COMMENTARY

THE TWILIGHT OF RESPONSIBILITY: TORTURE AND THE HIGHER DENIABILITY

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"A riddle wrapped in mystery inside an enigma"[1] ↓Churchill's comment about Soviet motivations floated into my mind as I read Philip Zelikow's elegant and powerful analysis of American "Codes of Conduct" during our Twilight War.[2] We as Americans stand today before a terrible and indisputable fact ↓that, as Mr. Zelikow puts it, "for the first time in American history, leaders of the U.S. government carefully devised ways and means to torment enemy captives."[3] And though we know an immense amount about how this came to happen ↓the plot lines of who did what to whom, who wrote the memos and who was "tormented" and how, who was smashed repeatedly against walls, who was crushed into tiny confinement boxes, who was waterboarded and how many times ↓we know relatively little about *how* the momentous decision came to be made.

And make no mistake: the decision *was* momentous. The American tradition of treating prisoners with honor and according to humane standards dates back to the country's birth, to General George Washington intervening personally, and eloquently, to protect Hessian prisoners from torture and abuse

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1. Winston Churchill, *Churchill and Russia: Online Exhibition*, CHURCHILL C. CAMBRIDGE (Oct. 1, 1939), http://www.chu.cam.ac.uk/archives/gallery/Russia/CHAR_09_138_46.php.

2. Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1 (2012). This Article originated as a response to Mr. Zelikow's.

3. *Id.* at 17.

at the Battle of Trenton.[4] Less than a century later that tradition was reaffirmed by Abraham Lincoln, the man who, though he did not hesitate to suspend the great writ of habeas corpus during the great national cataclysm of the Civil War, advised nonetheless that "[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions."[5] Compare Lincoln's use of that phrase, "military necessity," with George W. Bush's use 147 years later, when Bush directed that in the War on Terror prisoners should be "treat[ed] . . . humanely and, to *the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva."[6] Lincoln used the phrase to give force to an absolute commandment to adhere to the standards of humane treatment; Bush made of it a gaping loophole, provided personally by the President of the United States.[7]

Lincoln and Washington, both deeply interested in history, understood that the abolition of torture was the signature political issue during the Enlightenment from which the United States sprang.[8] They had read Voltaire, notably his *Treatise on Tolerance* on the case of Jean Calas;[9] understood why the Framers incorporated into the Constitution the Fifth and Eighth Amendments↓against compulsory self-incrimination and cruel and unusual punishment;[10] and felt in their bones why those who created our country believed that torture was inimical to a

4. *See* Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 222 & n.134 (2008) (crediting the victorious General Washington for ordering his men to "[l]et [the Hessian prisoners] have no reason to complain of our copying the brutal example of the British Army" (first alteration in original) (internal quotation marks omitted)).

5. FRANCIS LIEBER, GENERAL ORDERS NO. 100 (Apr. 24, 1863), *reprinted in* RICHARD SHELLEY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45, 48 (1983); Stephen I. Vladeck, *The* Field *Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 392–93 (2007).

6. Memorandum from George W. Bush, President, to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees para. 3 (Feb. 7, 2002) (emphasis added), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.

7. *See* ELIZABETH HOLTZMAN WITH CYNTHIA L. COOPER, CHEATING JUSTICE 73–76 (2012).

8. *See* Gary Kowalski, *Torturing Our History*, TIKKUN, Sept.–Oct. 2009, at 28, 28–29, *available at* http://www.tikkun.org/article.php/Kowalski-torturing-our-history (detailing the Framers' understanding of torture before founding the United States and discussing Washington's and Lincoln's recognition of those virtues).

9. *See generally* VOLTAIRE, TREATISE ON TOLERANCE 7–8 (Simon Harvey ed., Cambridge Univ. Press 2000) (1763).

10. U.S. CONST. amend. V; U.S. CONST. amend. VIII.

limited system of government, a system whose vanguard example they believed they were establishing in the New World.[11] They would have understood, that is, that torture is the absolute antithesis of a government limited in scope. Torture is the ultimate destruction, by the state, of human autonomy.

Another way to put this, of course, is that torture is the embodiment of the totalitarian idea: the embodiment, in action, of a state unbounded in power, able to do what it wants with the individual person. Torture is the state reaching beyond a person's skin and taking control, by brutal force, of that person's nervous system and then using it as a savage weapon against him. It is not an accident that the torments of the Survival, Evasion, Resistance, and Escape (SERE) program, from which the American "alternative set of procedures" (as President Bush preferred to call them) were drawn, were themselves copied directly from techniques developed by the Soviets and the Red Chinese (as they were then called) and used to "brainwash" captured American pilots↓not to extract information, by the way, but to force false confessions.[12]

Now, thanks to the events of the Twilight War, we need not rely on the history books of Soviet and Chinese tortures of the 1950s to know in intimate terms what the process looks like. We can thank the U.S. military, for example, with its unparalleled scrupulousness in recording every little thing it does, for the famous minute-by-minute account of the interrogation of Mohammed al-Qahtani, the so-called "twentieth hijacker."[13] During his fifty-four days of interrogation at Guantánamo, al-Qahtani was subjected to prolonged sleep deprivation; forced nudity; extremes of heat and cold; prolonged stress positions; unremitting, almost unbearable noise; sexual humiliations of various repugnant kinds; and many other torments.[14] Here are some of al-Qahtani's reactions, as

11. *See* Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 DENV. U. L. REV. 865, 867–69 (2009) (explaining how the Enlightenment and the classics shaped the Framers' (and Lincoln's) views about limited government and liberty).

12. MICHAEL OTTERMAN, AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND 11–13 (2007); Christopher W. Behan, *Everybody Talks: Evaluating the Admissibility of Coercively Obtained Evidence in Trials by Military Commission*, 48 WASHBURN L.J. 563, 576–80 (2009); Scott Shane, *China Inspired Interrogations at Guantánamo*, N.Y. TIMES, July 2, 2008, at A1.

13. *See generally* PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008) (reviewing the detailed military interrogation logs regarding al-Qahtani's interrogations).

14. *Id.* at 143, 165–67.

recorded by our military and edited by the barrister and writer Philippe Sands:

> Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee butted SGT R in the eye. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable. Moaning. Turned his head from left to right. Began crying hard spontaneously. Crying and praying. Began to cry. Claimed to have been pressured into making a confession. Falling asleep. Very uncomfortable. On the verge of breaking. Angry. Detainee struggled. Detainee asked for prayer. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Pushed guard. Dizzy. Headache. Near tears. Forgetting things. Angry. Upset. Complained of dizziness. Tired. Agitated. Yelled for Allah. Started making faces. Near crying. Irritated. Annoyed. Detainee attempted to injure two guards. . . . Became very violent and irate. Attempted to liberate himself. Struggled. Made several attempts to stand up. Screamed.[15]

This was the work of the U.S. military at Guantánamo. Officers of the Central Intelligence Agency (CIA) were also scrupulous in recording their work, filling nearly one hundred video recordings, for example, with the interrogations of Abu Zubaydah and Abd al-Rahim al-Nashiri.[16] But despite what one would have thought would be the great historic value of the words of these master terrorists, CIA officials destroyed the recordings in 2005—about the time, as Mr. Zelikow has well described, that votes of Congress and a ruling of the Supreme Court returned "cruel, inhuman, or degrading treatment" to the category of acts forbidden by American federal statute and international treaty undertaking.[17] Still, we retain an extensive record of what was done to these detainees: Abu Zubaydah, for example, was chained naked to a chair in a very cold, white room, with bright lights on and unbearably loud music playing

15. *Id.* at 170–71.

16. Memorandum from Philip Zelikow to Tom Kean and Lee Hamilton, Interrogations and Recordings: Relevant 9/11 Commission Requests and CIA Responses 1 (Dec. 13, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/20071222-INTEL-MEMO.pdf.

