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I Fraying the Rule of Law: The Last Eight Years

This Committee is well aware of the progress of the current administration toward fraying the rule of law in the United States. In my own research[1], I have encountered both refusals to abide by legal constraints and concerted efforts to avoid acknowledging these refusals. The following is not a comprehensive account of the stratagems, but a scandalized travelogue of some of the more striking gambits that have come to my attention.

A recent account quotes a CIA official on the administrators of the CIA's interrogation and detention program: "Their attitude was 'Laws? Like who the f[***] cares?"[2] So, too, according to reports, Khaled El Masri, an innocent German citizen was kidnapped by CIA operatives was kicked and beaten and warned by an interrogator: "You are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know."[3]

These are not isolated anomalies. Military officials were informed by White House operatives that "the gloves were off", and that the Geneva Conventions did not apply to the so called "Global War On Terrorism"(or "Terror") [Hereinafter, "GWOT"].[4] National Security

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[1]Seth F. Kreimer, Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror, 6 **U. Pa. J. Const. L.** 278 (2003); Seth F. Kreimer, Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror, 7 **U. Penn J. Const. L.** 133 (2004); Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 **J. Nat'l Sec. L & Pol'y** 187 (2005); Seth F. Kreimer, Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti- Terrorism and the Strategy of Transparency, 11 **Lewis & Clark L. Rev.** 1141 (2007); Seth F. Kreimer, The Freedom of Information Act and the Ecology of Transparency 10 **U. Pa. J. Const. L.** 1011 (2008).

[2]**Jane Mayer, The Dark Side,** 275 (2008) (expurgation added).

[3]Dana Priest, Wrongful Imprisonment:Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition', **Wash. Post**, Dec. 4, 2005, at A1.

[4]Richard Serrano, Prison Interrogators' Gloves Came Off Before Abu Ghraib, **L.A. Times** June 9, 2004, at A1; Eric Schmitt & Carolyn Marshall, In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse, N.Y. Times , Mar. 19, 2006, at A1 ("Placards posted by soldiers at the detention area advised, 'NO BLOOD, NO FOUL.' The slogan, as one Defense Department official explained, reflected an adage adopted by Task Force 6-26: 'If you don't make them bleed, they can't prosecute for it.' . . . [P]risoners at Camp Nama often disappeared into a

Agency officials were ordered by presidential finding to ignore the constraints of the Foreign Intelligence Surveillance Act. There is cold comfort to be gleaned from the fact that "Scooter" Libby is reported to have said of the CIA's abusive detentions that "ninety nine percent of what we do is legal."[5] From my research it appears that many members of the current administration viewed legal rules as obstacles to be circumvented rather than obligations to be honored; the tenor of the administration is as evident in the activities of Lurita Doan and Monica Goodling as in the opinions of Alberto Gonzales and David Addington.

The Fig Leaf of Legalism

To be sure the current administration did not turn to explicit lawlessness as a first resort. As one dissenter from the process described the modus operandi of "top officials of the administration" in dealing " with laws they didn't like", "they blew through them in secret based on flimsy legal opinions that they closely guarded so that noone could question the legal basis for the operations."[6]

These legal opinions sometimes involved fine-spun and implausible legal distinctions. Notwithstanding repeated public assurances that American forces avoided "torture," obeyed "the law," and acted "humanely" toward captured terrorist suspects, lawyers who set governing policy contrived to generate legal analyses that freed interrogators from legal constraints by insulating executive branch activities in the "GWOT" from ordinary linguistic and legal usage. In this insulated universe of meaning, waterboarding was not "torture" while hypothermia, stress positions and humiliation constituted "humane treatment."

Administration legal opinions often turned to legal manipulation to construct islands of impunity where legal obligations were said to be inapplicable. Most graphically, the current administration maneuvered detainees to the naval base at Guantanamo Bay, which was treated as a legal black hole to which neither the jurisdiction of federal courts nor the mandate of federal law reached. The administration took the position that its unilateral "determination" could avoid liability for breaches of domestic and international legal obligations, [7] and that its designation of individuals as "enemy combatants" could leave them devoid of legal rights. The current administration deployed the technique labeled "extraordinary rendition" to seize individuals suspected of hostile intent and put them in the hands of foreign surrogates who could engage in abusive interrogations in locations asserted to be beyond the reach of American law.

When other expedients did not suffice, the administration's positions often fell back on the proposition that like the English king, the President can do no wrong. Administration lawyers

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detention black hole, barred from access to lawyers or relatives. . . . 'The reality is, there were no rules there,' another Pentagon official said").

[5] **Mayer, The Dark Side,** 305.

[6]**Jack Goldsmith, The Terror Presidency** 181 (2007).

[7]Letter from John Ashcroft, Att'y Gen., to President George W. Bush (Feb. 1, 2002), reprinted in **Mark Danner, Torture and Truth: America, Abu Ghraib and the War on Terror** 92 (2004) (arguing that a presidential determination that the Genevea Convention did not apply because Afghanistan was a "failed state" would allow the abuse, while " minimizing" the "legal risks of liability, litigation, and criminal prosecution").

dispatched inconvenient obligations under law with reference to a quasi monarchical prerogative power to "legally" ignore them as Commander in Chief.

Armed with these secret opinions, members of the current administration regularly avowed their intent to be bound by "the law," with the secret mental reservation that "the law" imposed no binding constraints. They routinely made public statements appearing to disavow the very activities that they sought secret interpretations to authorize.

Secrets, Lies, and Videotape

Crucial to this strategy was the preservation of these activities and rationales from review and critical examination. Thus, the current administration sought to avoid accountability under law for its treatment of detainees by seeking to prevent the knowledge of abuse from coming to light, and by preventing detainees from obtaining access to judicial review. The current administration regularly hid overseas detainees from International Committee of the Red Cross monitors. At Guantanamo it denied access to attorneys representing those individuals, and obviously it continues to deny access to detainees held in CIA "black sites." In the United Sates, it manipulated jurisdictional locations to deprive detainees of access to attorneys.[8]

The current administration hid its dragnet roundup of non-citizens in the aftermath of September 11 from public review and congressional oversight.[9] It sought to avoid Supreme Court review of favorable decisions in a circuit conflict regarding its secrecy by representing that the decisions had no impact; it then sought to take advantage of the rule of the unreviewed decisions.[10] It initially put roadblocks in the path of obtaining counsel, then adopted a strategy to avoid judicial review of the legality of efforts to hold immigration detainees indefinitely by mooting out habeas petitions once filed and continuing to hold detainees who had not filed habeas actions.[11]

After erroneously arresting and harshly interrogating an Egyptian airline pilot, and presenting the false accusations to a court to justify his detention, the current administration sought to avoid revelation of its blunder by sealing the record, and sought to seal subsequent

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[8] When the attorney for Jose Padilla filed a petition challenging his detention in the criminal justice system pursuant to court order in New York, the administration designated him an "enemy combatant" and moved him to a naval brig in South Carolina.. Rumsfeld v. Padilla, 542 U.S. 426, 430-431 (2004). When his counsel filed a petition for habeas corpus in South Carolina, the administration sought to avoid Supreme Court review by transferring Padilla back to criminal custody. Padilla v. Hanft, 547 U.S. 1062, 1063 (2006).

