“THE GLOVES ARE COMING OFF”:
A MIXED METHOD ANALYSIS OF THE
BUSH ADMINISTRATION’S TORTURE MEMOS

A DISSERTATION
SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE
DOCTOR OF PHILOSOPHY
BY
DANERYL MAY NIER-WEBER
DISSERTATION ADVISOR: DR. LINDA HANSON

Ball State University
Muncie, Indiana
April 2011
© Copyright by Daneryl May Nier-Weber

All rights reserved.
# TABLE OF CONTENTS

List of Figures and Tables \( \text{v} \)

Acknowledgments \( \text{vi} \)

Dear Reader \( \text{vii} \)

Ch. I: The Great Divide \( 1 \)

  Research Questions/Rationale \( 6 \)

Ch II: Review of the Literature \( 14 \)

Ch. III: Methods and Methodology \( 36 \)

  Mixed Methods Approach: Grounded Theory and Critical Discourse Analysis \( 40 \)

  Previous Study I: “In Your Face” \( 42 \)

  Previous Study II: “Psycho vs. Sockpuppet” \( 47 \)

  Methods Chosen For This Study \( 50 \)

Ch. IV: The Scene, The Agents, Their Agency, and Their Purpose: Conceptions of Power and the Torture Debate \( 62 \)

  The Memos \( 71 \)

  Memos as Agency: Authorization for Torture \( 74 \)

  The Actors: The Men Behind the Memos \( 87 \)

  Conceptions of power \( 95 \)

  Ideological Provenance of the Memos \( 97 \)

  To Protect and Defend \( 102 \)

  Linguistic and Semantic Masking \( 113 \)

Ch. V: Torture and the Law \( 122 \)

  Semantic Shifts and their Material Enactments \( 131 \)

  “Civilization’s fight” \( 135 \)

  An Act of War \( 143 \)

Ch. VI: Thirty-Nine Documents \( 148 \)

  Exceptionalism and the Rhetoric of Crisis \( 150 \)

  National Security \( 158 \)

  Defense \( 174 \)

  War/Not War \( 184 \)
Ch. VII: The “Semantic Tap-Dance”: Discursive, Rhetorical, and Lexico-Grammatical Strategies in the Torture Memos
   - Authoritarianism and the Torture Memos
   - Framing
   - Argument Structure
   - Conflation
   - Elisions and Substitutions
   - Intertextuality
   - War/Not War, Continued
   - Hyperlexicalization and the Ideological Square

Ch. VIII: Constructions of Identity
   - Outcasting

Ch. IX: Constructing Torture
   - Semantic Reversal: Extraordinary Renditions
   - Doc 22: The Torture Memo
   - Agent Deletion

Ch. X: Analysis and Conclusions
   - Will to Power
   - Rhetoric and the Law
   - Failure to Protect
   - Findings and implications for further research
   - A final comment on authoritarianism

Works Cited

Appendix I: List of the Key Documents
List of Figures and Tables

Table 2.1 Possible differences in liberal versus conservative worldviews 25
Table 3.1 Frames identified in blog study II 49
Table 3.2 Linguistic markers identified in blog study II 49
Table 3.3 Similarities and differences in discursive practices from blog studies I & II 50
Table 3.4 Preliminary results from both studies 50
Table 3.5 Methodology, Methods, and Rationales 51
Table 3.6 Huckin’s two-way four-level method of analysis 51
Table 3.7 Level of granularity IV: Higher level concepts from Huckin 55
Table 3.8 Level of granularity III: Text 56
Table 3.9 Level of granularity II: Sentence/utterance 56
Table 3.10 Level of granularity I: Word/phrase 57
Table 3.11 Key markers of semantic, linguistic, and discursive strategies 59
Table 4.1 List of key documents identified by torturingdemocracy.org 67-71
Table 4.2 Top level officials during the first term of the Bush Administration 87
Table 5.1 Article 18 Section 2340 of the U.S. Code: the definition of torture 126
Table 5.2 Article 18 Section 2340 of the U.S. Code: the crime of torture 127
Table 5.3 The United Nations Convention Against Torture 128
Table 6.1 Collocates for plenary 170
Table 6.2 Frequency of words pertaining to the defense frame 182
Table 7.1 Major frames and language-based strategies 200
Table 7.2 Intertextuality example I 218
Table 7.3 Intertextuality example II 220
Table 7.4 Intertextuality example III 221
Table 7.5 Intertextuality example IV 222
Table 9.1 U.S. Code vs. Yoo 316
Table 9.2 Yoo vs. medical statute 325
Table 9.3 U.S. Code Section 2340 329
Table 10.1 The three research questions 375
Table 10.2 Codes/descriptors with examples for level of granularity IV 376
Table 10.3 Codes/descriptors with examples for level of granularity III 376
Table 10.4 Codes/descriptors with examples for level of granularity II 377
Table 10.5 Codes/descriptors with examples for level of granularity I 377
Table 10.6 Low- versus high-scoring authoritarians, from Hetherington and Weiler 380

Figure 3.1 Burke’s dramatistic pentad 52
Figure 3.2 Domains of analysis 55
Figure 6.1 Screen shot of concordance for plenary 170
Figures 6.2 & 6.3 Word list 1 & 2 sorted by frequency 182
ACKNOWLEDGMENTS

As my wonderful friend Heidi Skurat Harris has said, all writing occurs in communities of support. This dissertation, too, is no exception. Heidi, I could not have gotten here without you who walked all paths before me and generously led the way. Thanks to Jacob for his support and to Daria, who has filled my life here with laughter, love, and light. You are my family away from home.

To my committee, thank you for your willingness to put up with hundreds of pages of reading and for your feedback and advice. To Dr. Linda Hanson especially, for all your help, encouragement, and the friendship that will last far beyond this degree. To Gunther, too, for your humor and humanity and for showing me what it looks like to never know a stranger.

To Casey McArdle, the best buddy a grad student could have. I am in awe of your work ethic, your energy, your humor, and your commitment to integrity. You are a true friend and I couldn’t have done it without your help. To all my Ball State friends, thank you for the support and encouragement during our years of exploration and fun. Special thanks also to Shawna Sewell; without you, our small world would not turn. To the wonderful English Department at Butler as well, who started me on this journey and who remain the best cheerleaders I could have wished for.

To the triumvirate of girlfriends, Alicia Rasley, Tasha Buttler, and Mariam van Wesenbeeck, each of whom helped me through the hard times and reminded me what it’s all for. Especially to Alicia, who did the heavy lifting through twenty pages of MLA citations and made the impossible possible with effortless grace.

To the students, faculty, and staff at EOU, too numerous to name, who have made this a year of continuing discovery and delight.

To Marge and Charlie, Jim and Beth, and Ari, I love you. Thank you for being so supportive and proud, and for all your encouragement and love. To Mom, who gave me music and joy: I miss you every day. To my beloved German family: Klaus and Ingrid, Juergen, and to Baerbel, the finest mother I could have wished for. I will love you all, always.

To Ty, who has been my steadfast support, my partner, my best friend, my patient and abiding love. Thank you, too, for looking after the babies: Juno, Calli, and Nick.

To LeeAnna and Doyle, Hanna and Elliott, Jerry and Connie, and Annette, the best family a girl could have. I love you all.

Most of all to my sons, Sascha Alexander and Nicholas Jakob, who have given me riches beyond measure. I love you two more than I could ever say, and I am prouder of both of you than you will ever know. May you both fulfill your greatest dreams.
“As Orwell predicted, the English language had to disappear first.” –Andrew Sullivan

Dear Reader:

The subject of this dissertation is a set of 39 key documents from the website *Torturing Democracy*. Most of these documents were authored by a small group of attorneys in the Office of Legal Counsel, principally John Yoo. In order to avoid forcing readers to differentiate between over two dozen citations by the same author, I devised a system that I hope will facilitate the reading. The 39 Documents, therefore, appear in the text as “Doc 1,” “Doc 2,” and so on. Page numbers are cited in parentheses after the Doc number, separated by a comma. Thus page 18 in Document 22 would appear as follows: (Doc 22, 18). A footnote is marked as FN with the number used in the document. When necessary, I have also provided the name of the author.

A full list of the documents, including their number, author(s), title, date, and a brief summary of their content can be found near the beginning of Chapter IV. For easy reference, I have also included the full list in Appendix I. The summaries are taken largely from the summaries provided by *Torturing Democracy*, where the documents have been posted for easy access by Washington Media Associates in association with the National Security Archive based at George Washington University’s Gelman Library. They are part of a much larger collection called The Torture Archive. The full page count of these 39 documents alone numbers 675; it was, therefore, simply not feasible to include the complete texts of the documents themselves as an appendix. The entire archive will nonetheless remain, I hope, easily accessible at torturingdemocracy.org.

