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ANNALS OF THE PENTAGON

## THE MEMO

*How an internal effort to ban the abuse and torture of detainees was thwarted.*

by Jane Mayer

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One night this January, in a ceremony at the Officers' Club at Fort Myer, in Arlington, Virginia, which sits on a hill with a commanding view across the Potomac River to the Washington Monument, Alberto J. Mora, the outgoing general counsel of the United States Navy, stood next to a podium in the club's ballroom. A handsome gray-haired man in his mid-fifties, he listened with a mixture of embarrassment and pride as his colleagues toasted his impending departure. Amid the usual tributes were some more pointed comments.

"Never has there been a counsel with more intellectual courage or personal integrity," David Brant, the former head of the Naval Criminal Investigative Service, said. Brant added somewhat cryptically, "He surprised us into doing the right thing." Conspicuous for his silence that night was Mora's boss, William J. Haynes II, the general counsel of the Department of Defense.

Back in Haynes's office, on the third floor of the Pentagon, there was a stack of papers chronicling a private battle that Mora had waged against Haynes and other top Administration officials, challenging their tactics in fighting terrorism. Some of the documents are classified and, despite repeated requests from members of the Senate Armed Services Committee and the Senate Judiciary Committee, have not been released. One document, which is marked "secret" but is not classified, is a twenty-two-page memo written by Mora. It shows that three years ago Mora tried to halt what he saw as a disastrous and unlawful policy of authorizing cruelty



toward terror suspects.

The memo is a chronological account, submitted on July 7, 2004, to Vice Admiral Albert Church, who led a Pentagon investigation into abuses at the U.S. detention facility at Guantánamo Bay, Cuba. It reveals that Mora's criticisms of Administration policy were unequivocal, wide-ranging, and persistent. Well before the exposure of prisoner abuse in Iraq's Abu Ghraib prison, in April, 2004, Mora warned his superiors at the Pentagon about the consequences of President Bush's decision, in February, 2002, to circumvent the Geneva conventions, which prohibit both torture and "outrages upon personal dignity, in particular humiliating and degrading treatment." He argued that a refusal to outlaw cruelty toward U.S.-held terrorist suspects was an implicit invitation to abuse. Mora also challenged the legal framework that the Bush Administration has constructed to justify an expansion of executive power, in matters ranging from interrogations to wiretapping. He described as "unlawful," "dangerous," and "erroneous" novel legal theories granting the President the right to authorize abuse. Mora warned that these precepts could leave U.S. personnel open to criminal prosecution.

In important ways, Mora's memo is at odds with the official White House narrative. In 2002, President Bush declared that detainees should be treated "humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva conventions. The Administration has articulated this standard many times. Last month, on January 12th, Secretary of Defense Donald Rumsfeld, responding to charges of abuse at the U.S. base in Cuba, told reporters, "What took place at Guantánamo is a matter of public record today, and the investigations turned up nothing that suggested that there was any policy in the department other than humane treatment." A week later, the White House press spokesman, Scott McClellan, was asked about a Human Rights Watch report that the Administration had made a "deliberate policy choice" to abuse detainees. He answered that the organization had hurt its credibility by making unfounded accusations. Top Administration officials have stressed that the interrogation policy was reviewed and sanctioned by government lawyers; last November, President Bush said, "Any activity we conduct is within the law. We do not torture." Mora's memo, however, shows that almost from the start of the Administration's war on terror the White House, the Justice Department, and the Department of Defense, intent upon having greater flexibility, charted a legally questionable course despite sustained objections from some of its own lawyers.

Mora had some victories. "America has a lot to thank him for," Brant, the former head of the N.C.I.S., told me. But those achievements were largely undermined by a small group of lawyers closely aligned with Vice-President Cheney. In the end, Mora was unable to overcome formidable resistance from several of the most powerful figures in the government.

Brant had joked at the farewell party that Mora "was an incredible publicity hound." In fact, Mora—whose status in the Pentagon

was equivalent to that of a four-star general—is known for his professional discretion, and he has avoided the press. This winter, however, he agreed to confirm the authenticity and accuracy of the memo and to be interviewed. A senior Defense Department official, whom the Bush Administration made available as a spokesman, on the condition that his name not be used, did so as well. Mora and the official both declined to elaborate on internal Department of Defense matters beyond those addressed in the memo. Mora, a courtly and warm man, is a cautious, cerebral conservative who admired President Reagan and served in both the first and the second Bush Administrations as a political appointee. He strongly supported the Administration's war on terror, including the invasion of Iraq, and he revered the Navy. He stressed that his only reason for commenting at all was his concern that the Administration was continuing to pursue a dangerous course. "It's my Administration, too," he said.

Mora first learned about the problem of detainee abuse on December 17, 2002, when David Brant approached him with accusations of wrongdoing at Guantánamo. As head of the Naval Criminal [Investigative] Service, Brant often reported to Mora but hadn't dealt with him on anything so sensitive. "I wasn't sure how he would react," Brant, a tall, thin man with a mustache, told me. Brant had already conveyed the allegations to Army leaders, since they had command authority over the military interrogators, and to the Air Force, but he said that nobody seemed to care. He therefore wasn't hopeful when he went to Mora's office that afternoon.