Similarly during the period of September 27, 2002 to October 7, 2002, the Department of Justice played a game of three-card monte with the attorney for Maher Arar, misleading him as to Arar's location and rushing through Arar's compelled removal to Syria for torture on the basis of classified, but inaccurate, information. Arar v. Ashcroft, 414 F. Supp. 2d 250, 254 (E.D.N.Y. 2006).

[9] *See* Kreimer, Strategy of Transparency,, 11 Lewis & Clark L. Rev. at 1148-1158.

[10] Id at 1157-58.

[11] Id. at 1152 n.4.

litigation to vindicate the pilot's rights.[12]

When challenged on its use of the intrusive surveillance authorities granted by the "Patriot Act," the current administration began by refusing to disclose even the bare facts regarding the number of times the authorities had been utilized.[13] When it became politically advantageous, the administration declassified and announced the "fact" that Section 215 of the Act had not been used at all, and made similar representations to a court.[14] Less than a month later, the administration covertly deployed the authority it had disavowed, informing neither public nor judge.[15]

It is notorious that the administration initially claimed that detainees were treated "humanely" and disavowed "torture" or illegality with the mental reservations that hypothermia was "humane," waterboarding was not "torture," and that in the secretly promulgated view of administration attorneys nothing the president ordered could be "illegal."[16] What is somewhat less well known is that the current administration regularly deployed improper national security classifications to shield embarrassing evidence of these deceptions from Congress and the public.[17] Similarly, when videotapes of waterboarding and other "enhanced" interrogation techniques became the subject of judicial inquiry, officials destroyed those tapes, and the current

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[12]In August 2002, Judge Rakoff in In re Material Witness Warrant, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002), ordered an investigation of the case of Abdallah Higazy, an Egyptian who had been detained as a "material witness" in the aftermath of September 11. Higazy was bullied into a "confession" by FBI interrogators who threatened his family in Egypt with torture by Egyptian security forces. The "confession" was reported to Judge Rakoff as a justification for further detaining Mr. Higazy. When Mr. Higazy was definitively exonerated and one of his accusers was shown to have misrepresented crucial physical evidence, Judge Rakoff rejected the efforts of the government to keep the records of the case sealed. Id. Subsequent efforts to recover damages from the actors in the debacle ran aground on qualified immunity, Higazy v. Millennium Hotel & Resorts, CDL (N.Y.) L.L.C., 346 F. Supp. 2d 430, 452 (S.D.N.Y. 2004), although some of Mr. Higazy's claims were reinstated in Higazy v. Templeton, Docket No. 05-4148-cv, 2007 U.S. App. LEXIS 24443 (2d Cir. 2007), unredacted opinion available at http://howappealing.law.com/HigazyVsTempleton05-4148-cv_opnWithdrawn.pdf

[13]Kreimer, Strategy of Transparency at 1169-72.

[14]Id at 1172.

[15]Id at 1175.

[16] One particularly embarrassing example occurred in the Supreme Court argument of Rumsfeld v. Padilla, when an adminstration lawyer unambiguously announced that "our executive doesn't" order "mild torture" the day that the effort to conceal the abuses as Abu Ghraib fell apart on network news. See Transcript of Oral Argument at 22–23, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1027.pdf .

[17]Kreimer, Strategy of Transparency, 1204-05; id at 1217 n.320.

administration misrepresented to the court that the absent tapes had never existed.[18]

II)Restoring the Rule of Law: The Next Administration

A. Executive Reversal and Revelation

Much of this activity came at the direction of officials at the highest levels. President Bush made explicit presidential findings authorizing kidnaping and inhumane interrogation procedures. He personally approved surveillance programs in the teeth of explicit legal obligations adopted by Congress. The office of Vice President Cheney repeatedly encouraged evasion and disregard of legal constraints. Vice President Cheney's Counsel, David Addington, is quoted as proclaiming " We're going to push and push and push until some larger force makes us stop."[19] The attitude of the remainder of the administration followed suit. One CIA official observed of the CIA's physical abuses of detainees:"The truth is that the President wanted it. So everyone else wanted to be the most aggressive. A lot of ambitious people played on Cheney and the President's fascination with this. The President *loved* it."[20]

1. Strokes of a Pen

A new administration therefore can reverse some of this damage with the proverbial stroke of a pen. It can revoke the authorities to engage in lawless detention and coercive interrogations of detainees and reaffirm the commitment of the United States to the Geneva Conventions and the rules of common decency. It can move to close CIA "black sites" and dismantle the detention facilities at Guantanamo. It can direct the release of documents which have been called for in FOIA inquiries into "GWOT" abuses, long blocked by the obstruction of the current administration, subject only to redactions clearly mandated by compelling national interests. It can proactively release the series of studies by internal commissions and Inspectors General of the illegalities of its predecessor, subject again to redaction for compelling national interest. It can withdraw the gag order that prevents John Walker Lindh from commenting on the treatment he received at the hands of American officials.[21] It can order the prosecution for contempt of Congress of officials of the prior administration who have flouted legitimate legislative subpoenas seeking to uncover illegality.

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[18]Mark Mazzetti, C.I.A. Was Urged to Keep Interrogation Videotapes, **N.Y. Times**, Dec. 8, 2007, at A1; **Mayer** ,**The Dark Side** 320-21.

[19]**Goldsmith, The Terror Presidency** 125.

[20] **Mayer, The Dark Side** 43 (emphasis in original).

[21] *See* Dave Lindorff, Chertoff and Torture ,**The Nation** Feburary 15, 2005(reporting on plea agreement that demanding that Lindh sign a statement swearing he had "not been intentionally mistreated" by his US captors, waiving any future right to claim mistreatment or torture, and imposing"special administrative measure," barring Lindh from talking about his experience for the duration of his sentence); Tom Junod, Innocent , **Esquire** July 1, 2006 See Plea Agreement, Lindh, available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf .

2. Preservation and Rule of Law Audits

Equally important, a new administration can begin the effort to determine the scope of the illegality authorized by its predecessors. A new administration should immediately issue orders to prevent the destruction of documentary or electronic evidence, and should consider the establishment of targeted inquiries.

a. The "War Council"

One point of entry for these efforts focuses on the activities of the so-called "War Council"comprised of John Yoo, David Addington, Tim Flannigan Alberto Gonzales and William J."Jim" Haynes. This group, according to a series of reports, was instrumental in orchestrating disregard for controlling legal obligations. Upon entering office, the new administration should immediately issue an order to preserve all correspondence to and from these individuals which has not already been destroyed; it should move to identify electronic records that have been deleted and to reconstruct them where possible. Before accession of a new administration, relevant Committees of Congress should consider issuing orders to each of these individuals, as well as others known to be likely to have evidence of abuses, directing them to preserve documents and correspondence regarding the abuses that have been or are likely to be the subject of inquiry.

Once records are preserved, a new administration will be in a position to conduct a "rule of law audit" to evaluate what further actions should be taken to reverse the abusive authorities of its predecessor. From public records it appears that one modus operandi of the prior administration was to seek secret authorization from OLC for dubious initiatives, both in an effort to suppress disagreement within the administration and as a means of constructing defenses against future prosecution. At a minimum, competent attorneys should review every OLC opinion authored by Messrs. Yoo, Bybee and Flannigan, commencing with those which have been most highly classified. Given the practices of the prior administration these are most likely to conceal rule of law abuses. These reviews will provide one basis to identify further dubious policies and authorities that should be targeted for revocation.

More generally, the pattern of correspondence with members of the "War Council" is likely to provide a means of tracing the impact of "rule of law" violations. This tracing is in turn likely to require a full scale auditing process either by a specially detailed team from the FBI or the offices of one or more Inspectors General.

b. The Office of the Vice President

In a sobering account a year ago, it was reported that

> Iran-Contra was the subject of an informal "lessons learned" discussion two years ago among veterans of the scandal. [Elliott] Abrams led the discussion. One conclusion was that even though the program was eventually exposed, it had been possible to execute it without telling Congress. As to what the experience taught them, in terms of future covert operations, the participants found: "One, you can't trust our friends. Two, the C.I.A. has got to be totally out of it. Three, you can't trust the uniformed military, and four, it's got to be run out of the Vice-President's office"-a reference to Cheney's role, the former

senior intelligence official said.[22]

There are indications that this strategy of using the Office of the Vice President as an "undisclosed location" from which to launch legally and morally dubious off the books initiatives has been implemented. The Vice President has unilaterally exempted himself from disclosure obligations and as well as the obligations to comply with rules concerning classified information; the current Office of Legal Counsel has declined even to evaluate the legality of that exemption.[23] It is as yet unclear how many other legal obligations the Office of the Vice President has decided to ignore. Tracing the influence of the Office of the Vice President provides another means of tracing the pattern of rule derogation in the prior administration.

Upon entering office, the new administration should immediately issue an order to preserve all correspondence to and from the Office of the Vice President which has not already been destroyed, and move to identify electronic records that have been deleted and to reconstruct them where possible. Before accession of a new administration, relevant Committees of Congress should consider issuing notices to direct preservation of documents and correspondence regarding the abuses that have been or are likely to be the subject of inquiry.

Again, tracing the influence of the Office of the Vice President is likely to be a substantial task, and one that is likely to require the services of specially detailed personnel. In this regard it may also be worth considering empaneling a special grand jury with authority to investigate illegality, and either report on or recommend prosecution. *See* In re Report & Recommendation of June 5,1972 Grand Jury , 370 F. Supp. 1219, 1224 (D.D.C. 1974); *Cf.*.Cheney v. United States Dist. Court, 542 U.S. 367, 384 (2004)(determining that executive privilege is a less powerful concern when it is invoked to block grand jury inquiry).

c. Comprehensive Rule of Law Audit

In addition to these targeted inquiries, the new administration should move toward establishing a broader structure to catalogue the rule of law failures emanating from the White House in the last eight years. Whether such in house audit is best undertaken by a borrowed task force of career civil servants, a group detailed from the Council of Inspectors General, a specially engaged outside counsel or auditing group, or an inquiry by the White House Counsel's office is a matter on which I am not sufficiently informed at this point to have an opinion.

B) Responsibility, Reparation and Renewal: Longer Term Initiatives

In addition to these unilateral and immediate actions, a series of longer run actions by both executive and legislative branches can begin to reestablish the rule of law. The objects of these initiatives should be to hold the perpetrators responsible, to repair the damage they have caused

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[22] Seymour M. Hersh, The Redirection: Is the Administration's New Policy Benefitting Our Enemies in the War on Terrorism?, **New Yorker**, Mar. 5, 2007, at 54.

[23] See,e.g. Letter of Complaint by Federation of American Scientists January 3, 2008, available at http://www.fas.org/sgp/news/2008/01/fas-opr.pdf; Michael Isikoff, Challenging Cheney,**Newsweek**, December 24, 2007, http://www.newsweek.com/id/81883/ Justin Rood, Cheney Power Grab: Says White House Rules Don't Apply to Him, June 21, 2007, **The Blotter**, http://blogs.abcnews.com/theblotter/2007/06/cheney-power-gr.html .

and to renew the aspirations of our national order. The following list should be regarded as illustrative, rather than exhaustive.

1. Responsibility

a. Criminal Prosecution

Once a new administration has identified abuses, criminal prosecution constitutes one clear mechanism for holding responsible those who commanded or committed the abuses. It appears that the threat of possible prosecution had some moderating effect on the unilateral abuse by some participants in the current administration's activities. Observers recount that "senior FBI officials" moderated their responses to demands for "forward leaning" interventions because of concerns about potential criminal and civil liability if they were to act on overreaching legal opinions.[24] Another account reports that "after seeing midlevel colleagues convicted for following what they thought were presidential wishes in the Iran-Contra scandal, Kofer Black [of the CIA] warned his subordinates that the CIA was not in the "rid-me-of-this priest" business."[25] Actors report that the CIA required explicit presidential authorization and an OLC legal opinion to serve as a "golden shield**"** against future prosecution before proceeding with abusive interrogation.[26]

It may unfortunately be the case that for some activities undertaken after their issuance, these "gold shields" will be effective in negating the elements of criminal prosecution. And it is entirely possible that before leaving office the current President will issue pardons for some of the malfeasance he authorized. It is therefore imperative to explore prosecutions for efforts to shield abuses from accountability through illegal destruction of evidence or false statements[27]

This variety of investigation and prosecution should not be denigrated as a "witch hunt" or a "perjury trap." One crucial mechanism which this administration has used to avoid the force of governing rules has been secrecy and deception. Investigation and prosecution of these activities can bring to light the sordid, self-interested quality of the departures from legality and focus on the self-protective secrecy and self-dealing refusals to abide by law. Punishing such deception is

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[24] **Eric Lichtblau, Bush's Law**, 179 (2008).

