

Pentagon Report Argues Torture is Legal in War on Terror

By Jim Lobe | June 10, 2004

A classified Pentagon report, providing a series of legal arguments apparently intended to justify abuses and torture against detainees, appears to undermine public assurances by senior U.S. officials, including President George W. Bush, that the military would never resort to such practices in the “war on terrorism.”

Excerpts of the report, which was drafted by Defense Department lawyers, were published in the *Wall Street Journal* on June 7. The text asserts, among other things, that the president, in his position as commander-in-chief, has virtually unlimited power to wage war, even in violation of U.S. law and international treaties. (A full copy of the report is available at http://online.wsj.com/public/resources/documents/military_0604.pdf).

“The breadth of authority in the report is wholly unprecedented,” says Avi Cover, a senior attorney with the U.S. Law and Security program of Human Rights First, formerly known as Lawyers Committee for Human Rights. “Until now, we’ve used the rhetoric of a president who is ‘above the law,’ but this document makes that (assertion) explicit; it’s not a metaphor anymore,” he added.

While it is unknown whether Bush himself ever saw or approved the report, it was classified “secret” by Pentagon chief Donald Rumsfeld on Mar. 6, 2003, the eve of the U.S. invasion of Iraq, according to the *Journal*.

The report’s partial publication comes amid growing charges that the Pentagon is engaged in a cover-up of the full extent of abuses committed by U.S. forces in their anti-terrorism campaign in Afghanistan, Iraq, at the U.S. naval facility at Guantánamo, Cuba, and elsewhere.

Origins of the Scandal

The abuse scandal first came to light in April when news organizations published photographs of the sexual

humiliation and abuse of Iraqi detainees at Abu Ghraib prison outside Baghdad that took place last October and November. Seven soldiers have been charged in those cases. While the Pentagon and the White House have claimed that the abuses were committed by a “few bad apples,” evidence of much more widespread abuse, including severe beatings and torture, has steadily accumulated over the past month.

Former detainees at Guantánamo Bay and Afghanistan, as well as other prisons in Iraq, have complained about similar tactics used against them, leading a number of lawmakers and other observers to conclude that such treatment was authorized or at the least condoned by authorities at much higher levels.

The Defense Department has itself launched six investigations or reviews into the treatment of prisoners in Iraq and Afghanistan, but none is designed to probe the role of senior officers or the civilian leadership in the Pentagon or relevant policies that they may have developed. At the same time, lawmakers from the governing Republican Party have been actively discouraged from undertaking investigations of their own.

Rumsfeld’s Cover-up

“Rumsfeld has really launched a massive cover-up operation within the Department of Defense,” according to Scott Horton, president of the International League for Human Rights and an expert on military law with the New York City Bar Association. “The investigations going on right now



Foreign Policy In Focus (FPiF)

www.fpi.org
A Think Tank Without Walls

have all the hallmarks of a cover-up.” Horton was approached in April 2003 by senior uniformed military attorneys (Judge Advocates General, or JAGs), who were troubled by detention and interrogation policies they said were being developed by political appointees at the Pentagon. “It’s quite a reasonable inference to say that this report (the subject of the *Journal* articles) is what rattled them,” Horton said. “We knew they were extremely upset about something very much like this.”

The report, according to the *Journal* account, was initiated as a result of the failure of interrogators at the Guantánamo base, where suspected al-Qaeda and Taliban members are being held, to obtain information using conventional techniques. It was drafted by a working group appointed by the Pentagon’s general counsel, William Haynes, who last June assured Congress that the military could fully abide by the 1984 United Nations Convention Against Torture (CAT).

Much of the text, which reportedly runs more than 100 pages, deals with legal issues relating to interrogation tactics. But, according to the *Journal*, at its core the report asserts that nothing is more important, including the normal restrictions on torture, than “obtaining intelligence vital to the protection of untold thousands of American citizens.” The report further cited possible defenses for the use of torture, including the “necessity” for such methods to prevent an attack, or “superior orders,” also known as the Nuremberg defense that supposedly absolves the responsibility of subordinates for following orders from others higher up the chain of command.

