

FROM THE PRESIDENT

JOHN WESLEY HALL

Torturing the Geneva Convention

Defending A Torturer

War is ugly and hard to control, and it inevitably leads to war crimes. It is a fact of war, be it a civil war or a “traditional war” or a war with undefined “enemy combatants.” Every person in the field, be it in combat, Guantanamo Bay, or a “black op” prison, cannot be fully controlled by his or her superiors. People in the field cannot be expected to exactly follow the law, and not every violation of the law in battle or in the field is a war crime. Indeed, most such violations of the law are not war crimes because a war crime requires a “grave breach” of human rights under the Geneva Convention.¹ When commanders condone violations of human rights in advance, alleged war crimes will more readily happen and likely be found out because those in the field then feel licensed to act.

Did officials of the United States do what is alleged of them? If so, do the allegations rise to a “grave breach” including a pattern of conduct and not just isolated acts?

It would appear from its actions that our government anticipates a federal grand jury may ultimately investigate alleged violations of the U.S. federal war crimes statute (18 U.S.C. § 2441), which incorporates the Geneva Conventions. Why? Because Congress, in the Detainee Treatment Act of 2005, while more obviously seeking to prevent habeas corpus from applying to detainees, quietly authorized payment of attorneys fees in civil and criminal cases for U.S. government actors accused of war crimes occurring between September 11, 2001, and December 31, 2005.²

Well, a mass of evidence of alleged U.S. war crimes (torture of detainees) is finding its way into the public domain.³ This evidence would appear to directly contradict the claims

of senior members of the Bush administration that it did not encourage or instruct the use of torture in the War on Terror.

Years of in-depth investigative reporting and advocacy by defense attorneys for Guantanamo detainees, including NACDL members, have unearthed a compendium of documents and testimony suggesting that Vice President Dick Cheney was far from using hyperbole when, on Sunday, September 16, 2001, he said, “We’ll have to work sort of the dark side, if you will. . . . It’s going to be vital for us to use any means at our disposal basically, to achieve our objectives.”⁴

The call for an investigation is mounting, and it is more than just an alleged crime under investigation. It seems as if our national soul is at stake. Michael Ratner, president of the Center for Constitutional Rights, in *The Trial of Donald Rumsfeld: A Prosecution by Book*, wrote the following in his “Opening Statement”:

We cannot put the genie back in the bottle. We cannot go back in time and stop what has occurred. Perhaps we can deter future conduct if we send a message to the world that torturers, like the pirates of old, are enemies of all humankind and will be brought to justice no matter their power or high office.⁵

Ratner proceeds to make his case against senior Bush administration officials including former Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, and former White House Counsel and Attorney General Alberto Gonzales, among almost a dozen others, a number of them attorneys. In making out his case for a war crimes prosecution, he lays out the charges “of war crimes and torture, and other cruel, inhuman, or degrading treatment,” using the words of the Geneva Convention Against Torture.⁶ Ratner is not alone.⁷

Of course, the alleged authorization and encouragement of torture as a war crime will not be investigated, indicted, or tried by authors, not-for-profits, investigative journalists, or the media. It is a matter for our criminal justice or military justice system. A grand jury in the U.S. District Court for the District of Columbia could be empanelled to ascertain whether or not U.S. officials condoned war crimes in the War on Terror.

All the authors thus far agree that our nation’s reputation requires it. Under our rule of law, the evidence of possible war crimes must not be ignored; indeed, they must be vigorously pursued. The integrity of our constitutional system and our nation’s standing as the ultimate and historical guardian of human rights depend upon it. The larger question is whether it will ever be pursued.

One can read these books about torture and feel impelled toward the conclusion of guilt, but the public must never forget the bedrock American principle of the presump-

John Wesley Hall, president of NACDL, defended a Sierra Leone



military officer accused of war crimes in violation of the Geneva Convention for the “unlawful killing of . . . civilians and captured enemy combatants.” (<http://www.sc-sl.org/CDF.html> (indictment)).