17. Zelikow, *supra* note 2, at 23, 38–41; *see also* Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd(a) (2006) (prohibiting cruel, inhuman, or degrading treatment of any individual in the custody or control of the U.S. government); Hamdan v. Rumsfeld, 548 U.S. 557, 628–32 (2006) (holding that Common Article 3 applied to Hamdan and provided him with all of the procedural guarantees recognized by civilized nations).

incessantly, for eleven straight days.[18] After this "conditioning" phase↓the terminology is our government's↓CIA officers began to subject the naked Abu Zubaydah to the "correction" phase:[19]

> After the beating I was then placed in the small box. They placed a cloth or cover over the box to cut out all light and restrict my air supply. As it was not high enough even to sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant my wounds both in the leg and stomach became very painful. . . . The wound on my leg began to open and started to bleed. I don't know how long I remained in the small box, I think I may have slept or maybe fainted.
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> I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.
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> I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilt over me. . . . I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall with the plywood covering and repeatedly slapped in the face by the same two interrogators as before.

18. INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 28–31 (2007), *available at* http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf; David Cole, *Introductory Commentary* to THE TORTURE MEMOS 2 (David Cole ed., 2009).

19. Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005) [hereinafter Bradbury Memorandum], *available at* http://www.justice.gov/olc/docs/memo-bradbury2005-2.pdf.

> I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold.[20]

We have a good many detailed accounts, courtesy of the International Committee of the Red Cross (ICRC) and various other sources, of what our government did to prisoners at the CIA "black sites."[21] Vivid, horrible, and revolting they are, but frankly there is not much new in them. Read accounts of what the Soviets, the Red Chinese, and the North Koreans did to their unfortunate prisoners and it's all in there: the forced standing, the beatings, the smashing against walls, the waterboarding.[22] The Argentines in their dirty war, the Salvadorans in theirs, the French in Algeria, even the Khmer Rouge during their genocide: there is a vivid painting of waterboarding in Tuol Sleng execution center↓S-21, as it's known↓that I saw in Phnom Penh a few years back that would work well as an illustration of Abu Zubaydah's vivid account, except that the Khmer Rouge, presumably lacking mineral water bottles, poured their water from a can.[23] The most precise historical parallel I've been able to find, though, is this: "[A] wet cloth is laid over the prisoner's mouth and nostrils, and a small stream of water constantly descending upon it he sucks ye cloth into his throat . . . and puts ye unhappy wretch into the AGONIES OF DEATH."[24] Those words are drawn from a contemporary description of the water torture of the Spanish Inquisition.[25]

20. INT'L COMM. OF THE RED CROSS, *supra* note 18, at 30.

21. *Id.* at 6–7; Joby Warrick, Peter Finn & Julie Tate, *Red Cross Described 'Torture' at CIA Jails*, WASH. POST, Mar. 16, 2009, at A1; *see also* Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46, 48–55.

22. Behan, *supra* note 12, at 576, 581, 582 tbl.1.

23. *See* Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1492–93 (C.D. Cal. 1988) (reciting the "form of the persecution" the plaintiffs faced at the hands of the Salvadoran military during the Salvadoran Civil War), *aff'd sub nom.* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); Michael Bryant, *America's Special Path: U.S. Torture in Historical Perspective*, 66 GUILD PRAC. 35, 43–44 (2009) (detailing the "preferred method[s] of torture" the French army employed in Algeria as electric shock, waterboarding, and rape); Daniel Kanstroom, *On "Waterboarding": Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT'L & COMP. L. REV. 203, 205 (2009) (noting the use of waterboarding by the Khmer Rouge); Tim Golden, *Argentina Settles Lawsuit by a Victim of Torture*, N.Y. TIMES, Sept. 14, 1996, at A6 (accusing the Argentine military regime of the late 1970s and early 1980s of torturing captives by burning them with cigarettes, shocking them with electricity, and insulting their religion); *see also* Christiane Amanpour, *Survivor Recalls Horrors of Cambodia Genocide*, CNNWORLD (Apr. 7, 2008), http://articles.cnn.com/2008-0407/world/amanpour.pol.pot_1_prison-guards-interrogators-water-torture (describing the paintings of a former Khmer Rouge prisoner at S-21).

24. CECIL ROTH, THE SPANISH INQUISITION 98 (1964).

25. *Id.* at 97–98.

It is unclear whether lawyers at the ICRC↓the body legally empowered by the Geneva Conventions of 1949 to look after the rights of prisoners[26]↓were students of history. They don't say in their secret report, from which I drew the account of the treatment of Abu Zubaydah and thirteen other "high value detainees," and whose subchapter titles read in part as follows:

I.3.I. Suffocation by water

I.3.2. Prolonged stress standing

I.3.3. Beatings by use of a collar

I.3.4. Beating and kicking

I.3.5. Confinement in a box

I.3.6. Prolonged nudity

I.3.7. Sleep deprivation and use of loud music

I.3.8. Exposure to cold temperature/cold water

I.3.9. Prolonged use of handcuffs and shackles

I.3.I0. Threats

I.3.II. Forced Shaving

I.3.I2. Deprivation/restricted provision of solid food[27]

These expert investigators and attorneys of the ICRC had no trouble finding, in their secret conclusion delivered to the CIA Acting General Counsel, John Rizzo, in February 2007, that: "[T]he ill-treatment to which [the detainees] were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel[,] inhuman[,] or degrading treatment."[28]

John Yoo, on the other hand, a bright young lawyer and fledgling academic then at the Office of Legal Counsel (OLC) in the U.S. Department of Justice (DOJ) and now my colleague on the faculty of the University of California at Berkeley, seems to have had little interest in history. In his so-called "torture memos," he mentions no precedents↓not even what one would have thought were fairly direct ones, like the Reagan Administration's prosecution of Sheriff James Parker in Texas for waterboarding prisoners as recently as 1983, let alone the prosecution of Yukio Asano for the same offense in the war crimes trials in 1947, or the courts-martial of American soldiers

26. Geneva Convention Relative to the Treatment of Prisoners at War arts. 3, 9 & 10, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

27. INT'L COMM. OF THE RED CROSS, *supra* note 18, at 2.

28. *Id.* at 26.

for applying the "water cure" to Filipino prisoners in 1902.[29] Mr. Yoo did judge that waterboarding, because it did not cause the pain equivalent to organ failure or death he considered necessary to constitute torture, amounted merely to a "controlled acute episode" and was thus wholly legal for Americans to use on their prisoners.[30] And as Mr. Zelikow has reminded us, Yoo did not even consider whether the treatment just described constituted cruel, inhuman, or degrading treatment, having earlier argued that it was the well-founded policy of the Bush Administration that such cruel, inhuman, or degrading treatment could in fact be imposed↓legally↓on detainees in American custody on foreign soil.[31] When the Supreme Court, Senator John McCain, and the U.S. Congress, among others, begged to differ several years later, it was left to Stephen Bradbury, one of Professor Yoo's successors at the OLC (that elite legal "think tank" of the Executive Branch), to argue that this treatment, including waterboarding, which had earlier been found not to be torture, did not constitute cruel, inhuman, or degrading treatment either.[32]

Professor David Cole has dissected this particular memorandum with merciless precision in the introduction to his volume of *The Torture Memos*.[33] Mr. Zelikow, a polite and measured man who knows from experience the pressures that can accompany national security decisionmaking within government, now tells us mildly that the OLC's

29. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Interrogation of al Qaeda Operative 5–6, 11 (Aug. 1, 2002) [hereinafter Bybee Memorandum I], *available at* http://www.justice.gov/olc/docs/memo-bybee2002.pdf; *see also* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 485 n.74, 494, 500–02 (2007) (detailing waterboarding prosecutions by the U.S. government). Reportedly, the August 1, 2002 Memoranda were drafted by John Yoo and signed by Jay Bybee.

