Testimony of Marjorie Cohn before the

Subcommittee on the Constitution, Civil Rights and Civil Liberties

House Judiciary Committee

May 6, 2008

2141 Rayburn House Office Building
Washington, D.C.

From the Department of Justice to Guantánamo Bay:

Administration Lawyers and Administration Interrogation Rules

Marjorie Cohn

President, National Lawyers Guild
Professor, Thomas Jefferson School of Law

Testimony of Marjorie Cohn

What does torture have in common with genocide, slavery, and wars of aggression? They are all *jus cogens*. *Jus cogens* is Latin for "higher law" or "compelling law." This means that no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a *jus cogens* prohibition.

The United States has always prohibited the use of torture in our Constitution, laws executive statements and judicial decisions. We have ratified three treaties that all outlaw torture and cruel, inhuman or degrading treatment or punishment. When the United States ratifies a treaty, it becomes part of the Supreme Law of the Land under the Supremacy Clause of the Constitution.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, says, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."

Whether someone is a POW or not, he must always be treated humanely; there are no gaps in the Geneva Conventions. He must be protected against torture, mutilation, cruel treatment, and outrages upon personal dignity, particularly humiliating and degrading treatment under, Common Article 3. In *Hamdan v. Rumsfeld*, the Supreme Court rejected the Bush administration's argument that Common Article 3 doesn't cover the prisoners at Guantánamo. Justice Kennedy wrote that violations of Common Article 3 are war crimes.

We have federal laws that criminalize torture.

The War Crimes Act punishes any *grave breach* of the Geneva Conventions, as well as any violation of Common Article 3. That includes torture, willfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

The Torture Statute provides for life in prison, or even the death penalty if the victim dies, for anyone who commits, attempts, or conspires to commit torture outside the United States.

The U.S. Army Field Manual's provisions governing intelligence interrogations prohibit the "use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." Brainwashing, mental torture, or any other form of mental coercion, including the use of drugs, are also prohibited.

Military personnel who mistreat prisoners can be prosecuted by court-martial under provisions of the Uniform Code of Military Justice. These include conspiracy, cruelty and maltreatment, murder, manslaughter, maiming, sodomy, and assault.

In *Filartiga v. Peña-Irala*, the Second Circuit declared the prohibition against torture is universal, obligatory, specific and definable. Since then, every U.S. circuit court has reaffirmed that torture violates universal and customary international law. In the *Paquete Habana*, the Supreme Court held that customary international law is part of U.S. law.

The Constitution gives Congress the power to make the laws and the President the duty to carry them out. Yet on February 7, 2002, President Bush, relying on memos by lawyers including John Yoo, announced that the Geneva Conventions did not apply to alleged Taliban and Al Qaeda members. Bush said, however, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva." But torture is *never* allowed under our laws.

Lawyers in the Department of Justice's Office of Legal Counsel wrote memos at the request of high-ranking government officials in order to insulate them from future prosecution for subjecting detainees to torture. In memos dated August 1, 2002 and March 18, 2003, former Deputy Assistant Attorney General John Yoo (Jay Bybee, now a federal judge, signed the 2002 memo), advised the Bush administration that the Department of Justice would not enforce the U.S. criminal laws against torture, assault, maiming and stalking, in the detention and interrogation of enemy combatants.

The federal maiming statute makes it a crime for someone "with the intent to torture, maim, or disfigure" to "cut, bite, or slit the nose, ear or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person." It further prohibits individuals from "throwing or pouring upon another person any scalding water, corrosive acid, or caustic substance" with like intent.

Yoo said in an interview in *Esquire* that "just because the statute says -- that doesn't mean you have to do it." In a debate with Notre Dame Professor Doug Cassell, Yoo said there is no treaty that prohibits the President from torturing someone by crushing the testicles of the person's child. In Yoo's view, it depends on the President's motive, notwithstanding the absolute prohibition against torture in *all* circumstances.