A last note: I have come to view the 39 legal documents that are the focus of this study as a kind of “ground zero” (to use the battered term) of political discourse, representative of many of the extreme and polarized assumptions of right versus left that define the divisions between worldviews. In that sense, the discourse of the war on terror, of which the rhetoric of torture is a key part, is an ideal object of study. The discourse of 9/11 and the subsequent response (and indeed, much of what preceded it) throw disparate views on morality, good and evil, what it means to protect and defend, human rights, and the nature of legitimate authority—to name just a few of the core issues—into sharp relief. I have also come to believe, over the course of this project, in the crucial need for those who are not lawyers to read, study, and closely examine key legal documents, and to challenge their claims when necessary. Such documents, as well as the beliefs that inform them, are a vital part of the legal scaffolding that shapes and sustains not only our country, but the rule of law. It is our responsibility to pay attention.

Dani Weber
April, 2011
Few would dispute the agonistic and polarized nature of current political and public discourse in early 21st century United States. In what is essentially a two-party system, the fundamentally different worldviews represented by the Democrat and Republican parties often seem diametrically opposed. Arguably, the right/left binary is overly simplistic, and few people (if any) fit neatly into one side or the other, certainly not consistently on every issue. The current debate, however, is largely structured along the dichotomous and simplistic lines of liberal versus conservative, perhaps in part because this mirrors the structure of our two-party system, perhaps also because it makes any discussion of the two opposing worldviews possible and, presumably, manageable.

There may well be other reasons for using a simple binary, although quite possibly alternative ways of describing political views, such as a matrix or a grid comprised of dual spectrums, e.g. a social scale versus an economic scale, might be a better model for describing people’s actual political views. In discussions of political discourse, however, most characterizations of political affiliation nonetheless
continue to be cast somewhere along a simple continuum from left to right. This study began with a binary model; the intent was to identify, examine, and attempt to better understand some of the key characteristics of current political discourse in the United States, as well as to investigate possible meanings of such contested terms as liberal and conservative, left and right and the disparate worldviews and assumptions that differentiate the two.

Numerous scholars, theorists, pundits, and social commentators have attempted to explain the two fundamentally different political points of view, both to each other and to those on the opposite side. Investigations into the differences between the two worldviews include (but are by no means limited to) cognitive linguist George Lakoff’s Moral Politics and The Political Mind; psychologist Drew Westen’s The Political Brain; cultural anthropologist Jeffrey Feldman’s examinations of political framing; and the explorations of psychology professor Jonathan Haidt, whose current stated project to help liberals and conservatives better understand each other is based on the claim that conservatives make moral judgments according to five basic criteria, while liberals base their judgments on only two. (More on that below.) Most of these theorists, scholars, and pundits—Lakoff, Westen, journalist Thomas Frank, among others—also point to emotion as playing at least as important a role as reason in political decision-making. While many of these scholars and theorists have used textual evidence to support their claims, to the best of my knowledge a thorough investigation into what is actually occurring in political discourse, one based on a systematic examination of both formal
political speech, and one that combines close textual analysis with layers of other linguistic, metaphorical, and rhetorical considerations, has yet to be conducted.

The research I initially proposed to conduct in this dissertation was based on the assumption that a wealth of untapped and as yet unexamined information lies in the manifold artifacts of speech, recorded verbal as well as written, that comprise our current political discourse. I hypothesized that an in-depth inquiry into what is being said on all sides of the spectrum, through various media, officially as well as unofficially, edited and spontaneous, would reveal much about the actual nature of our various political beliefs, the moral values that shape them, and the assumptions about reality and human nature that underlie them. The problematics and easy problematization of language used to discuss the most controversial issues such as abortion—e.g. the terms “pro-choice” versus “pro-life,” the variances in the language chosen used to describe women, certain medical procedures, etc.—suggest that the language used reveals much about the worldviews, assumptions, and values of the interlocutors. The word “torture,” for example, is now as hotly contested as its “proper” definition; what other word choices are being made in that discussion, and by whom, and how are they being used? What less obvious associations might be triggered by those often loaded choices? What hidden assumptions might be revealed through a careful and close textual analysis? In that discussion, how is the Other being defined and constructed—on both sides?

In this study I initially aimed to investigate a wide variety of political discourse pertaining to the subject of torture using a broad sampling of speech from
different sources, venues, and levels of formality. The focus was quickly narrowed to one plane of discourse only: a set of legal documents known as the Torture Memos, authored by various officials in the Bush administration and others in response to those documents, compiled by the National Security Archives of George Washington University and posted as “Key Documents” on a website entitled torturingdemocracy.org. The documents comprised a heated internal debate about the proper response to the attacks of Sept. 11 and the ensuing war on terror. My intention was to base my methodology in part on a grounded theory approach, gathering a wealth of information from the text, developing broad categories to characterize the language I was seeing, and then to hone those categories as I continued to code and analyze the data. The subject of this investigation, the rhetoric of torture as part of the discourse of the war on terror, is only one sample subject for the kind of analytical method I hope to develop; ideally, I will ultimately be able to apply this method of analysis to many other topics such as taxes, immigration, gun control, health care, etc. This method of analysis will, I hope, use a wealth of textual support to ultimately reveal much about the cognitive, emotional, rhetorical, presumptive, and metaphorical mechanisms at work in our current discourse.

This study is based on the assumption that the more we can discover and understand what is actually occurring in the text, i.e. the more that our theories, characterizations, and claims about each other are based on actual textual evidence—which implies both a close reading and a close listening—the more we
might be able to better understand one another both in theory and in practice. This has implications for our ability to communicate with one another, even and especially when communication seems the most difficult. Above all, taking a closer look at what is actually there, at what is actually going on in the discourse, will also have important implications for the way we teach our students—who are voters, citizens, and critical thinkers who, we hope, make evidence-based arguments—to understand, to listen, to argue, and to communicate, with us and with one another, in and beyond the college classroom.

**Research Questions/Rationale**

The beginning of this inquiry dates perhaps to the day, shortly after I returned to the States after living in Germany for over thirteen years, that I turned on the radio and first heard Rush Limbaugh. It was the early nineties. Bill Clinton had recently been elected and his wife Hillary was attempting to provide all Americans with affordable health care, a project that seemed perfectly reasonable to me. Hearing Limbaugh, I was mystified. I had just spent well over a decade in a system that effectively and efficiently provided every one of its citizens, as well as legal immigrants such as I, with a level of quality care and choice that most Americans, it seemed, were literally unable to imagine. I will never forget the voice coming out of the radio; Limbaugh was railing against “Nurse Ratched,” vociferously disparaging the kind of health insurance that remains, to this day, both superior to (in terms of choice and coverage) and, above all, far simpler to manage than any I
have experienced here. Eminently affordable, my routine maternity care in Germany, for example, had included a full week's stay in the hospital of my choice for the birth of each of my children, costing me each time the rough equivalent of 50 dollars, preceded by monthly maternity check-ups (more, if needed) and followed by five years of regular well-child check-ups with any doctors I chose, plus many other services—such as ten in-home visits from a pediatric nurse—at no additional cost. Every woman living in Germany, citizen or legal alien such as I, received such care.

I was shocked at the numerous inaccuracies and blatant untruths of Limbaugh’s claims about the inevitable dysfunctions and failings of “socialized medicine,” all of which went unchallenged by his enthusiastic and supportive listeners (and all of which persist to this day, nearly two decades later). More shocking, however, was the tone he was using and the level of polemic, even hostility, in the discourse, both his own and that of the people who were calling in to agree. Over the next few months my wonder—and unease—only grew at the differences between what I had experienced as lively, engaged German political discourse—something of a national pastime in the country I had adopted—and the political discourse I was experiencing back home. Political discussion in the United States seemed to me to largely vacillate between three identifiable points: agreement, avoidance, or acrimony. We didn’t, it seemed, know how to actually disagree with one another. I would later discover that, just around the same time, sociolinguist Deborah Tannen was identifying what she would call The Argument
Culture, in which one of her core questions was how we might achieve different, more productive, less agonistic and antagonistic ways of communicating, particularly in our public discourse.

My (admittedly brief) encounter with Limbaugh left me with any number of questions: how could such polemic go unchallenged? Why did people believe him so unquestioningly, even eagerly? And where was all this hostility coming from? It didn’t seem to me that the desire to ensure that all U.S. citizens receive adequate medical care warranted such deep-seated anger and contempt as I felt coming through the radio in gleeful, virulent waves. This was not the country I remembered growing up in. What had happened to our national discourse in the time I had been gone? How had the landscape changed so radically from the way I remembered it? Could I be remembering things that wrongly?

In a February, 2009, lecture at Ball State University, communications professor Kathleen Hall Jamieson of the Annenberg Foundation made the (to me surprising) claim that, to his listeners, Rush Limbaugh sounds not hostile, but funny. His fans, she explains, find him entertaining and hilarious. This project is, in part, an attempt to pick up the threads of my continuing bewilderment at our discourse.