[25] **Mayer, The Dark Side** 20 ; *See* id at 271 (describing "growing unease about legal exposure" as imposing some constraints on torture).

[26]**Goldsmith, The Terror Presidency** 144.

[27]*See, e.g.* 18 U.S.C. § 1505 (defining violations by one who "obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House") ;18 U.S.C. § 1515(b)(clarifying the prohibition as including "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."); United States v. Safavian, 451 F. Supp. 2d 232, 246 (D.D.C. 2006).

a first step toward eliminating the culture of impunity. Indeed, if time is necessary for investigation, as one pair of commentators sympathetic to the current administration has pointed out in a parallel context, it would not be a constitutional violation to extend unexpired statutes of limitations for criminal statutes covering the rule of law abuses in question.[28]

The prospect of criminal prosecution may, however ,on occasion be less than an effective deterrent. The CIA's Kofer Black is also quoted as saying upon leaving a meeting in the aftermath of September 11, "We'll all probably be prosecuted," and "practically relishing the possibility, casting himself as a tough but noble hero forced to sacrifice himself for his country."[29] While it is more difficult to construct the lure of heroism in the destruction of evidence, it is important to explore other mechanisms to hold violators responsible and to repudiate primary rule violations.

b. Civil Redress

Two centuries ago, Justice John Marshall observed that "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U.S. 137 (1803). Two decades ago, Justice Sandra O'Connor dissented in United States v. Stanley 483 U.S. 669, 710 (1987) from the denial of relief to former Sgt. James B. Stanley whom military experimenters had surreptitiously dosed with mind-altering drugs:

> No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case...The United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War [and established the principles of the Nuremberg Court]. If this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.

In response to the admonitions of Justice O'Connor and others, Congress ultimately awarded Sgt. Stanley $400,000 compensation in 1994.[30]

The abuses of the current administration have not infrequently risen to the level of war crimes. They have generated substantial litigation by their victims. But unfortunately the federal courts have been active in crafting judicial rules to insulate the perpetrators from liability. On occasion, Congress has been complicit in this effort. It is entirely appropriate for a new Congress and a new administration to intervene promptly to assure that the promise of due

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[28]Eric Posner & Adrian Vermeule, Transitional Justice as Ordinary Justice, 117 **Harv. L. Rev.**761, 766 (2004) (citing Stogner v. California, 123 S. Ct. 2446, 2453 (2003); United States ex rel. Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982); Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1928)).

[29]**The Dark Side** at 41.

[30]H.R. 808/Private Law 103–8 For the relief of James B. Stanley 108 Stat. 5066 (October 25,1994)

process and the rule of law is not defeated by denying relief to those who have been abused.
An illustrative, but not complete list of possible initiatives follows.

State Secrets Privilege Some efforts to obtain redress have run aground on the judicially crafted "state secrets" doctrine which obstructs redress not because it is substantively unwarranted, but because adjudication of claims would pierce the veil of secrecy under which abuses were committed. Rather than simply reviewing evidence to cull validly classified material, courts which accept this privilege simply refuse to entertain actions for relief. Thus for example in El Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007), the court dismissed an action for redress by a concededly innocent German citizen who was abducted, detained and abused by the CIA not on the ground that the suit was without legal merit, but on the ground that the details of the covert abduction were "state secrets." The current administration has been profligate in its invocation of this doctrine.

Congress is currently considering legislation to constrain the exertion of this doctrine in the form of S. 2533, the "State Secrets Protection Act.". Even before this legislation is adopted, a new administration can undertake to withdraw assertions of that privilege which obstruct actions against perpetrators of abuses. An incoming administration should require an audit of the cases in which the Justice Department is asserting a "state secrets" privilege, and assess where the real public interest lies in these matters.

"Special Factors Counseling Hesitation"

A substantial number of cases have invoked exactly the doctrine that Justice O'Connor decried to refuse to adjudicate actions for redress brought by victims of the current administrations programs, however substantively meritorious. These cases maintain that "special factors counseling hesitation" preclude actions to redress abuses in the administration's initiatives, even if constitutional rights have been manifestly violated.Arar v. Ashcroft , 532 F.3d 157 (2d Cir. 2008), for example, a case brought by Maher Arar, who was deported by the administration for torture in Syria, is currently awaiting en banc reargument before the Second Circuit. Wilson v. Libby, 2008 U.S. App. LEXIS 17119 (D.C. Cir. 2008), dismissed an action by Joseph Wilson and Valerie Plame for the retaliatory actions taken against them by members of the Vice President's office; a petition for certiorari is pending. [31]

In pending cases a new administration can reverse current aggressive executive branch claims to immunity from responsibility under the rubric of "special factors counseling hesitation." It can urge the courts to recognize that the real interests of the United States encompass the repudiation of constitutional abuses and the provision of redress to their victims. In the longer run, Congress can and should make authoritatively clear that redress should be provided.

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[31]There is cause for concern, as well, in the efforts of the current administration's advocates in Iqbal v. Hasty, 490 F.3d 143, 151 (2d Cir. N.Y. 2007) *cert granted* Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) to avoid adjudication of the merits of the claims of individuals detained and abused in the post September 11 mass arrests by the administration. Likewise in Rasul v. Myers 512 F.3d 644 (D.C. Cir 2008) *petition for cert pending*, an action brought by detainees in Guantanamo to challenge their abuse, the administration invoked and a concurring judge accepted the "special factors" defense.