When we spoke, Mora recalled the mood at the Pentagon at the time, just fifteen months after the September 11th attacks. "The mentality was that we lost three thousand Americans, and we could lose a lot more unless something was done," he said. "It was believed that some of the Guantánamo detainees had knowledge of other 9/11-like operations that were under way, or would be executed in the future. The gloves had to come off. The U.S. had to get tougher." Mora had been inside the Pentagon on September 11th and recalled the jetliner crashing into the building one facet over. He said that it "felt jarring, like a large safe had been dropped overhead." From the parking lot, he watched the Pentagon burn. The next day, he said, he looked around a room full of top military leaders, and was struck by the thought that "these guys were going to be the tip of the spear."

Brant oversaw a team of N.C.I.S. agents working with the F.B.I. at Guantánamo Bay, in what was called the Criminal Investigative Task Force. It had been assigned to elicit incriminating information from the nearly six hundred detainees being held there. Unlike a group run by Army intelligence, Joint Task Force 170, or J.T.F.-170, which was looking for intelligence that would help American authorities determine Al Qaeda's next move, Brant's investigators gathered evidence that eventually could be used for prosecutions in military tribunals or civilian courts. He and his agents had experience and training in law enforcement: Brant, a civilian, holds an advanced degree in criminology, and worked as a policeman in Miami in the nineteen-seventies.

Brant informed Mora that he was disturbed by what his agents told him about the conduct of military-intelligence interrogators at Guantánamo. These officials seemed poorly trained, Brant said, and were frustrated by their lack of success. He had been told that the interrogators were engaging in escalating levels of physical and psychological abuse. Speaking of the tactics that he had heard about, Brant told me, “Repugnant would be a good term to describe them.”

Much of Brant’s information had been supplied by an N.C.I.S. psychologist, Michael Gelles, who worked with the C.I.T.F. and had computer access to the Army’s interrogation logs at Guantánamo. Brant told me that Gelles “is phenomenal at unlocking the minds of everyone from child abusers to terrorists”; he took it seriously when Gelles described the logs as shocking.

The logs detailed, for example, the brutal handling of a Saudi detainee, Mohammed al-Qahtani, whom an F.B.I. agent had identified as the “missing twentieth hijacker”—the terrorist who was supposed to have been booked on the plane that crashed in a Pennsylvania field. Qahtani was apprehended in Afghanistan a few months after the terrorist attacks.

Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called “invasion of space by a female”; forced to wear women’s underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. By December, Qahtani had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. Ten days before Brant and Mora met, Qahtani’s heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

Brant told me that he had gone to Mora because he didn’t want his team of investigators to “in any way observe, condone, or participate in any level of physical or in-depth psychological abuse. No slapping, deprivation of water, heat, dogs, psychological abuse. It was pretty basic, black and white to me.” He went on, “I didn’t know or care what the rules were that had been set by the Department of Defense at that point. We were going to do what was morally, ethically, and legally permissible.” Recently declassified e-mails and orders obtained by the American Civil Liberties Union document Brant’s position, showing that all C.I.T.F. personnel were ordered to “stand clear and report” any abusive interrogation tactics.

Brant thinks that the Army’s interrogation of Qahtani was unlawful. If an N.C.I.S. agent had engaged in such abuse, he said, “we would have relieved, removed, and taken internal disciplinary action against the individual—let alone whether outside charges would have been brought.” Brant said he feared that such methods would taint the cases his agents needed to make against the detainees, undermining any attempts to prosecute them in a court of law. He also doubted the reliability of forced confessions. Moreover, he told

me, “it just ain’t right.”

Another military official, who worked closely with Brant and who has been denied permission to speak on the record, told me that the news “rocked” Mora. The official added that Mora “was visionary about this. He quickly grasped the fact that these techniques in the hands of people with this little training spelled disaster.”

In his memo, Mora noted that Brant asked him if he wanted to hear more about the situation. He wrote, “I responded that I felt I had to.”

Mora was a well-liked and successful figure at the Pentagon. Born in Boston in 1952, he is the son of a Hungarian mother, Klara, and a Cuban father, Lidio, both of whom left behind Communist regimes for America. Klara’s father, who had been a lawyer in Hungary, joined her in exile just before the Soviet Union took control. From the time Alberto was a small boy, Klara Mora told me, he heard from his grandfather the message that “the law is sacred.” For the Moras, injustice and abuse were not merely theoretical concepts. One of Mora’s great-uncles had been interned in a Nazi concentration camp, and another was hanged after having been tortured. Mora’s first memory, as a young child, is of playing on the floor in his mother’s bedroom, and watching her crying as she listened to a report on the radio declaring that the 1956 anti-Communist uprising in Hungary had been crushed. “People who went through things like this tend to have very strong views about the rule of law, totalitarianism, and America,” Mora said.

At the time, Mora’s family was living in Cuba. His father, a Harvard-trained physician, had taken his wife and infant son back in 1952. When Castro seized power, seven years later, the family barely escaped detention after a servant informed the authorities that they planned to flee to America. In the ensuing panic, Alberto obtained an emergency passport from the American Embassy in Havana. “This was my first brush with the government,” he said. “When I swore an oath of allegiance to the American government, part of the oath involved taking up arms to defend the country. And I was thinking, This is a serious thing for me to be an eight-year-old boy, raising my hand before the American vice-consul and taking the oath of allegiance.” Cuban customs officials, seeing Alberto’s American passport, threatened not to let him board a ship. At the last minute, one of his father’s colleagues, who had been put in charge of the port, allowed Alberto’s emigration.