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tion of innocence and right to a defense. Just as NACDL has argued for years in public statements, *amicus* briefs, and everywhere else on behalf of those detained as part of the War on Terror, any target of a torture investigation is entitled to a competent and vigorous defense in the finest tradition of American defense lawyers. Just as we represented the detainees, accused or not, in the noble tradition of John Adams,⁸ I am sure we will represent any accused torturers.

The irony here can be cut with a knife. Most of those allegedly subjected to torture have been accused of no crime in the United States or before a military commission. The vast majority were detained without charges, with the Bush administration and Congress adamantly opposing any legal claim that they were entitled to legal counsel or access to the U.S. courts. It is a remarkable proposition for a person to be held by the U.S. government but denied access to a U.S. court for years.⁹

While the government was allegedly torturing detainees with the imprimatur of the August 1, 2002, “torture memo” from DOJ, a document designed to legalize torture as an investigative technique in the War on Terror, Congress, at the administration’s request, quietly gave those doing its torture in the Detainee Act of 2005 taxpayer-funded representation in any “civil action or criminal prosecution or investigation” relating to the “detention and interrogation of aliens who the president or his designees have determined are believed to be engaged in terrorist activity.”¹⁰ The Act also provides that “good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would not know the practices were unlawful.”¹¹ In the developing torture literature, everybody seems to have doubted it, even with the torture memo. If they doubt it, how good is the “advice of counsel” defense?

Our government’s anticipatory use of the defense of advice of counsel to justify repeated, affirmative acts of violence on defenseless prisoners is repugnant to normal sensibilities. Moreover, this statute tells me that the government is worried that defense will not hold up. As a legal ethicist, I am particularly troubled by this manufactured advice of counsel gambit designed to head off or thwart potential prosecutions. In the aftermath of World War II, the United States successfully established for all time that “I was only following orders” is no defense. This has long been known by just one word: “Nuremberg.”

How will this defense fly today? Torture is a crime of violence under international law.¹² In a crime of violence, advice of counsel has never before, to my knowledge, been a defense. Leave it to our overlawyered society to use a government lawyer with no true lawyerly independence as legal cover. One would think that no really independent-minded lawyer would be a part of such a scheme. Remarkably, our “law and order” government has concocted a new legal defense to the crime of torture in the name of democracy.¹³

Surely even the lawyers giving that legal advice must know by now that if a torture case goes before a grand jury investigating war crimes, they too will require criminal defense lawyers. In arguably failing to provide independent legal advice, they may be exposed themselves.

In light of this evidence, a grand jury may be empanelled so the world will know this nation is serious about protection of human rights. Why? The continuity of American democracy as the leading example of freedom in the world is only as assured as the commitment of our leaders to the principles upon which the nation was founded and the human rights treaties we spearheaded after the atrocities of World War II.¹⁴

The mere allegation of this conduct by senior members of the Bush administration has undermined the very character of the United States and our place as a beacon of human rights. We championed the Geneva Conventions to be sure that war would be conducted humanely [an oxymoron, I know], but it would now seem from these allegations that we violated them.

Our failure to enforce the customs of law we created proscribing the torture of detained persons not only opens the United States up to charges of hypocrisy, but creates the likelihood of future harm to our soldiers because we ignore the Geneva Conventions. Our government appears to have undermined one of the central tenets of American criminal justice: No one is above the law.¹⁵ This nation is also supposed to be the world example of the “rule of law.” We proved that first at Nuremberg and later with the Watergate investigation and its inevitable resignation of the president.

Reclaiming our national soul likely requires that these allegations be investigated. Should military and civilian officials become subjects or witnesses of a grand jury investigation, they need to be assured that they are entitled under the Sixth and Fourteenth Amendments to legal representation and due process of

law, which is a lot more process than the detainees at Guantanamo have received over the past six years.

If not us, whom?