Revocation of Impunity Unfortunately, past Congresses have on occasion intervened in exactly the opposite direction. In the "Detainee Treatment Act" of 2005, and the "Military Commission Act" of 2006, Congress sought to provide a variety of immunities to individuals from actions to redress abuse of detainees. Likewise, in the recent FISA Amendment Act of 2008, Congress has provided retrospective immunity to private entities who colluded in the current administration's illegal interceptions Future sessions of Congress concerned with the rule of law should review immunity provisions to determine whether and how this legal impunity should be revoked. As an alternative, if it elects to retain immunities Congress can authorize actions against the United States as defendant to provide compensation to victims of abuse. While such actions would not serve the purpose of "seeing that victims are compensated by perpetrators," they would at least provide compensation, as well as providing a forum in which the legalities of impositions by the current administration can be adjudicated.

Conditional Indemnification It may be the view of Congress, or the incoming administration in the exercise of its existing authority, that while compensation of victims is important there are reasons to provide indemnification for officials who participated in abuses, either against substantive liability or against legal expenses. Such indemnification, if it is undertaken, provides an opportunity to further the salutary effort to reveal the abuses of the prior administration. Malpractice insurers require that applicants inform them of potential legal claims as a condition for providing insurance coverage. Similarly, any indemnification program should require that applicants for indemnity come forward and identify under oath the precise nature and scope of the activities for which they seek protection. This would both indicate the scope of potential indemnities, and equally important provide information as to the scope of legally dubious practices.[32]

Congress or the executive should consider as well the option of imposing similar conditions on the ability of government officials to obtain or continue insurance against responsibility for abuses of the rule of law.[33] Insurance outside of federal oversight obviously undercuts the deterrent effect of potential legal sanctions. At a minimum, such insurance should be permitted only if potential violators are required to disclose their actions to responsible superiors.

Statutes of Limitations

At this point in time, as a result of the current administration's efforts to conceal its activities and to obstruct access to courts, the scope of the underlying abuses is entirely unclear. It is likely that these efforts would toll the running of statutes of limitations in many cases. If it is concerned about reestablishing the rule of law, however, Congress should consider explicitly adopting provisions extending or tolling civil statutes of limitations for victims of rule of law abuses to

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[32]Compare Marek M. Kaminski and Monika Nalepa, Judging Transitional Justice, A New Criterion for Evaluating Truth Revelation Procedures 50 **J. Conflict Resolution** 383 (2006) (reviewing the virtues of procedures which require those claiming immunity to verify the scope of wrongdoing under threat of criminal sanction for false testimony).

[33]*Cf.* Scott Shane, In Legal Cases, C.I.A. Officers Turn to Insurer, **N. Y.Times** A31 Jan 20,2008 ; R. Jeffrey Smith, Worried CIA Officers Buy Legal Insurance; Plans Fund Defense In Anti-Terror Cases, **Washington Post** A01 September 11, 2006.

assure that concealment does not become a self-fulfilling prophecy of impunity.

c. Other Modes of Responsibility

i. Employment Discipline

Whether or not they are found criminally or civilly liable, rule of law violators who are currently employed by the federal government should face review for internal disciplinary sanctions. At a minimum, considerations of such violators for promotion should take into full account their failures to abide by standards of legality and integrity.

ii.Security Clearances

Beyond the imposition of internal discipline, individuals who have been the perpetrators of rule of law abuses in the current administration should not have access to continued opportunities to undercut the integrity of the United States government in the future. The incoming administration should undertake a review of the actions of current employees holding security clearances to assure that rule of law violators do not retain the opportunity to do harm, and do not reap rewards at the expense of the nation. At a minimum, individuals who are identified as rule of law violators in internal investigations or external prosecutions should be stripped of their clearances.

In addition, given the prominence of deception and dissimulation as a means of avoiding the rule of law in the previous administration, a new administration should consider a separate audit to determine which individuals invoked security classifications to conceal misdeeds, made false statements to other branches or public inconsistent with their knowledge of classified materials, or destroyed classified records. Such individuals do not warrant the confidence that accompanies high level security clearances. Rule of law violators who have left the employment of the federal government should likewise be precluded from obtaining security clearances as private contractors, and private contractors who have engaged in rule of law violations should face adverse review of their clearance status.

iii. Debarment

A refusal to abide by the rule of law is not, in my view, a prominent qualification for service to the federal government as a private contractor. In the case of individuals or institutions who have engaged in financial fraud, debarment from eligibility for federal contracts is common.[34] Conversely, an individual in government service who knows that she will be subjected to certain exclusion from the opportunities of government contracting upon departing government may be deterred from engaging in rule of law violations to a greater extent than an official who contemplates the uncertain penalties of civil or criminal litigation. The incoming administration should investigate its authority to impose debarments from federal contracting activities on those who have been determined to have participated in the flouting of the rule of law. If such authorities do not already exist, Congress should consider enacting them.

2. Reparation

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[34] See,e.g. Debarment, Suspension and Eligibility, 48 C.F.R. § 1, Pt. 9 (Defense Department); 42 U.S.C. § 1320a-7(a) and 42 C.F.R. § 1001.101 (mandatory debarment by HHS); 42 U.S.C. § 1320a-7(b) (permissive).

a.Restoration

Some of the illegal initiatives of the previous administration have resulted in wrongs that can be undone directly. Thus individuals who have been improperly detained should be released, and individuals who have been improperly deported should be offered the option of returning to the United States[35]**.**

We know that Yaser Hamdi after prevailing in his appeal to the Supreme Court was required to renounce his American citizenship and agree not to seek compensation as a condition of release from his incarceration as an "enemy combatant"[36]**.** It is unclear how many other individuals have been subject to similar "offers". At a minimum such extorted expatriations should be revisited.

So, too, individuals who have been demoted, dismissed or passed over for promotion because of their opposition to illegal initiatives should be offered the opportunity to return to government service.[37] The "rule of law audit" suggested above is likely to reveal other situations which are appropriate for restoration.

b. Recompense

Many abuses cannot be undone directly; lives disrupted by incarceration cannot be fully reconstructed, the effects on bodies and minds racked by torture cannot be erased. But the government of the United States can provide some measure of compensation and apology. Even if one were to view innocent victims of abuses as "collaterally damaged" by open and honest failures in the GWOT, it would be appropriate to consider a mechanism to compensate them, just as the September 11 Victims Compensation Fund provided recompense to those whose lives

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[35] It seems likely, given the chaotic standards chronicled by the Department of Justice Inspector General **, The September 11 Detainees: A Review of the Treatment Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks** at 14, 16, 42, 53-57 (2003) that the mass deportations in the aftermath of September 11 included more than a few individuals who should have been eligible for continued residence. Such individuals should be offered the opportunity to seek reconsideration of their deportations.