#

Notably, both the right and the left consistently accuse the other of anger, hostility, and of using hateful rhetoric—at this writing, a particularly hot topic in the
wake of the shooting at Gabrielle Giffords’ political event in Arizona. When I began
pursuing this area of study, toward the beginning of my graduate work, the left was
often accused of being angry. In the meantime, the Tea Party has emerged and
taken up the mantle of angry grassroots Americans. Accusations and blame abound
on both sides, arguably with abundant evidence to back up claims at both ends of
the spectrum. *Media Matters* senior fellow Paul Waldman claims, for example, that
“being hostile has been pretty effective for the right” (qtd in Chaudhry 19),
particularly in its influence on the mainstream media.

Several years ago, on the other hand, Andrew J. Coulson, Director of the
Center for Educational Freedom at the Cato Institute, used a stylistic study of the use
of profanity on blogs to make the claim that as far as anger was concerned, the left is
“currently in the ‘lead’ (waaaay in the lead)” (1). Coulson equated the use of
profanity with a higher score on what he calls the “Anger Index,” in essence
attempting to substantiate claims of an “angry left” that placed hostility and violent
and hate-filled speech chiefly in the purview of the left. As recently as September
2008, at the Republican National Convention during the campaign for the
presidential election, George W. Bush accused the “angry left” of attacking John
McCain. After the Safeway shooting in Arizona, commentators such as the *New York
Times*’ Paul Krugman, the *Washington Post’s* Eugene Robinson, Pima County Sheriff
Clarence Dupnik, and many others decried the hate-filled and violent rhetoric they
perceived as coming from the Tea Party and the far right.
Several smaller studies were the basis for this one. In those smaller sample studies of political speech, which were blog comparisons, one of the most interesting phenomena I have observed was that each side often accused the other of similar misdeeds and nefarious purposes, including the attempt to impose some form of totalitarianism (fascism, socialism, etc.) on the country in an effort to hijack or destroy democracy, of being out of touch with reality, or of failing to use “logic.”

This dissertation is intended to be a step toward unlocking some of the commonalities in our political rhetoric, as well as the differences. Ultimately I hope to create a clearer picture of what is really going on (my hope is that this dissertation provides a first important step toward clarity), including the question of whether one side or the other demonstrates a greater tendency toward hateful or violent speech, and if so, what empirical evidence for this exists. I began with a simple set of questions: what is evident in the language used by each side about how and why they might interpret “facts” so differently? What does the rhetoric reveal about a speaker or author’s assumptions and worldview? My original hope was to use blog speech, which I saw as representing relatively uncensored voices in our political discourse; as I delved deeper into the Bush administration documents, however, I began to see them as a microcosm of the polarity. More focused questions began to emerge, chief among them the question of how people I knew and loved, people even in my own family whom I otherwise respected, could condone torture.
I hope to use the material I have gathered here, both my greater understanding of some of the characteristics of the disparate worldviews I am examining, and the methodology I am developing for unpacking those worldviews, to continue this course of inquiry. Is there a way to map the agonism in talk radio and television punditry? Is there a format for actual dialogue—and if so, how might it function? What overall patterns does exploring the various forms of political speech in our current public discourse uncover? What differences exist? What similarities? What is really there, in the text?

This study hypothesizes that in our age, opposing sets of assumptions are “at war” in our public discourse, and that further, these assumptions are grounded in the cultural imperatives Nan Johnson defined in her landmark work, *19th Century Rhetoric in North America*. Johnson’s four imperatives pertain to assumptions about 1) the relationships between thought, language, and communication; 2) dominant philosophical views of human nature and the nature of affective response to discourse; 3) appropriate modes of formal communication; 4) the perceived role of the study and practice of rhetoric in the maintenance of social and political order. Contention at each of these points feeds the agonistic rhetoric that Tannen and others have identified, and enormous struggles for power and influence are currently (and perhaps always) being waged over which set of assumptions “wins.”

My starting point in this dissertation was to seek textual evidence for differing views of human nature, such as Lakoff’s idea that, in the conflicting paradigms of right and left, human beings are assumed to be either fundamentally
weak and in need of restraint, or fundamentally benevolent. As well, I wanted to seek textual evidence for differing views of “truth” and “reality”—based on the assumption that knowledge is negotiated and socially constructed, albeit very differently constructed among people who disagree. My research questions ultimately evolved into the following:

1. **What conflicting assumptions and values underlie the “Great Divide” in our current political discourse?**

2. **What textual evidence exists for the above and for how power/power struggles are enacted in political discourse?**

3. **Can I use that textual evidence to create a method that reveals and illuminates core elements of opposing worldviews across various expressions of political speech? (i.e. can I build a set of analytical methods that I can then apply individually or collectively to a broad range of discursive samples?)**

My own perspective is also grounded in two further, personal assumptions, which I freely acknowledge formed my “bias” as I examined and analyzed the material: 1) human beings are human beings. That is, humanness is not a hierarchy and there are no non- or lesser humans. Moreover, human beingness occurs in context—that is, humans both influence and are influenced by their environment in a dialectical relationship that is perhaps best described as an ongoing tension between essential and socially constructed identity. 2) Torture is practically, morally, ethically, and legally wrong.
Assuming—as I do—that the world exists in and is created largely through language, a close study of language is crucial to better understanding that world. My future aspirations for this inquiry include exploring ways that might facilitate understanding between people with disparate views, especially when dialogue is difficult—and in our current national culture, difficult dialogue is insufficiently taught and practiced. I hope my larger project eventually leads also to further examination of the role of composition instruction in educating citizens for a participatory democracy, particularly one struggling under the blatant imbalances of wealth, influence, and power that arguably increasingly define our republic. Although it goes without saying, I will state that this exploration does not and will not presume to answer any of these questions definitively, but merely seeks to contribute to an ongoing discussion.
Many current theorists are attempting to examine, explain, and better understand not only the differences between a liberal and conservative mind-set, but to explain and understand the disconnects and breakdowns that characterize our current political discourse. Again, the binary of “liberal” versus “conservative” is overly simplistic, but something is happening that severely impedes communication between what are often termed “both sides of the aisle”—and not merely in Washington. A quick look at the comment thread on any major political blog, right or left, as well as more official avenues of discourse, reveals that each side is full of accusations about the other. Further, as stated above, I have previously conducted several smaller studies in which I attempted to lay the groundwork for this larger study; in each of them, I have repeatedly observed that many of those accusations are identical. That is, each side accuses the other of committing exactly the same offenses, e.g. being out of touch with reality, not using evidence-based arguments, etc.
Another interesting phenomenon I have observed is that no matter how a writer or theorist (Lakoff, Haidt) portrays the two sides, one side or the other rarely sees itself as accurately characterized, portrayed, or understood. Such reactions can be readily observed on the comment threads of book reviews on sites such as amazon.com, or in responses to articles on blogs and online sites. The divide between the two seems firmly entrenched and often even unbridgeable, despite numerous attempts by theorists such as George Lakoff and Jonathan Haidt who purportedly seek to narrow the chasm and facilitate understanding.

Sociolinguist Deborah Tannen laid some of the groundwork for my initial analysis, both with her work on framing and in her work on what she has called our “argument culture.” Tannen suggests that American political discourse has long been at an unproductive impasse; hostility and anger abound, particularly as the use of computer mediated discourse has exploded and replaced much face to face communication. Tannen also outlines many of the issues surrounding public discourse in general. In a 2004 article, Tannen calls for “higher quality outrage” (1); the problem as she sees it, however, is not that emotion characterizes our political discourse, but the way that emotion is expressed. According to Tannen, “with all the shouting over politics, we have less genuine opposition” (1) and less real discussion—a development she views as a danger to civic life and ultimately, democracy. Tannen defines the discourse of agonism as “ritualized opposition, a knee-jerk, automatic use of warlike formats . . . [that] obfuscates and obliterates real opposition” (1). This agonism extends to and perhaps originates with many
journalists, according to Tannen, who seem to value “attack over other modes of inquiry, such as analyzing, integrating, or simply informing” and whose “seemingly laudable search for "balance" . . . results in reporting accusations without examining their validity” (1). Certainly, the latter has been one reason for the often vocal criticism of the mainstream media over the last fifteen years on both the left and the right. Interestingly, both sides often accuse the mainstream media of being biased in favor of the other.

