‘New Torture Files’ - Declassified Memos Detail Roles of Bush White House and DOJ Officials Who Conspired to Approve Torture

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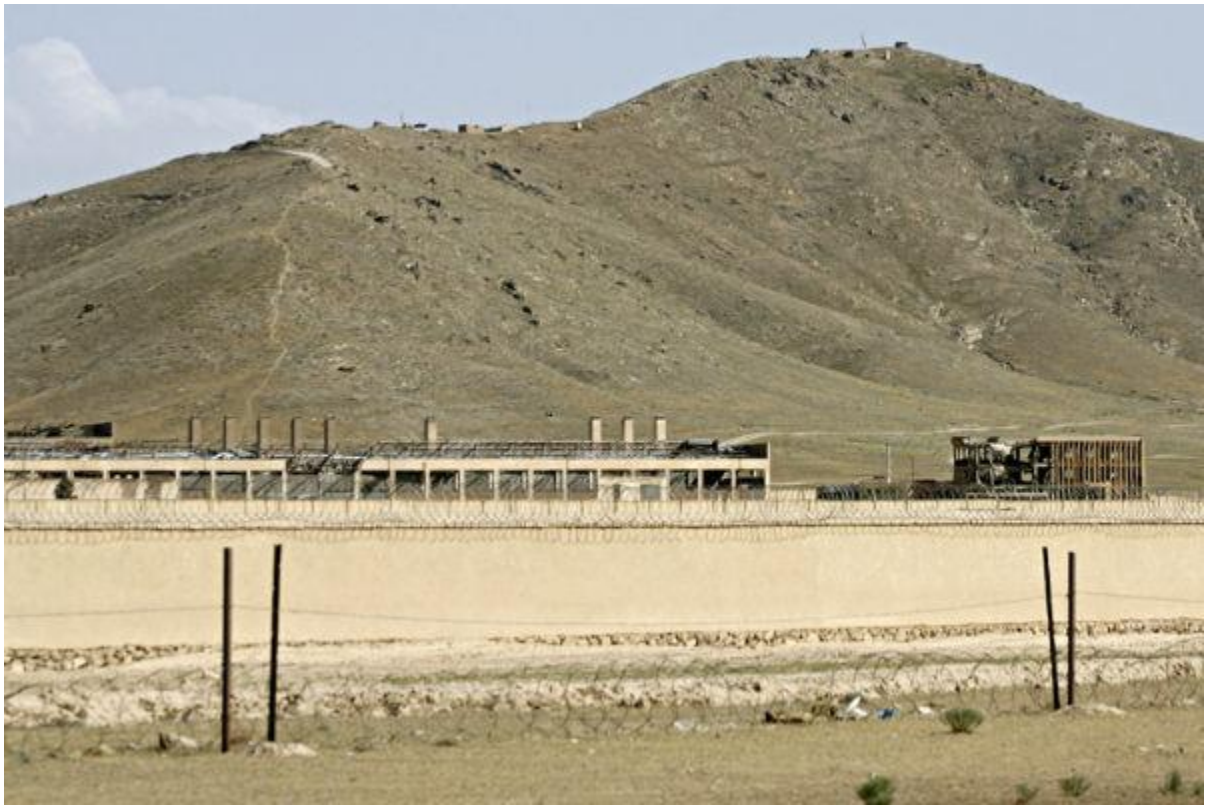

An alleged CIA prison near Kabul, Afghanistan. Image credit: Trevor Paglen via Wikimedia Commons.

Last week, I wrote, both here and in the New York Times, that after reading all 828 pages of the released SSCI report on the CIA’s Detention and Interrogation program and responses to it from the CIA and Republican committee members, I had concluded that the report’s focus on whether the techniques used by the CIA were “effective” was misguided, and essentially gave a pass to too many culpable actors beyond the CIA, especially in the White House, the Cabinet, and the Justice Department.

This week, in the name of correcting the record, and thanks, ironically, to the CIA’s own effort to defend itself, I want to place blame where it rightly belongs – with the CIA, to be sure, but also with specific high-level officials and lawyers outside the agency who were directly involved in reviewing the CIA’s tactics, and either said yes or failed to say no. It’s now been brought to

my attention that lost in all the focus on the irresolvable "efficacy" debate were a series of newly declassified documents that fill out the picture of joint responsibility that is the real story of our descent into torture. These new documents, not addressed in any other reporting on the subject of which I am aware, name names, describe specific meetings, and demonstrate that many well-respected lawyers and statesmen said yes when they should have said no. They provide an important – if likely uncomfortable for some – addition to the narrative, and show just how widespread the blame for the torture program really goes.