[36]Eric Lichtblau , U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant', **New York Times** A1 (September 23, 2004).

[37]*See infra* pp. 17-21. *See also, e.g.* Gail Russell Chaddock ,A Surge in Whistle-blowing ... and Reprisals **Christian Science Monitor** February 16, 2006 p.1. (Describing experience of Sgt. Samuel Provance who stated that his rank was reduced for disobeying orders not to speak about mistreatment he saw at Abu Ghraib);Brooks Egerton, Losing a Fight for Detainees; Officer Says He Leaked List of Terror Suspects in the Name of Justice; Now Convicted, He Could Face Prison Term, **Dallas Morning News** May 18, 2007, at 1A (describing prosecution, beginning in 2005, of Matthew Diaz, military lawyer who provided a list of the names of prisoners to civil rights attorneys). The Department of Defense continued its court martial proceedings against Cmdr. Diaz even after the names had been disclosed in response to FOIA litigation. Id. ("When asked why the government pressed on with its criminal case against Cmndr. Diaz, Navy spokeswoman Beth Baker said, 'I can't give you a philosophical answer.'")

were destroyed in part by the failures of airline security.[38]

The past administration's failures, moreover, have regularly been far from open and honest. In the past the U.S. government has acknowledge and provided compensation for reprehensible overreaction in the past by compensating the victims of the internment of Japanese Americans during World War II. The current administration has on at least one occasion provided an apology and compensation to an innocent victim of its excesses.[39] The incoming administration should investigate the propriety of comparable apologies and compensation to other victims. Congress should similarly consider the establishment of a compensation fund, or commission.

3. Renewal

Responsibility and reparation will facilitate return to the rule of law . But a finalimperative calls for strengthening the ability and willingness of soldiers, career civil servants and political appointees of integrity to resist abuses. To that end, it is eminently worth investigating what structures facilitated the abuses which ones made resistance to them possible. Three suggestions are illustrative.

Sunsets and Renewal

One important aspect experience surrounding the "Patriot Act" was the functioning of the sunset provisions imposed on some of the more intrusive authorities it granted.[40] The prospect that the authorities would require renewal provided some leverage for civil servants who cautioned against abuse, warning that "In deciding whether or not to re-authorize the broadened authority, Congress will certainly examine the manner in which the FBI has exercised it."[41]

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[38]Cf. Radiation Exposure Compensation Act of 1990 , 42 U.S.C. § 2210 note and subsequent amendments.

[39]Eric Lichtblau, U.S. Will Pay $2 Million To Lawyer Wrongly Jailed, **New York Times** A18 (November 30, 2006).

[40]Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 [hereinafter, the "Patriot Act"]. Prominent controversy surrounded section 213, authorizing "sneak and peek" warrants; section 214, authorizing the issuance of pen register warrants on reduced standards of cause and connection to intelligence investigations; section 215, authorizing the issuance of secret warrants for access to "tangible things" on reduced standards of cause and connection to intelligence investigations; and section 505, which broadened authority for the FBI to issue national security letters (NSLs) without judicial authorization, obligating recipients to turn over consumer financial, telephonic, and electroniccommunication records. §§ 213–215, 115 Stat. at 285–88; § 505, 115 Stat. at 365–66.

[41]Memorandum from Gen. Counsel, Nat'l Sec. Law Unit, FBI, National Security Letter Matters 3 (Nov. 28, 2001), http://www.aclu.org/patriot_foia/FOIA/Nov2001FBImemo.pdf. The author of the memorandum has been identified as Michael Woods, who left the FBI in 2002. Barton Gellman, The FBI's Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans, **Washington Post**, Nov. 6, 2005, at A1.

In addition to this incentive for moderation, the actual public debate surrounding the renewal of those provisions occasioned both some reassertion of congressional concern for overreaching, and equally important, the mobilization of skeptics within and outside of the administration.[42] Similarly, the requirement that intrusive extralegal surveillance authorities adopted by Presidential directive in the aftermath of September 11 be regularly re-authorized provided an occasion for a new set of lawyers of integrity to re-evaluate its violation of law.[43] One lesson from the experience of the last administration is that a requirement of periodic reauthorization is an important structural support for the rule of law.

Sunlight as a Disinfectant

It is clear that the current administration used the mechanism of covert decision-making, isolated from the usual channels of policy-making and hence from possible criticism as the means to effect some of its less savory initiatives. Secrecy and the homogeneity of insular cliques of decision makers combined with a self-reinforcing fear of short run danger to dessicate norms of legality and impair regard for the longer run national interest in retaining the ideals of America.

One recurring lesson that has emerged from the current administration is that broad consultation in policy processes is less likely to result in lawless action. The incoming administration should reverse the procedures used by the current administration to avoid consultation with a broad portfolio of analysts in the formation of policy, as well as the practice of keeping legal analysis and authorities secret from officials within the government.

A salient teaching of computer security analysis in the last decade is that the more broadly and transparently disseminated a program becomes, the less likely it is to be infected with bugs and security flaws. By analogy, the more broadly proposed legal authorities are disseminated, the less likely they are to be infected with slipshod or evasive legal analysis, and the less easily such analysis defective can be implemented. The incoming administration should revisit the rules adopted by the Bush regime which make secrecy a default, and return to rules of transparency that prevent disclosure only in the case of real danger to the national interest.[44]

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[42] Kreimer, Strategy of Transparency at 1181; Kreimer, Ecology of Transparency at 1058.

[43] *See,e.g.*, **Lichtblau, Bush's Law** at178-84 (describing 2003-2004 controversy involving Jack Goldsmith Robert Meuller and James Comey confronting Alberto Gonzales, David Addington, and Andrew Card over re-authorization of extralegal "Terrorist Surveillance Program"); **Mayer, Dark Side** 289-91 .