Notes

- 18 U.S.C. § 2441(c).
- 42 U.S.C. § 2000dd-1 (Detainee Treatment Act of 2005, § 1004, *as amended* by Military Commissions Act of 2006, § 8).
- A database of “torture documents” is available and searchable on the home page of NACDL’s and the ACLU’s John Adams Project. Go to <http://www.aclu.org/safefree/detention/johnadams.html>.
- NBC, “Meet the Press,” Sept. 16, 2001, quoted in JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008), 9-10.
- MICHAEL RATNER, *THE TRIAL OF DONALD RUMSFELD: A PROSECUTION BY BOOK 4* (2008).
- Ratner, *supra*, at 11: Pursuant to international humanitarian law contained in the four Geneva Conventions of 1949, ratified by the United States; international human rights law under the International Covenant on Civil and Political Rights (ICCPR, arts. 7 & 10) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), both of which are ratified by the United States; pursuant to the principles of customary international law applicable to all states; pursuant to the U.S. War Crimes Act of 1996 (18 U.S.C. § 2441) and to the Torture Victims Protection Act of 1994 (18 U.S.C. § 2340A).
- Other books published this year exploring the Bush administration’s record on torture include JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008), and PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).
- <http://www.aclu.org/safefree/detention/johnadams.html>.
- Detainees have been in the Supreme Court three times; the last ruling was handed down in June. *Boumediene v. Bush*, 553 U.S. ____; 2008 WL 2369628 (2008).
10. Detainee Treatment Act of 2005, § 1004, *as amended* by Military Commissions Act of 2006, § 8.
11. Detainee Treatment Act of 2005, § 1004(a). Apparently the government felt that outright immunity would either not pass or it would be noticed by the public.
12. Geneva Convention Art. 17 (1949, entered into force 1950) (“No physical or men-

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tal torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”).

13. The Department of Justice Office of Legal Counsel has issued the “torture memorandum” that justifies what would otherwise be a crime. Is this a legal defense? Who knows now? See 2 Paul Robinson, *CRIMINAL LAW DEFENSES* § 183(c)(3):

Potential for abuse is also often cited as a rationale for limiting the reasonable reliance excuse to official misstatements. A client might seek, or a counsel might intentionally give, erroneous advice that would then permit the client to undertake criminal activity with impunity. The objection is not without basis, but the requirement of the defense that there be actual and reasonable reliance seems sufficient to effectively exclude such fraudulent excuses. ...

It should be noted as well that where fabricated reliance upon a calculated misstatement is a concern, officials themselves have no special immunity from the temptations of bribery and corruption. Thus, if abuse is a sufficient concern to bar the defense, the defense might properly be barred for reliance upon official misstatement as well.

14. Starting, of course, with the Geneva Convention and all its amendments.

15. *United States v. Lee*, 106 U.S. 196, 220 (1882):

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it. ■

NACDL Sentencing Committee — Call to Action

Mark Rankin and Mark Allenbaugh are the new co-chairs of the NACDL Sentencing Committee and seek your involvement. The Committee will focus on state, federal, and international sentencing policy and procedure. The first meeting of the newly constituted committee will be on Sunday morning at the Fall Meeting in Tampa. Please e-mail the co-chairs at mraink@carltonfields.com and mallenbaugh@alsalaw.com to express your interest in being involved and attending the meeting in person or by phone.

omitted).

35. *Id.* at 719; see also *Ebbers*, 458 F.3d at 128 (“The loss must be the result of the fraud.”).

36. *Olis*, 429 F.3d at 546-47 (citing cases rejecting market capitalization calculations of loss).

37. See *Rutkoske*, 506 F.3d at 178.

38. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343 (2005); cf. *Ebbers*, 458 F.3d at 127 (“The loss to investors who hold during the period of an ongoing fraud is not easily quantifiable because we cannot accurately assess what their conduct would have been had they known the truth.”).

39. See *In re Cedant Corp. Litig.*, 264 F.3d 201, 242 (3d Cir. 2001) (illustrating inflated loss generated by market capitalization analysis where an investor purchased stock at a lower price than that immediately preceding disclosure of a fraud), discussed in *Reyes Order*, at 5-6.

