

Torture, Aggressive War & Presidential Power: Thoughts on the Current Constitutional Crisisⁱ

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Abstract: This chapter analyses the intersection of torture, aggressive war and Presidential power in the 21st century, with particular attention to the current Constitutional crisis and related international humanitarian/human rights law, including treaties signed and ratified by the U.S., from the Geneva Conventions to the U.N. Convention Against Torture. America's embrace of a "liberal culture of torture" after 9/11 is examined, as well as the road leading from Bagram Air Base to Guantanamo to Abu Ghraib. Prospects for change are also analyzed, in light of revelations about the role of both the Democrats and Republicans in policies of torture, extraordinary rendition and aggressive war, past and present.

For Sister Dianna

"Why is there this inability to reckon with the moral and spiritual facts?"ⁱⁱ

"The abuse of detainees in U.S. custody cannot simply be attributed to the actions of 'a few bad apples' acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."ⁱⁱⁱ

2009 initially brought sharp relief to torture abolitionists in the U.S. and around the world, as President Obama, in his first week in office, signed three executive orders 1) closing Guantanamo in a year 2) creating a task force to examine policies towards prisoners caught up in the "war on terror" and 3) mandating lawful interrogations in compliance with the Army Field Manual and thus international agreements. All of these appeared initially to be major victories for the movement against torture and in favor of international humanitarian law and adherence to related international treaties. And yet, virtually as fast as these orders were signed, in a number of realms, the Obama administration began to backtrack radically on key areas affecting the question of torture and related war crimes. Thus, what appeared to be a clear difference between the candidates during the Presidential campaign, quickly morphed into an increasingly blurry similarity between Obama and what David Luban, Professor of Law and Philosophy at Georgetown Law School, calls the "liberal culture of torture" that now pervades life in the U.S. and those states allied with U.S. power.

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By now it is apparent that *even if* Guantanamo is shut down – a prospect made more difficult by the Democratic Congress’s recent stripping of funding for this - the Obama administration has made the following clear: prisoners caught up in the so-called war on terror will be subject to the same legal black hole as Guantanamo detainees at a host of prison sites across the globe. And at the time of this writing, in late July 2009, the Obama administration announced that it reserved the right to imprison at least non-US citizens for indefinite periods, *even if* they are acquitted by the military commissions set up under the Bush administration, legislatively approved by Congress through the infamous Military Commissions Act, now being revived under Obama. This act, widely referred to as the torture act, is considered by many as one of the worst pieces of legislation ever enacted by Congress.^{iv}

In July of 2009 it was also reported that the Obama administration declined requests from U.N. human rights investigators for private interviews with prisoners held at Guantanamo and for information on secret CIA prisons around the world. Around the same time it was revealed that among the Kafkaesque ideas being considered by the Obama administration is draft legislation to Congress that would change the Military Commissions Act and military law to include the possibility of letting prisoners facing the death penalty to plead guilty without a trial, with possible executions thereby allowing the U.S. to avoid further revelations of torture during trial proceedings. Existing law requires that those tried in such cases be proven guilty, even in instances where the defendants want to plead guilty; the change therefore would allow the U.S. to dispose of such prisoners through execution, without a trial.

One would have thought that the Congressional revelations from the Senate Armed Services Committee in the so-called Levin Report released in late April 2009 – much of the substance of which was known to varying extents many years ago - that the Bush administrations program of torture were motivated in part by the desire to induce false confessions linking Iraq and Al Qaeda, as well as to reveal non-existent WMD programs, so as to justify the invasion and occupation of Iraq, would have profoundly shocked the conscience of humanity, both around the world and in the U.S.. Some of the charts U.S. military personnel and the CIA used in this quest came from a 1957 Air Force study of Chinese Communist torture techniques which were used to extract false confessions from U.S. prisoners tortured during the Korean War.^v

One would have hoped that the scandalous revelations would at last lead to criminal prosecution of high officials for war crimes and other high crimes and misdemeanors as described in the U.S. Constitution, especially given that failure to prosecute such war crimes is itself a violation of international law. Instead, the U.S. press almost entirely ignored the shocking revelations, which implicated what David Luban calls the “torture lawyers of Washington” and other high officials directly in the Bush administration’s *war of aggression* in Iraq - approved by Congress - the “supreme international crime” for which people were hanged at Nuremberg.

Lies and related practices of secrecy and deception by the Bush administration in the run up to the Iraq War were crucially aided by these false confessions obtained

through torture, in violation of international and domestic law, not to mention the U.S. Constitution. Indeed, the torture *did work*, at least to an extent, for the Bush administration (though not as much as they had hoped), helping them to extract at least some false confessions that they then used to help ensure Congressional approval of the U.S. invasion of Iraq, despite it being clearly illegal under the U.N. Charter and international law.^{vi} Yet today, despite the documentation of these revelations by Congress, the Obama administration continues to shield the Executive Branch under a cloak of secrecy to prevent further revelations about the widespread use of torture.^{vii} Instead of protecting National Security, of course, such war crimes and crimes against humanity arguably constitute one of the greatest ongoing threats to U.S. and world security in recent memory.^{viii} These developments are also a clear sign that efforts to end U.S. practices of torture and the U.S. war in and occupation of Iraq are far from over.

Seemingly no sooner than the Obama administration had settled in, a headline in on February 6, 2009 - buried on p. A16 of the *New York Times* - noted, the incoming CIA director "Panetta is Open to Extreme Methods in Certain C.I.A. Cases." Furthermore, the article noted the administration's announcement that it will continue the practice of extraordinary rendition, whereby the U.S. captures suspects in the "war on terror" and sends them to third countries. In March 2009, President Obama's Justice Department then came to the defense of the preeminent "torture lawyer" of Washington, John Yoo, arguing that former "enemy combatants" have no right to sue U.S. government officials responsible for their torture in a court of law.^{ix} When the U.S. District Judge queried incredulously: "You're not saying that if high public officials commit clearly illegal acts, a citizen subject to those acts has no remedy in this court?," Justice Department attorney Mary Mason replied affirmatively, saying that unless Congress explicitly authorized such a lawsuit, former torture victims had no recourse to the courts.^x Soon thereafter, Richard Haas, the President of the leading Establishment think tank, the Council on Foreign Relations, in an article on the question of torture, argued against prosecution of officials, stating that "Criminalizing legitimate policy differences will paralyze the conduct of foreign policy."^{xi}

All of this indicates that we are far from ensuring that the new administration will comply with the U.N. Convention Against Torture, the Geneva Conventions and so forth. Now is thus a time not for complacency but instead for what Dr. Martin Luther King, Jr., called the "fierce urgency of now." We must, if we are to prevent the continuation of torture, look back to understand how torture, the cancer of democracy, metastasized in our body politic, critically and honestly examining what is to be done to ensure that minimally, such practices stop and never happen again.