The Torture Convention defines torture as the intentional infliction of severe physical or mental pain or suffering. The U.S. attached an "understanding" to its ratification of the Torture Convention, which added the requirement that the torturer "specifically" intend to inflict the severe physical or mental pain or suffering. This is a distinction without a difference for three reasons. First, under well-established principles of criminal law, a person specifically intends to cause a result when he either consciously desires that result or when he knows the result is practically certain to follow. Second, unlike a "reservation" to a treaty provision, an "understanding" cannot change an international legal obligation. Third, under the Vienna Convention on the Law of Treaties, an

"understanding" that violates the object and purpose of a treaty is void. The claim that treatment of prisoners which would amount to torture under the Torture Convention does not constitute torture under the U.S. "understanding" violates the object and purpose of the Convention, which is to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The U.S. "understanding" that adds the specific intent requirement is embodied in the U.S. Torture Statute.

Nevertheless, Yoo twisted the law and redefined torture much more narrowly than the definitions in the Convention Against Torture and the Torture Statute. Under Yoo's definition, the victim must experience intense pain or suffering equivalent to pain associated with serious physical injury so severe that death, organ failure or permanent damage resulting in loss of significant body functions will likely result.

Yoo wrote that self-defense or necessity could be used as a defense to war crimes prosecutions for torture, notwithstanding the Torture Convention's *absolute* prohibition against torture in *all* circumstances. There can be no justification for torture.

After the exposure of the atrocities at Abu Ghraib and the publication of the August 1, 2002 memo, the Department of Justice knew the memo could not be legally defended. That memo was withdrawn as of June 1, 2004. A new opinion, authored by Daniel Levin, Acting Assistant Attorney General Office of Legal Counsel, is dated December 30, 2004. It specifically rejects Yoo's definition of torture, and admits that a defendant's motives to protect national security will not shield him from a torture prosecution. The rescission of the August 2002 memo constitutes an admission by the Justice Department that the legal reasoning in that memo was wrong. But for 22 months, the it was in effect, which sanctioned and led to the torture of prisoners in U.S. custody.

John Yoo admitted the coercive interrogation "policies were part of a common, unifying approach to the war on terrorism." Yoo and other Department of Justice lawyers, including Jay Bybee , David Addington, William Haynes and Alberto Gonzalez, were part of a common plan to violate U.S. and international laws outlawing torture. It was reasonably foreseeable that the advice they gave would result in great physical or mental harm or death to many detainees. Indeed, more than 100 have died, many from torture.

ABC News reported last month that the National Security Council Principals Committee consisting of Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. Bush admitted, "yes, I'm aware our national security team met on this issue. And I approved."

These top U.S. officials are liable for war crimes under the U.S. War Crimes Act and torture under the Torture Statute. They ordered the torture that was carried out by the interrogators. Under the doctrine of *command responsibility*, used at Nuremberg and enshrined in the Army Field Manual, commanders, all the way up the chain of command to the commander in chief, can be liable for war crimes if they knew or should have

known their subordinates would commit them, and they did nothing to stop or prevent it. The Bush officials ordered the torture after seeking legal cover from their lawyers.

But Yoo and the other Justice Department lawyers who wrote the enabling memos are also liable for the same offenses. They were an integral part of a criminal conspiracy to violate our criminal laws. Yoo admitted in an *Esquire* interview last month that he knew interrogators would take action based on what he advised.

The President can no more order the commission of torture than he can order the commission of genocide, or establish a system of slavery, or wage a war of aggression.

A Select Committee of Congress should launch an immediate and thorough investigation of the circumstances under which torture was authorized and rationalized. The high officials of our government and their lawyers who advised them should be investigated and prosecuted by a Special Prosecutor, independent of the Justice Department, for their crimes. John Yoo, Jay Byee, and David Addington should be subjected to particular scrutiny because of the seriousness of their roles in misusing the rule of law and legal analysis to justify torture and other crimes in flagrant violation of domestic and international law.