The SSCI deserves credit for prompting disclosure of the new documents, which were declassified by the CIA in response to the report's allegations. Had it not been for the SSCI investigation, it is likely that these documents would remain classified to this day. But as is all too often the case, when the CIA saw that it might be in its own interest to disclose what it previously said could not be revealed without endangering national security, it declassified. Feeling the heat of the SSCI inquiry, the CIA chose to declassify a series of memoranda and communications that reflect and record multiple high-level meetings at the White House and the DOJ involving the torture program. The CIA's interest in declassification is clear. It wants to show that it repeatedly sought – and *received* – legal assurances from higher-ups that its actions were legal and authorized. But as is so often the case when co-conspirators try to deflect blame by pointing the finger at others, the CIA's newly declassified documents don't so much exculpate it as inculpate others.

The new documents are reproduced at a mysterious website dedicated to defending the CIA, with a name only a security consultant could have dreamt up, "ciasavedlives.com." They recount in detail multiple meetings and communications, in which White House and DOJ officials repeatedly gave the CIA a green light to torture. Some parts of the story have been told before, in particular by the DOJ Office of Professional Responsibility, which recommended in 2009 that **Jay Bybee** and **John Yoo**, the OLC lawyers who wrote the first memos authorizing the CIA program, be referred to their respective bars for disciplinary proceedings. (That recommendation was overridden in 2010 by a senior Justice Department official, David Margolis). The new documents, however, fill in the gaps with a great deal of important and damning detail, and show that responsibility extends beyond **Bybee** and **Yoo** to a host of other top lawyers and government officials.

The overall picture that the new documents paint is not of a rogue agency, but of a rogue administration. Yes, the CIA affirmatively proposed to use patently illegal tactics — waterboarding, sleep deprivation, physical assault, and painful stress positions. But at every turn, senior officials and lawyers in the White House and the Department of Justice reassured the agency that it could — and should — go forward. The documents reveal an agency that is extremely sensitive to whether the program is legally authorized and approved by higher-ups — no doubt because it understood that what it was doing was at a minimum controversial, and very possibly illegal. The documents show that the CIA repeatedly raised questions along these lines, and even suspended the program when the OLC was temporarily unwilling to say, without further review, whether the techniques would "shock the conscience" in violation of the Fifth Amendment. But at every point where the White House and the DOJ could have and should have said no to tactics that were patently illegal, they said yes.

From the start, the administration crafted its policies to give the CIA leeway. In February 2002, for example, even before the CIA detainee and interrogation program had formally begun, President Bush issued a memo declaring that while the Geneva Conventions do not apply to al Qaeda and Taliban detainees, US Armed Forces would nonetheless as a matter of policy treat detainees humanely. At the time, critics, myself included, focused on Bush's caveat that "military necessity" might justify inhumane treatment. But a new document reveals that the administration also intentionally drafted the memo to exclude the CIA. (To his credit, Marty Lederman may have been the first to identify the significance of the focus on the Armed Forces, but that was not until many years later in January 2005.) A newly declassified February 2003 memo drafted by CIA General Counsel **Scott Muller** reports that Justice Department lawyer **John Yoo** told **Muller** in January 2003 "that the language of the [February 2002] memorandum had been deliberately limited to be binding only on 'the Armed Forces' which did not include the CIA." **Yoo** also confirmed that in drafting his memo authorizing the CIA program, he had considered the intent and effect of the February 2002 memo, and concluded that it posed no bar.

The newly declassified documents also reveal that **Condoleezza Rice**, National Security Adviser, and **John Bellinger**, her lawyer, both of whom many years later sought to restrict use of the CIA's techniques, were personally and intimately involved in the initial approval of the tactics. In April 2002, shortly after Abu Zubaydah was captured, **Bellinger** arranged the first meeting on the subject of enhanced interrogation, and told OLC that the State Department should be kept out of the loop. His boss, **Rice**, gave policy approval to the tactics in July 2002, pending legal sign-off by the Department of Justice, which came one week later, in the now infamous August 1, 2002 memo drafted by **Yoo** and **Bybee**. The documents do not reveal what **Rice** was told by **Bellinger**, her counsel, about the legality of approving waterboarding, extended sleep deprivation, and the like, but there is no sign that he told her the tactics were illegal. If he had done so, it would have been very difficult for her to approve the tactics in the face of such advice.