30. Bybee Memorandum I, *supra* note 29, at 9–11, 15; *see also* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 5–13 (Aug. 1, 2002) [hereinafter Bybee Memorandum II], *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf (interpreting the definition of torture under Section 2340 as a high level of pain or suffering that results in death, organ failure, or permanent impairment of a significant body function).

31. Zelikow, *supra* note 2, at 23–24; *see also* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees 5–10 (Jan. 22, 2002), *available at* http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf (determining that Common Article 3 of the Geneva Convention did not apply to al Qaeda because it was a nonstate actor).

32. 42 U.S.C. § 2000dd (2006); Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006); Bradbury Memorandum, *supra* note 19, at 1–2.

33. Cole, *supra* note 18, at 21–25.

"interpretation . . . did not seem to present a fair reading of the case law under [the 'shocks the conscience'] standard," and later (and more broadly) that "[t]he continued attempt [within the government] to defend the program at this stage . . . obliged intelligent and highly educated attorneys to adopt legal positions that were untenable and extreme."[34] Now, I agree entirely with Mr. Zelikow that when looking at this grim history "it is all the more important not just to judge it, but to comprehend it."[35] We must work hard to understand so that we see before us not the projection of some alien evil beings, but people like us, and we must try to understand how we, in their places, might have done the same. This is empathy, and empathy is grace, and we must struggle always to attain both.

Still↓and I say this conscious of my delicate position as a non-lawyer opining on legal matters in the company of distinguished members of the bar↓one really has to be a lawyer not to read Mr. Bradbury's argument without greeting it with a grim, unpleasant, and cynical little laugh. I am not qualified to judge, as Professor Cole is, what constitutes good faith lawyering.[36] I can say, having read it and reread it, and having tried to describe it accurately and dispassionately, that Bradbury's memorandum is neither honest nor credible. Stand in front of a roomful of bright and brilliant Palestinian students, many of them aspiring lawyers, as I have done this fall lecturing at Al Quds University in East Jerusalem, and try to explain the legal arguments to them. Try to work through them point by point. You will look up from the text and gaze at their bright, inquisitive, disbelieving faces gazing back at you and, whatever your political views, as an American you can't help but feel shame.

Mr. Bradbury's memorandum, as Mr. Zelikow says, can be understood only by acknowledging that the roots of its arguments come not from a dispassionate appraisal of the law but from a "fear of criminal investigation."[37] That holds true of too much of the present story↓including, of course, the disfigurements of the War Crimes Act that have provided retroactive immunity for these actions (and, perhaps, future immunity as well),[38] and that are not the least of the stinking

34. Zelikow, *supra* note 2, at 40–41.

35. *Id.* at 44.

36. *See* Cole, *supra* note 18, at 2–4 (discussing the legal memos of Justice Department lawyers analyzing lawful interrogation tactics).

37. Zelikow, *supra* note 2, at 40–41.

38. *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), *amended by* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2635 (codified at 18 U.S.C. § 2441 (2006)) (providing for retroactive liability as of November 26, 1997),

detritus this affair has bequeathed to us. This brings us back to this supposed riddle wrapped in mystery inside an enigma. For I confess I feel we are doing ourselves a bit of an injustice in behaving as if many of these documents were drafted in good faith. To do so is to follow along, beginning in faith but ending in befuddlement, on a master narrative that quite plainly is not true. We would do better to rely on the words of Douglas Feith, the number three official in the Department of Defense (DOD) during the time the memoranda were drafted, who, when asked by the wily Philippe Sands whether it was the intention of those in the Bush Administration who drafted the "Geneva decision" that the Conventions' constraints on interrogation should not apply to any prisoner at Guantánamo, shot back, "Oh yes, sure."[39] "So that was *the intention*," Sands pressed him.[40] "'Absolutely,' [Feith] replied, without any hesitation."[41] "That's the point."[42]

In making this admission, Mr. Feith↓a strange and contradictory figure who has something of the Holy Fool about him↓made what in Washington is defined as a gaffe: that is, he inadvertently spoke the truth, which is about intention, an intention that took shape very early on.[43] Let us return for a moment to that riddle wrapped in mystery inside an enigma that Mr. Zelikow describes for us: how it was that this "extraordinary bureaucratic feat," by which this interrogation "program [was] conjured out of organizational thin air," actually came about.[44] History was made here, history that would have shocked Washington or Lincoln, and yet, Mr. Zelikow suggests, we have no idea quite how. We know, as he has described, what didn't happen. There seems to have been no study undertaken of various interrogation methods, no survey of the rather voluminous history of what has been done to extract information from prisoners, no effort to consult allies↓the English, the French, the Israelis↓who had grappled intimately with these issues.[45] No record exists of any effort to examine, let alone adapt, the remarkably effective↓and noncoercive↓interrogation program developed during World War

invalidated in part by Boumediene v. Bush, 553 U.S. 723 (2008).

39. SANDS, *supra* note 13, at 35 (internal quotation marks omitted).

40. *Id.* (emphasis added).

41. *Id.*

42. *Id.* (internal quotation marks omitted).

43. *Id.* at 34–35.

44. Zelikow, *supra* note 2, at 15.

45. *Id.* at 27–30; *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1684 (2005) (noting the use of torture in France, Britain, Israel, and the United States).

II.[46] Indeed, faced with the momentous decision to torment American prisoners, to quote Mr. Zelikow with my added emphasis, "[*n*]*one of the policy or moral issues connected with these choices appear to have been analyzed in any noticeable way*, including the background and merits of the SERE training analogy."[47]

Instead, the American government hired a few contractors (men who previously had no experience of any kind interrogating detainees and who knew nothing of al Qaeda, its history, or its methods) and put the highest of America's highest value detainees, including Abu Zubaydah and Khalid Sheikh Mohammed↓men who supposedly had information vital to America's security, including knowledge of the next wave of attacks that any moment might kill thousands of Americans↓into their (entirely inexperienced) hands.[48] These men then applied to these highest value detainees methods they had reverse-engineered from the tortures the Soviets and the Communist Chinese used on American prisoners in the 1950s.[49] The government's elite lawyers, in the meantime, were tasked with the *Through-the-Looking-Glass* job of arguing that these "enhanced interrogation techniques," originally designed expressly to mimic methods illegal under international law, were in fact perfectly legal.

The story smacks of "novelistic improbability"↓which is to say, it is far too bizarre to be credible in a novel, where readers, requiring a certain degree of verisimilitude, would simply not believe it. The story is only possible in, as it were, "real life," which lacks, alas, limits on the improbable. One senses a bit of this unlikely strangeness in the account of Ali Soufan, the FBI al Qaeda specialist and veteran interrogator, of that interrogation of Abu Zubaydah.[50] Now it is quite true, as Mr. Zelikow says,

46. ERIC ROSENBACH & AKI J. PERITZ, CONFRONTATION OR COLLABORATION? CONGRESS AND THE INTELLIGENCE COMMUNITY 63 (2009) (providing the Marine Corps interrogation program, "based on establishing rapport with captured Japanese prisoners," as an example of the success of nonviolent U.S. interrogation programs during World War II); Zelikow, *supra* note 2, at 28–30.

47. Zelikow, *supra* note 2, at 24 (emphasis added).

48. *See* ALI H. SOUFAN WITH DANIEL FREEDMAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA 373–74, 396–99 (2011) (describing Zubaydah's interrogation); Mayer, *supra* note 21, at 48–55 (detailing Mohammed's interrogation at CIA black sites).

49. Zelikow, *supra* note 2, at 15–16; *see also* Shane, *supra* note 12 (asserting that the only change made to the Chinese interrogation training chart was to remove its original title).

50. *See generally* SOUFAN WITH FREEDMAN, *supra* note 48 (detailing Soufan's experiences interrogating Abu Zubaydah and recalling the dissension between the interrogation procedures of the CIA and the FBI).

that there has been an enormous and ongoing controversy about enhanced interrogation techniques in general, and Zubaydah's interrogation↓the first to use them systematically↓in particular.[51] It is hard to read Soufan's account, though, without feeling shock and shame at how this affair was managed.