Mora’s family settled in Jackson, Mississippi, where his father taught at the state medical school and Mora attended a Catholic school. For the most part, Jackson was “a wonderful place,” Mora recalled, although it was also “very conservative.” Racism was rampant and everyone, including Mora, backed Barry Goldwater in the 1964 election. Mora had never met anyone who opposed the Vietnam War until he enrolled at Swarthmore College, a school that he chose after reading an S.A.T.-preparation booklet that described it as small and especially rigorous. He also had never met a feminist before going to hear Kate Millett speak at Bryn Mawr,

during his freshman year; her talk infuriated him. After growing up in the South among friends who played sports, drank beer, and had a good time, he found the Northeastern liberal élite curiously “nerdish.” The girls had thrown away their skirts—if they’d ever had them, he joked—and there were no parties. Yet he loved the intellectual environment. “You just had these intense discussions,” he recalled. “I revelled in it.” Mora said that he was the only person among his friends who wasn’t a conscientious objector to the war.

Mora graduated in 1974 with honors, and joined the State Department, working in Portugal; in 1979, he entered law school in Miami. Finding litigation work more “a living than a life,” Mora said, he was happy to get an appointment as general counsel of the U.S. Information Agency in the first Bush Administration. During the Clinton years, he was appointed to a Republican seat on the Broadcasting Board of Governors, where he was an advocate for Radio Martí, the American news operation aimed at Cuba. He also practiced international law in several private firms. When George W. Bush was elected, Mora—with the backing of former Defense Secretary Frank Carlucci, whom he had befriended in Portugal—was appointed general counsel of the Navy. He expected to spend most of his time there streamlining the budget.

The day after Mora’s first meeting with Brant, they met again, and Brant showed him parts of the transcript of Qahtani’s interrogation. Mora was shocked when Brant told him that the abuse wasn’t “rogue activity” but was “rumored to have been authorized at a high level in Washington.” The mood in the room, Mora wrote, was one of “dismay.” He added, “I was under the opinion that the interrogation activities described would be unlawful and unworthy of the military services.” Mora told me, “I was appalled by the whole thing. It was clearly abusive, and it was clearly contrary to everything we were ever taught about American values.”

Mora thinks that the media has focussed too narrowly on allegations of U.S.-sanctioned torture. As he sees it, the authorization of cruelty is equally pernicious. “To my mind, there’s no moral or practical distinction,” he told me. “If cruelty is no longer declared unlawful, but instead is applied as a matter of policy, it alters the fundamental relationship of man to government. It destroys the whole notion of individual rights. The Constitution recognizes that man has an inherent right, not bestowed by the state or laws, to personal dignity, including the right to be free of cruelty. It applies to all human beings, not just in America—even those designated as ‘unlawful enemy combatants.’ If you make this exception, the whole Constitution crumbles. It’s a transformative issue.”

Mora said that he did not fear reprisal for stating his opposition to the Administration’s emerging policy. “It never crossed my mind,” he said. “Besides, my mother would have killed me if I hadn’t spoken up. No Hungarian after Communism, or Cuban after Castro, is not aware that human rights are incompatible with cruelty.” He added, “The debate here isn’t only how to protect the country. It’s how to protect our values.”

After the second meeting with Brant, Mora called his friend Steven Morello, the general counsel of the Army, and asked him if he knew anything about the abuse of prisoners at Guantánamo. Mora said that Morello answered, “I know a lot about it. Come on down.”

In Morello’s office, Mora saw what he now refers to as “the package”—a collection of secret military documents that traced the origins of the coercive interrogation policy at Guantánamo. It began on October 11, 2002, with a request by J.T.F.-170’s commander, Major General Michael Dunlavey, to make interrogations more aggressive. A few weeks later, Major General Geoffrey Miller assumed command of Guantánamo Bay, and, on the assumption that prisoners like Qahtani had been trained by Al Qaeda to resist questioning, he pushed his superiors hard for more flexibility in interrogations. On December 2nd, Secretary of Defense Rumsfeld gave formal approval for the use of “hooding,” “exploitation of phobias,” “stress positions,” “deprivation of light and auditory stimuli,” and other coercive tactics ordinarily forbidden by the Army Field Manual. (However, he reserved judgment on other methods, including “waterboarding,” a form of simulated drowning.) In Mora’s memo, Morello is quoted as saying that “we tried to stop it.” But he was told not to ask questions.

According to a participant in the meeting, Mora was “ashen-faced” when he read the package. The documents included a legal analysis, also dated October 11th, by Lieutenant Colonel Diane Beaver, who was then the top legal adviser to J.T.F.-170. She noted that some of the more brutal “counter-resistance” techniques under consideration at Guantánamo, such as waterboarding (for which soldiers had been court-martialled in earlier conflicts), might present legal problems. She acknowledged that American military personnel at Guantánamo, as everywhere else in the world, were bound by the Uniform Code of Military Justice, which characterizes “cruelty,” “maltreatment,” “threats,” and “assault” as felonies. Beaver reasoned, however, that U.S. soldiers preparing to violate these laws in their interrogations might be able to obtain “permission, or immunity” from higher authorities “in advance.”