[44] *E.g.,* Dana Milbank & Mike Allen, Release of Documents Is Delayed, **Washington Post**, Mar. 26, 2003, at A15 (describing revocation of the requirement that material "not be classified if there is 'significant doubt'" as to its danger to national security); Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003); Memorandum from John Ashcroft, U.S. Att'y Gen. to Heads of All Fed. Dep'ts & Agencies(Oct. 12, 2001), available at http://www.usdoj.gov/oip/foiapost/2001foiapost19 (Directing recipients of FOIA requests to explore basis for withholding); Memorandum from Laura L.S. Kimberly, Acting Dir., Info. Sec. Oversight Office, & Richard L. Huff & Daniel J. Metcalfe, Co-Dirs., Office of Info. & Privacy, Dep't of Justice to Dep'ts & Agencies (Mar. 19, 2002), available at

Even when full transparency is inadvisable, summary reports to outside bodies can combine with internal record keeping and auditing capabilities to impose accountability for potential abuse. In general record keeping requirements, and the possibility of even partial disclosure are likely to activate norms that support the rule of law.[45] A refusal to abide by record keeping requirements, or an effort to destroy existing records is a red flag for potential failures of the rule of law. One of the lessons of the 2005 Patriot Act renewal[46], which combined enhanced public reporting of bottom line statistics with a mandate of audits by the Department of Justice Inspector General is that partial transparency combined with internal review by effective watchdogs can provide an important set of institutional checks.[47]

From Twilight to Dawn: Celebration of Integrity

The saga of the last administration's erosion of the rule of is not without glimmers of integrity; some civil servants refused to accede to lawlessness even at the risk of their careers. In considering ways to renew the rule of law and prevent future abuses, it is important to recognize that integrity. On one hand, examination of their experiences can give clues to the ways in which in which future resistance to lawlessness can be fostered, and put in clear perspective the fact that the lawlessness of the last administration was a choice rather than an ineluctable necessity. On the other hand, just as a properly functioning system should sanction misconduct in order to deter its repetition, admirable integrity should be fostered by assuring that it is rewarded. The following list is illustrative rather than exhaustive; these individuals have as yet received no appropriate rewards from their country.

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http://www.usdoj.gov/oip/foiapost/ 2002foiapost10.htm (directing officials to consider means of resisting disclosure);Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff to Heads of Executive Dep'ts & Agencies (Mar. 19, 2002), available at http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm (highlighting the Kimberly/Huff/Metcalfe memo).

[45] *Cf.* Daniel C. Esty, Environmental Protection in the Information Age, 79 **N.Y.U. L. Rev.** 115, (2004); Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 **Geo. L.J.** 257 (2001); William M. Sage, Regulating Through Information: Disclosure Laws and American Health Care, 99 **Colum. L. Rev.** 1701 (1999); Michael P. Vandenbergh, Order Without Social Norms: How Personal Norm Activation Can Protect the Environment, 99 **Nw. U. L. Rev.** 1101, 1144-45 (2005) Mary Graham, Information as Risk Regulation: Lessons from Experience , (Regulatory Policy Program Working Paper No. RPP-2001-04, 2001), available at www.ksg.harvard.edu/cbg/research/rpp/RPP-2001-04.pdf.

[46]USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177 (2006).

[47] *See* Kreimer, Strategy of Transparency at 1182-85. For a broader argument for the use of internal auditing mechanisms see Mariano-Florentino Cuellar, Auditing Executive Discretion, 82 **Notre Dame L. Rev.**. 227, 258-66 (2006).

1.In the aftermath of September 11, INS Commissioner James Ziglar refused to acquiesce in wide ranging house to house sweeps for Muslim extremists. "The INS won't be involved," he is quoted as saying, "We do have this thing called the Constitution."[48] James Ziglar resigned a year later.

2. In December 2001, Jennifer Radack an attorney at the Department of Justice's Professional Responsibility Advisory Office advised the administration that John Walker Lindh could not be interrogated without respecting his constitutional rights. Her advice was ignored. In June 2002 when the administration publicly claimed that his rights had been respected, and attempted to destroy evidence of the prior advice, Ms. Radack leaked the information to the media. She was dismissed and subjected to a series of investigations and efforts to ruin her legal career.[49]

3. In March of 2002, Department of Justice Inspector General Glenn Fine initiated an investigation into the treatment of individuals detained in the roundups following September 11. The scathing report was issued a little of a year later.[50] The Department of Justice Inspector General's office continued to investigate GWOT abuses fairly and intensively over the next six years.[51] Its institutional integrity made the office a leading choice for legislation seeking to impose controls on GWOT abuses within the Department of Justice. Mr. Fine remains in is post as Inspector General.

4. In the fall of 2002 FBI Agent James T. Clemente sought to prevent illegal and abusive interrogation of prisoners at Guantanamo, filing critiques with his superiors and confronting

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[48]**Lichtblau, Bush's Law** 6; See id at 47-48 (detailing Ziglar's refusal to acquiesce in illegal detention).

[49]Jesselyn Radack, Whistleblowing in Washington, Reform Judaism Spring 2006, http://reformjudaismmag.org/Articles/index.cfm?id=1104 (describing decision to leak e-mails); *see* Radack v. U.S. Dep't of Justice, 402 F. Supp. 2d 99 (D.D.C. 2005); Michael Isikoff, The Lindh Case E-Mails: The Justice Department's Own Lawyers Have Raised QuestionsAbout the Government's Case Against the American Taliban, **Newsweek** June 24, 2002, at 8 (describing the e-mails).

[50]**Office of the Inspector General, U.S. Dept. Of Justice, The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges in Connection with the Investigation of the September 11 Attacks**, at 14 (2003),

[51]*E.g.* **Office of the Inspector General, U.S. Dept. Of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York** (2003); **Office of the Inspector General, U.S. Dept. Of Justice, Report to Congress on the Implementation of Section 1001 of the USA Patriot Ac**t (Mar. 2006); **Office of the Inspector General, U.S. Dept. Of Justice, Report to Congress on the Implementation of Section 1001 of the USA Patriot Act** (Mar. 2007); **Office of the Inspector General, U.S. Dept of Justice, A Review of the Federal Bureau of Investigation's Use of National Security Letters** (Mar. 2007).

army interrogators in Guantanamo.[52] Agent Clemente is still employed with the FBI.

5. In late December 2002 and early 2003, David Brant, the head of the Navy's Criminal Investigation Division refused to participate in prisoner abuse at Guantanamo, commenting later that "We were going to do what [only] what was morally, ethically and legally permissible." He approached Navy General counsel Alberto Mora to complain unlawful abuse by other interrogators, using information had supplied in part by Michael Gelles, a NCIS psychologist who had penetrated a hard drive of the logs of Army interrogators. Mora repeatedly confronted his administration superiors, and ultimately moderated the abuse. Brant left government service in 2006; Mora and Gelles departed the same year. [53]

6. In the fall of 2003 Air Force Reserve Colonel Steven M. Kleinman refused an order to deploy techniques designed to recreate illegal abuse outlawed by the Geneva Conventions against detainees in Iraq.[54]

7.In December 2003 Navy JAG Lt. Commander Charles Swift refused directions to coerce Salim Hamdan, whom he was appointed to represent, into pleading guilty to violations of the law of war.[55] Commander Swift's tenacious advocacy ultimately resulted in the landmark decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Commander Swift was passed over for promotion and forced to leave the Navy shortly thereafter.