Soufan and an FBI colleague began the Zubaydah interrogation using so-called "traditional methods": building rapport, showing Zubaydah that they knew an immense amount about him, outsmarting him, and building confidence.[52] Soufan, a native Arabic speaker, called Zubaydah by his mother's childhood nickname for him and astounded the prisoner with his knowledge of the al Qaeda network.[53] And the two most valuable pieces of intelligence we know↓the identification of Jose Padilla (the so-called "dirty bomber") and the revelation of Khalid Sheik Mohammed's pseudonym, and thus his role in planning the 9/11 attacks↓were drawn from Zubaydah during this period.[54]

Soon, however, a CIA team arrived at the black site from Washington, including a contractor who Soufan refers to as "Boris."[55] "Washington feels," Soufan is told, "that Abu Zubaydah knows much more than he's telling you, and Boris here has a method that will get that information quickly."[56] That method, according to Boris, is that he would "force Abu Zubaydah into submission."[57] His idea was to make Abu Zubaydah "see his interrogator as a god who controls his suffering."[58] Zubaydah would have his clothes taken away and:

> [I]f he failed to cooperate, harsher and harsher techniques would be used. "Pretty quickly you'll see Abu Zubaydah buckle and become compliant," Boris declared.

51. *See* INT'L COMM. OF THE RED CROSS, *supra* note 18, at 5, 8–18, 30–31 (relaying Zubaydah's claim that he was the one of the first detainees subject to enhanced interrogation techniques); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 253–68 (2004) (presenting policy arguments for and against the use of torture); James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 603–05 (2010) (questioning whether exceeding the CIA internal guidelines for waterboarding qualified as torture).

52. SOUFAN WITH FREEDMAN, *supra* note 48, at 377–79, 384, 387 (recounting the building of trust, speaking in Arabic, and providing medical care as methods that Soufan employed while interrogating Zubaydah).

53. PETER BERGEN, THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA 109–10 (2011); SOUFAN WITH FREEDMAN, *supra* note 48, at 377, 406.

54. *See* SOUFAN WITH FREEDMAN, *supra* note 48, at 386–87, 389, 407–08.

55. *Id.* at 393.

56. *Id.* at 394 (internal quotation marks omitted).

57. *Id.*

58. *Id.*

> "For my technique to work," he said, "we need to send the message to Abu Zubaydah that until now he had the chance to cooperate, but he blew it. He has to understand that we know he was playing games, and that the game is now over."[59]

Soufan, appalled at this, asked Boris two simple questions:

> "Have you ever questioned an Islamic terrorist before?" [Soufan] asked him.
>
> "No."
>
> "Have you ever conducted any interrogations?"
>
> "No," he said again, "but I know human nature." [Soufan] was taken aback by his response. [Soufan] couldn't believe that someone with no interrogation or terrorism experience had been sent by the CIA on this mission."[60]

Now knowing Soufan's record as a professional interrogator of terrorists, which is impeccable and unrivaled within the government,[61] it is very hard not to be appalled by this account, of which I have given only a brief extract. As I mentioned, we are indeed hearing one side of a longstanding controversy over interrogation that was already being fought through leaks in the press even as Abu Zubaydah was undergoing his initial interrogation.[62] This is not the time to rehearse it all, other than to note that the CIA Inspector General, John Helgerson, whose extensive and essential report Mr. Zelikow mentioned,[63] seems to support one of Soufan's central points: that the entire misconceived assault on Abu Zubaydah began with a misunderstanding borne of ignorance of who precisely Zubaydah was, what position he occupied in al Qaeda, and thus what he could be expected to know.[64] As Helgerson wrote:

> Some participants in the [interrogation] Program, particularly field interrogators, judge that [Headquarters's]

59. *Id.*

60. *Id.* at 396. The brackets around Soufan's name indicate original redactions by the CIA.

61. *See generally* Lawrence Wright, *The Agent: Did the C.I.A. Stop an F.B.I. Detective from Preventing 9/11?*, NEW YORKER, July 10 & 17, 2006, at 62, 63–67 (chronicling Soufan's extensive FBI career and unparalleled experience as an interrogator).

62. *See, e.g.*, Jodie Morse, *How Do We Make Him Talk?*, TIME (Apr. 6, 2002), http://www.time.com/time/nation/article/0,8599,227493,00.html.

63. Zelikow, *supra* note 2, at 32.

64. OFFICE OF INSPECTOR GEN., CENT. INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003), at 83, 104–05 (2004), *available at* http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf.

> assessments to the effect that detainees are withholding information are not always supported by an objective evaluation of available information and the evaluation of the interrogators but are too heavily based, instead, on presumptions of what the individual might or should know.[65]

And again:

> [L]ack of knowledge led analysts to speculate about what a detainee "should know," [versus] information the analyst could objectively demonstrate the detainee did know.
>
> . . . When a detainee did not respond to a question posed to him, the assumption at Headquarters was that the detainee was holding back and knew more; consequently, Headquarters recommended resumption of [enhanced interrogation techniques].[66]

Now the CIA was convinced, as President Bush announced publicly when Abu Zubaydah was captured, that he was "chief of operations" of al Qaeda, or anyway "one of the top three leaders in the organization."[67] As Soufan, who by then had spent years interrogating al Qaeda figures, remarks: "To people who knew what they were talking about, the insistence that Abu Zubaydah was the number three or four in al-Qaeda was flatly ridiculous, as were the claims that he wasn't cooperating."[68] Zubaydah was not even a member of al Qaeda, having served the group, as one analyst remarked, as "simply a travel agent."[69]

The insistence that Zubaydah wasn't cooperating, that is, was based on ignorance—ignorance projected from "headquarters." It is worth noticing that Mr. Qahtani, the Army's account of whose moaning and crying I quoted earlier,[70] was also a case of an almost-certainly-mistaken conviction that the supposed twentieth hijacker had it in his power, if he could only be "broken," to reveal all sorts of critical details about the coming

65. *Id.* at 104–05.

66. *Id.* at 83.

67. SOUFAN WITH FREEDMAN, *supra* note 48, at 411; President George W. Bush, *Remarks by the President in Address to the Nation*, THE WHITE HOUSE (June 6, 2002, 8:00 PM), http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020606-8.html; President George W. Bush, *Remarks by the President at Thaddeus McCotter for Congress Dinner*, THE WHITE HOUSE (Oct. 14, 2002, 6:01 PM), http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html.

68. SOUFAN WITH FREEDMAN, *supra* note 48, at 411.

69. BERGEN, *supra* note 53, at 110 (internal quotation marks omitted).

70. *See supra* text accompanying notes 13–15.

"second wave attacks."[71] As Peter Bergen, an expert on al Qaeda, remarks in his history, *The Longest War*:

> Anyone with the most superficial understanding of al-Qaeda would have understood that Qahtani, as one of the "muscle" hijackers, might have known a great deal about the training regime at al-Qaeda's camps in Afghanistan, but that would be the extent of his knowledge. Until the last moments of the operation, the muscle hijackers didn't even know what the targets were on 9/11, let alone the outlines of other al-Qaeda plots, nor did they have much contact with the leaders of the terrorist organization.[72]

Bergen goes on to remark that while "[t]he abuse of Qahtani produced little valuable intelligence," it did keep him from being prosecuted, or brought before a military commission, when Susan Crawford, a senior Pentagon official who had been former General Counsel of the Army under President Reagan, concluded that the abuse he had suffered at Guantánamo met the legal definition of torture.[73]

The "pressure from headquarters" described in the CIA Inspector General's report strikes me as a critical clue to get us to the heart of the riddle wrapped in mystery inside an enigma. We know that on September 17, 2001, President Bush signed a Memorandum of Notification granting power to the CIA to detain, imprison, and interrogate prisoners taken in the War on Terror, an organization that had had no experience with interrogation for decades.[74] And we know that approval of the program, including of specific methods, came from the very top of the Administration because . . . well, because those top officials have told us so.[75] "In top secret meetings about enhanced interrogations," Dick Cheney told a national audience in May 2009, "I made my own beliefs clear. I was and remain a strong proponent of our enhanced interrogation program."[76] When were these secret meetings? Presumably between September 17, 2001, and December 2001, when the DOD General Counsel, William "Jim" Haynes II, first started making inquiries about the

71. DONALD RUMSFELD, KNOWN & UNKNOWN 574–75, 577 (2011).

72. BERGEN, *supra* note 53, at 107.

73. *Id.* at 107–08.