Perhaps no one is more closely associated with advocacy for torture and the "torture lawyers" of Washington than former high level Bush Administration official, John Yoo, former Deputy Assistant Attorney General in the Office of Legal Counsel (OLC) in the Bush administration. John Yoo is of course most well known for his seminal role in writing the infamous "torture memos," such as the one from August 1, 2002, which he wrote with Jay Bybee, then head of the OLC. This memo redefined

torture as needing to be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The point here was to try and technically, through semantics, not violate the letter of the "Convention 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," the Torture Act. The memo goes on to state that to be considered torture, acts would have to be those "that are specifically intended to inflict, severe pain or suffering, whether mental or physical."

This language is an attempt to allow for the theoretical possibility that if someone was being tortured for information, then since the torture was not an end in itself but designed to garner actionable intelligence, then the actions might also not be considered torture. Once again we see the effort here to evade the law and the moral obligation it implies.^{xii} All of this is part and parcel of building what David Luban, rightly calls "a liberal culture of torture." Even Bybee's successor Jack Goldsmith, despite some strong stands against some of the OLC's most extreme policies, drafted a memo in March of 2004 on Article 49 of the Fourth Geneva Convention that radically departed from the actual thrust of the Treaty. Article 49 states clearly that:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Goldsmith's memo somehow interpreted this as *allowing* for transfers of "illegal aliens in Iraq," according to Luban, who goes on to note:

It's a little hard to believe that the drafters of Article 49 were oblivious to the Nazi's studied policy of using immigration law to facilitate the deportation of Jews to Auschwitz...Goldsmith's argument would have legalized the deportation of Anne Frank.^{xiii}

Although 9/11 and the declaration of an endless so-called war on terror thereafter was the context for the rapid proliferation of U.S. torture practices during this period – putting aside here for the moment the long-standing U.S. support for these practices historically - the U.S. attack on Afghanistan, as well as the invasion of Iraq and subsequent insurgency, sectarian violence and larger civil war there under the U.S. occupation, has also been instrumental in the spreading of torture, long considered "the cancer of democracy," as the title of one famous book about French torture in Algeria read. Once thought as repugnant in the modern world as slavery, with slaver traders, holders and torturers considered "*hostis humani generis*, an enemy of all mankind," torture today is actually widely practiced throughout the world "in more countries than ever-132 at the latest count, but who knows if there are not more..."^{xiv} Though the Convention against Torture (CAT) provides for no exceptions to the absolute prohibition against torture, neither war nor emergency, in May 2006, the legal adviser for the U.S. Department of State told the U.N. Committee Against Torture that the U.S. "has never

understood CAT to apply during armed conflicts."^{xv}

Yet the "torture memos" came out of a longer process of stripping away important human rights protections in the so-called "war on terror" and giving the President virtually untrammelled authority in foreign affairs, as evidenced in signing statements openly thwarting the will of the elected representatives of the people in the legislative branch and through a host of other actions.^{xvi} On September 25, 2001, almost immediately after the terrorist attacks of 9/11, Yoo penned a "Memorandum Opinion for Timothy Flanigan, The Deputy Counsel to the President, entitled: "The President's Constitutional Authority to Conduct Military Operations Against Terrorists & Nations Supporting Them." This memo argued the President has virtually unlimited power in the "war on terror" to make war upon any country or groups he deems necessary in response to September 11, 2001, or to prevent further attacks, without even consulting Congress, and to take all measures necessary to protect the country, even if such measures violate the law.^{xvii}

Soon thereafter in January 9, 2002 a memo written by John Yoo and Robert J. Delahunty went beyond the argument even of the Justice Department lawyers that the U.S. didn't have to comply with international law in dealing with prisoners in the "war on terrorism," by arguing that international law as a whole didn't apply to the U.S., including customary international law dealing with armed conflict. Effectively this meant that al Qaeda and the Taliban were beyond the protections of the Geneva Conventions, a position President Bush adopted rapidly thereafter. Other memos authored by Yoo and colleagues argued that prisoners at Guantanamo were beyond the reach of law, attempting to create in effect a legal black hole where no law applied and torture could be practiced.^{xviii} In fact, as has been pointed out, in Guantanamo, the Cuban iguana, protected under the U.S. Endangered Species Act, has more rights than do those humans imprisoned at the base, notwithstanding recent Supreme Court decisions.^{xix}

Inspired by the memos of Yoo and company, a January 25, 2002 Memorandum for the President by then White House Counsel and later Attorney General Alberto Gonzales has this to say about the benefits of overturning the Geneva Conventions:

Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).

That statute, enacted in 1996, prohibits the commission of a "war crime" by or against a U.S. person, including U.S. officials. "War crime" for these purposes is defined to include any grave breach of GPW or any violation of common Article 3 thereof (such as "outrages against personal dignity"). Some of these provisions apply (if the GPW applies) regardless of whether the individual being detained qualifies as a POW. Punishment for violations of Section 2441 include the death penalty.^{xx}

Subsequently the White House reversed course on February 7, 2002, arguing that Geneva applied to Afghanistan, but simultaneously denying "treatment required by the Geneva Conventions" under Common Article 3 and "more generally" to al Qaeda and the Taliban, determinations "which are war crimes," as international law professor Jordon Paust notes.^{xxi} It is important to note here too that the U.N. Convention against Torture

and the Geneva Conventions, the latter being the "foundation of contemporary international law," are, along with the U.N. Convention Against Torture, as Treaties signed and ratified by the U.S., under the Supremacy Clause of Article VI of the Constitution of the United States, the Supreme Law of the Land, on par with our own domestic laws and of course the Constitution itself.^{xxii}

Yoo and his colleagues argue that the power of the U.S. President and that of his subordinates are virtually unlimited. According to Yoo, these Presidential powers include the right to launch so-called pre-emptive military attacks and invasions of other countries such as Iraq without consulting Congress, the right to detain foreign nationals or U.S. citizens secretly and indefinitely without being charged or tried, and of course, the right to torture.^{xxiii} The essence of all of Yoo's arguments reminds one of exactly of those dangers the Founders feared; as James Madison noted in the Federalist Papers:

The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.^{xxiv}

Yoo's arguments fly in the face of the overwhelming preponderance of evidence and scholarship, most importantly perhaps, James Madison's famous April 2, 1798 letter to Jefferson:

The constitution supposed, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] Is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature].^{xxv}

The Bush administration, moreover, has asserted a host of new "rights," exercising its effective power through arresting foreign nationals and U.S. citizens and holding many of them without charges and without trial, at times secretly and without being able to consult a lawyer. In effect, for the first time in U.S. history, on a wide scale, people in the U.S. are being disappeared, a term heretofore associated with U.S. supported military regimes in Latin America. Dozens to up to a hundred or more persons have been killed in custody while being tortured. Moreover, at one time there were some 50,000 persons held at Guantanamo and dozens of sites in Afghanistan and Iraq, not to mention the network of CIA prisons around the world, some in the former Soviet empire in Eastern Europe, all places where torture tactics migrated too, after officials were clearly influenced by the OLC memos mentioned above and which according to Paust, are marred by being "completely erroneous" and engaging in "complete fabrication" and "clear falsehood" on various important points.^{xxvi}

To summarize then, in a series of internal and public memos, the Bush administration argued that it has the right to ignore the Geneva Conventions, to which the U.S. is both a signatory and party to (having both signed and ratified these treaties), or interpret them in such a way so as to deny protections to those it designates enemy combatants, including al Qaeda, the Taliban, and foreign fighters in Iraq, and to be able to interrogate them (read torture them) at will, in violation of both the Geneva

Conventions, the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, U.S. domestic law, including the War Crimes Act, the Torture Act, and the U.S. Constitution.^{xxvii} Yet, as legal scholar Michael Ramsey states, "The combination of the Supremacy Clause and the Take Care Clause seems to amount to a specific constitutional prohibition on such unauthorized executive suspensions of treaties that are the supreme law of the land."^{xxviii} The memos from the Bush administration and related evidence reveals clearly that the war crimes and crimes against humanity committed at Guantanamo, Abu Ghraib and elsewhere are in fact "crimes of obedience," as Herbert Kelman has argued.^{xxix}

Lieutenant Commander Charles Swift, a lawyer in the Navy's Judge Advocate General Corp's assigned to defend Guantanamo prisoner Salim Ahmed Hamdan, and who along with others successfully sued the President and the Secretary of Defense over the new military tribunals noted: "The whole purpose of setting up Guantanamo Bay is for torture. Why do this? Because you want to escape the rule of law."^{xxx} In a historic decision in 2006 in *Hamdan v. Rumsfeld*, the Supreme Court declared Bush's military tribunals illegal under U.S. and international law, including the Geneva Conventions and the Uniform Code of Military Justice, while reaffirming habeas corpus and federal court jurisdiction over the writ of habeas corpus. Yet soon thereafter under pressure from the Bush Administration, the then Republican-controlled Congress ran a legislative end-game around the Supreme Court by passing the Military Commissions Act, again stripping habeas corpus, judicial review and Geneva Protections for those captured in the "war on terror," while allowing for confessions obtained via "coercion." Furthermore, the Act immunized interrogators retroactively for any misdeeds and rejected the notion that the rape of a detainee would constitute torture.^{xxxi} In addition, as with John Yoo's previous memos at the OLC, the Act effectively redefines torture and cruel and unusual punishment down, "excluding serious pain or suffering not involving "significant loss or impairment of the function of a bodily member, organ, or mental faculty," or "extreme" physical pain, or "a substantial risk of death."^{xxxii}

Ironically, in 2007, on the same day that President Bush was quoted as saying that George Washington "believed that the freedoms we secured in our Revolution were not meant for America alone," the U.S. Court of Appeals, in *Boumediene v. Bush*, in a 2 to 1 decision, upheld the Military Commissions Act, stripping federal judges of the ability to review the imprisonment of Guantanamo prisoners, despite two Supreme Court rulings that federal statutes allowed courts to consider habeas corpus petitions challenging their imprisonment.^{xxxiii} Subsequently, on June 12, 2008, in a 5-4 vote, the U.S. Supreme Court reversed this decision, deciding in favor of the prisoners that they could in fact petition the federal courts for redress via habeas corpus, thus striking down the heart of the two legislative acts of Congress that sought to deny this fundamental right (inscribed too in the U.S. Constitution), the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006.^{xxxiv} Unfortunately, as noted above, military commissions are now being revived under President Obama, with the proviso that even acquittals will not stop the administration from detaining prisoners indefinitely.^{xxxv}

Today, it is necessary for intellectuals to do more to penetrate behind such subterfuge and to try and address the evidence before us, uncomfortable as that might be. For as Noam Chomsky wrote long ago, the responsibility of intellectuals is to tell the truth and expose lies. This brings us to the reality of the Iraq war, clearly an illegal war of aggression in violation of the U.N. Charter, which the U.S. has signed and ratified, as former U.N. Secretary General Kofi Annan stated, and hence a crime against the peace, one in which it is estimated that over one million Iraqis and thousands of Americans have died, and in which up to three million of refugees have been created.^{xxxvi} In the words of the Nuremberg Tribunal, a war of aggression is "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The long-term U.S. disdain for international humanitarian and human rights law as well as the U.N. Charter authorizing the use of force only in self-defense will surely have deleterious consequences for both the dignity of human beings and global security. In an editorial comment in the prestigious *American Journal of International Law* written *before* the invasion of Iraq, former State and Defense Department official Tom J. Farer noted that in terms of the Bush administration's embrace of preemption/preventive war:

...there is simply no cosmopolitan body of respectable legal opinion that could be invoked to support so broad a conception of self-defense. It is in fact reminiscent of the notion of strategic preemption that animated German policy in the early years of the twentieth century...Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths. The Israeli experience could well prove a microcosmic anticipation of the global system's future in this scenario. To sustain its occupation of desired land filled with people it did not desire as fellow citizens, Israel's government coped with increasing resistance by slipping from the normative restraints on a state's tools for safeguarding its security. Collective punishment, hostage taking, escalatory reprisals, riot control with live ammunition, assassinations, and torture combated... resistance....^{xxxvii}