The senior Defense Department official designated to speak for the Administration acknowledged that Beaver’s legal argument was inventive. “Normally, you grant immunity after the fact, to someone who has already committed a crime, in exchange for an order to get that person to testify,” he said. “I don’t know whether we’ve ever faced the question of immunity in advance before.” Nevertheless, the official praised Beaver “for trying to think outside the box. I would credit Diane as raising that as a way to think about it.” (Beaver was later promoted to the staff of the Pentagon’s Office of General Counsel, where she specializes in detainee issues.)

Mora was less impressed. Beaver’s brief, his memo says, “was a wholly inadequate analysis of the law.” It held that “cruel, inhuman, or degrading treatment could be inflicted on the Guantánamo detainees with near impunity”; in his view, such acts were

unlawful. Rumsfeld's December 2nd memo approving these "counter-resistance" techniques, Mora wrote, "was fatally grounded on these serious failures of legal analysis." Neither Beaver nor Rumsfeld drew any "bright line" prohibiting the combination of these techniques, or defining any limits for their use. He believed that such rhetorical laxity "could produce effects reaching the level of torture," which was prohibited, without exception, under both U.S. and international law. Mora took his concerns to Gordon England, the Secretary of the Navy, who is now the Deputy Secretary of Defense. Then, on December 20th, with England's authorization, Mora went to William Haynes, the Pentagon's general counsel; they met in Haynes's office, an elegant suite behind vault-like metal doors.

In confronting Haynes, Mora was engaging not just the Pentagon but also the Vice-President's office. Haynes is a protégé of Cheney's influential chief of staff, David Addington. Addington's relationship with Cheney goes back to the Reagan years, when Cheney, who was then a representative from Wyoming, was the ranking Republican on a House select committee investigating the Iran-Contra scandal. Addington, a congressional aide, helped to write a report for the committee's Republican minority, arguing that the law banning covert aid to the Contras—the heart of the scandal—was an unconstitutional infringement of Presidential prerogatives. Both men continue to embrace an extraordinarily expansive view of executive power. In 1989, when Cheney was named Secretary of Defense by George H. W. Bush, he hired Addington as a special assistant, and eventually appointed him to be his general counsel. Addington, in turn, hired Haynes as his special assistant and soon promoted him to general counsel of the Army.

After George W. Bush took office, Addington came to the White House with Cheney, and Haynes took his boss's old job at the Pentagon. Addington has played a central part in virtually all of the Administration's legal strategies, including interrogation and detainee policies. The office of the Vice-President has no statutory role in the military chain of command. But Addington's tenacity, willingness to work long hours, and unalloyed support from Cheney made him, in the words of another former Bush White House appointee, "the best infighter in the Administration." One former government lawyer described him as "the Octopus"—his hands seemed to reach into every legal issue.

Haynes rarely discussed his alliance with Cheney's office, but his colleagues, as one of them told me, noticed that "stuff moved back and forth fast" between the two power centers. Haynes was not considered to be a particularly ideological thinker, but he was seen as "pliant," as one former Pentagon colleague put it, when it came to serving the agenda of Cheney and Addington. In October, 2002, almost three months before his meeting with Mora, Haynes gave a speech at the conservative Federalist Society, disparaging critics who accused the Pentagon of mistreating detainees. A year later, President Bush nominated him to the federal appeals court in Virginia. His nomination is one of several that have been put on hold by Senate Democrats.



In his meeting with Haynes, Mora told me, he said that, whatever its intent, what Rumsfeld's memo permitted was "torture." According to Mora, Haynes replied, "No, it isn't."

Mora asked Haynes to think about the techniques more carefully. What did "deprivation of light and auditory stimuli" mean? Could a prisoner be locked in a completely dark cell? If so, could he be kept there for a month? Longer? Until he went blind? What, precisely, did the authority to exploit phobias permit? Could a detainee be held in a coffin? What about using dogs? Rats? How far could an interrogator push this? Until a man went insane?

Mora drew Haynes's attention to a comment that Rumsfeld had added to the bottom of his December 2nd memo, in which he asked why detainees could be forced to stand for only four hours a day, when he himself often stood "for 8-10 hours a day." Mora said that he understood that the comment was meant to be jocular. But he feared that it could become an argument for the defense in any prosecution of terror suspects. It also could be read as encouragement to disregard the limits established in the memo. (Colonel Lawrence Wilkerson, a retired military officer who was a chief of staff to former Secretary of State Colin Powell, had a similar reaction when he saw Rumsfeld's scrawled aside. "It said, 'Carte blanche, guys,' " Wilkerson told me. "That's what started them down the slope. You'll have My Lais then. Once you pull this thread, the whole fabric unravels.")

Haynes said little during the meeting with Mora, but Mora left the room certain that Haynes would realize he had been too hasty, and would get Rumsfeld to revoke the inflammatory December 2nd memo. Mora told me, "My feeling was it was just a blunder." The next day, he left Washington for a two-week Christmas holiday.

The authorization of harsh interrogation methods which Mora had seen was no aberration. Almost immediately after September 11th, the Administration had decided that protecting the country required extraordinary measures, including the exercise of executive powers exceeding domestic and international norms. In January, 2002, Alberto Gonzales, then the White House counsel (he is now the Attorney General), sent a memo to President Bush arguing for a "new paradigm" of interrogation, declaring that the war on terror "renders obsolete" the "strict limitations on questioning of enemy prisoners" required by the Geneva conventions, which were ratified by the United States in 1955. That August, the Justice Department's Office of Legal Counsel, which acts as an in-house law firm for the executive branch, issued a memo secretly authorizing the C.I.A. to inflict pain and suffering on detainees during interrogations, up to the level caused by "organ failure." This document, now widely known as the Torture Memo, which Addington helped to draft, also advised that, under the doctrine of "necessity," the President could supersede national and international laws prohibiting torture. (The document was leaked to the press in 2004, after the Abu Ghraib scandal broke.)