74. David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, at A1.

75. Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'* ABCNEWS (Apr. 9, 2008), http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1#.TzFo35.

76. Richard B. Cheney, *Remarks by Richard B. Cheney to the American Enterprise Institute*, AEI (May 21, 2009), http://www.aei.org/print/remarks-by-richard-b-cheney.

workings of the SERE program; by the following month, Haynes had asked formally for assistance from officers in the Pentagon.[77] Was President Bush himself privy to these decisions? Did he know of the program at this stage? Dick Cheney, during a television interview in May 2009, gave us an answer: "I certainly, yes, have every reason to believe he knew—he knew a great deal about the program. He basically authorized it. I mean, this was a presidential-level decision. And the decision went to the president. He signed off on it."[78] Bush himself, of course, has emphatically noted that he personally approved the waterboarding of Khalid Sheikh Mohammed, responding, by his own account, to then-Director of Central Intelligence George Tenet, when Tenet asked for his approval, "Damn right."[79]

So: no policy process, no staffing out to the relevant departments, no historical survey or research of any kind. Instead, secret meetings with a handful of people and then a "presidential-level decision." We have seen this movie before. The military commissions policy was developed the same way, by David Addington (Vice President Cheney's counsel at the time) and a handful of others, and then presented by Cheney to George W. Bush during one of their private lunches for the President's signature.[80] The Secretary of State, Colin Powell, found out about it all on CNN.[81] So did Condoleezza Rice, who as National Security Adviser was supposedly running "the interagency process."[82] We have a vivid description of this emblematic little narrative in Barton Gellman's essential book on Cheney, *Angler*, which tells how a tiny cabal of officials, led by Vice President Cheney and including Addington, Tenet, Haynes, and Deputy Assistant Attorney General Yoo, among one or two others, essentially constructed—themselves—the critical national security policies of the U.S. government during the weeks and months after September 11.[83] The National Security Council system, set up in the National

77. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xiii–xvi, xxvi, 24–25 (Comm. Print 2008).

78. *Face the Nation: Interview by Bob Schieffer with Dick Cheney* (CBS television broadcast May 10, 2009) (transcript available at http://www.cbsnews.com/htdocs/pdf/FTN_051009.pdf?tag=contentMain;contentBody).

79. GEORGE W. BUSH, DECISION POINTS 170 (2010) (internal quotation marks omitted).

80. Barton Gellman & Jo Becker, '*A Different Understanding with the President*,' WASH. POST, June 24, 2007, at A1.

81. *Id.*

82. *Id.*

83. BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 129–43 (2008).

Security Act of 1947 as the means by which critical decisions would be made—by which information and analysis would be drawn up from the essential security bureaucracies of the government and decisions imposed downward[84]↓was effectively bypassed. Critical officials↓including the Secretary of State and the Attorney General↓were kept in the dark, sidelined, and ignored.[85] It was the machinery for creating a series of faits accomplis, and it worked.

Of course, that conclusion depends on what you mean by "worked." The military commissions system was a disaster, a political and diplomatic embarrassment that was entirely unworkable in practice and that the Supreme Court later threw out.[86] By the time Bush left office, of the more than eight hundred "unlawful combatants" who had been brought to Guantánamo, his military commissions had convicted a grand total of three.[87] Hundreds had simply been released.[88] But it is true that the cabal succeeded, through secrecy, in creating the military commissions system, circumventing those in the government who would have questions about it, and then in springing it on the Secretary of State and other officials and making it the law of the land for several years.

And then of course there is the system of "enhanced interrogation" itself↓George W. Bush's "alternative set of procedures."[89] I agree with Mr. Zelikow that its creation and establishment was an "extraordinary bureaucratic feat."[90] I am not sure I quite agree, not entirely, with Mr. Zelikow's subtle and fascinating analysis of how exactly Bush, presented with the decision whether to use the "alternative set of procedures" on Abu Zubaydah, came to his decision. "Cheney and/or Tenet argued to President Bush," Mr. Zelikow writes,

> perhaps in April 2002, that Zubaydah was withholding vital information and that they had a proposed interrogation program to get it. . . .
>
> . . . .

84. National Security Act of 1947, Pub. L. No. 80-253, § 101, 61 Stat. 495, 496–97 (codified as amended at 50 U.S.C. § 402 (2006 & Supp. III 2010)).

85. GELLMAN, *supra* note 83, at 162–68.

86. *See* Boumediene v. Bush, 553 U.S. 723, 795 (2008) (holding that key provisions of the Military Commissions Act unconstitutionally denied petitioners' right to seek a writ of habeas corpus).

87. BERGEN, *supra* note 53, at 105–06 (internal quotation marks omitted).

88. *Guantanamo, Ten Years On*, HUMAN RIGHTS WATCH (Jan. 6, 2012), http://www.hrw.org/news/2012/01/06/guantanamo-ten-years.

89. Remarks on the War on Terror, 2 PUB. PAPERS 1612, 1615 (Sept. 6, 2006).

90. Zelikow, *supra* note 2, at 15.

> Consider, then, the position of President Bush. Tenet, backed by the Vice President, stated—in the most compartmented and secret discussion possible—that, in the Agency's expert judgment, the program was necessary.
>
> The applicable legal standards *had already been decided*, months earlier. With the "cruel, inhuman, or degrading treatment" (CID) standard codified in Common Article 3 tossed out, the only remaining relevant standard was the federal anti-torture statute, construed in the narrowest conceivable way. . . .
>
> . . . [Yoo found] that the proposed procedures did not amount to "torture," at least as proscribed by federal law. . . .
>
> . . . .
>
> . . . .
>
> In other words, the President was told that an al Qaeda leader with knowledge of possible plots was in our hands, that this was the only way to find what he knew, and that the proposed program was legal. The President approved it.[91]

Now this account↓brilliantly analyzed and described by someone whom we should be grateful is both an accomplished historian and an experienced practitioner—is quite accurate. Which is to say, all of it—every individual sentence↓is true. But is it . . . right?

I don't think so. For the implication, in my reading, is that President Bush, in effect, was "sandbagged." That is, given the circumstances, there was only one decision he could make: circumstances, or Cheney and his cabal, had in effect decided the matter for him. Bush really had no decision to make; it had all been determined by the time the matter reached his desk.

It strikes me, though, that this could only really be the case—could only be right—if President Bush had not been involved in this effort, and apprised of it, and in sympathy with it, pretty much all along. And I think the evidence is overwhelming that he was.

What evidence? I have no documents↓indeed, what written evidence there might be (and I agree with Mr. Zelikow that there is likely to be little, if any)[92] remains classified, notably the Memorandum of Notification of September 17, 2001[93]↓which is,

91. *Id.* at 22–24 (footnote omitted).

92. *Id.* at 18.