In a more recent book, Farer noted, "All in all, the Administration's view of international law bears an ironical resemblance to views exhibited by Wilhelmine Germany around the turn of the twentieth century and thereafter in the practices of the Third Reich."^{xxxviii} Most recently, of course, the U.S. supported illegal Israeli assault on Gaza this last December-January 2008-2009, which has been planned by the Israeli military for some six months or more, killing and wounding thousands of persons, many of them children, demonstrated the continued use of apocalyptic violence by the U.S. and its close allies, replete with attacks on defenseless civilians. And the prospects for further violence seems likely, especially given Obama's sharp escalation of the U.S. war in Afghanistan, increasingly spilling over to Pakistan as well.^{xxxix}

As the Clinton administration of course worked aggressively and successfully to make sure that the crime of aggression was not included in the purview of the International Criminal Court after Kosovo, so it is not surprising that there still appears to be great sympathy for the Bush doctrine in the halls of power.^{xl} In a recent 2004 piece in

Foreign Affairs, called “A Duty to Prevent,” Lee Feinstein and Anne Marie-Slaughter (Secretary of State Clinton’s new head of Policy Planning) note: “...the biggest problem with the Bush preemption strategy may be that it does not go far enough... We propose... a collective “duty to prevent” nations run by rulers without internal checks on their power from acquiring or using WMD.”^{xii} One wonders whether it occurred to the authors that the Bush Administration comes to mind here given their articulation of a view of untrammelled Presidential power akin exactly to the divine right of Kings, not to mention Bush’s own nuclear threats, widely echoed by most of the Presidential contenders in the last election.^{xiii} This type of absolute power, that allows the President to “dispense” with or “suspend” laws of Parliament, and which includes the right to absolve subordinates from criminal responsibility for crimes ordered by the King and carried out by his subordinates, though once claimed as the prerogative of royalty through divine right by English Kings, in actuality “did not survive the English Civil War and the Glorious Revolution of 1688, which ended the Stuart Dynasty,” as least as a legal or Constitutional matter, and certainly is not to be found either in the U.S. Declaration of Independence or U.S. Constitution.^{xliii}

Yet today, when scholars analyze U.S. Presidential powers, their eyes are turning not towards English Kings but to the jurists of the Third Reich. As one of the nation’s leading legal scholars Sanford Levinson recently wrote, Carl "Schmitt...the brilliant Nazi theorist, may have much to tell us about the legal world within which we live...it seems plausible to suggest that the true *eminence grise* of the administration, particularly with regard to issues surrounding the possible propriety of torture, is Schmitt." Schmitt noted that the "Sovereign is he...who decides the state of the exception"; after considering the various persons detained without charge and given virtually no legal rights, Levinson notes that "Far more important, however, is the articulation, on behalf of the Bush administration, of a view of presidential authority that is all too close to the power that Schmitt was willing to accord to his own Fuhrer." As Noam Chomsky noted, “One rarely hears such words from the heart of the establishment.”^{xliv} And as Jordan Paust notes:

Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.^{xlv}

Paust furthermore notes that customary laws of war, as enshrined in the 1949 Geneva Conventions, to which the U.S. is a signatory and party too, apply:

Common Article 1 of the Geneva Conventions expressly requires that all of the signatories respect and ensure respect for the Conventions "in all circumstances." "It is widely recognized that Common Article 1, among other provisions, thereby assures that Geneva law is non-derogable, and that alleged necessity poses no exception unless a particular article allows derogations on the basis of necessity," which "are rare." "...Article 1 also provides that the duty to respect and to ensure respect for Geneva law is not based on reciprocal compliance by an enemy but rests upon a customary *obligation erga omnes* (an obligation owing by and to all humankind) as well as an express treaty-based obligation assumed by each signatory [and party]...as expressly mandated in Article 1 the rights and duties set forth in the Geneva Conventions must be observed "in all circumstances."^{xlvi}

According to the Geneva Conventions, combatants

"must at all times be humanely treated" and cannot be subjected to "acts of violence or intimidation"; those not considered POWs are still covered under Geneva Convention IV (the Civilian Convention) apply to all those "who, at a given moment and *in any manner whatsoever*, find themselves in enemy hands, whether or not they have violated the laws of war or are lawful combatants.^{xlvii} As the International Committee of the Red Cross, tasked with monitoring the Geneva Conventions notes: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention....There is no intermediate status; nobody in enemy hands falls outside the law...The United States has long accepted the view, shared by the international community, that Common Article 3 is part of customary international law, which means it articulates universally accepted norms of civilized behavior and therefore binds the military in all circumstances."^{xlviii}

As to the question of the extent of complicity in the U.S. for policies of torture, a recent series of stories originally appearing in the *Washington Post* revealed that a number of members of the U.S. Congress, including various Republicans and future Democratic House Speaker Nancy Pelosi, Jane Harman, who later became the head of the House Intelligence Committee, and Senator Jay Rockefeller, now head of the Senate Intelligence Committee (and all Democrats), were briefed on the CIA torture program as early as 2002, replete with a "virtual tour of the CIA's overseas detention sites and the... techniques...devised [including] waterboarding, a practice later...condemned as torture by Democrats and some Republicans on Capital Hill.

But on that day, no objections were raised. Instead, at least two lawmakers in the room asked the CIA to push harder, two U.S. officials said.

'The briefer was specifically asked if the methods were tough enough,' said a U.S. official who witnessed the exchange....[Porter Goss, Chair of the House Intelligence Committee from 1997-2004 and then CIA Director from 2004 to 2006], said: 'the reaction in the room was not just approval but encouragement.'^{xlix} These revelations were the first confirmation of earlier statements by the Bush Administration that Congressional leaders had in fact been briefed on such programs, though controversy rages about the extent of their knowledge and approval of such techniques. In this regard, Nazi high official Albert Speer's belated acknowledgement of the moral imperative of officials to overcome their willful ignorance of crimes against the peace and against humanity and act accordingly seems especially pertinent here when considering the responsibility of U.S. officials, elected representatives and the U.S. public in what is a criminal war and with regard to related war crimes.¹ All of this raises the question asked long ago by Noam Chomsky's (1969: 16-17) *American Powers & the New Mandarins*, about the need for the denazification of U.S. society.

What makes this story even more extraordinary is that even when the Abu Ghraib torture scandal was revealed publicly in the Spring of 2004, not one of these Congressional leaders considered their oath to defend and protect the Constitution of the U.S., including those international human rights treaties such as the U.N. Convention

against Torture that are the "Supreme Law of the Land," having been signed and ratified by the U.S., more important and overriding than their promise of secrecy to the Executive Branch.ⁱⁱ Straight through the Abu Ghraib revelations, these elected representatives and government officials said nothing publicly, though truthful revelations at such times could have led to the truly independent Congressional investigations necessary to reveal the responsibility of U.S. officials for these crimes of obedience.