Lawrence Wilkerson, whom Powell assigned to monitor this unorthodox policymaking process, told NPR last fall of "an audit

trail that ran from the Vice-President's office and the Secretary of Defense down through the commanders in the field." When I spoke to him recently, he said, "I saw what was discussed. I saw it in spades. From Addington to the other lawyers at the White House. They said the President of the United States can do what he damn well pleases. People were arguing for a new interpretation of the Constitution. It negates Article One, Section Eight, that lays out all of the powers of Congress, including the right to declare war, raise militias, make laws, and oversee the common defense of the nation." Cheney's view, Wilkerson suggested, was fuelled by his desire to achieve a state of "perfect security." He said, "I can't fault the man for wanting to keep America safe, but he'll corrupt the whole country to save it." (Wilkerson left the State Department with Powell, in January, 2005.)

At the time, the Administration's embrace of interrogation measures normally proscribed by the Army Field Manual remained largely unknown to the public. But while Mora was on Christmas vacation, the *Washington Post* published a story, by Dana Priest and Barton Gellman, alleging that C.I.A. personnel were mistreating prisoners at the Bagram military base, in Afghanistan. Kenneth Roth, the director of Human Rights Watch, warned that if this was true U.S. officials who knew about it could be criminally liable, under the doctrine of command responsibility. The specific allegations closely paralleled what Mora had seen authorized at Guantánamo.

Upon returning to work on January 6, 2003, Mora was alarmed to learn from Brant that the abuse at Guantánamo had not stopped. In fact, as *Time* reported last year, Qahtani had been stripped and shaved and told to bark like a dog. He'd been forced to listen to pop music at an ear-splitting volume, deprived of sleep, and kept in a painfully cold room. Between confessing to and then recanting various terrorist plots, he had begged to be allowed to commit suicide.

Mora suspected that such abuse was a deliberate policy, and widened his internal campaign in the hope of building a constituency against it. In the next few days, his arguments reached many of the Pentagon's top figures: Deputy Secretary of Defense Paul Wolfowitz; Captain Jane Dalton, the legal adviser to the Joint Chiefs of Staff; Victoria Clarke, who was then the Pentagon spokeswoman; and Rumsfeld.

Meanwhile, on January 9, 2003, Mora had a second meeting with Haynes. According to Mora's memo, when he told him how disappointed he was that nothing had been done to end the abuse at Guantánamo, Haynes explained that "U.S. officials believed the techniques were necessary to obtain information," and that the interrogations might prevent future attacks against the U.S. and save American lives. Mora acknowledged that he could imagine "ticking bomb" scenarios, in which it might be moral—though still not legal—to torture a suspect. But, he asked Haynes, how many lives had to be saved to justify torture? Thousands? Hundreds? Where do you draw the line? To decide this question, shouldn't there be a public debate?

Mora said he doubted that Guantánamo presented such an urgent ethical scenario in any event, since most of the detainees had

been held there for more than a year. He also warned Haynes that the legal opinions the Administration was counting on to protect itself might not withstand scrutiny—such as the notion that Guantánamo was beyond the reach of U.S. courts. (Mora was later proved right: in June, 2004, the Supreme Court, in *Rasul v. Bush*, ruled against the Administration’s argument that detainees had no right to challenge their imprisonment in American courts. That month, in a related case, Justice Sandra Day O’Connor declared that “a state of war is not a blank check for the President.”)

Mora told Haynes that, if the Pentagon’s theories of indemnity didn’t hold up in the courts, criminal charges conceivably could be filed against Administration officials. He added that the interrogation policies could threaten Rumsfeld’s tenure, and could even damage the Presidency. “Protect your client!” he said.

Haynes, again, didn’t say much in response, but soon afterward, at a meeting of top Pentagon officials, he mentioned Mora’s concerns to Secretary Rumsfeld. A former Administration official told me that Rumsfeld was unconcerned; he once more joked that he himself stood eight hours a day, and exclaimed, “Torture? That’s not torture!” (“His attitude was ‘What’s the big deal?’ ” the former official said.) A subordinate delicately pointed out to Rumsfeld that while he often stood for hours it was because he chose to do so, and he could sit down when he wanted. Victoria Clarke, the Pentagon spokeswoman, also argued that prisoner abuse was bad from a public-relations perspective. (Clarke declined to discuss her conversations with Administration officials, other than to say that she regarded Mora as “a very thoughtful guy, who I believed had a lot of important things to say.”)

By mid-January, the situation at Guantánamo had not changed. Qahtani’s “enhanced” interrogation, as it was called in some documents, was in its seventh week, and other detainees were also being subjected to extreme treatment. Mora continued to push for reform, but his former Pentagon colleague told me that “people were beginning to roll their eyes. It was like ‘Yeah, we’ve already heard this.’ ”

On January 15th, Mora took a step guaranteed to antagonize Haynes, who frequently warned subordinates to put nothing controversial in writing or in e-mail messages. Mora delivered an unsigned draft memo to Haynes, and said that he planned to “sign it out” that afternoon—making it an official document—unless the harsh interrogation techniques were suspended. Mora’s draft memo described U.S. interrogations at Guantánamo as “at a minimum cruel and unusual treatment, and, at worst, torture.”