In December 2002, **Bellinger** twice confirmed to CIA General Counsel **Muller** that "use of the type of techniques authorized by the Attorney General had been extensively discussed and was consistent with the President's …. February Memo." On January 13, 2003, in a meeting with **Muller**, White House Counsel **Alberto Gonzales**, Counsel to the Vice-President **David Addington**, **Yoo**, and Defense Department General Counsel Jim Haynes, **Gonzales** and **Addington** also reaffirmed that the February 2002 memo about humane treatment did not apply to the CIA. And three days later, in a meeting with **Rice**, Secretary of Defense **Dnnald Rumsfeld**, Secretary of State **Colin Powell**, Vice-President Dick **Cheney**, and Haynes, **Muller** yet again raised the possible inconsistency between "what the CIA was authorized to do and what at least some in the international community might expect in light of the Administration's public statements about 'humane treatment' of detainees." According to **Muller**, "Everyone in the room evinced understanding of the issue. CIA's past and ongoing use of enhanced techniques was reaffirmed…. **Rice** clearly distinguished between the issues to be addressed by the military and CIA."

In July 2003, after Jim Haynes wrote a letter to Senator Pat Leahy contending that US policy "is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with [the Constitution]," the CIA again raised concerns about whether the

administration's public commitment to humane treatment could be squared with its program – understandably, as its tactics were the very opposite of humane, and would plainly be unconstitutional if applied to anyone protected by the Constitution. Another newly declassified document shows that CIA Director **George Tenet** sent a memo to **Rice** requesting express reaffirmation of the CIA's program. Later that month, **Tenet** met with, among others Attorney General **Ashcroft**, DOJ lawyer **Patrick Philbin**, **Rice**, **Gonzales**, **Bellinger**, and **Cheney** to review the program. Ashcroft, backed by a full explication by **Philbin**, "forcefully reiterated the view of the Department of Justice that the techniques being employed by the CIA were and remain lawful and do not violate the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment." When Ashcroft was told that Khaled Sheikh Mohammed had been waterboarded 119 times, Ashcroft replied "that he was fully aware of the facts and that CIA was 'well within' the scope of the [OLC] opinion." **Cheney**, **Rice**, and Ashcroft all confirmed that the CIA was "executing Administration policy."

After the Abu Ghraib photos were released in April 2004, the CIA again sought reaffirmation of its program. In fact, in May 2004, **Tenet** suspended the interrogation program, and expressly requested the NSC Principals and the Attorney General to approve of the CIA's tactics yet again. The next month, the Washington Post published the August 2002 OLC memo, the first written approval of the torture tactics, which until then had remained a secret. As soon as that memo became public, then-OLC head **Jack Goldsmith** withdrew it; what everyone went along with in private was not sustainable once exposed to the light of day. Yet at a meeting in July 2004 with **Rice**, Ashcroft, **Gonzales**, **Bellinger**, and Deputy Attorney General **James Comey**, **Rice** said that the CIA's techniques were in her view humane, and Ashcroft reaffirmed their legality (apart from waterboarding, which the DOJ was then reevaluating). The next month, **Daniel Levin**, the new head of the OLC, authorized the use of the waterboard for a particular detainee (although the CIA did not ultimately use the waterboard in that instance).

In December 2004, as has been previously reported, **Levin** issued a new memo on interrogation techniques, to replace the withdrawn August 1, 2002 memo. Its rhetoric was designed to sound more reasonable than the initial memo, but it included a critical footnote, stating that the OLC did not believe any of its conclusions regarding previously approved interrogation techniques would be different under the new standards. In other words, nothing material had changed. The OLC was still saying yes. About six months later, still another OLC head, **Stephen Bradbury**, wrote two memos opining that none of the CIA's techniques were cruel, inhuman, or degrading, nor would they violate the Constitution if employed against detainees in the United States.

In short, the newly declassified documents reveal that the CIA was very nervous about the legal authority for its interrogation program – even after DOJ and White House officials had repeatedly given the program their blessings. It is almost as if the CIA had a guilty conscience; it knew what it was doing was wrong, so it had to be repeatedly reassured that it was okay. Above all, it seems, the agency wanted to make sure it had legal cover.

But the newly declassified documents also underscore an equally important point, one not sufficiently emphasized by the SSCI Report and the coverage of it: the CIA was only one part of this conspiracy to commit war crimes. The scheme had the participation and express or tacit assent of many others, from **President Bush** and **Vice-President Cheney** and the **NSC**

Principals on down to Justice Department lawyers **John Yoo, Jay Bybee, Patrick Philbin, Daniel Levin, Stephen Bradbury,** DOD General Counsel **Jim Haynes**, Counsel to the Vice-President **David Addington,** and Counsel to the National Security Adviser **John Bellinger**. Not one of these people said no. Had any one of them done so, the program might well have been stopped in its tracks. Yet most of them have gone on to lucrative, prestigious, and/or powerful positions in private practice, the academy, or other government positions. Where is the accountability for their part in the CIA's grievous wrong?