How or whether we confront these questions may well determine whether there is a world for us to live in for the 21st century, or at least one in which we might feel good about our children inhabiting. If the first order of business for the movement and the new Congress and administration is to end the wars in Iraq and Afghanistan (which provides the context for ongoing torture operations) – and end Guantanamo type imprisonment - other important initiatives related to this would be to overturn the Military Commissions Act/Torture Act, restore habeas corpus and end the abominable practice of torture, heinous not only in its immediate effects but its lifelong consequences as manifested in complex post-traumatic stress disorder (CPTSD).ⁱⁱⁱ In order to ensure that these practices are stopped and never resorted to again, we must make sure that we return to our Constitutional system of government with three roughly co-equal branches. A step forward in this regard would be to appoint a Special Prosecutor, with subpoena power, to investigate and prosecute officials for willful violations of the U.S. Constitution and international law. In so doing, we could become that beacon of light and source of hope, carrying through on that promissory note to torture survivors everywhere, that we shall stand with you and beside you, to change the world, to make it safe once again for you and your children to live in. Yet this will require hard work and arduous effort, and the willingness to be honest about who we are, who we want to be, and what we have become. Let us begin.

ⁱ Thanks to Noam Chomsky, Marjorie Cohn, Tom Dobrzeniecki, Daniel Ellsberg, David Luban, Christina Shaheen and Jordan Paust for assistance. I of course take full responsibility for the content herein. A shorter and substantially revised version of this chapter will appear in Marjorie Cohn, ed., *The United States & Torture*, New York University Press, 2010.

ⁱⁱ Bishop Bell, quoted in Andrew Chandler, "The Church of England & the Obliteration Bombing of Germany in the Second World War," *English Historical Review*, Volume 108, No. 429, October 1993, p. 939.

ⁱⁱⁱ Quote from "Inquiry into the Treatment of Detainees in US Custody," Report of the Committee on Armed Services, US Senate, November 20, 2008, p. xii, also known as the Levin Report, which was only released however in late April 2009 http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf The report came out right around the time that the Obama administration released some new torture memos from the Bush White House, which mostly added to our knowledge by revealing the depths of the detailed sadistic practices approved by Bush's torture lawyers. Scott Horton starts off a piece on the question of "bad apples" and command responsibility at Nuremberg and beyond as follows:

'This so-called ill treatment and torture in detention centers, stories of which were spread everywhere among the people, and later by the prisoners who were freed ... were excesses committed by individual prison guards, their deputies, and men who laid violent hands on the detainees.' Most people who hear this quote today assume it was uttered by a senior officer of the Bush administration. Instead, it comes from one of history's greatest mass murderers, Rudolf Hoess, the SS commandant at Auschwitz.

As Horton notes, U.S. prosecutors still held the German high command accountable for what were clearly outcomes of their earlier policy decisions, under the doctrine of "command responsibility," even in the absence of proof that the actual crimes took place with their knowledge. Scott Horton, *Los Angeles Times*, "A Nuremberg Lesson," 1/21/05 <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/38/8452>

^{iv} On the Military Commission Act/Torture Law, see details of the campaign for its repeal <http://torturelaw.org/index.php?sn=277&subject=12>

^v Scott Shane, "China Inspired Interrogations at Guantanamo: Communist Techniques; Military Used '57 Study of Steps that led to False Confessions," *New York Times*, Wednesday, July 2, 2008, pp. A1, 14.

^{vi} See Michael Isikoff & David Corn, *Hubris* (New York: Crown Books, 2007).

^{vii} See the "Inquiry into the Treatment of Detainees in US Custody," Report of the Committee on Armed Services, US Senate, November 20, 2008, also known as the Levin Report, which was only released however in late April 2009 http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf

^{viii} See for example, Laura K. Donohue, *The Costs of Counterterrorism: Power, Politics, & Liberty*, Cambridge University Press, 2008. See also Noam Chomsky, "The Torture Memos," May 24, 2009 <http://www.chomsky.info/articles/20090521.htm>

^{ix} The term "enemy combatant" is a totally meaningless phrase that has no legal standing in international law; like the prisons at Guantanamo, it was invented by the Bush Administration for the sole purpose of evading the law; in this sense it is exactly that type of "categorical inequality," that sociologist Charles Tilly (1998, University of California Press) referred to in his *Durable Inequality* (see also Honigsberg, 2009: 15-22).

^x *San Francisco Chronicle*, "U.S. Lawyers Defend Bush Torture Memo Writer," Saturday, March 7, 2009, p. A7.

^{xi} Richard N. Haas, "The Interrogation Memos & the Law," *Wall Street Journal*, Friday, May 1, 2009, p. A17.

^{xiii} Office of the Assistant Attorney General, Jay S. Bybee, Assistant Attorney General; Memorandum for Alberto R. Gonzales Counsel to the President. This document, part of an effort to, in the words of David Luban, make "the world safe for torturers," was primarily drafted by John Yoo, who was the principal author (see Luban, "Liberalism, Torture, & the Ticking Bomb," in Karen J. Greenberg, ed., *The Torture Debate in America*, Cambridge University Press, 2006, pp. 55 and 74, where the document is reprinted). The quotes and related references are from pages 317 and 344. See also Luban, 2006, pp. 59-62 on the question of "specific intent" discussed in the Yoo-Bybee memo. Luban, in a scholarly tour de force, completely dismantles the liberal argument for torture in the ticking bomb scenario; while recognizing this as a potentially real if relatively unlikely scenario, Luban systematically critiques it as "an intellectual fraud," deflecting attention as it does from torture as "a world of *practices*...." Luban (2006: 47) asks, if our motivations are so noble and essential for saving lives: "Should universities create an undergraduate major in torture?"

Luban (2006: 48), discussing the Dirty War in Argentina, notes that

Escalation is the rule, not the aberration...[yet]...The liberal ideology of torture presupposes a torturer impelled by the desire to stop a looming catastrophe, not by cruelty.

Luban's (2006: 51) arresting conclusion: "Abu Ghraib is the fully predictable image of what a torture culture looks like."