Much discussion has taken place recently about perceived and/or real changes in media power structures. One example is a recent article by New Yorker reporter Jane Mayer investigated the billionaire Koch brothers, who have built an enormous network of “foundations, think tanks, and political front groups” (1) dedicated to funding opposition campaigns against liberal policies, particularly under Obama, from addressing climate change to health care reform to economic stimulus programs. According to Mayer, their ideological network is so far-reaching that in political circles it “is known as the Kochtopus” (1). Charles Lewis, the founder of the Center for Public Integrity, a nonpartisan watchdog group, described the brothers as

on a whole different level. There's no one else who has spent this much money. The sheer dimension of it is what sets them apart. They have a pattern of lawbreaking, political manipulation, and obfuscation. I've been in Washington since Watergate, and I've never seen anything like it. They are the Standard Oil of our times. (qtd in
Others on the left perceive an increasing imbalance of views on public airways. Left-wing political blogger Jeffrey Feldman has also investigated issues of framing in political discourse. Feldman, editor in chief of the political blog *Frameshop*, claims in *Framing the Debate* that “the powerful communications machine of the conservative movement has controlled our national political discourse” (back cover), thanks to four billion dollars spent over the last four decades on what Feldman calls their “message machine” (xi): think tanks, radio and TV, print media, various institutes, etc. Feldman differentiates between spin, which according to Feldman is dedicated to spreading untruths, and framing, which is about morality, truths, and the value systems that provide a context for understanding “facts.”

Like Lakoff, Drew Westen, and others, Feldman cautions that using the framing of the other side is counterproductive because the other side’s values are embedded in those frames. Feldman’s analysis is grounded in historical speeches, from Washington, Jefferson, and Lincoln, to Nixon, Carter, Reagan, and Bush (43), texts he uses to illuminate both the frames used in the speeches and the different values that underlie them. In doing so, he highlights differences in the fundamental values of (to use his terms) progressives versus conservatives; his analysis will provide a key piece of the methodological approach I hope to devise for my own analysis of textual artifacts.

Framing will be an important part of that analysis. Indeed, cognitive linguist George Lakoff has long maintained that language changes brains. In *The Political*
Mind: Why You Can’t Understand 21st Century American Politics with an 18th Century Brain, Lakoff examines the effectiveness of conservative framing and the importance of emotion in political decision-making, an argument linking emotion and reason that is supported by, among others, Antonio D’Amasio in his 1994 landmark work, *Descartes’ Error*. Emotional appeals, Lakoff contends, have been far more effective in wooing voters than mere logical appeals—a strategy he claims conservatives have long better understood, and exploited, than liberals. (Stanley Fish might well agree: regarding the academy, he claims,

the left may have won the curricular battle, but the right won the public-relations war . . . by mastering the ancient art of rhetoric and spinning a vocabulary that, once established in the public mind, performed the work of argument all by itself. [117])

According to Lakoff, narratives are, in essence, a kind of cognitive muscle memory; even more, they shape our understanding of the world in fundamental ways that we have neglected to sufficiently recognize. Those narratives are embedded in the conceptual metaphors Lakoff identifies as characterizing differences in conservative and liberal belief systems, models based on ideas about family, and in the ways they are articulated. Identifying and examining core narratives in the discourse of the war on terror, therefore, form a crucial part of this study.

The core of Lakoff’s theory, outlined in *Moral Politics*, is that conservatives operate according to a Strict Father model based on a hierarchy of authority as well as assumptions of the weakness of human character and the need for authoritative
(ideally male) constraints. The Strict Father view of human character is essentialist, i.e. one is born either basically good or basically bad, and in general strict discipline is required to control children’s behavior and teach obedience. A core assumption is that external control will teach self-control; other core values of the conservative Strict Father model are independence, non-interference once a child has reached maturity and becomes the authority over a family of his own, and a hierarchy of and respect for authority (male over female, adult over child, etc.). In this model, the world is viewed as a dangerous and often untrustworthy place, and the patriarchal father is the ultimate arbiter of protection for his own until the children are grown and become the authority over their own families.

Liberals on the other hand, according to Lakoff, operate under a Nurturant Parent model, in which the central values are collaboration, cooperation, and negotiation. Although not every voice in the Nurturant Parent model has equal weight, a diversity of voices is accepted and even encouraged; children need to “learn honest questioning and sincere probing” (111) in order to develop self-knowledge. Nurturant parents “encourage questioning, self-examination and openness,” which in this model are viewed as necessary for a child to develop as a “self-conscious and socially conscious person” (111). Ideally, these children learn not only self-control through self-awareness and positive support, but to take care of others as well as themselves.

Lakoff’s explanations of the two models are extensive, and he does much to illuminate differences in the value systems of the two sides. In Moral Politics,
however, as in much of his work, he begins with the two conceptual metaphorical models rather than with text. Lakoff occasionally uses text to elaborate on his theory, as he did in a May 29, 2009, article on the conservative skewing of the meaning of empathy, in which he analyzed, among other things, two paragraphs from a column by New York Times political commentator David Brooks. This analysis, however, pertained more to Brooks’ use of accepted truths, several in a row, to set up a false (in Lakoff’s interpretation) conclusion, rather than to provide support for Lakoff’s conceptual models. As with Haidt, Lakoff’s work begins with his assumptions of how liberals and conservatives think and uses text only to provide the occasional example, although his more recent work often shows a closer attention to the terms being used on either side. There is nothing wrong, of course, with the way Lakoff has presented his work, and it is quite possible that his models are based in previous analysis he has chosen not to elaborate on; in my opinion, however, a definitive study of exactly what textual evidence exists to support Lakoff’s (and others’) models of political value systems and reasoning is nevertheless sorely needed. In contrast to the theoretical explanations I have found so far, the study I propose to conduct will have a textual, as opposed to a theoretical, starting point. Whether the text will support Lakoff’s (or other’s) theories has yet to be determined.

A close textual analysis of the work of Jonathan Haidt, an Associate Professor of Social Psychology at the University of Virginia, is also vital to examining Haidt’s assumptions. Haidt is conducting research into morality, emotion, the “moral
foundations of politics and on ways to transcend the ‘culture wars’ by using recent discoveries in moral psychology to foster more civil forms of politics” (Homepage).

Like Lakoff, Haidt views emotion as vital to moral reasoning. As he puts it,

> when gut feelings are present, dispassionate reasoning is rare . . . this is the first rule of moral psychology: feelings come first and tilt the playing field on which reasons and arguments compete. If people want to reach a conclusion, they usually find a way of doing so. (“What Makes”) 

Haidt’s model of analysis consists of five categories that are the five universal foundations upon which all moral reasoning is based—even, he claims, across cultures. The first two are 1) harm/care, based on John Stuart Mill’s claim that in civilized societies, power can only be exercised to prevent harm to others, and 2) fairness/reciprocity, also a foundation of a Millian society. The other three are moral values that lead to a more strongly binding society, based on the work of sociologist Emile Durkheim: 3) in-group/loyalty; 4) authority/respect; and 5) purity/sanctity. Haidt claims that liberals rely on the first two foundations to make moral judgments, whereas conservatives rely on all five, thereby creating “morality that bind people into intensely interdependent groups that work together to reach common goals” (“What Makes”). Exactly this bonding, he claims, is why conservatives have been more successful, over the last few decades (with a few notable exceptions) at winning elections. On a webpage devoted to his upcoming book *The Righteous Mind*, Haidt writes that
this book will be a friendly slap in the face to liberal and atheists . . .
liberals and atheists generally do not understand the breadth of
human morality. They think morality is about decreasing harm and
increasing justice and autonomy. But for most of the world, morality
is primarily about binding people into cohesive communities with
strong institutions and collective goals. ("Righteous")

In fact, in Haidt’s view, Democrats “use a much smaller part of the [moral] spectrum
than do Republicans,” making them the “party of the profane” that represents a
vision of society that “can easily degenerate into a nation of shoppers,” thereby
creating what he calls a “sacredness gap” between liberals and conservatives ("What
Makes").

As far as I have been able to discover, Haidt, like Lakoff, does not use textual
evidence for his claims; instead, he has set up a number of surveys on the Internet in
which anyone can participate and thus is slowly amassing a body of data he uses to
support his theory. One example of this is the website yourmorals.org, at which
participants can answer an array of questions and then see how they rate on various
charts against other liberals and conservatives. One of main difficulties with both
Haidt’s thesis and with the data he is gathering, however, is that he first of all
neither examines the terms he is using, nor does he question or even explain his
definitions. His rhetoric as well as the assumptions that underlie them can and
should, in my opinion, be challenged: rhetorically, semantically, and discursively.
Here, too, a close textual analysis will, I believe, prove invaluable in investigating
and perhaps contesting some of Haidt’s claims about what is really happening in our political discourse.