Both defenses are inconsistent, however, with U.S. law and the U.N.’s CAT, which was ratified by the United States in 1994. It states that “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 justifi-

cation for torture,” and that orders from superiors “may not be invoked as a justification of torture.” U.S. army field manuals also say that soldiers are prohibited from obeying any superior order to torture someone.

In its report, the working group took the position that neither the U.S. Congress, the courts, nor international law could interfere with the president’s powers to wage war. That means, according to the report, that the president himself is not bound by U.S. law, such as the federal Torture Statute or the constitutional ban on “cruel and unusual” punishment. “In order to respect the president’s inherent constitutional authority to manage a military campaign...(the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his commander-in-chief authority,” the document stated, adding later that “without a clear statement otherwise, criminal statutes (against torture or abuse) are not read as infringing on the president’s ultimate authority” to wage war.

“What’s most terrifying about this is the argument that the administration has been making since 9/11—that the president has unlimited power to do whatever he deems necessary,” said Cover. “It doesn’t matter what Congress says, what the constitution says, or what international law says.”

But the report also bolsters the growing belief that easing the rules governing interrogations was a top-level policy decision that better explains why reports of abuses are so widespread. “If anyone still thinks that the only people who dreamt up the idea about torturing prisoners were just some privates and corporals at Abu Ghraib, this document should put that myth to rest,” said Tom Malinowski, Washington director of Human Rights Watch. “It’s not hard to see how these abstract arguments made in Washington led to appalling and systematic abuses

“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 for torture.”

that ended up doing huge damage to U.S. interests,” he said.

“Effectively what you’ve got here is a group of government attorneys trying to justify war crimes,” said Horton. “It makes a mockery of Haynes’ statement about adhering to the CAT and Bush’s assurances that the U.S. would not torture or subject detainees to cruel or inhumane treatment.”

“If we apply the same rules to ourselves as we have advocated in the international tribunals on Yugoslavia and Rwanda (that the civilian leadership is responsible for war crimes committed by their militaries), then Donald Rumsfeld is in very serious trouble.”

(Jim Lobe is a political analyst with Foreign Policy in Focus (online at www.fpif.org). He also writes regularly for Inter Press Service.)

FOR MORE ANALYSIS FROM FOREIGN POLICY IN FOCUS:

Tenet Resignation Exposes Accelerating Intrigue Within Bush Administration

By Jim Lobe | June 9, 2004

<http://www.fpif.org/commentary/2004/0406tenet.html>

Published by Foreign Policy In Focus (FPIF), a joint project of the Interhemispheric Resource Center (IRC, online at www.irc-online.org) and the Institute for Policy Studies (IPS, online at www.ips-dc.org). ©2004. All rights reserved.

Foreign Policy In Focus

“A Think Tank Without Walls”

Established in 1996, Foreign Policy In Focus is a network of policy analysts, advocates, and activists committed to “making the United States a more responsible global leader and global partner.” For more information, visit www.fpif.org.

Recommended citation:

Jim Lobe, “Pentagon Report Argues Torture is Legal in War on Terror,” (Silver City, NM & Washington, DC: Foreign Policy In Focus, June 10, 2004).

Web location:

<http://www.fpif.org/commentary/2004/0406torturelegal.html>

Production Information:

Writer: Jim Lobe

Editor: John Gershman, IRC

Layout: Chellee Chase-Saiz, IRC

p. 3

www.fpif.org

A Think Tank Without Walls

Prisoner Abuse Calls into Question America’s Position of Moral “Exceptionalism”

By Jim Lobe (May 19, 2004)

<http://www.fpif.org/commentary/2004/0405moralex.html>

From Iraqi Occupation to Islamic Reformation: Neocons Aim Beyond Baghdad

By Jim Lobe (April 9, 2003)

<http://www.fpif.org/commentary/2003/0404neocons.html>

FOR MORE INFORMATION:

Foreign Policy In Focus coverage of human rights

<http://www.fpif.org/indices/topics/rights/index.php>

Association of the Bar of the City of New York

<http://www.abcny.org/>

Human Rights First

www.humanrightsfirst.org

Human Rights Watch

www.hrw.org

Amnesty International-USA

<http://www.amnestyusa.org/>

Committee on Torture

Office of the UN High Commissioner for Human Rights

<http://www.unhchr.ch/html/menu2/6/cat/index.html>