For a recent detailed but ultimately quite problematic assessment (from the vantage point of morality and a human rights perspective) of these matters, see Mark Osiel, *The End of Reciprocity: Terror, Torture & the Law of War*, Cambridge University Press, 2009; an important critique “An Eye for An Eye: Counterterrorism, Reciprocity, & Human Rights,” by Seumas Miller appeared in *Harvard International Review*, Spring 2009, Volume 31, #1, pp. 84-86 <http://hir.harvard.edu/index.php?page=article&id=1885>; see also the important discussion of these issues at <http://opiniojuris.org/2009/05/02/marc-osiel-the-end-of-reciprocity/>, especially by Charles Gittings, one of the founders of the Project to Enforce the Geneva Conventions <http://www.pegc.us/> See also the important work of Theodor Meron – on Shakespeare, the laws of war and the evolution of customary international law - and the recent work of Giorgio Agamben. On the importance of cultural messages from television, see Jane Mayer, "Whatever it Takes: The Politics of the Man Behind 24," *New Yorker*, 2/12/07. See also the brilliant book by Marguerite Feitlowitz, *A Lexicon of Terror: Argentina & the Legacies of Torture*, New York: Oxford University Press, 1998. For a religious Catholic perspective, see John Perry, *Torture: Religious Ethics & National Security*, New York: Maryknoll, Orbis Books, 2005. Thanks to Robert Ellsberg for sending this to me. http://www.newyorker.com/printables/fact/070219fa_fact_mayer See also Martha Minow, “Living Up to the Rules: When Should Soldiers (and Others?) Disobey Orders?”, Montreal, 2006 <http://www.learnquestion.com/resources/database/archives/000907.html> and subsequently revised and reprinted.

In a personal conversation Dan Ellsberg pointed out to me that the importance of the prohibition against torture is not only that it protect those guilty of crimes from torture, but that, like the Miranda warning, it also protects the innocent from torture and coercive interrogation, as expressed in part in the fifth amendment of the U.S. Constitution, which states that “No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....” As Ellsberg expresses it:

In particular, there is concern for banning, absolutely or to a maximum practical degree, “torture,” and this for a number of reasons. First, it changes the relation of the subject to the state, and even the relation to the state of all citizens who know of its potential use...it not only causes pain and suffering to its victims, but changes their relation to society and humanity as a whole, and that permanently; the sense of self and basic trust in other humans is permanently altered...

Whereas human empathy is generally very limited with respect to perpetrators of heinous crimes or terrorist acts and to the known possessors of extremely guilty knowledge about such crimes, the main purpose of a ban on torture is not to protect such persons (as advocates of torture postulate) but to protect the mass of “innocent,” people who are potential subjects of investigation or suspects who are not, in fact, possessed of guilty knowledge or indeed...any knowledge critical to an investigation.

To make them subject to torture is vastly to increase the number of actual victims of torture, most of whom know nothing that is important to increasing the safety of others or the population as a whole. It is to make a large part of the population if not all of it *insecure* in the most intimate and consequential sense...A comparable phenomenon occurred with the acceptance of strategic bombing in World War II and after, making non-combatants legitimate and actual targets of direct attack. The number of potential and actual victims in wartime was multiplied. Above all, with the extension of the same principle to the planned use of thermonuclear weapons, the potential victims have come to encompass the populations of continents, hemispheres, and all life on earth. [Dan Ellsberg, Unpublished paper, March 12, 2007; see also Ellsberg’s ongoing blog revealing the heretofore hidden history of the nuclear age on <http://www.ellsberg.net/>].

See also Elaine Scarry, *The Body in Pain*, New York: Oxford University Press, 2007.

^{xiii} The quotes from Luban are all from his *Legal Ethics & Human Dignity*, 2007, pp. 185-186. This chapter includes an extended discussion of Goldsmith’s tenure at the OLC. See also Tom Reifer, “Review of David Luban, *Legal Ethics & Human Dignity*, Cambridge University Press, 2007, *Law & Society Review*, Volume 43, Number 2, June 2009, pp. 449-451.

^{xiv} Ariel Dorfman, “Foreword, *The Tyranny of Terror: Is Torture Inevitable in Our Century & Beyond?*,” in Sanford Levinson, ed., *Torture*, Oxford University Press, 2006, p. 5. For a recent study of French torture in Algeria, relating it to empires in decline, see Marnia Lazreg, *Torture & the Twilight of Empire: From Algiers to Baghdad*, Princeton University Press, 2008. See the recent study, Darius Rejali, *Torture & Democracy*, Princeton University Press, 2007.

^{xv} See David Luban, “The Torture Lawyers of Washington,” Chapter 6 of David Luban, *Legal Ethics & Human Dignity*, Cambridge University Press, 2008, p. 167.

^{xvi} Charlie Savage, *Takeover: The Return of the Imperial Presidency & the Subversion of American Democracy*, Back Bay Books, 2008. See also Tom Reifer, “September 11, Terrorism & the Globalization of Human Rights,” *Transnational Institute News*, September 2008 http://www.tni.org/detail_page.phtml?act_id=18652

^{xvii} Reprinted in Karen J. Greenberg & Joshua L. Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), pp. 3-24. See also Glenn Greenwald, *How Would a Patriot Act? Defending American Values from*

a President Run Amok, (San Francisco: Working Assets, 2006).

^{xviii} In an analysis by Seton Hall University Law School (2006) it was found that only 5% of Guantanamo's prisoners had been captured by the U.S.; the remainder were captured by the Northern Alliance, Afghan warlords and Pakistani intelligence, who many times sold them for bounty. A mere 8% were "even alleged to be al-Qaeda fighters," some 55%, or 280 persons, weren't alleged to have engaged in hostile activities against the U.S., with the remaining 45% accused of things like fleeing U.S. forces (quoted in Joseph Margulies, *Guantanamo & the Abuse of Presidential Power* (2006: Simon & Schuster, 168). Mark Denbeaux, "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data," February 6, 2006 <http://www.google.com/search?hl=en&ie=ISO-8859-1&q=Seton+Hall+report+on+Guantanamo>

An additional key point here, as Piero Gleijeses notes, is that "with our without its gulag," Guantanamo, "is a monument to US arrogance" ("Cuba or the Base," *London Review of Books*, March 26, 2009 <http://www.lrb.co.uk/v31/n06/glei01.html>). On the history of U.S. relations with Cuba, see most recently, Lars Schoultz, *That Infernal Little Cuban Republic*, University of North Carolina Press, 2009.