93. Johnston, *supra* note 74.

in any case, unlikely to contain much specific information about interrogation. What we do have are "overt acts," as the lawyers say, and those tell a very clear story, one that was not lost on senior officials at the time. Alberto Mora, the General Counsel of the Navy and one of the few officials who emerges honorably from this affair, told Barton Gellman quite bluntly that "the Geneva decision had the primary purpose of making room for cruelty"[94]↓that is, *the intention* was to make way for the application of cruel, inhuman, and degrading treatment. Douglas Feith, as we saw, also kindly confirmed this to Mr. Sands.[95] As for the process that John Yoo was launched upon that spring, the purpose of this was quite clear to those within the government and, I venture, will be quite clear to anyone who takes the time to read the fascinating Office of Professional Responsibility (OPR) report from the DOJ.[96] You learn therein how CIA officials sought first from the DOJ a "letter of declination"↓an absolute ex ante pardon.[97] When Michael Chertoff, then head of the DOJ's criminal division, flatly refused to grant this, attention focused not only on obtaining the OLC memos but making sure they were, as it were, ironclad.[98] On these matters various members of the CIA have been quite clear. "[T]he requests for advice," Ralph S. DiMaio of the CIA's National Clandestine Service said in a sworn statement to a federal court in April 2008, "were solicited in order to prepare the CIA to defend against future criminal, civil, and administrative proceedings that the CIA considered to be virtually inevitable."[99]

Indeed, the OPR report and other evidence suggest that the concluding and most notorious section of John Yoo's August 1 memorandum↓which argues, in essence, that even if the interrogation techniques described do constitute torture, the President still has the power, legally, to order them, by virtue of his commander-in-chief authority↓was written and included in the memorandum in order to offer a final, bulletproof "golden shield" to the CIA, so that, come what may↓even if this extreme

94. GELLMAN, *supra* note 83, at 176.

95. *See supra* notes 39–42 and accompanying text.

96. *See generally* OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.

97. *See id.* at 47–49.

98. *Id.*

99. Declaration of Ralph S. Dimaio, Information Review Officer, National Clandestine Service, Central Intelligence Agency at 64, Amnesty Int'l v. CIA, 728 F. Supp. 2d 479 (2010) (No. 07 Civ. 5435 (LAP)), 2008 WL 3415452.

reasoning was eventually disowned and discarded, as it was—all involved could claim to have acted in good faith, on the advice of their attorney.[100] It should be added, by the way, that Mr. Yoo, in composing this part of his argument↓the idea for which seems originally to have come from Mr. Addington↓was not arguing anything he did not himself believe, as is well demonstrated in his other writings[101] and, most vividly, in this later exchange in a debate with Douglass Cassel at Notre Dame:

> [Doug Cassel:] If the president deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?
>
> John Yoo: No treaty.
>
> Cassel: Also no law by Congress—that is what you wrote in the August 2002 memo. . . .
>
> Yoo: I think it depends on why the president thinks he needs to do that.[102]

This horrible exchange has attained a degree of notoriety. I think it is worth overcoming our repugnance for a moment to point out that Mr. Yoo is quite right: his memorandum, which was the official policy of the U.S. government for a number of years, does in fact argue this, that the President of the United States can order a child's testicles crushed in front of his father to elicit information, and that if he were doing so pursuant to his commander-in-chief authority such an order would be *legal*.[103] Presumably he could order the child burned alive, dipped in acid, or boiled in oil, and there's nothing illegal about that either. He is the President and the Commander in Chief.

In view of Mr. Zelikow's observation about Bill Clinton—how he was at his most brilliant as a lawyer when he teased out the implicit problems buried in an argument and so on[104]—I feel compelled to point out that there are times when the conclusion of an argument is so plainly wrong that it alone may serve as proof of mistaken premises, faulty reasoning, or

100. *See* Bybee Memorandum II, *supra* note 30, at 31, 36–39.

101. *See generally* JOHN YOO, THE POWERS OF WAR AND PEACE (2005) (arguing for broad presidential authority to interpret treaties).

102. Nat Hentoff, *Don't Ask, Don't Tell*, VILLAGE VOICE, Feb. 1–7, 2006, at 28, 28 (emphasis omitted) (internal quotation marks omitted).

103. *See* Bybee Memorandum II, *supra* note 30, at 34–39 (arguing that Congress cannot interfere with, or regulate, the President's interrogation of enemy combatants while he is acting pursuant to his commander-in-chief authority).

104. *See* Zelikow, *supra* note 2, at 12 ("Clinton had been a quintessential law school product, brilliantly teasing out every question embedded in a problem . . . .").

both. This is one of those times. We know of governments in which the leader of the state may "legally" order a child's testicles to be crushed or a child to be burned alive: Voltaire certainly knew about states like that, and so did the Framers of our Constitution, and so did Abraham Lincoln. In fact, we know of them ourselves, today. They are all around us. I have covered some of them as a journalist. Mr. Islam Karimov of Uzbekistan, for example, if we are to believe British intelligence reporting, is to this day fond of boiling prisoners alive, or parts of them.[105]

So while there is nothing particularly exotic about a government in which the head of state by virtue of his position can order a child's testicles crushed to extract information, and can do so in full confidence that the action is legal because he is the head of state or commander in chief or whatever↓while there is nothing particularly exotic about it, this is not the kind of government the Framers created or anyway thought they were creating. It is—this is the least we can say↓a government of men and not of laws, based on the principle, to paraphrase the late Richard Nixon↓a President for whom, not coincidentally, both Mr. Cheney and Mr. Rumsfeld served as young men in high positions—that "when the president does it, that means that it is not illegal."[106] That principle is the implication of Mr. Yoo's memorandum, and very recently it became the policy of our government, and in certain significant ways remains inscribed within our laws.

So, about that riddle and mystery and enigma: I think a fair reading of the evidence suggests that, as part of the post-9/11 national security planning undertaken by this tiny group of officials beginning within a week or so of the attacks, a plan was put in motion to make use of harsh interrogation techniques and to construct a legal "golden shield" to protect those who devised them, those who ordered them, and those who applied them to detainees. I believe the President was part of this. There are signs here and there of an effort to argue that, or make it appear that, the initiative to develop and use these techniques came from "the field."[107] Philippe

105. Peter Hitchens, *Our New Best Friends Boil Dissidents Alive*, MAIL ONLINE (Apr. 23, 2004), http://www.dailymail.co.uk/debate/columnists/article-228241/Our-new-best-friends-boil-dissidents-alive.html; *Uzbekistan: Detainees Tortured, Lawyers Silenced*, HUMAN RIGHTS WATCH (Dec. 13, 2011), http://www.hrw.org/news/2011/12/13/uzbekistan-detainees-tortured-lawyers-silenced.

106. DAVID FROST WITH BOB ZELNICK, FROST/NIXON 89 (2007).

107. *Cf.* OFFICE OF PROF'L RESPONSIBILITY, *supra* note 96, at 32–37 (conveying that CIA operatives requested the development of enhanced interrogation techniques in

Sands demolishes one such effort in his analysis of al-Qahtani and Guantánamo.[108] So far as I can tell, the CIA storyline on interrogation is pretty much the same: the planning, what there was of it, began at the top. And from the top, of course, came the order to go ahead and try them out. Once the decisionmakers at the top of our government initiated this program—or rather, began to "reverse engineer" these techniques—it was very unlikely they would not be used. Those giving the order to use them did so in part because the program was, in a word, "their baby."[109] I think this includes President Bush. You cannot "sandbag" yourself. And so they were "tried out." As Abu Zubaydah's tormenters told him, these were "experiments," and since "he was one of the first to receive these interrogation techniques, . . . no rules applied."[110]

Now it should be said there is nothing illegal about the President ignoring his own National Security Council. On various occasions, presidents have worked around the National Security Council's processes in creative ways, most notably, President Nixon and his first National Security Adviser, Henry A. Kissinger, during their secret opening to China.[111] But nothing remotely like what happened in the American government after 9/11 has ever happened before. And these decisions—Guantánamo, Abu Ghraib, and so on—well, to paraphrase Talleyrand, they were worse than crimes, they were blunders. They were stupid, costly policies that dishonored and materially harmed the country.