As I was taking the survey on morals, for example, it quickly became clear to me that the terms he was using were rooted in what I came to view, during the course of my preliminary examination of his work (a view supported by, among others, Jeffrey Feldman, see above, and Sharon Crowley, see below), as hegemonic conservative discourse. In other words, his questions are skewed toward conservative understandings and definitions of terms. For example, the term *morality* is often understood in U.S. political discourse to describe sexual behavior (purity), an understanding associated with a conservative point of view, where for a liberal morality might pertain to equality, responsible fiscal behavior, or social justice. Liberal moral thinking thus arguably covers just as broad a spectrum of moral values—just not the same values, at least as Haidt has understood them. Equally, Haidt’s study fails to clearly define many other of the terms used and, further, fails to recognize the contested nature of many of the terms he is using. He also fails to examine the underlying assumptions of the questions in his study. For example, a liberal point of view might be characterized as operating under the premise that economic matters belong to the public domain and should thus, at least sometimes, be regulated by the government, while sexual matters (between adults) are a private matter and should thus be left to the individual; a conservative viewpoint might assume the opposite. The close, detailed textual analysis I hope to conduct might also reveal whether the conservative paradigms Haidt has
unquestioningly adopted have indeed become increasingly dominant over the last several decades, and if so, which ones. But are they truly hegemonic? Again, what is really going on in our political discourse? What does the language actually reveal?

A close analysis may or may not also reveal what Haidt fails to recognize: that liberals operate under the same five categories as conservatives, they just define those categories differently; that liberals have just as rich and nuanced a sense of morality as conservatives; just as keen a respect for authorities they accept as legitimate (e.g. the Constitution and democratic ideals, although possibly less so for symbols and authority figures); and just as keen a sense of disgust and outrage as conservatives over things that violate their sense of purity, such as crass economic exploitation or environmental destruction. It may also reveal that in some ways, conservatives have been better able to appropriate the public discourse on their terms and thus “erase” alternative definitions from public discourse (and also in Haidt’s surveys, therefore in my opinion skewing the results), while in other areas a liberal understanding has prevailed.

I suspect, however, that because (in my opinion) Haidt’s study is based solely or at least largely on hegemonic, i.e. conservative, definitions and assumptions of values and morality, it mostly reinforces those definitions and assumptions, while the liberal point of view remains largely invisible or misrepresented and misunderstood, particularly in the surveys he is conducting. There, more liberal points of view go unarticulated and therefore uncaptured in the data. While this is not to say that Haidt does not have a valuable contribution to the discussion of
liberal versus conservative morality, the close textual analysis I propose to undertake will, I hope, provide a different framework for viewing his work and for thoroughly examining his claims, including as detailed an investigation as possible into the definitions of the terms as well as of the assumptions behind them. It is possible that expanding the discussion to incorporate both kinds of understandings—if indeed, as I suspect, there is textual evidence that they do exist—may facilitate communication and broaden our communicative repertoire, rather than putting the onus, as Haidt does, on one side only to “transcend moralism” and better understand the other. The table below provides an overview of the differences in the two main worldviews in U.S. mainstream politics as identified by Haidt and Lakoff:

Table 2.1 Possible differences in liberal versus conservative worldviews

<table>
<thead>
<tr>
<th>Jonathan Haidt</th>
<th>George Lakoff</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Virginia, Social Psychology</td>
<td>Cognitive linguistics, UC Berkeley</td>
</tr>
<tr>
<td>Liberal belief system based on</td>
<td>Conservative belief system based on</td>
</tr>
<tr>
<td>- Harm/Care</td>
<td>- Harm/Care</td>
</tr>
<tr>
<td>- Fairness/Reciprocity</td>
<td>- Fairness/Reciprocity</td>
</tr>
<tr>
<td></td>
<td>- In-/Out-Groups</td>
</tr>
<tr>
<td></td>
<td>- Authority/Respect</td>
</tr>
<tr>
<td></td>
<td>- Sanctity/Purity</td>
</tr>
<tr>
<td>Nurturant Parent</td>
<td>Strict Father</td>
</tr>
<tr>
<td>- empathy, community</td>
<td>- obedience</td>
</tr>
<tr>
<td>- fairness</td>
<td>- moral authority &amp; order</td>
</tr>
<tr>
<td>- helping/protecting those who cannot help/protect themselves</td>
<td>- self-discipline, responsibility</td>
</tr>
<tr>
<td>- fulfillment, happiness</td>
<td>- self-reliance</td>
</tr>
<tr>
<td>- nurture and strengthen</td>
<td>- reward/punishment</td>
</tr>
<tr>
<td></td>
<td>- protection from external evils</td>
</tr>
</tbody>
</table>
Beyond what I see as the need to gather evidence to support Lakoff’s sweepingly general theory of conceptual metaphors, or to counter Haidt’s perhaps simplistic and flawed interpretation of liberal versus conservative worldviews, a number of scholars, writers, and theorists see greater and darker tendencies in current political discourse. Perhaps more than any of the academic differences mentioned above, these more sinister interpretations of what is going on in our current discourse point to the need for as broad and exact an examination of the rhetoric as can be feasibly done in this kind of study. In Toward a Civil Discourse: Rhetoric and Fundamentalism, Sharon Crowley claims that, as Sara Diamond has also documented, “our national politics has moved to the right since the 1970s because of a powerful alliance forged during that decade between conservative political activists and apocalyptic Christians” (6), a move that has undoubtedly impacted the discourse as well. Crowley asserts that the stronger the ideology one subscribes to, the denser, i.e. the more impenetrable and impervious to empirical evidence, the belief system it underlies becomes. Indeed, as Feldman points out in Framing the Debate, Barack Obama defines the difference between ideology and values in The Audacity of Hope as follows: “Values are faithfully applied to the facts before us, while ideology overrides whatever facts call theory into question” (xvi). Basically understood, however, ideology could be defined simply as “the collection of unstated values and beliefs that inform people’s understanding of the world” (Mauk & Metz 85). However one defines ideology, Crowley’s argument that in order for communication to succeed, it must be approached rhetorically, using a mix of
emotional and well as logical appeals and, in addition, a keen awareness of ethos, is a powerful one. Appeals to values and character are vital, as well, to a full-fledged articulation of morality.

Crowley outlines a number of rhetorical strategies used by the political right (presumably, plenty of evidence also exists for these strategies on the left), notably political scientist Jean Hardisty's characteristic three, i.e. stereotyping, scapegoating, and demonization (akin to Tannen's concept of demonography), to which Crowley adds a fourth, self-victimization. Further, Hardisty's interpretation of the right-wing tendency to delineate in- and out-groups is less benign than Haidt's depiction of in-groups and the social bonding they provide:

When the right mobilizes intolerance against a minority or an out-group (such as lesbians and gay men, welfare recipients, or teenage offenders), it blames and demonizes the hated group, and, at the same time, draws anger away from the real sources of social ills. By displacing anger onto such decoys, the right allows for greater dominance by elites while creating the impression of increased empowerment for those expressing their intolerance. (qtd in Crowley 161)

Hardisty's characterization—who, after eight years of researching conservative political thought, left academia in 1981 to found a political research center in response to the rise of the New Right—touches on several significant points. Her work, like Crowley's, undergirds the need for close rhetorical analyses of right-wing
texts and textual artifacts—but of left-wing texts as well, where there is similar
evidence of stereotyping, demonization, scapegoating, and a sense of victimization.
It will be as interesting to identify the commonalities in these rhetorical strategies
as it will be to identify the differences in the assumptions that underlie them.

Michelle and Annita Lazar have developed the idea of in-group and out-group
creation in several studies of a discursive strategy they call “outcasting.” Outcasting,
according to Lazar and Lazar in their 2007 article “Enforcing justice, justifying force:
America’s justification of violence in the New World Order,” is a “process of border
control by which individual and/or groups are systematically marked and set aside
as outcasts of a social order” (46). Outcasting, which functions as both a noun and a
verb, is “a macro-strategy encompassing a range of inter-related micro-strategies:
‘criminalization,’ enemization,’ (e)vilification’ and ‘orientalization’” (46). For
example, Saddam Hussein and Osama bin Laden are cast as criminals, murderers,
and killers; as enemies of freedom and democracy; as evil; and as barbaric,
merciless, and outside of the moral order. Lazar and Lazar call this an over-
negativization that represents them as “a hypersignified Other, who threatens the
moral values of the New World Order on all fronts” (46). Lazar and Lazar’s detailed
identification of the specific discursive strategies that comprise the more generally
termed process of “Othering” has proven invaluable in analyzing the language of the
Torture Memos.

The second point is the groundwork laid by such in-group rhetoric for a
“greater dominance by elites”—the definition of which, of course, must be examined
in the rhetoric, i.e. elites as defined how, and by whom? Presumably, however, this deference to some kind of an elite authority ties Crowley and Hardisty's work closely to the research of Robert Altemeyer, Associate Professor of Psychology at the University of Manitoba. Altemeyer has spent decades gathering data through surveys of his myriad classes and also their parents, in order to study authoritarian personalities and their connections to the Religious Right; his groundbreaking work *The Authoritarians*, in which he discusses his findings in fascinating—and disturbing—detail, is available on the Internet. Importantly, Altemeyer distinguishes (as others such as David Neiwert, below, also do) between traditional conservatism and the authoritarian conservative movement that Altemeyer and others (Altemeyer worked closely with John Dean while Dean was writing *Conservatives without Conscience*) view as having taken over the Republican party. Altemeyer says he has found “bucketfuls of right-wing authoritarians in nearly every sample [he has] drawn in Canada and the United States for the past three decades” (10), that is, of people who are either authoritarian followers or leaders (the latter of whom, if paired with a high desire for social dominance, Altemeyer terms double-highs). While this phenomenon may well be a perfectly understandable response to what many perceived as the excesses and moral decay of the sixties, it nonetheless seems to have had a profound and ongoing impact on American politics in the decades since.