^{xix} See Peter Jan Honigsberg, *Our Nation Unhinged*, University of California Press, 2009, with a foreword by Edwin Chemerinsky. See also www.cubaniguana.net

^{xx} Alberto R. Gonzales, "Memorandum for the President," January 25, 2002, pp. 83-85. Reproduced in Mark Danner, *Torture & Truth: America, Abu Ghraib, & the War on Terror*, New York Review of Books, 2004.

^{xxi} Memorandum of President George W. Bush, February 7, 2002, in FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (August 2004), Appendix C, available at <http://wid.ap.org/documents/iraq/040824finalreport.pdf>, pp. 33-34; cited in Jordan J. Paust, "Executive Plans & Authorizations to Violate International Law Concerning Treatment & Interrogation of Detainees," *Columbia Journal of Transnational Law*, Volume 43, #3, 2005, pp. 827-828.

^{xxii} Noam Chomsky, *Failed States*, New York: Metropolitan Books, 2006, p. 40.

^{xxiii} See for example, John Yoo, *The Powers of War & Peace: The Constitution & Foreign Affairs after 9/11*, University of Chicago Press, 2005. See also Jide Nzelibe and John Yoo, in "Rational War & Constitutional Design," *Yale Law Journal*, Volume 115, Number 9, September 2006, pp. 2512-2541.

^{xxiv} *The Federalist Papers*, No. 47, 324, Jacob E. Cooke, ed., 1961; quoted in Erwin Chemerinsky, "Enemy Combatants & Separation of Powers," in *Journal of National Security Law & Policy*, Volume 1, Number 1, p. 80.

^{xxv} Letter from James Madison to Thomas Jefferson, 2, April, 1798, Writings, 6: 312-14, "The Founder's Constitution", edited by Philip B. Kurlan & Ralph Lerner, Article 1, Section 8, Clause II, Document 8, (http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html). <http://www.lewrockwell.com/woods/woods45.html>

^{xxvi} On the number of prisoners held, see FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (August 2004), Appendix C, available at <http://wid.ap.org/documents/iraq/040824finalreport.pdf>

David Luban (2007: 203) makes the point that "in modern practice" the "opinions" of the OLC "bind the executive branch. That makes them quasi-judicial in character."

^{xxvii} For an analysis demonstrating that the U.S. President is legally bound by the Geneva Conventions, see the article by Derek Jinks & David Sloss, "Is the President Bound By the Geneva Conventions?" *Cornell Law Review*, November 2004, Volume 90, #97, pp. 96-202 <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Jinks-Vol-90-1-97.pdf>

^{xxviii} Michael D. Ramsey, "Torturing Executive Power," *The Georgetown Law Journal*, Volume 93, #4, April 2005, pp. 1213-1252, especially p. 1234; see also 1240 and p. 1252. See also Michael D. Ramsey, *The Constitution's Text in Foreign Affairs*, Harvard University Press, 2007.

^{xxix} "The Policy Context of Torture: A Social-Psychological Analysis," *International Review of the Red Cross*, Volume 87, Number 857, March 2005, pp. 123-134 <http://www.icrc.org/Web/eng/siteeng0.nsf/html/review-857-p123>. See also the pathbreaking work of Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Towards a Social Psychology of Authority & Responsibility*, Yale University Press, New Haven & London, 1989.

^{xxx} January 2007, cited in Marie Brenner, "Taking on Guantanamo," *Vanity Fair*, March 2007, pp. 328-341 <http://www.vanityfair.com/politics/features/2007/03/guantanamo200703?printable=true¤tPage=all>. See also Jonathan Mahler, *The Challenge*, New York: Farrar, Straus, & Giroux, 2009. On the Military Commissions Act, see Howard Ball, *Bush, the Detainees, & the Constitution: The Battle Over Presidential Power in the War on Terror*, Ch. 7, "Bush Trumps the Supreme Court: The 2006 Military Commissions Act," University Press of Kansas, 2007, pp. 175-186.

In 2006, the Supreme Court, in *Hamdan v. Rumsfeld*, rejected President's Bush's decision to strip Geneva protections from al Qaeda and the Taliban, holding that Geneva's common article 3 applies in the "war on terror," even to al Qaeda, and "forbids torture" (see Luban, 2007: 204-205). For the Supreme Court decision, see <http://www.google.com/search?hl=en&ie=ISO-8859-1&q=Supreme+Court+decision%2C+Hamdan+v.+Rumsfeld> See also *Hamdan v. Rumsfeld*, 2006 <http://www.law.cornell.edu/supct/html/05-184.ZS.html> See also Neal Kumar Katyal,

"The Supreme Court, 2005 Term, Comment: Hamdan v. Rumsfeld: The Legal Academy Goes to Practice," 120 *Harvard Law Review* 65, 2006, pp. 65-123 <http://www.google.com/search?hl=en&ie=ISO-8859-1&q=Neal+Katyal%2C+The+Supreme+Court%2C+2005+term%3A++Hamdan&btnG=Google+Search>

^{xxx} Howard Ball, *Bush, the Detainees, & the Constitution: The Battle Over Presidential Power in the War on Terror*, University Press of Kansas, 2007, pp. 180, 184. Jordan Paust, *Beyond the Law*, Cambridge University Press, 2007, pp. 120-127.

^{xxxii} Jordan Paust, *Beyond the Law*, Cambridge University Press, 2007, p. 96.

^{xxxiii} Bush, cited in Sheryl Gay Stolberg, "Defending Nation's Latest War, Bush Recalls its First," *New York Times*, February 20, 2007, p. A16. See also *New York Times*, Stephen Labaton, "Court Endorses Curbs on Appeal by U.S. Detainees: Ruling on Habeas Corpus: Law Stripping Judges of Power on Guantanamo Cases is Upheld, 2-1," February 21, 2007, pp. A1, 17. See the decision and the dissent <http://www.google.com/search?hl=en&ie=ISO-8859-1&q=Boumediene+v.+Bush>

^{xxxiv} See Karen J. Greenberg & Joshua L. Dratel, with Jeffrey S. Grossman, *The Enemy Combatant Papers: American Justice, the Courts, & the War on Terror*, Cambridge University Press, 2008, especially pp. 997-1008. See also Karen Greenberg, *The Least Worst Place: Guantanamo's First 100 Days*, Oxford University Press, 2009.

^{xxxv} The Military Commissions Act of 2006

defined "unlawful enemy combatants" broadly, prohibited detainees from arguing for Geneva Convention rights, retroactively decriminalized humiliating and degrading treatment, declared that federal courts could not use international law to interpret war crimes provisions, vested interpretive authority over Geneva in the President, allowed coerced evidence to be admitted" and more.