By the end of the day, Haynes called Mora with good news. Rumsfeld was suspending his authorization of the disputed interrogation techniques. The Defense Secretary also was authorizing a special “working group” of a few dozen lawyers, from all branches of the armed services, including Mora, to develop new interrogation guidelines.

Mora, elated, went home to his wife and son, with whom he had felt bound not to discuss his battle. He and the other lawyers in

the working group began to meet and debated the constitutionality and effectiveness of various interrogation techniques. He felt, he later told me, that “no one would ever learn about the best thing I’d ever done in my life.”

A week later, Mora was shown a lengthy classified document that negated almost every argument he had made. Haynes had outflanked him. He had solicited a separate, overarching opinion from the Office of Legal Counsel, at the Justice Department, on the legality of harsh military interrogations—effectively superseding the working group.

There was only one copy of the opinion, and it was kept in the office of the Air Force’s general counsel, Mary Walker, whom Rumsfeld had appointed to head the working group. While Walker sat at her desk, Mora looked at the document with mounting disbelief; at first, he thought he had misread it. There was no language prohibiting the cruel, degrading, and inhuman treatment of detainees. Mora told me that the opinion was sophisticated but displayed “catastrophically poor legal reasoning.” In his view, it approached the level of the notorious Supreme Court decision in *Korematsu v. United States*, in 1944, which upheld the government’s internment of Japanese-Americans during the Second World War.

The author of the opinion was John Yoo, a young and unusually influential lawyer in the Administration, who, like Haynes, was part of Addington’s circle. (Yoo and Haynes were also regular racquetball partners.) In the past, Yoo, working closely with Addington, had helped to formulate the argument that the treatment of Al Qaeda and Taliban suspects, unlike that of all other foreign enemies, was not covered by the Geneva conventions; Yoo had also helped to write the Torture Memo. Before joining the Administration, Yoo, a graduate of Yale Law School, had clerked for Justice Clarence Thomas and taught law at Berkeley. Like many conservative legal scholars, he was skeptical of international law, and believed that liberal congressional overreaction to the Vietnam War and Watergate had weakened the Presidency, the C.I.A., and the military. However, Yoo took these arguments further than most. Constitutional scholars generally agreed that the founders had purposefully divided the power to wage war between Congress and the executive branch; Yoo believed that the President’s role as Commander-in-Chief gave him virtually unlimited authority to decide whether America should respond militarily to a terror attack, and, if so, what kind of force to use. “Those decisions, under our Constitution, are for the President alone to make,” he wrote in a law article.

A top Administration official told me that Yoo, Addington, and a few other lawyers had essentially “hijacked policy” after September 11th. “They thought, Now we can put our views into practice. We have the ability to write them into binding law. It was just shocking. These memos were presented as *faits accomplis*.”

In Yoo’s opinion, he wrote that at Guantánamo cruel, inhumane, and degrading treatment of detainees could be authorized, with few restrictions.

“The memo espoused an extreme and virtually unlimited theory of the extent of the President’s Commander-in-Chief authority,” Mora wrote in his account. Yoo’s opinion didn’t mention the most important legal precedent defining the balance of power between Congress and the President during wartime, *Youngstown Sheet & Tube Company v. Sawyer*. In that 1952 case, the Supreme Court stopped President Truman from forcing the steel worker’s union, which had declared a strike, to continue producing steel needed in the Korean War. The Court upheld congressional labor laws protecting the right to strike, and ruled that the President’s war powers were at their weakest when they were challenging areas in which Congress had passed legislation. Torture, Mora reasoned, had been similarly regulated by Congress through treaties it had ratified.

In an e-mail response to questions this month, Yoo, who is now back at Berkeley, defended his opinion. “The war on terrorism makes *Youngstown* more complicated,” he said. “The majority opinion explicitly said it was not considering the President’s powers as Commander-in-Chief in the theater of combat. The difficulty for *Youngstown* created by the 9/11 attacks is that the theater of combat now includes parts of the domestic United States.” He also argued that Congress had ceded power to the President in its authorization of military force against the perpetrators of the September 11th attacks.

Mora concluded that Yoo’s opinion was “profoundly in error.” He wrote that it “was clearly at variance with applicable law.” When we spoke, he added, “If everything is permissible, and almost nothing is prohibited, it makes a mockery of the law.” A few days after reading Yoo’s opinion, he sent an e-mail to Mary Walker, saying that the document was not only “fundamentally in error” but “dangerous,” because it had the weight of law. When the Office of Legal Counsel issues an opinion on a policy matter, it typically requires the intervention of the Attorney General or the President to reverse it.

Walker wrote back, “I disagree, and I believe D.O.D. G.C.”—Haynes, the Pentagon’s general counsel—“disagrees.”

On February 6th, Mora invited Yoo to his office, in the Pentagon, to discuss the opinion. Mora asked him, “Are you saying the President has the authority to order torture?”

“Yes,” Yoo replied.

“I don’t think so,” Mora said.

“I’m not talking policy,” Yoo said. “I’m just talking about the law.”

“Well, where are we going to have the policy discussion, then?” Mora asked.