Altemeyer identifies three main characteristics of those who score high on the right-wing authoritarian scale (or high RWA’s): 1) a high degree of submission
to established authority; 2) high levels of aggression in the name of those authorities; and 3) a high level of conventionalism (9). Where Haidt sees (or at least addresses) self-righteousness primarily on the part of liberals, Altemeyer sees it most noticeably in authoritarian followers; according to Altemeyer, self-righteousness is, in fact, the major releaser of authoritarian aggression against those deemed suitable targets (238). Altemeyer’s characterizations of high RWA’s are not categorically negative—fundamentalists, he points out, work hard for things they believe in and have a keen sense of loyalty to their in-group, for example. Although his research is quantitative rather than rhetorical, his characterizations may provide fruitful ground for further exploration into the features of certain types of political thought, moral judgments, and moral behavior that inform existing texts and may also further the kind of understanding provided by Crowley’s investigations into the discourse. In turn, the close textual analysis I conduct here may also, I hope, shed further light on the work of both Altemeyer and Crowley and on the work of other theorists either mentioned above or who will be included in the study.

Altemeyer’s work, however, must also be examined at the level of text. If Haidt’s surveys are, as I argue, skewed toward conservative understandings of the basic vocabulary of morality, one could make the same claim about Altemeyer’s questions. For example, liberals might score low on questions about the role of government in regulating people’s sexual behavior and high on personal autonomy and the right to make certain life choices without interference by others, giving them a generally low rating on Altermeyer’s authoritarian scale. If, however,
Altemeyer posed questions—which he did not—that asked whether the government should stop corporations from polluting the waterways, liberals might score much higher on the authoritarian scale. Finding a set of methods with which to analyze such surveys, one that arises out of a close rhetorical, linguistic, and discursive examination of other texts, will serve to illuminate the discussion here as well.

Hardisty’s final point in the quote above, that out-group thinking promotes “increased empowerment for those expressing their intolerance,” relates closely to the work of journalist and author David Neiwert, particularly his 2009 book *The Eliminationists: How Hate Talk Radicalized the American Right*. Neiwert, who founded *Orcinus*, an award-winning blog that (among other things) closely watches right-wing extremists, draws a clear distinction (as already mentioned above) between mainstream conservatism and the conservative movement, which in his view has closely aligned itself with right-wing extremism. Neiwert’s research highlights the violent, “eliminationist” rhetoric that he sees coming from the right—which is, he claims, not a new phenomenon but is deeply rooted in our history—and which, importantly, has become increasingly acceptable and mainstream, not least due to the rhetoric used by right-wing commentators as such Rush Limbaugh, Glenn Beck, Bill O'Reilly, etc. Neiwert views all three of the above, despite their vast differences, as transmitters of extremism into mainstream language and thought. Again, many commentators, for example the *Washington Post*’s Mark Thiessen, see just as much violence in the rhetoric coming from the left side of the political spectrum.
Such discussion is particularly compelling in light of recent events, such as the shooting of Gabrielle Giffords and a number of her supporters mentioned above. While it seems likely that the shooter’s primary motives were not overtly political, the incident has turned the spotlight on the incendiary state of our public discourse. Another recent case was the murder of Dr. George Tiller; a number of articles linked O’Reilly’s campaign of verbal attacks on Dr. Tiller, whom O’Reilly likened to a Nazi and called “Tiller the Baby Killer,” to the doctor’s subsequent murder. The Southern Poverty Law Center has reported a recent rise in hate crimes. If indeed there are such connections between thought, language, and action, it seems all the more urgent to look as closely as possible at exactly what is occurring in our public discourse. As more than one commentator has recently cautioned, language has consequences; others, however, have seen this as a crassly political attempt to place blame and manipulate others’ outrage and sense of victimhood.

Neiwert, for one, sees all of this not as an isolated incident but as a larger ideological shift; for Neiwert, right-wing commentators such as Limbaugh, Coulter, Malkin, O’Reilly and others are “conduits” for the rhetoric of the extreme right into the mainstream, where through AM talk radio and TV stations such as Fox News, rhetoric that not long ago would have been shocking goes increasingly unquestioned and ultimately becomes acceptable. As Neiwert reminds us, historian Robert Paxton warned that “the legitimation of violence against a demonized internal enemy brings us close to the heart of fascism” (qtd in Neiwert “Conservatives and Fascism”). Of course the rhetoric coming from the right is
similar; in *Liberal Fascism*, Jonah Goldberg conversely accuses the left of drifting toward fascism, and the accusation that Obama is turning the country toward “socialism,” which is often rhetorically (if not historically) equated with fascism, has become a current commonplace. So much is being said, in fact, and so many competing claims are being made, that it is arguably of vital importance, at this political moment, to closely examine political rhetoric from all sides of the spectrum to see what identifiable characteristics, patterns, trends, etc. actually characterize our current discourse, and also to get above all a more accurate picture, if possible, of where exactly on the spectrum the different patterns are occurring. A first crucial step in that larger analysis is the development of effective methods of textual analysis such as this study hopes to provide.

Countless other works, both scholarly and mainstream, address the difficulties of our current political conversation. Often the accusations made seem surprisingly similar on all sides of the ideological spectrum. The purpose of this dissertation will not be to discover the “truth” of such competing claims, but rather to examine as closely as possible how language is being used and to try to identify and characterize the assumptions and constructs that underlie various points of view, as well as the aims and motivations of those on what is perceived to be the opposing side: assumptions, in other words, of both self and Other. I hope in this dissertation to hold up to the light all of the above-mentioned theories (as well as many others) about the intersections of rhetoric, moral values, and moral behavior using closely analyzed text. Only when we look as carefully as possible at the range
of rhetorical, linguistic, and semantic choices occurring in our current discourse can, in my opinion, a productive dialogue about a) exactly what is going on, and b) what might be done in order to further communication, even begin. As I said, a close examination of what is there, in the text, will be my starting point.

By now, I trust, it is clear that I am approaching this study from a liberal/progressive/leftist standpoint. I consider myself a social democrat and am aware of my own bias, at least as far as I am capable of being; I am also aware that this will necessarily affect how I see, code, and analyze the data. To the best of my ability, I will watch my own process of observing and evaluating as much as I am watching the discourse and will attempt, as much as possible, to avoid either ignoring evidence that contradicts my personal assumptions or ignoring confirming evidence in an attempt to overcompensate and so avoid being accused of bias. In other words, it is my clear intention to approach the material as open-mindedly as I can.

It should also be clear that this work will take place at an intersection of scholarly and mainstream investigations, research, and theories. We will see what the evidence supports.

As stated above, which bears repeating, I have come to view the thirty-nine legal documents that are the focus of this study as a kind of “ground zero” (to use the battered term) of political discourse, representative of many of the extreme and polarized assumptions of right versus left that define the divisions between worldviews. In that sense, the discourse of the war on terror, of which the rhetoric of torture is a key part, is an ideal object of study. The discourse of 9/11 and the
subsequent response (and indeed, much of what preceded it) throw disparate views on morality, good and evil, what it means to protect and defend, human rights, and the nature of legitimate authority—to name just a few of the core issues—into sharp relief. I have also come to believe, over the course of this project, in the crucial need for those who are not lawyers to read, study, and closely examine key legal documents, and to challenge their claims when necessary. Such documents, as well as the beliefs that inform them, are a vital part of the legal scaffolding that shapes and sustains not only our country, but the rule of law. It is our responsibility to pay attention.
CHAPTER THREE:
METHODS AND METHODOLOGY

The set of texts comprising the data in this study was analyzed using a mixed methods approach that combined grounded theory with features of critical discourse, rhetorical, and linguistic analysis. The purpose of the study was to create as thorough a method of analysis as possible that could then be applied to a wide variety of other texts or artifacts of political speech across a broad spectrum of discourse. The purpose of the study is twofold: first, to better understand the specific set of texts known as the Torture Memos, and more generally what they reveal about our current political discourse. Second, to create a methodology that will illuminate other textual artifacts and speech acts as well. Creating a workable and widely applicable method for analyzing political speech in various forms is, in fact, one of the primary purposes of this dissertation.

