The Odyssey of the United States Road to Torture –
How did the United States become a Waterboarder?

Talk delivered to a Human Rights Seminar in the School of Law, University College Dublin on October 20, 2010 by Robert M Bloom.[1]

The question for this talk is how the United States a democratic country with a refined system of check and balances, became a waterboarder. To most, waterboarding constitutes torture; however, some disagree, as we will discover. Although I will focus on the abuses of the executive branch, the other branches of the United States government have historically also lost their way. For example, in 1945 the Supreme Court during World War II approved President Roosevelt's plan for the internment of Japanese citizens in *Toyosaburo Korematsu v. United States*.[2] The legislature, in particular the United States Senate, in the fifties facing the war on communism went on a witch hunt looking for communists. These so-called "McCarthy hearings" were led by Senator Joseph McCarthy. The United States seems to lose its democratic ideals and principles at times of war: World War II, the war on communism, and now, the war on terrorism.[3] I am reminded of a quote by Supreme Court Justice Robert H. Jackson, the lead prosecutor at Nuremberg: "Security is like liberty in that many are the crimes committed in its name." [4]

On June 26, 2003, to mark the United Nations International Day in Support of Victims of Torture, President George W. Bush said, "The United States is committed to the worldwide elimination of torture and we are leading this fight by example."[5] He further declared his intention to prosecute torture and to prevent other cruel or unusual punishment. This statement unnerved the Central Intelligence Agency ("CIA") due to concern that CIA interrogators would be prosecuted when the political winds change, becoming scapegoats.[6] It is interesting to note that when Bush was Governor of Texas he utilized the death penalty far more than any other state or country.[7]

In describing the United States road to torture, I will use the Italian Spaghetti western, *The Good, the Bad, and the Ugly* (*Il Buono, il Bruto, il Cattiva*). You might remember Clint Eastwood was the good, Lee Van Cleef the bad and Eli Wallach the ugly.[8] The Italian word *cattiva* means more than just bad, it also means wicked. In this category, I have put Vice President Cheney, David Addington (Cheney's alter ego) and John Yoo, the academic brains behind the operation. I could add many more to the list especially in the bad category but I only have an hour. The ugly or *brutto* means somewhat comical and oafish, but still really

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[2] Toyosaburo Korematsu v. United States, 323 U.S. 214, 225 (1945).
[3] Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 469-70 (2003) (detailing lapses in the rule of law over the course of the twentieth century, while ensuring that despite these lapses, rule of law can be maintained during times of war and exigency).
[4] *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950).
[5] Peter Slevin, *U.S. Pledges to Avoid Torture*, Wash. Post, June 27, 2003, at A11.
[6] Mark Mazzetti and Scott Shane, *Interrogation Debate Sharply Divided Bush White House*, N.Y. Times, May 4, 2009, at A13.
[7] Anthony Lewis, *Abroad at Home; Punishing the Country*, N.Y. Times, December 21, 1999.
[8] IMDB.com, *The Good, the Bad and the Ugly*, http://www.imdb.com/title/tt0060196/ (last visited Oct. 29, 2010).

bad. Because of their core badness, but inability to implement their badness, I have put President Bush, his Counsel Gonzales, and Jay Bybee, the head of the Justice Department Office of Legal Counsel ("OLC"). In the good category I have put James Comey, the first Assistant Attorney General to Ashcroft and Jack Goldsmith, the head of OLC after Bybee.
Let me set the scene. A former Justice Department lawyer described the atmosphere on September 11, 2001, "The twin towers were still smouldering. The atmosphere was intense. The tone at the top was aggressive. The President used words like dead or alive."[9] You may also recall that President Bush used the term *crusade* to describe the war on terror and his administration's determination to bring those involved to justice.[10] Michael Mukasey, a distinguished federal judge in New York for 18 years and who served as Attorney General of the United States from 2007 until end of Bush presidency, described the pressure under which lawyers worked after 9/11. They were facing difficult and novel legal questions, under criticism that the legal culture was risk adverse and needed to be more aggressive. Furthermore, the limits of executive power were not clearly defined by the constitution or by well-settled precedent.[11]

How this atmosphere translated into action:

Alberto Gonzales, a soft spoken Harvard-educated lawyer, was Bush's legal counsel who had been with him since his days as governor of Texas. A lawyer who worked with him described him as such, "His defining characteristic is loyalty to the president."[12]