Who should have been protecting the country from such harm? Mr. Zelikow, in another subtle point, speaks of his former boss, Condoleezza Rice, and notes that the then-National Security Adviser—the person who was supposed to coordinate

cooperation with CIA attorneys who requested criminal declination prior to interrogating Abu Zubaydah); SANDS, *supra* note 13, at 60–64, 124 (describing Diane Beaver's account of the development of aggressive interrogation techniques used at Guantánamo).

108. *See* SANDS, *supra* note 13, at 5, 60–61, 123, 225–26 (examining the U.S. Army Field Manual, concluding that it did not authorize any of the interrogation approaches, and finding that influential decisions at top levels of the government brought about these techniques).

109. *Cf.* Greenburg, Rosenberg & de Vogue, *supra* note 75 (quoting Condoleezza Rice as telling the CIA, regarding enhanced interrogation techniques: "This is your baby. Go do it" (internal quotation marks omitted)).

110. INT'L COMM. OF THE RED CROSS, *supra* note 18, at 12, 17, 31 (emphasis omitted) (internal quotation marks omitted).

111. *See* JOHN P. BURKE, HONEST BROKER? THE NATIONAL SECURITY ADVISOR AND PRESIDENTIAL DECISION MAKING 136–37 (2009) (affirming Kissinger's role as NSC advisor in the United States' opening with China); YUKINORI KOMINE, SECRECY IN US FOREIGN POLICY: NIXON, KISSINGER AND THE RAPPROCHEMENT WITH CHINA 41–52 (2008) (examining Nixon's broad restructuring of the role of the NSC within his administration).

policy and make sure things like this did not, could not, happen—that:

> [Ms.] Rice could have argued for a more substantial policy analysis. . . . The issue was already framed by the questions Bush had posed.
>
> What is not evident to those outside of the government is the procedural stance of Tenet and Cheney's interrogation proposal. This appears to have been presented to Bush as a decision about intelligence collection methods—if a momentous one.[112]

Well, yes: this is, as I say, subtle, and sensitive. But in fact it wasn't a "[procedural] decision about intelligence collection methods," no matter how it "framed." It was a deeply political decision that would have momentous consequences in what was in fact a political war. In the formulation of Peter Bergen, one of the best and most experienced analysts of this "longest war," the United States committed two grand strategic errors in the war against al Qaeda.[113] One was to launch the war in Iraq, and one was the decision to intern, abuse, and torture detainees, and to do it in a way that "foreseeably," as Mr. Zelikow says, in the hands of little-trained troops, was going to create a terribly damaging public scandal.[114] The National Security Adviser was watching that grand strategic error take shape right in front of her, and her response, in this case as in that of the military commission and other consequential issues, was . . . to insist that the Attorney General should have some say.[115] Eventually, as Mr. Gellman describes, Ms. Rice complained angrily about being circumvented and ignored—not to the President, but to his lawyer, Alberto Gonzales.[116]

All of which is to say: Ms. Rice didn't do her job. Or, to put the matter more accurately, she didn't go to the President and demand to be allowed to do her job. If the National Security Council system was working in anything like the way it was

112. Zelikow, *supra* note 2, at 25 (emphasis omitted).

113. *See generally* BERGEN, *supra* note 53 (assessing the strategic errors of both the United States and al Qaeda through a narrative history of the "war on terror").

114. *See id.* at 120, 172 (concluding that the war in Iraq, "[conducted] under the banner of winning the war on terrorism[,] . . . was a failure, giving the jihadist movement around the world a new battlefront and a new lease on life" and concluding that the Bush Administration's counterproductive approach to the treatment of detainees "helped to torpedo America's good reputation around the world"); Zelikow, *supra* note 2, at 3 (discussing the interrogation code of conduct adopted for the CIA program).

115. *See* GELLMAN, *supra* note 83, at 173 (recounting Rice's frustration that Cheney failed to include her in decisionmaking and noting her resulting complaint to Attorney General Gonzales).

116. *Id.*

designed to work, Abu Zubaydah would not have been tortured. Of course, Cheney, Addington, and others were well aware of this: that was precisely their problem with the system and why they worked so hard to circumvent it. Our problem with what they did, on the other hand, is not that Cheney and his colleagues were not devoted public servants sincerely working hard to protect the country. Our problem was that, whatever their virtues, experience, and skills—and Cheney in particular had vast amounts of all of those—they were not infallible; they had blind spots, prejudices, and shortcomings. And the way they controlled the government after 9/11 made sure that those blind spots, prejudices, and shortcomings were translated directly into policy and thereby translated into what was done to these detainees in those cold white rooms. Their errors, prejudices, and misjudgments were eventually inscribed on the skin and nervous systems of these detainees. All this with the imprimatur of the U.S. government: with the imprimatur of you and me.

Now, the interagency system exists to prevent precisely that.[117] And this handful of high officials swept it away. Yes, it was a horrible, frightening time, and Mr. Zelikow vividly describes the pressures and the fears: how the President was pulled out of bed because another attack was thought to be coming, how the Vice President was warned he had been infected with botulism, and so on.[118] But it is important to remember that much of this damage was self-inflicted and could have been avoided. If the President and other senior officials were obsessed with the "threat matrix" and all the phantasms of attacks pouring in, this was in part because they decided to demand they be given raw intelligence.[119] "We went from basically no information to floods," Condoleezza Rice told her biographer.[120] "It just started flooding with everything. So now you were getting un-assessed intelligence. You know, just anything anybody said that might be a threat."[121] Another, more pungent description

117. *See* 50 U.S.C. § 402(a)–(b) (2006 & Supp. III 2010).

118. Zelikow, *supra* note 2, at 6–7; *see also* BUSH, *supra* note 79, at 152–53 (providing an account of the botulism toxin scare); ROBERT DRAPER, DEAD CERTAIN 145 (2007) (recounting President Bush's evacuation in the middle of the night following reports of an attack).

119. *See* ELISABETH BUMILLER, CONDOLEEZZA RICE 167 (2007) (noting that Bush had requested to receive detailed threat assessments on a daily basis); GELLMAN, *supra* note 83, at 233 (defining the "daily Threat Matrix" as a "compilation of terrorist 'indications and warnings'" and commenting that "[m]ost of [the indications and warnings] were probably spurious, and nearly all were vague").

120. BUMILLER, *supra* note 119, at 168 (internal quotation marks omitted).

121. *Id.* at 168 (internal quotation marks omitted).

of this comes from Roger Cressey, an experienced intelligence officer and counterterrorism official then working in the White House:

> You're being flooded with some of the most dogshit, inaccurate threat reporting possible. . . . So, threat reporting that I would laugh out of my working group on threats was now making it . . . directly into the Oval Office because God forbid the FBI or the CIA didn't tell the president or the White House of a threat and it became true.[122]

Which is to say that the fact that the President was spending hours looking at raw threat reporting was *a mistake*; the Commander in Chief should not have been spending his time doing what an intelligence analyst is paid to do. Tenet and Rice should have seen to it that he wasn't. Is it understandable, after the success of those attacks, that the President would want to see the raw intel and that the intelligence people would want him to? Yes, of course it is. But that doesn't mean that it wasn't foolish, wasn't a mistake, that it wasn't a self-defeating deformation of the policy process. And, so too, was the way the military commissions policy was created and imposed. And so, finally, was the planning and creation of the United States of America's first official torture policy by Mr. Cheney, Mr. Addington, and a handful of other officials, all watched over and approved by the President of the United States.

When we say these reactions are understandable we mean that we, as human beings, can see ourselves reacting the same way. But "we" should not be the point of comparison. Would Franklin Roosevelt have reacted the same way? Did he demand, after the attack on Pearl Harbor, that he personally review every bit of raw intelligence reporting that might hint at an attack? Would Eisenhower, Kennedy, or Nixon have conceivably reacted this way? We can't know, of course. But this is the question to ask, and in asking it, we gain newfound appreciation for the terse clarity of counterterrorism adviser Richard A. Clarke's appraisal. After 9/11, said Clarke, "we panicked."[123] And we did so in a way to magnify our blind spots and fears and draw on precisely those for the creation of our most important policies.