8. In January 2004, after Specialist Joseph Darby, revolted by the abuse he had observed on a video disc, submitted a complaint and the CD of Abu Ghraib pictures to a military investigator. Sgt. Darby has left the military, and he is reported to have been unable to return home for fear of retaliation.[56]

9. In March 2004 Major General Antonio Taguba was detailed to investigate the abuses at Abu Ghraib; he carried out his task with integrity, knowing that he had put his career at risk, filing a report detailing the which set forth both the "sadistic, blatant, and wanton" prisoner abuse by

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[52] **Mayer, The Dark Side** 204.

[53] *See* **Mayer, The Dark Side** 212-237, Jane Mayer, The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted, **New Yorker**, Feb. 27, 2006, at 32 ; Memorandum from Alberto J. Mora to Inspector General, Dep't of the Navy 9 (2004), available http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf

[54] **Mayer, The Dark Side** 246-48.

[55] *See* Testimony of Charles Swift, before the Senate Judicary Committee June 15, 2005 http://judiciary.senate.gov/testimony.cfm?id=1542&wit_id=4361

[56] *See* CBS News, Exposing the Truth of Abu Ghraib June 24,2007 http://www.cbsnews.com/stories/2006/12/07/60minutes/printable2238188.shtml

guards and apparent collusion and acquiescence by superiors.[57] In addition to Specialist Darby, General Taguba identified Master-at-Arms First Class William J. Kimbro who “refused to participate in improper interrogations despite significant pressure from the MI personnel at Abu Ghraib”, and First Lieutenant David O. Sutton, who “ took immediate action and stopped an abuse, then reported the incident to the chain of command.[58] General Taguba was asked to retire in 2006.[59]

11. In March 2004, Deputy Attorney General James B Comey famously confronted Alberto Gonzales and Andrew Card at the bedside of Attorney General Ashcroft over Mr. Comey’s refusal to reauthorize the illegal Terrorist Surveillance Program.[60] He was instrumental in encouraging OLC head Jack Goldsmith to revoke the infamous Yoo/Bybee “torture memo,” at what Mr. Comey and Mr. Goldsmith regarded as possible personal physical risk.[61] In April 2005 Mr. Comey left the Justice Department.

12. In May of 2004, as the Abu Ghraib story broke, transparency activists officially requested that William Leonard, Director of the Information Security Oversight Office investigate the classification of the Taguba report. Mr. Leonard, took the request seriously. According to one report, he “made a personal visit to the Defense Department to ask why [the report] had been classified,” commenting, “On the surface, they gave the appearance that the classification was used to conceal violations of law which is specifically prohibited.” In July 2004, Mr. Leonard publicly challenged the classification of portions of the Working Group report
authorizing coercive interrogation. Both reports were officially declassified, and military officials were admonished to eschew the use of classification to conceal violations of law.[62] Mr. Leonard retired in January 2008.

13. In September 2005, Army Captain Ian Fishback, after seeking for 17 months to report abuses of detainees in Iraq through his chain of command publicly spoke out about the abuse in a letter to Congress in support of anti-torture legislation. Captain Fishback commented "If we abandon

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[57] **Antonio M. Taguba, U.S. Dept of Def. Article 15-6 Investigation of the 800th Military Police Brigade** (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf

[58] *Id.; See* **Seymour M. Hersh, Chain of Command** 37(2004) (Describing MP captain who refused to accede to the the demands of military intelligence officers to engage in abusive interrogtion in the fall of 2003).

[59] Seymour M. Hersh, The General's Report, **New Yorker**, June 25, 2007, at 58

[60] *See* **Testimony of James B. Comey** May 15, 2007 before Senate Judiciary Committee.

[61] *See* **Mayer, The Dark Side**, 289-94, see also id 309-12.

[62] Kreimer, Strategy of Transparency at 1204-05.

our ideals in the face of adversity and aggression then those ideals were never really in our possession."[63] Reports suggest that Capt. Fishback has been targeted for retaliation.

14. In the spring of 2006 CIA Deputy Inspector General Mary McCarthy who had filed reports decrying illegal interrogation techniques was impelled to turn to the press when she "was startled to hear what she considered an outright falsehood" in CIA presentations to Congress denying the use of abusive techniques[64]. She was dismissed from the CIA.

15. In June 2007 Reserve Lt. Colonel Stephen Abraham felt compelled to come forward to give evidence of the "fundamentally flawed" and unfair military tribunal process in which he had participated, evidence which was instrumental in inducing the Supreme Court to review the process.[65]

16. In spring 2008, Air Force Colonel Morris Davis, who served as Chief Prosecutor for the Office of Military Commissions resigned after being pressured to proceed with politically motivated prosecutions of Guantanamo detainees using the results of torture, and publicly repudiated the tribunals. [66]

A serious "rule of law audit" by the incoming administration will doubtless uncover many other examples. Once a fuller picture emerges of the individuals and institutions who have functioned with integrity under pressure, it will be important to begin to draw institutional lessons. As an initial step, however, individuals who are still members of the federal service should be given favorable consideration in promotion. For those who are no longer with the federal government, it seems advisable both to seek their input in future efforts to restore the rule of law, and to officially recognize their prior service. If the past administration can give the Medal of Freedom to officials who undercut the rule of law, the next administration can honor those who upheld it.

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[63]See Eric Schmitt, Officer Criticizes Detainee Abuse Inquiry **N.Y. Times** September 28, 2005, at A10; letter available at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/27/AR2005092701527.html .

[64]R. Jeffrey Smith, Fired Officer Believed CIA Lied to Congress; Friends Say McCarthy Learned of Denials About Detainees' Treatment, **Washington Post**, May 14, 2006, at A1.

[65]Reply to Opposition to Petition for Rehearing, at i, Declaration of Stephen Abraham, Al Odah v. United States, No. 06-1196 (U.S. June 22, 2007), available at http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf; William Glaberson, Military Insider Becomes Critic of Hearings at Guantanamo, **N.Y. Times**, July 23, 2007, at A1.

[66] William Glaberson, Ex-prosecutor Testifies on Guantánamo Politics, **International Herald Tribune** April 30, 2008 at 4.