Mora wrote that Yoo replied that he didn’t know; maybe, he suggested, it would take place inside the Pentagon, where the defense-policy experts were. (Yoo said that he recalled discussing only how the policy issues should be debated, and where. Torture, he said, was not an option under consideration.)

But Mora knew that there would be no such discussion; as the Administration saw it, the question would be settled by Yoo's opinion. Indeed, Mora soon realized that, under the supervision of Mary Walker, a draft working-group report was being written to conform with Yoo's arguments. Mora wrote in his memo that contributions from the working group "began to be rejected if they did not conform to the OLC"—Office of Legal Counsel—"guidance."

The draft working-group report noted that the Uniform Code of Military Justice barred "maltreatment" but said, "Legal doctrine could render specific conduct, otherwise criminal, *not* unlawful." In an echo of the Torture Memo, it also declared that interrogators could be found guilty of torture only if their "specific intent" was to inflict "severe physical pain or suffering" as evidenced by "prolonged mental harm." Even then, it said, echoing Yoo, the Commander-in-Chief could order torture if it was a military necessity: "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."

A few days after his meeting with Yoo, Mora confronted Haynes again. He told him that the draft working-group report was "deeply flawed." It should be locked in a drawer, he said, and "never let out to see the light of day again." He advised Haynes not to allow Rumsfeld to approve it.

In the spring of 2003, Mora waited for the final working-group report to emerge, planning to file a strong dissent. But the report never appeared. Mora assumed that the draft based on Yoo's ideas had not been finalized and that the suspension of the harsh techniques authorized by Rumsfeld was still in effect.

In June, press accounts asserted that the U.S. was subjecting detainees to "stress and duress" techniques, including beatings and food deprivation. Senator Patrick Leahy, Democrat of Vermont, wrote to Secretary of State Condoleezza Rice, asking for a clear statement of the Administration's detainee policy. Haynes wrote a letter back to Leahy, which was subsequently released to the press, saying that the Pentagon's policy was never to engage in torture, or cruel, inhumane, or degrading treatment—just the sort of statement Mora had argued for. He wrote in his memo that he saw Haynes's letter as "the happy culmination of the long debates in the Pentagon." He sent an appreciative note to Haynes, saying that he was glad to be on his team.

**O**n April 28, 2004, ten months later, the first pictures from Abu Ghraib became public. Mora said, "I felt saddened and dismayed. Everything we had warned against in Guantánamo had happened—but in a different setting. I was stunned."

He was further taken aback when he learned, while watching Senate hearings on Abu Ghraib on C-SPAN, that Rumsfeld had signed the working-group report—the draft based on Yoo's opinion—a year earlier, without the knowledge of Mora or any other internal legal critics. Rumsfeld's signature gave it the weight of a military order. "This was the first I'd heard of it!" Mora told me.

Mora wrote that the Air Force's deputy general counsel, Daniel Ramos, told him that the final working-group report had been "briefed" to General Miller, the commander of Guantánamo, and General James Hill, the head of the Southern Command, months earlier. (The Pentagon confirmed this, though it said that the generals had not seen the full report.) "It was astounding," Mora said. "Obviously, it meant that the working-group report hadn't been abandoned, and that some version of it had gotten into the generals' possession."

The working-group report included a list of thirty-five possible interrogation methods. On April 16, 2003, the Pentagon issued a memorandum to the U.S. Southern Command, approving twenty-four of them for use at Guantánamo, including isolation and what it called "fear up harsh," which meant "significantly increasing the fear level in a detainee." The Defense Department official told me, "It should be noted that there were strong advocates for the approval of the full range of thirty-five techniques," but Haynes was not among them. The techniques not adopted included nudity; the exploitation of "aversions," such as a fear of dogs; and slaps to the face and stomach. However, combined with the legal reasoning in the working-group report, the April memorandum allowed the Secretary to approve harsher methods.

Without Mora's knowledge, the Pentagon had pursued a secret detention policy. There was one version, enunciated in Haynes's letter to Leahy, aimed at critics. And there was another, giving the operations officers legal indemnity to engage in cruel interrogations, and, when the Commander-in-Chief deemed it necessary, in torture. Legal critics within the Administration had been allowed to think that they were engaged in a meaningful process; but their deliberations appeared to have been largely an academic exercise, or, worse, a charade. "It seems that there was a two-track program here," said Martin Lederman, a former lawyer with the Office of Legal Counsel, who is now a visiting professor at Georgetown. "Otherwise, why would they share the final working-group report with Hill and Miller but not with the lawyers who were its ostensible authors?"

Lederman said that he regarded Mora as heroic for raising crucial objections to the Administration's interrogation policy. But he added that Mora was unrealistic if he thought that, by offering legal warnings, he could persuade the leaders of the Administration to change its course. "It appears that they weren't asking to be warned," Lederman said.

The senior Defense Department official defended as an act of necessary caution the decision not to inform Mora and other legal advisers of official policy. The interrogation techniques authorized in the signed report, he explained, were approved only for Guantánamo, and the Pentagon needed to prevent the practices from spreading to other battlefronts. "If someone wants to criticize us for being too careful, I accept that criticism willingly, because we were doing what we could to limit the focus of that report . . . to Guantánamo," the official said.