At the White House meeting, Gonzales was concerned about observing the law. A participant recalls, "we didn't want to go over the line."[13] But Gonzales often worried about whether actions were "forward-leaning enough."[14] A fellow lawyer recalled the following: "That's a phrase I heard Gonzales use many times," … "'Lean forward' had become a catchphrase for the administration's offensive approach to the war on terror. And the second part of that statement was always, 'Prevent an attack, save lives.' If Gonzales had any role in this, it was to be the fair arbiter of 'Are we doing enough?'"[15]

In the first months after 9/11, Gonzales helped to craft, or more accurately, signed off on some of the most momentous and controversial decisions of Bush's presidency. Among them: to create military commissions for the trials of terrorists, to designate U.S. citizens as "enemy combatants" and to disregard the Geneva Conventions in the treatment of prisoners at Guantanamo Bay. [16]

I characterize Gonzales as ugly and not wicked because he was inexperienced and not particularly knowledgeable about national security issues. Instead, he relied a great deal on

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[9] Jane Mayer, *Outsourcing Terror: The Secret History of America's Extraordinary Rendition Program*, The New Yorker, Feb. 14, 2005.
[10] *President: Today We Mourned, Tomorrow We Work*, Georgewbush-whitehouse.archives.gov, Sept. 17, 2001 (last visited Oct. 29, 2010). Many European countries criticized his use of *crusade* due to the words… get cite.
[11] Daniel Kanstroom, *Law, Torture, and the "Task of the Good Lawyer"—Mukasey Agnostics*, 32 B.C. Int'l & Comp. L. Rev. 187, 194 (2009).
[12] Michael Isikoff, Daniel Klaidman & Michael Hirsh, *Torture's Path: The Paper Trail is Long, and it isn't Pretty. But it's Sure to Produce Some Tough Senate Questions for Alberto Gonzalez*, Newseek, Dec. 27, 2004, at 54.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006.

David Addington.[17] Addington is a graduate of Georgetown Foreign Service Program and Duke Law School (same law school as Nixon). I should point out that my own law school Boston College claims both Senator John Kerry and Senator Scott Brown. Over twenty years, Addington had a variety of jobs in government, many of them with Cheney. He was Vice President Cheney's legal counsel and then Chief of Staff when Libby was convicted. He was often characterized as Cheney's eyes, ears, and voice. He was first among equals.[18] I should point out usually counsel to the Vice President is "worth less than the proverbial bucket of warm spit," but that was not true with Cheney, who was more like a Prime Minister. [19] As such, Addingtion played a very powerful role in the administration, after 9/11. Addington shared Cheney's view that the executive had been greatly weakened by Vietnam, Watergate, and the Iran Contra affair.[20] He was a strong adherent to unitary executive theory. Addington with his years of government experience was a ferocious in fighter who would often end-run the usual bureaucratic channels. One of these channels he needed to end-run was the Office of Legal Counsel at the Justice Department. [21]

The OLC acts as the conscience of the executive branch. It provides final legal say on what the President, CIA, Pentagon and all executive agencies can and cannot do. Traditionally, the OLC is composed of career lawyers who ensure that the tenor of legal opinions is devoid of political overtones and have a history of scholarly nuanced legal analysis. There were powerful cultural norms within the OLC about detached apolitical legal advice as though it were an independent court inside the executive branch. Its usual way of doing business was to consult with many agencies and to vet their drafts so that a final draft reflects a collective sentiment. Among its alums were Chief Justice Rehnquist and Justice Scalia. Addington, however, did not like this approach and he found a willing ally in John Yoo.[22]

Yoo, a graduate of Yale Law School and a clerk to Justice Clarence Thomas, left the justice department in the summer of 2003 to return to his position as a professor at University of California Berkeley, Boalt Hall. He shared Addington's view of a Unitary Executive. Followers of this theory interpret Article 2 of U.S. Constitution, as vesting control of the entire executive branch in the President. According to Yoo, as signed by Bybee, any effort by Congress to regulate interrogations of battle field combatants would violate the constitutional sole vesting of executive power to the President. Congress can no more interfere with the interrogation of enemy combatants than it can dictate tactical decisions on the battle field. They would further argue that, according to the swearing in statement from the Constitution, that the President can interpret law.[23]

Bybee wrote a memo on August 1, 2002, that stated: "We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A, anti-torture legislation may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war." As a result of 9/11 the President could break the law without reprisals. Some characterized this view Unitary

[17] *Id.*
[18] *Id*
[19] Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, Newsweek, Feb. 6, 2006, at 34.
[20] *Id.*
[21] *Id.*
[22] *Id.*; Nate Katyal, *Counsel, Legal and Illegal*, The New Republic, Nov. 5, 2007, at 37.
[23] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006; Nate Katyal, *Counsel, Legal and Illegal*, The New Republic, Nov. 5, 2007, at 37.