This bill... was clearly inspired by the style of legal thinking perfected by the torture lawyers. In effect, the torture lawyers helped to define a "new normal" without which the Military Commissions Act would not exist" [(Luban, 2007: 204.)

^{xxxvi} See the most recent study from Opinion Research Business http://www.opinion.co.uk/Newsroom_details.aspx?NewsId=88. See also Roy Gutman, et al., *Crimes of War*, 2nd revised edition, New York: W.W. Norton & Co., 2007.

^{xxxvii} Tom J. Farer, "Editorial comment: Beyond the Charter Frame: Unilateralism or Condominium?," *American Journal of International Law*, April 2002, Volume 96, #2, p. 359-364 (see also the interview with Farer in *Harper's Magazine*, April 2008 <http://www.harpers.org/archive/2008/04/hbc-90002880>

For a review of the question of human rights in Israel and the Occupied Territories, replete with an analysis of Israel's Abu Ghraib and its continuation of torture right up to the present, despite the decisions of its high court (which had formally sanctioned torture), see Norman G. Finkelstein, *Beyond Chutzpah: On the Misuse of Anti-Semitism & the Abuse of History*, University of California Press, 2008. See also the Public Committee Against Torture in Israel, *Back to a Routine of Torture: Torture & Ill-Treatment of Palestinian Detainees During Arrest Detention & Interrogation, September 2001-April 2003*, Jerusalem, April 2003 <http://www.stoptorture.org.il/files/back%20to%20routine.pdf>

^{xxxviii} Tom Farer, *Confronting Global Terrorism & American Neo-Conservatism: The Framework of a Liberal Grand Strategy*, Oxford University Press, 2008, p. 63.

^{xxxix} See the new study by Selig Harrison, *Pakistan: The State of the Union*, Center for International Policy, April 2009 http://www.ciponline.org/asia/reports/pakistan_the_state_of_the_union.pdf

^{xl} See Michael Mandel, *How America Gets Away With Murder: Illegal Wars, Collateral Damage & Crimes Against Humanity*, London, Pluto, 2004, and Noam Chomsky's *A New Generation Draws the Line: Kosovo, East Timor & the Standards of the West*, London: Verso, 2000.

^{xli} Lee Feinstein & Anne-Marie Slaughter, "A Duty to Prevent," *Foreign Affairs*, January/February 2004 <http://www.foreignaffairs.org/20040101faessay83113/lee-feinstein-anne-marie-slaughter/a-duty-to-prevent.html?mode=print>

^{xlii} See Dan Ellsberg, "Roots of the Upcoming Nuclear Crisis, or Dr. Strangelove Lives: How Those Who Do Not Love the Bomb Should Learn to Start Worrying," forthcoming, and www.ellsberg.net

^{xliii} Frederick A. O. Schwarz, Jr. & Aziz Z. Huq, *Unchecked & Unbalanced: Presidential Power in a Time of Terror*, New York: New Press, 2007, p. 15; see also Ch. 7-8.

^{xliv} Sanford Levinson, "Torture in Iraq & the Rule of Law in America," *Daedalus: Journal of the American Academy of Arts & Sciences*, Summer 2004, pp. 5-9. Originally cited in Noam Chomsky, "Imperial Presidency," *Canadian Dimension*, January/February 2005, Volume 39, #1 <http://www.chomsky.info/articles/20041217.htm> and later in his *Failed States*, 2006: 41.

^{xlv} Jordan J. Paust, "Executive Plans & Authorizations to Violate International Law Concerning Treatment & Interrogation of Detainees," *Columbia Journal of Transnational Law*, Volume 43, #3, 2005, p. 811, cited in Noam Chomsky, *Failed States*, 2006: 41-42. See also the work of Scott Horton in *The Torture Debate* on the role of Nazi lawyers in Hitler's aggression.

^{xlvi} Jordan J. Paust, "Executive Plans & Authorizations to Violate International Law Concerning Treatment & Interrogation of Detainees," *Columbia Journal of Transnational Law*, Volume 43, #3, 2005, pp. 814-816.

^{xlvii} Joseph Margulies, *Guantanamo & the Abuse of Presidential Power*, 2006: Simon & Schuster, p. 54.

^{xlviii} *Ibid.*, p. 55. On the comprehensive coverage under Geneva, see also David Sloss, "Availability of U.S. Courts to Detainees at Guantanamo Bay Naval Base-Reach of Habeas Corpus-Executive Power in War on Terror," *American Journal of International Law*, October 2004, Volume 98, Number 4, pp. 788-798.

^{xlix} *Washington Post* "CIA Briefed Lawmakers on Waterboard Tactic in '02," Joby Warrick & Dan Eggen, December 9, 2007, p. A1 on <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/08/AR2007120801664.html>. Jane Harman and Nancy Pelosi have stated that they registered objections or at least raised questions about the waterboarding, with Harman asking in a letter if the President had approved such techniques. Pelosi has further alleged being misled by the CIA, stating that she was not told that these techniques were then being used, only that they were in the armory of possible techniques. According to a top aide, though, Pelosi learned that torture techniques such as waterboarding were being used as early as 2003. See also *Washington Post*, "Top Pelosi Aide Learned of Waterboarding in 2003," May 9, 2009 <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/08/AR2009050803967.html>

ⁱ On Speer's relevance for U.S. officials, see Dan Ellsberg, "The Responsibility of Officials in a Criminal War," in *Papers on the War* (New York: Random House, 1972). See also Gitta Sereny, *Albert Speer: His Battle With Truth*, New York: Vintage, 1995.

ⁱⁱ See Daniel Ellsberg, "Are Secrecy Oaths a License to Lie," *Harvard International Review*, Summer 2004, Volume XXVI, No. 2 <http://hir.harvard.edu/articles/1235/> See also the new documentary film currently screening at various locations (including in Santa Monica, California and New York city, *The Most Dangerous Man in America: Daniel Ellsberg and the Pentagon Papers*.

ⁱⁱⁱ See the brilliant and fundamental work of Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence-From Domestic Abuse to Political Terror*, New York: Basic Books, 1997. See also *Indiana Law Journal*, "Symposium: War, Terrorism, & Torture: Limits on Presidential Power in the 21st Century," *Fall 2006, Volume 81, #4*. See also Pat Barker's magnificent *Regeneration* series, about the life and treatment of war hero turned anti-war activist in World War I, including his treatment for CPTSD, the decorated British officer Siegfried Sassoon.