For these texts in particular, critical discourse analysis (CDA) seemed ideally suited for examining documents that not only legitimized torture, but that were both directly and indirectly part of a clear and irrevocable shifted the surrounding discourse. Other methods of analysis might presumably be better suited for a different set of texts, but here CDA seemed particularly appropriate because it
begins with an interest in understanding, uncovering, and transforming conditions of inequality. The starting point for the analysis differs depending on where the critical analyst locates and defines power, bearing in mind that in the arena of language as a social practice, power can take on both liberating and oppressive forms. CDA relies on both a close analysis of the text and a broader consideration of its context to achieve a more complete understanding, elements that became part of the approach I used. Once more, while I tried to take as broad an approach as possible in understanding, this is not intended to be a legal analysis. Much has been said, for example, about Yoo’s use of an obscure, unrelated precedent to define torture, but the ways in which he articulated and manipulated that definition are just as revealing as the precedent he used. Examining Yoo’s rhetorical moves is crucial to unveiling both the assumptions and, as far as humanly possible, the motivations behind them.

CDA has no set method or fixed set of methods; instead, it borrows from many disciplines and allows the methods of research to arise from the analytical needs generated by the text. It therefore perfectly matches a grounded theory approach. Broadly, CDA attempts to combine social theory and discourse analysis “to describe, interpret, and explain the ways in which discourse constructs, becomes constructed by, represents, and becomes represented by the social world” (Rogers, “Critical” 366). CDA is explicitly concerned with enactments of power and justice—which is certainly the locus of the Torture Memos—and with “how language as a cultural tool mediates relationships of power and privilege in social interactions,
institutions, and bodies of knowledge” (367). Power is arguably a key theme both in the Torture Memos and the discourse surrounding them; they were written under a veil of secrecy and in the belief that they would be seen by only a few pairs of eyes.

Arguably, the documents illuminate the ideology behind the power they grant, and reasons for granting that power, in ways that could be termed archetypal. They reveal much about the ideological views and assumptions not only of those who empowered the Bush administration to move into unprecedented territory (i.e. the legal sanctioning of torture), but those who supported the administration and its policies. I do not argue (nor do I believe) that everyone who supported the Bush administration supported torture. These documents, however, reveal a great deal about a particular worldview. They are an important cornerstone of a cultural shift it is crucial, in my opinion, to examine as closely as possible by devising a method of analysis that is up to the task of interrogating not only these documents, but artifacts of political thought and speech across the spectrum.

As legal documents, the Torture Memos are at the far end of the spectrum of speech: formal, inaccessible, highly mediated, carefully constructed according to strict, clearly delineated conventions of the genre. Outside the mainstream of typical daily communication, they share highly specialized characteristics, unique to their specific location in time and space. However inaccessible, legal discourse at this level directly legitimizes and sanctions—or prohibits—human action and is an expression and legitimation of one of the more absolute forms of human power: the authority of the state. Moreover, these memos are not products of just any state, but
the most powerful state in the world, one that wields the greatest magnitude of military power in history. This analysis attempts to examine as closely as possible the enactments, enshrinements, legitimations, and de-legitimations of power that the memos perform, both in language and ultimately as material reality.

The approach to CDA that Norman Fairclough lays out in *Analysing Discourse* occurs at three levels: the level of text; the discursive practice, which includes the production, distribution, interpretation, and consumption of the text; and the sociocultural practice surrounding the text, especially issues of power as “realized through interdiscursivity and hegemony” (37). Hegemony, as Fairclough defines it, “entails achieving a measure of success in projecting certain particulars as universals” (*Analysing* 41), often naturalizing those particulars as simple “common sense.” Fairclough, who borrows from a systemic functional linguistic approach, sees meanings as influenced by the social and cultural contexts in which they are exchanged.

A critical discourse approach is thus characterized by the following:

- does not seek to discover so much as to [accurately] describe using tools from linguistics, rhetoric, discourse analysis, etc. as appropriate to the task at hand
- focuses on enactments of power
- has an explicit positional stance, i.e. does not see itself as neutral. CDA looks at how domination, oppression, and imbalances of power are enacted in the discourse
- The “critical targets [of CDA] are the power elites that enact, sustain, legitimate, condone, or ignore social inequality and injustice” (van Dijk)

- CDA asks: “What aspects of the language facilitate abuses of power?” (Huckin)

**Mixed Methods Approach: Grounded Theory and Critical Discourse Analysis**

The dissertation uses both qualitative and quantitative methods to analyze the language of the memos. The approaches ultimately taken were in part the result of evaluating various approaches taken in several previous studies, two of which I will briefly outline here. These smaller projects essentially functioned as “pilot” studies in which I experimented with various methods of analysis, each of which were then individually set aside or used in future analyses as deemed appropriate. Glaser and Strauss’s grounded theory, first conceived in 1967, allows categories to arise from the text and honors the contextual nature of knowledge construction that is crucial to this study, as the memos were created in a particular context, a unique moment in history. A grounded theory approach seemed especially applicable to the goals of this project, among which, as previously stated, was the intent to start not with grand theory—or any theory at all—but to allow the theories to arise from the data gathered and from the text itself, to enable the discovery of theory from data. Grounded theory, which involved a recursive process of collecting data, coding, and creating emerging categories of analysis upon which to build theory, was a particularly well-suited methodology for setting aside the assumptions of
political theorists and instead using the data gathered to guide and inform the direction to take in the interpretation and analysis of data.

Both of the previous studies focused on computer mediated discourse, specifically blog speech. Both used different analytical approaches comprised of specific methods borrowed from linguistics, rhetorical analysis, and critical discourse analysis in the overall grounded theory framework of first collecting data, then coding and categorizing that data, and analyzing only after a point of saturation (i.e. the point at which no new categories seemed to be emerging) had been reached or at least approached. This approach seemed particularly suited to discourse analysis; arguably, the combination of grounded theory with CDA may be a perfect match. As Meyer points out, “CDA sees itself more in the tradition of Grounded Theory (Glaser and Straus, 1967), where data collection is not a phase that must be finished before analysis starts but might be a permanently ongoing procedure” (18).

As earlier stated, one of the endemic problems with theorizing political discourse is that analysis often begins with grand theory rather than actual text and gives only examples that support the theory—a top down approach. From the beginning, the studies I conducted attempted to take a bottom-up approach. That is to say, I did not pretend to be unaware of theories of political discourse, such as Lakoff’s use of conceptual family metaphors to explain opposing political worldviews; I did, however, start with the texts to discover what evidence for the myriad theories I had been looking at was actually there.
**Previous Study I: “In Your Face”**

The first study, titled “In Your Face,” used a mixed method approach to analyze the language of two blog posts with comment threads, one from a left-wing and one from a right-wing political blog. Both had been written in response to a recently published study of Muslim Americans. The analysis assumed, as outlined in the discussion on CMD above, that blogs have become an important part of American political discourse and that they mirror significant tendencies in our larger public conversation, functioning in both dialogic and agonistic ways. The specific impetus for the study was a desire to counter claims being made at the time about an unreasonably “Angry Left,” ( premised on the left’s supposed higher use of profanity), and employed a three-tiered methodology that combined stylistics analyses from Edward Corbett and Robert Connors’ *Style and Statement,* analysis of linguistic register from Finegan and Besnier, and the identification of metaphoric/emotional markers to identify similarities and differences between rhetorical strategies of the left and the right.

The study showed, unsurprisingly, that both sides were using a discursive strategy linguist Teun van Dijk calls the “ideological square” to create a positive ingroup versus a negative out-group:

1. Emphasizing our good properties/actions
2. Minimizing their good properties/actions
3. Emphasizing their bad properties/actions
4. Minimizing our bad properties/actions
The demarcation of out versus in, however, as well as the inferred motivations for those demarcations, varied greatly. The study concluded with suggestions for the creation of a more accurate methodology for analyzing emotional political speech, including hate speech, by using more precisely defined categories of negative emotion than merely counting words of profanity—which, obviously, can be used to express an entire spectrum of emotions, from extremely positive to extremely negative. These categories, which emerged out of the data analysis of this first study, included name-calling; stereotyping; racist comments; references to KKK- or Nazi-like measures of subjugation and control including deportation and extermination; and threats of violence. The study further suggested that more clearly understanding the rhetorical strategies of political discourse, as well as the motivations and assumptions behind them, might aid us in envisioning a dialogue that expresses emotion in less agonistic, more constructive ways—or perhaps, simply, help us more accurately hear what the other side is saying and imagine, beyond what could be called knee-jerk demonization, why they might be saying it.

Regarding the specific methods of analysis used in this first study, I examined the two sample blogs on three levels, beginning with basic stylistic levels of word choice, grammar, and register variation; I then moved through a close analysis of emotion words, including possible conceptual and concrete metaphors that underlay them. Finally, I applied a critical discourse analysis framework to provide a rhetorical and social context for both diaries. For the first level of analysis, I used the four stylistics analyses from Corbett and Connors’ *Style and Statement*. These
initial studies looked at sentence and paragraph length, grammatical types of sentences and their sequence, sentence openers, and word function, and gave me a range of data with which to work as I compared the two styles and identified specific features of each.