Executive Theory on steroids. [24] The head of OLC, Jay Bybee, was largely used as a rubber stamp and left in the summer of 2003 to become federal judge in the 9th Circuit in California, ironically the most liberal circuit among US circuit courts.[25]

Addington, Yoo, and Gonzales made three crucial decisions after 9/11: (1) preclude congress participation in the creation of military commissions, (2) interpret existing law as narrowly as possible thus to avoid it or utilize Unitary Executive Theory, and (3) finally keep the group making this policy small.[26] The group, which I shall call the "war council," was made up of Gonzales and two associates, Addington,Yoo and William Haynes. Yoo was quickly becoming a protégé of Addington and William Haynes (counsel to the pentagon) was also a long time squash buddy of Addington).[27]

The work that came out of this war council was largely written by Yoo and can be summarized by the following statement: the President did not have to comply with the Geneva Convention because the people detained were illegal enemy combatants and not associated with any nation. As a matter of fact, the President has near limitless power in his fight against terrorism. War on terror was a new paradigm which renders obsolete the strict limitations of Geneva Convention.

Finally the August 1, 2002 memo, the so-called "torture memo," was written. This memo interprets section 2340[28] as follows:

> [Torture required an intent to inflict suffering] equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute namely the threat of imminent death; threats of infliction of the kind of pain that would amount to physical torture; * * *. We conclude that taken as a whole, makes plain that it prohibits only extreme acts.[29]

Waterboarding is one of the oldest most popular forms of torture and would not easily fit under this definition because there would need to be a showing that this mental harm caused significant psychological damage lasting months in duration. Let me describe water boarding, a person is restrained with his face up and head tilted downward. Water is then poured into his mouth, reaching breathing passages. The effect is to cause a gag reflex from which victim experiences what amounts to drowning and feels that he is about to die.[30] The State

[24] Some scholars have gone so far as to argue that the President's oath of office in Article 2 grants the president the authority to interpret the constitution. Michael Stokes Paulson, *Constituion of Necessity*, 79 Notre Dame L. Rev. 1257, 1261 (2004) ("the President has an independent, personal, and nonabdicable constitutional responsibility of faithful constitutional interpretation and execution. The President swears that he (or she) will "preserve, protect and defend" the Constitution. The duty is awesome and personal.").

[25] Adam Liptak, *The Nation: Torture and Legal Ethics; How Far Can a Government Lawyer Go?*, N.Y. Times, June 27, 2004 at 43.

[26] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006.

[27] *Id.*; Peter Raven-Hansen, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, Amer. J. of Intern. Law 672, 674 (2008).

[28] 18 U.S.C. § 2340 (2006) (defining torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control")

[29] Jay Bybee, *Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency*, Office of Legal Counsel, August 1, 2002.

[30] Daniel Kanstroom, *Law, Torture, and the "Task of the Good Lawyer"—Mukasey Agonistes*, 32 B.C. Int'l & Comp. L. Rev. 187, 191 (2009).

Department lawyers described Yoo's position of disregarding the Geneva Convention as "untenable, incorrect, and confused" they further suggested that Bush could be prosecuted as a war criminal.[31]

Let me further describe the work of this "war council." The CIA counsel John Rizzo questioned Gonzales as to how far they could go in interrogating terror suspects, in particular, Abu Zubaydah.[32] In Gonzales's cozy, wood-panelled office, the group reviewed suggested techniques. The result of this meeting is Yoo's memo signed by Bybee.[33]

The memo is carefully tailored to apply to the facts provided to the OLC by the CIA. It introduces several security considerations, most likely to establish the exigency of the situation. The memo begins with:

> You have asked for this Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code. You have asked for this advice in the course of conducting interrogations of Abu Zubaydah. As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001. This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition.[34]

The CIA requested advice with regards to ten enhanced interrogation techniques: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard. Each of these techniques is described in detail:

> "Cramped confinement involves placement of individual in a confined space... which restricts the individual's movement. The confined space is usually dark... [and the] duration can last up to eighteen hours [in a larger space] or two hours [in a smaller space] * * * Wall standing is used to induce muscle fatigue. The individual stands about four to five feet from a wall, with his feet spread... and his arms stretched out... and his fingers support[ing] all of his body weight. * * * Sleep deprivation... could occur for [no] more than eleven days at a time. * * *"

The memo determined that none of these techniques would cause prolonged psychological damage nor physical pain. As such, Bybee advised that none of these methods would violate Section 2340A of title 18 of the United States Code.[35]

Let me finally talk about the good-there are many "goods" but I thought I would just highlight these two: Jack Goldsmith and James Comey. When Bybee left in the summer of 2003 for the bench, a vacancy of head of the OLC was created. Addington and Gonzales wanted Yoo to fill this vacancy. The Attorney General Ashcroft balked because he did not like the close relationship that had been created between the White House and OLC, which in essence allowed for a direct line from the White House to the OLC. Goldsmith, a graduate of

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[31] Jane Mayer, *Outsourcing Terror: The Secret History of America's Extraordinary Rendition Program*, The New Yorker, Feb. 14, 2005.
[32] Jay Bybee, *Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency*, Office of Legal Counsel, August 1, 2002.
[33] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006.
[34] Jay Bybee, *Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency*, Office of Legal Counsel, August 1, 2002.
[35] Jay Bybee, *Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency*, Office of Legal Counsel, August 1, 2002.

Oxford and Yale Law School and a Professor at University of Chicago, worked for Haynes at the Pentagon and was recommended by Yoo and Haynes. He was interviewed by both Addington and Gonzales and there was apparently no discussion about his disagreement with administration's policy.[36] His tenure at OLC was only nine months. He is moderately conservative and pro-presidential power.[37] He wrote a book called The Terror Presidency: Law and Judgment Inside the Bush Administration about his experience.[38] Goldsmith thought Yoo's decisions were sloppy and overreaching. He also felt that Yoo's reasoning rested on cursory one-sided legal arguments. Respect for separation of power, duty of care and thoroughness demand full consideration of Congressional and judicial prerogatives, as well as, acknowledgment of significant counter-arguments. He sought out advice from others in Government, as the OLC had traditionally done. He inquired about the applicability of the Geneva Convention to others in government, including State Department, who thought it should be applicable. Goldsmith stood up to Addington and argued that the executive had to follow the Geneva Conventions. When he told Addington that Yoo's torture memo was under review he had a confrontation with Addington, who accused him of a betrayal, changing the rules in the middle, and running for the hills. Goldsmith chose to resign the same day he advised the White House of his withdrawal of the August 1, 2002 opinion. He thought timing would make it hard for the White House to reverse his opinion without making it seem like he resigned in protest.[39] He proudly claims, "I changed the rules".

Let me tell you briefly about Deputy Attorney General Comey. He is a real straight shooter, a religion major at William and Mary, graduate of University of Chicago Law School, and the grandson of an Irish cop. Bush did not like him and referred to him as Coumo, a former governor of New York and a leading democrat. The continuation of National Security Agencies surveillance required approval by the Attorney General. Ashcroft was seriously ill in the hospital and Comey was the acting Attorney General. Comey was advised by Goldsmith not to approve the surveillance, as it would be a violation of Foreign Intelligence Surveillance Act (FISA). Gonzales and Andy Card, White House Chief of Staff, upon the request of Bush, went to hospital to implore Ashcroft to approve the continued surveillance. Ashcroft refused and stood behind Comey's decision.[40]

Robert Jackson once said, "If there is any fixed star in our constitutional and human rights constellation, it is that torture is illegal" [41] Goldsmith recommends that Bush should have sought Congressional authorization for what he did. This caused a distrust of the executive by the court and Congress and he suggests that it weakened power of future presidents. He should have used politics to get Congress on board and, ironically, given the times they likely would have been very sympathetic. For example, with regards to the military tribunal and NSA surveillance, Congress was happy to accommodate the President.[42]