In fact, techniques that had been approved for use at Guantánamo were quickly transferred elsewhere. Four months after General Miller was briefed on the working-group report, the Pentagon sent him to Iraq, to advise officials there on interrogating Iraqi detainees. Miller, who arrived with a group of Guantánamo interrogators, known as the Tiger Team, later supervised all U.S.-run prisons in Iraq, including Abu Ghraib. And legal advisers to General Ricardo Sanchez, the senior U.S. commander in Iraq at the time, used the report as a reference in determining the limits of their interrogation authority, according to a Pentagon report on Abu Ghraib.

A lawyer involved in the working group said that the Pentagon's contention that it couldn't risk sharing the report with its authors "doesn't make any sense." He explained, "We'd seen everything already." The real reason for their exclusion, he speculated, was to avoid dissent. "It would have put them in a bind," he said. "And it would have created a paper trail."

Meanwhile, Mora's warnings about the legal underpinnings of the working-group report proved prophetic. In December, 2003, in an extraordinary repudiation of the Administration's own legal work, the Office of Legal Counsel quietly withdrew the Yoo opinion. The new head of the O.L.C., Jack Goldsmith, a conservative legal scholar who now teaches at Harvard Law School, told the Pentagon that it could no longer rely on the legal analysis. Among other problems, Goldsmith had found Yoo's interpretation of the President's powers overly broad. In March, 2005, the Pentagon declared the working-group report a non-operational "historical" document. By that time, however, much of the most serious abuse at Guantánamo had already occurred.

**A**t the Pentagon in recent weeks, officials portrayed Mora's memo as ancient history. They argued that they had acted quickly to rectify the wrongs he helped expose, by limiting the list of approved interrogation techniques. But while Mora believes that the use of cruel treatment in interrogation has diminished, he feels that the fight to establish clear, humane standards for the treatment of detainees is not over. He also worries that the Administration's views on interrogation have undermined American foreign policy, in part by threatening the international coalition needed to fight terrorism. Allied countries may not be able to support U.S. military actions, he said, if detainees are treated in a manner that most nations deemed illegal.

Just a few months ago, Mora attended a meeting in Rumsfeld's private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military's detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest-ranking officers of each service, and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat detainees in accordance with Common Article Three of the Geneva conventions, which bars cruel, inhumane, and degrading treatment, as well as outrages against human dignity. Going around the huge wooden conference table, where the officials sat in double rows, England asked for a consensus on whether the Pentagon should support Waxman's proposal.



This standard had been in effect for fifty years, and all members of the U.S. armed services were trained to follow it. One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was Haynes. They argued that the articulated standard would limit America's "flexibility." It also might expose Administration officials to charges of war crimes: if Common Article Three became the standard for treatment, then it might become a crime to violate it. Their opposition was enough to scuttle the proposal.

In exasperation, according to another participant, Mora said that whether the Pentagon enshrined it as official policy or not, the Geneva conventions were already written into both U.S. and international law. Any grave breach of them, at home or abroad, was classified as a war crime. To emphasize his position, he took out a copy of the text of U.S. Code 18.2441, the War Crimes Act, which forbids the violation of Common Article Three, and read from it. The point, Mora told me, was that "it's a statute. It exists—we're not free to disregard it. We're bound by it. It's been adopted by the Congress. And we're not the only interpreters of it. Other nations could have U.S. officials arrested."

Not long afterward, Waxman was summoned to a meeting at the White House with David Addington. Waxman declined to comment on the exchange, but, according to the *Times*, Addington berated him for arguing that the Geneva conventions should set the standard for detainee treatment. The U.S. needed maximum flexibility, Addington said. Since then, efforts to clarify U.S. detention policy have languished. In December, Waxman left the Pentagon for the State Department.

To date, no charges have been brought against U.S. personnel in Guantánamo. The senior Defense Department official I spoke to affirmed that, in the Pentagon's view, Qahtani's interrogation was "within the bounds." Elsewhere in the world, as Mora predicted, the controversy is growing. Last week, the United Nations Human Rights Commission called for the U.S. to shut down the detention center at Guantánamo, where, it said, some practices "must be assessed as amounting to torture." The U.N. report, which the White House dismissed, described "the confusion with regard to authorized and unauthorized interrogation techniques" as "particularly alarming."

Mora recently started a new job, as the general counsel for Wal-Mart's international operations. A few days after his going-away party, he reflected on his tenure at the Pentagon. He felt that he had witnessed both a moral and a legal tragedy.

In Mora's view, the Administration's legal response to September 11th was flawed from the start, triggering a series of subsequent errors that were all but impossible to correct. "The determination that Geneva didn't apply was a legal and policy mistake," he told me. "But very few lawyers could argue to the contrary once the decision had been made."

Mora went on, "It seemed odd to me that the actors weren't more troubled by what they were doing." Many Administration

lawyers, he said, appeared to be unaware of history. “I wondered if they were even familiar with the Nuremberg trials—or with the laws of war, or with the Geneva conventions. They cut many of the experts on those areas out. The State Department wasn’t just on the back of the bus—it was left off the bus.” Mora understood that “people were afraid that more 9/11s would happen, so getting the information became the overriding objective. But there was a failure to look more broadly at the ramifications.

“These were enormously hardworking, patriotic individuals,” he said. “When you put together the pieces, it’s all so sad. To preserve flexibility, they were willing to throw away our values.” ♦

Annals Of The Pentagon, “The Memo,” The New Yorker, February 27, 2006, p. 32

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