. In February 2011, for example, Bush called off a visit to Switzerland when he was notified that lawyers — at the New York-based Center for Constitutional Rights (CCR) and the Berlin-based European Center for Constitutional and Human Rights — had prepared a massive torture indictment that was to be presented to the Swiss government the moment he landed in the country.

The former president was told that foreign countries might take their responsibilities under the UN Convention Against Torture more seriously than America has and arrest him on the basis that his home country had failed to act on the clear evidence that he had authorized torture,

which he had actually boasted about in his memoir, *Decision Points*, published in November 2010.

Most recently, lawyers seeking accountability have tried pursuing Bush in Canada. Last September, prior to a visit by the former president, CCR and the Canadian Centre for International Justice (CCIJ) submitted a 69-page draft indictment to Attorney General Robert Nicholson, along with more than 4,000 pages of supporting material setting forth the case against Bush for torture.

When that was turned down, the lawyers launched a private prosecution in Provincial Court in Surrey, British Columbia, on behalf of four Guantánamo prisoners — Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani, and Murat Kurnaz (all released, with the exception of bin Attash) — on the day of Bush’s arrival in Canada.

That avenue also led nowhere because the attorney general of British Columbia swiftly intervened to shut down the prosecution. Undeterred, however, CCR and CCIJ last week tried a new approach on behalf of those four men who, as Katherine Gallagher of CCR explained in the *Guardian*, “are all survivors of the systematic torture program the Bush administration authorized and carried out in locations including Afghanistan, Iraq, Guantánamo, and numerous prisons and CIA ‘black sites’ around the world.”

“Between them,” she added, “they have been beaten; hung from walls or ceilings; deprived of sleep, food, and water; and subjected to freezing temperatures and other forms of torture and abuse while held in U.S. custody.”

The new approach taken by the lawyers was to file a complaint with the UN Committee Against Torture, in which the four men “are asking one question: how can the man responsible for ordering these heinous crimes openly enter a country that has pledged to prosecute all torturers regardless of their position and not face legal action?”

As Gallagher explained, “Canada should have investigated these crimes. The responsibility to do so is embedded in its domestic criminal code that explicitly authorizes the government to prosecute torture occurring outside Canadian borders. There is no reason it cannot apply to former heads of state, and indeed, the convention has been found to apply to such figures including Hissène Habré [the former president of Chad] and Augusto Pinochet.”

That is true, and it will be interesting to see how the UN Committee Against Torture responds. Probably the “golden shield” will not need to be invoked once more by the United States, as the Canadian government evidently has no wish to annoy its neighbor. Moreover, it has its own appalling track record when it comes to preserving human rights in the “war on terror,” as the cases of Omar Khadr in Guantánamo, and Mahar Arar and others who were tortured in Syria demonstrate. However, the submission is to be commended for reminding people that great crimes — committed by the most senior U.S. officials and their lawyers — still remain unpunished, and that that is a situation that ought to be considered a major disgrace rather than something to be brushed aside.