40. See *United States v. Bakhit*, 218 F.Supp. 2d 1232, 1241-42 (C.D. Cal. 2002) (calculating loss based on depressed stock price on date trading resumed following disclosure of fraud would result in an inflated loss adjustment because initial price drop was temporary and “appear[ed] to be an anomaly, an extreme reaction to the announcement of the fraud”).

41. 479 F.3d at 720.

42. *Id.* at 720; cf. *Ebbers*, 458 F.3d at 127-28 (discussing defects in “simplistic analysis” of market capitalization model).

43. See *Rutkoske*, 506 F.3d at 179, citing *Olis*, 429 F.3d at 546 (looking to civil securities fraud damages law for guidance in calculating Guidelines loss).

44. *Rutkoske*, 506 F.3d at 179.

45. 544 U.S. 336.

46. *Id.* at 341.

47. 429 F.3d at 546.

48. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of Title 15 U.S.C.).

49. See 15 U.S.C. § 78u-4(e); *United States v. Grabske*, 260 F.Supp.2d 866, 873-75 (N.D. Cal. 2002); *Reyes Order*, at 6.

50. 506 F.3d at 179.

51. See, e.g., *Reyes Order*, at 5-6.

52. *Olis*, 429 F.3d at 546.

53. See *Rutkoske*, 506 F.3d at 180 (“basic failure” for sentencing court to not even consider factors relevant to stock price decline other than fraud).

54. Cf. *Rutkoske*, 506 F.3d at 180 (rejecting government’s argument that a “thin market” for a stock means that market forces could not have contributed to investors’ losses).

55. *Rutkoske*, 506 F.3d at 179-80.

56. See *Reyes Order*, at 8-10 (rejecting government calculations based on “rescissory loss model” because effects of defendant’s wrongdoing cannot be untangled from market influences on stock price).

57. See USSG § 2B1.1, cmt. n.3(B); *Zolp*,

479 F.3d at 719.

58. See, e.g., *United States v. West*, 2 F.3d 66, 71 (4th Cir. 1993) (brokerage fees paid by government is appropriate loss where brokers fraudulently obtained under-secured bonds for government).

59. *Id.* 479 F.3d at 717.

60. *Id.* at 720; cf., e.g., *United States v. Munoz*, 430 F.3d 1357, 1371 (11th Cir. 2005) (sentencing court would be justified in using defendant’s gain to assess loss given that it was arguably difficult to determine customer’s loss in misbranding case), *cert. denied*, 126 U.S. 2305 (2006); *United States v. Yeager*, 331 F.3d 1216, 1225-26 (11th Cir. 2003) (affirming trial court finding that defendant’s profit was reasonable estimate of loss where court was unable to reasonably estimate actual or intended losses due to conflicting and confusing trial testimony).

61. See, e.g., *6 Arrested Over Plots to Pump Up Share Prices*, N.Y. TIMES, Dec. 8, 2007, at B1 (detailing operation in which undercover FBI agent “got word out in the penny stock community that he was willing to buy stocks in struggling companies in return for bribes”).

62. See, e.g., *Reyes Order*, at 7 (rejecting government’s alternate proposal of measuring loss by SEC fines paid by issuer, or tax liabilities of victim employees that issuer voluntarily assumed).

63. *Olis*, 429 F.3d at 547, n.11, cited in *Reyes Order*, at 7 (citation omitted).

64. USSG § 2B1.1, cmt. n.3(D); *United States v. Schuster*, 467 F.3d 614, 618-20 (7th Cir. 2006) (reversing loss calculation that included victims’ expenses in connection with trial testimony).

65. USSG § 2B1.1, cmt. n.3(E)(i).

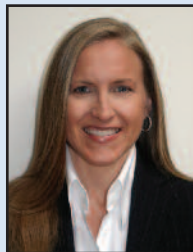
66. *Id.* cmt. n.3(F)(iv); *Loss Overview*, at 13.

67. 966 F.2d 262, 265 (7th Cir. 1992). ■

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