One of Mr. Cheney's blind spots was that he had almost no understanding of the political aspect of this War on Terror—which,

122. BERGEN, *supra* note 53, at 95–96 (internal quotation marks omitted).

123. *Global Public Square: Interview by Fareed Zakaria with Richard Clarke* (CNN television broadcast May 9, 2010) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/1005/09/fzgps.01.html).

as it happens, is its most important aspect. Mr. Zelikow says that by 2005 both he and Rice "believed that the raging controversy, usually encapsulated in shorthand words like 'Abu Ghraib' or 'Guantánamo' or 'torture,' was hurting the United States' position in the world more than any other problem in our foreign policy, even more than the war in Iraq."[124] Contrast this with what Dick Cheney, in his recent memoirs, has to say about Guantánamo: "I don't have much sympathy for the view that we should find an alternative to Guantanamo . . . simply because we are worried about how we are perceived abroad."[125] As for what he calls the "recruitment tool theory" of Guantánamo, Abu Ghraib, and the rest, Cheney remarks that, "after a familiar fashion, it excuses the violent and blames America for the evil that others do. It's another version of that same old refrain from the Left, 'We brought it on ourselves.'"[126]

Now, it is clear from this and other quotations that Mr. Cheney, for all his experience and considerable virtues, has very little appreciation for the politics of this war—and very little understanding of why al Qaeda actually does what it does. Al Qaeda launches terrorist attacks not because its leaders "hate our freedoms," but in order to inspire and build a movement of devout Muslims who will rise up against the "apostate rulers" of the Muslim world and their American supporters.[127] They do it to recruit, that is, and the particular "propaganda of the deed" that was the attack of 9/11 was more than anything else the largest recruitment poster in the history of the world.[128] It was also an act of provocation, designed to provoke the United States into invading and occupying Afghanistan, where al Qaeda intended to trap the country in a bloody quagmire and use insurgent warfare to defeat it, as it had—so the mythology goes—the Soviet Union before it, all the while providing the Muslim world with daily television pictures of Americans bombing, strafing, and otherwise abusing Muslims.[129] (That was the idea, anyway; in the event, the Bush Administration presented the organization with the much larger and more valuable prize of a bloody and unprovoked American invasion of Iraq.)

124. Zelikow, *supra* note 2, at 36.

125. DICK CHENEY WITH LIZ CHENEY, IN MY TIME 356 (2011).

126. Cheney, *supra* note 76.

127. *The al Qaeda Manual Introduction*, *in* THE IRAQ PAPERS 496, 496 (John Ehrenberg et al. eds., 2010) (internal quotation marks omitted).

128. BERGEN, *supra* note 53, at 91 (internal quotation marks omitted).

129. Thomas Hegghammer, *Jihadi Studies: The Obstacles to Understanding Radical Islam and the Opportunities to Know It Better*, TIMES LITERARY SUPPLEMENT, Apr. 4, 2008, at 15, 15.

This political project means that the key question for American policymakers in the War on Terror was, as Donald Rumsfeld phrased it, "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?"[130] This depends critically on what the United States does, notably on whether what it does encourages recruitment, in part by vividly confirming the picture of the United States that al Qaeda wants to present, for example, by tormenting, torturing, and humiliating detainees. The Abu Ghraib photographs were unquestionably the largest single boon to al Qaeda in the entire War on Terror; you only have to spend a bit of time in the Middle East to appreciate this. It is clear that Mr. Cheney has no time for this view of al Qaeda—that he is blind to it and sees it as so much liberal folderol, akin to the theory that poverty and injustice cause crime. When he speaks of al Qaeda in this way, Mr. Cheney doesn't sound like a staunch conservative. He just sounds ignorant.

No one is perfect, of course. But it was the job of the National Security Council that Ms. Rice was charged with managing to make sure that such large and consequential blind spots of individual policymakers, however powerful and important those policymakers might be, did not get translated into the policy of the country and thereby do it harm. And that would have meant not just sending the proposal to use "enhanced interrogation" to the lawyers but to consider it as a matter of great import that would have consequences, grave ones, in the very war that supposedly urgently demanded these skills to fight. For the real question to ask about torture is not only whether it is uniquely effective in extracting information from terrorists; not only whether it can extract information that other methods cannot; but whether, if it can in fact do so—and that is a very big "if"—whether that information it uniquely extracts is likely to outweigh the enormous downsides it brings, the negative consequences—not just diplomatic, legal, or even moral, but *political*, as a national security matter—that the decision to use these techniques is certain to have. And though there is, yes, debate about the effectiveness of "enhanced interrogation" and so on, I have no doubt, having read an ungodly amount about this distasteful subject, what the answer to that particular question, if honestly posed and explored, would have been.[131] Perhaps the

130. RUMSFELD, *supra* note 71, at 668.

131. *See* Scott Shane & Charlie Savage, *Harsh Methods of Questioning Debated Again*, N.Y. TIMES, May 4, 2011, at A1 (commenting on the revival of a "national debate

greatest tragedy of this affair, among so many others, is that this question was not even asked, let alone answered.

Instead, there were secret meetings in secret rooms, and we got a grand policy that reflected all the shortcomings and disfigurements and prejudices of Mr. Cheney and a handful of other officials, and a president who willingly signed these policies into law and into practice. In the end, there is no riddle, wrapped in mystery, inside an enigma here. I wish there were.

Though torture has stopped, the policy in many ways is still with us, in a corrupted public debate and in the loud calls, after every failed attack—that of the so-called Christmas Day Bomber, most recently—that the captured terrorist should be taken to Guantánamo and "really interrogated." Guantánamo is still with us, of course, despite President Obama's Executive Order, signed with great fanfare on his second full day in office, directing that it be closed within a year.[132] Indeed, closing Guantánamo, in view of the loud and sometimes near hysterical opposition of politicians worried about seeming "soft on terror," seems ever farther away. As for torture, a decade after the September 11 attacks, one of our two great political parties has a clear position on this "alternative set of procedures": it is in favor of it.[133] (By another name, of course.) And torture itself? President Obama tells us that he has "prohibited" it, though in fact he lacks that power.[134] The clear truth is that torture is illegal and the pretense that this President has the power to prohibit it follows insidiously from the belief that his predecessor had the power to order it. And yet this pretense, together with the Military Commissions Act of 2006, and the changes in the War Crimes Act it embodied—together with the refusal to confront the lawbreaking of the recent past—means that torture, throughout our history illegal and anathema, is now a policy choice.

At the end of the day, the responsibility for all this belongs to President Bush. I don't think he was sandbagged. I think he was an inexperienced leader who, after presiding over the gravest defeat in America's history, found his calling in the War on Terror, tried hard and relentlessly to demonstrate his toughness and resolve in protecting the country, and, in so doing, harmed it in unprecedented ways. If President Bush broke the

about torture," which accompanied the killing of Osama Bin Laden).

132. Exec. Order No. 13,492, 3 C.F.R. 203 (2009); BERGEN, *supra* note 53, at 306.

133. Editorial, *The Torture Candidates*, N.Y. TIMES, Nov. 15, 2011, at A24.

134. *Text: Obama's Speech in Cairo*, N.Y. TIMES, June 4, 2009, http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html?pagewanted=all.

social contract Mr. Zelikow so eloquently describes,[135] it was in not giving to such a decision the moral weight and gravity it deserved. He thought it courageous to make tough decisions, and he wanted to show in making those decisions that he would do *anything* to protect America. Unfortunately doing *anything* is not always the wisest thing to do. In this case, his decisions hurt us badly, and as this Twilight War goes on, we struggle still to cope with their aftermath.

135. *See* Zelikow, *supra* note 2, at 51–52 (explaining the social contract formed "of trust" when "extraordinary powers" are granted to government).