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[36] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006.
[37] *Id.*
[38] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Co. 2009) (2007).
[39] Terry Eastland, *Armed Democracy; Battles within the War on Terror*, The Weekly Standard, Oct. 15, 2007.
[40] Chitra Ragavan, *Cheney's Guy*, U.S. News and World Report, May 29, 2006.
[41] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[42] Congress passed both the Military Commissions Act of 2006, P.L. 109-366, and the Authorization for the Use of Military Force Against Terrorists (AUMF), P.L. 107-40, which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons"

Yoo produced superficially plausible memos to justify torture and ignore the Geneva Convention. How should the law respond to the misuse of reasoning to authorize unlawful action? Lawyers must take into account moral concepts social norms. De Tocqueville observed that political questions turn into legal questions and there is a special role for lawyers in the debate because lawyers develop tools for dispassionate and reasoned analysis to distinguish legal questions from political questions.[43]

Deputy Attorney General James B. Comey, to whom Goldsmith looked to for advice when he decided to withdraw the August 2002 torture memo and to whom he lauds as a public servant and a model lawyer, told the National Security Agency in May 2005:

> It is the job of a good lawyer to say "yes." It is as much the job of a good lawyer to say "no." "No" is much, much harder. "No" must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. "No" is often the undoing of a career. And often, "no" must be spoken in competition with the voices of other lawyers who do not have the courage to echo it. For all these reasons, it takes far more than a sharp legal mind to say "no" when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified "yes." It takes an understanding that, in the long run intelligence under law is the only sustainable intelligence in this country.[44]

Compare this sentiment with that of Dick Cheney:

> When we get people who are more concerned about reading the rights to an Al Qaeda terrorist than they are with protecting the United States against people who are absolutely committed to do anything they can to kill Americans, then I worry... If it hadn't been for what we did – with respect to the... enhanced interrogation techniques for high-value detainees... we would have been attacked again.[45]

However, according to Ali H. Soufan, a former FBI agent, these techniques lauded by Cheney failed to discover "even a single imminent threat of terrorism."[46] Instead, the majority of information was acquired by searching the detainees' pockets and computer files. Further valuable information was acquired by "playing detainees against each other," by which detainees freely gave information assumed to be known by the interrogators. Some have suggested that enhanced interrogation techniques on Mr. Mohammed revealed the plot to attack Liberty Tower in Los Angeles; however, Mr. Mohammed was captured after the plot was foiled.

President Obama has communicated a different view than Cheney in March 2009: "I think Vice President Cheney has been at the head of a movement whose notion is somehow that we can't reconcile our core values, our Constitution, our belief that we don't torture, with our national security interests..."[47]

But even if there is some advantage to torture, the real question is at what cost is this advantage obtained. Israel's Chief Justice of the Supreme Court, Aharon Barak, addressed

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[43] *See* Alexis de Tocqueville, Democracy in America 280 (Phillips Bradley, ed., Alfred A. Knopf, Inc. 1945) (1835).

[44] James B. Comey, Former Deputy Attorney General, Speech before the National Security Agency in Fort Meade: Intelligence Under the Law (May 20, 2005).

[45] John F. Harris et al., *Cheney Warns of New Attacks*, Politico, Feb. 5, 2009, http://www.politico.com/news/stories/0209/18390.html.

[46] Ali H. Soufan, *What Torture Never Told Us, N.Y. Times, Sept. 5, 2009.*

[47] *60 Minutes: Obama on AIG Rage, Recession, Challenges* (CBS television broadcast Mar. 22, 2009), *available at* http:// www.cbsnews.com/stories/2009/03/18/60minutes/main4873938.shtml.

and answered this same balancing of security and humanitarian interests in 2004 when ordering the Israeli army to remove a portion of the West Bank Security Wall due to its burden on the Palestinians. Justice Barak's words suggest an acknowledgment that to win the war there may be a Pyrrhic victory if individual liberties are sacrificed in its wake:

> We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it any easier . . . This is the destiny of a democracy: she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. [48]

[48] Gareth Evans, President, Int'l Crisis Group, Lecture at the University of New South Wales, Sydney: The Global Response to Terrorism 10 (Sept. 27, 2005), *available at* http://www.unsw.edu/au/news/pad/articles/2005/sep/FINAL WurthLectureTerrorismGE.pdf.