The second set of analyses came from Edward Finegan and Niko Besnier’s 1989 article “Registers: Language variation in situations of use.” According to Finegan and Besnier, “three principal elements determine each situation of use: setting, purpose, and participants” (450). Their work, therefore, provided a basis for rhetorical as well as stylistic analysis as it focused on dimensions of register variation: “it is by differentially drawing on the same grammatical resources at each level of grammar that different texts in different registers are created” (444). Finegan and Besnier provided the criteria for a basic linguistic categorization of the language used and information conveyed, specifically on a continuum from “involved to informational” and “narrative to non-narrative.”

Although the stylistics and register analyses both proved interesting in their own right, they ultimately also proved less fruitful than other approaches I applied, providing less detailed information overall that might lead to greater understandings about what was occurring in the language. Moreover, because the language in the Torture Memos is extremely genre-specific, i.e. largely “legalese,” it seemed as though the scope of information that both the stylistic and register analyses might yield could prove quite limited. Official documents by definition, for example, fall on the informational and non-narrative ends of the spectra. I decided,
therefore, not to include these approaches in the set of methods chosen for this dissertation.

The role of emotion on political blogs, however, particularly in the comment threads, proved crucial. I was able to identify both emotion and identification words—a process vital to this study—but was also often able to connect them to the metaphors they rely on for expression. For this, I relied on chapters one and three from Zoltan Kovecses’ *Metaphor: A Practical Introduction*, in which Kovecses identifies differences between conceptual metaphor and linguistic metaphor and the sets of mappings that tie them together. George Lakoff and Mark Johnson’s *Metaphors We Live By* also provided the basis for a close examination of the metaphors used in the blog samples and helped illuminate some of the assumptions that shaped the perceptions of both bloggers and commentators. The process of connecting emotions—e.g. anger, fear, hostility, blame—to values, for example as undertaken by Deborah Tannen in her 1999 book, *The Argument Culture*, also helped further illuminate some of the root causes for the discursive hostility clearly seen in the blogs. This approach was carried over into the current study.

Finally, I also looked through the lens of critical discourse analysis, which “is context-sensitive . . . and includes pragmatic, ideological, social, and cognitive elements in text processing” (Simpson 7), including the consideration of the power relations out of which text arises. Sources for CDA included Norman Fairclough’s *Language and Power* and Steve Price’s article “Critical Discourse Analysis: Discourse Acquisition and Discourse Practices.” Price differentiates between language as
semiotic and language as action—a distinction he accuses Fairclough of failing to make—suggesting an interesting (but less central to this particular study) later discussion of the widespread if (perhaps) unstated assumption that using volatile and incendiary language in blogs, even the act of blogging itself, is a form of political action. Price discusses encoded meanings versus pragmatic meanings and also acknowledges the importance of viewing language in context. Here as in grounded theory, discourse is seen as a process rather than stable object.

Like Johanek, Fairclough, and others, Price sees context as a final, crucial basis for analysis—a view that informs this analysis of the Torture Memos. In the 2007 article “Can Discourse Analysis Successfully Explain the Content of Media and Journalistic Practice?” Greg Philo argues that a textual approach that excludes social and cultural context necessarily distorts the meaning and interpretation of text. Philo also includes audience, and an awareness of the different meanings of text to various members of an audience, as vital to understanding. He calls for a “method which analyzes processes of production, content, reception and circulation of social meaning simultaneously” (175) to achieve the most complete understanding of discourse.

Most importantly, Philo also applies linguist Teun van Dijk’s above-mentioned concept of the “ideological square,” a discursive strategy at the heart of which “is a polarization between ‘us’ and ‘them’, the positive in-group description and negative out-group description” (Philo 189). Van Dijk’s ideological square explains much about the word choices authors, bloggers, commentators, etc. make,
as well the words of identification chosen to describe others or groups of others, and helps lay bare the ideological positioning of self versus other that is crucial to this analysis as well. The study also clearly demonstrated similarities in the rhetorical and argumentative strategies used by both sides, as well as considerable difference and disagreement about content—in this case, among other things, about the nature and level of the threat posed by Muslim Americans.

Previous Study II: “Psycho vs. Sockpuppet”

The second preliminary study I conducted was also a study of political blogs. In this study, the intertextuality was also particularly interesting; the two bloggers, Glenn Greenwald and Charles Johnson, were conducting an indirect dialogue by addressing each other through their audiences. For this analysis I eliminated the examination of Corbett and Connors’ stylistic elements of analysis and created a different mosaic of methods to apply to the discourse. Note that, as I also used a grounded theory approach here, I began with what I was seeing in the language and then searched through the literature to find the ways that seemed best suited to categorize it. This included finding and identifying markers of the following elements: frames (evaluative language and the language of moral judgments, from Tannen’s Framing in Discourse); demonography from Tannen’s The Argument Culture; the conceptual metaphors Strict Father vs. Nurturant Parent from Lakoff’s Moral Politics; various semantic fields, e.g. in John Wilson’s “Political Discourse”; designations of role and identity, e.g. in Laura Shepherd’s “Veiled References”;
negatively marked and emotionally laden lexical items. I also looked for specific features characteristic of (but not limited to) computer mediated discourse, such as addressivity, stereotyping, humor, etc. and continued using descriptors from van Dijk’s ideological square.

This study too was based in Fairclough’s assumption that there are no universal meanings and that text as a social event must be understood in context, an assumption Wilson shares, recognizing that “while much has been made of single words in political discourse, the reality is that in most cases it is the context or reflected form of the words which carries the political message” (409). The data finally seemed to center around different versions of reality and representations of reality, based on the three key points of disagreement: 1) the nature of the threat posed by terrorism and/or Islamic extremism, 2) the intensity of the threat posed by terrorism and/or Islamic extremism; 3) characterizations of each side by the other and their opposing interpretation of reality. I found the results interesting, but I was still unsatisfied, however, that the methodology I had used served to unveil the inner workings of the text as much as I had hoped.

The following four tables show the methods used and evaluation of each method as well as the results of this second study, which built on the results of the first study.
Table 3.1 Frames identified in blog study II

<table>
<thead>
<tr>
<th>FRAMES</th>
<th>Left</th>
<th>Right</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• They are disconnected from reality</td>
<td>• They are disconnected from reality</td>
</tr>
<tr>
<td></td>
<td>• We are rational, they are not</td>
<td>• We are rational, they are not</td>
</tr>
<tr>
<td></td>
<td>• Fear</td>
<td></td>
</tr>
<tr>
<td></td>
<td>o Pro-war mentality = fear-based;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>o Pro-war = cowards</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Psychosexual motivations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>o Pro-war = masculinity is threatened</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Hidden motivations for war (economic and political)</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.2 Linguistic markers identified in blog study II

<table>
<thead>
<tr>
<th>LINGUISTIC MARKERS</th>
<th>Left</th>
<th>Right</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Humor/Sarcasm</td>
<td>• Humor/Sarcasm</td>
</tr>
<tr>
<td></td>
<td>• General personal attack</td>
<td>• General Personal attack</td>
</tr>
<tr>
<td></td>
<td>o Ideological opponents</td>
<td>o Ideological opponents</td>
</tr>
<tr>
<td></td>
<td>• Specific personal attack (against Johnson)</td>
<td>• Specific personal attack (against Greenwald)</td>
</tr>
<tr>
<td></td>
<td>• Praise/defense of Greenwald</td>
<td>• Praise/defense of Johnson</td>
</tr>
<tr>
<td></td>
<td>• Name-calling, mockery</td>
<td>• Name-calling, mockery</td>
</tr>
<tr>
<td></td>
<td>• Swear words</td>
<td>• Swear words</td>
</tr>
<tr>
<td></td>
<td>• Emotive reactions</td>
<td>• Emotive reactions</td>
</tr>
</tbody>
</table>
Table 3.3 Similarities and differences in discursive practices from blog studies I & II

<table>
<thead>
<tr>
<th>SIMILARITIES</th>
<th>DIFFERENCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Markers of demonography</td>
<td>LEFT</td>
</tr>
<tr>
<td>• Markers of the ideological square (positive in-group, negative out-group)</td>
<td>• Longer comments</td>
</tr>
<tr>
<td></td>
<td>• More identifiable frames</td>
</tr>
<tr>
<td></td>
<td>• More markers of psychological/psychosexual attack</td>
</tr>
<tr>
<td></td>
<td>• More markers of inquiry and analysis</td>
</tr>
<tr>
<td>RIGHT</td>
<td></td>
</tr>
<tr>
<td>• Shorter comments</td>
<td></td>
</tr>
<tr>
<td>• More markers of mockery, name-calling</td>
<td></td>
</tr>
<tr>
<td>• More hate speech (stereotyping; racist comments, threats of deportation, violence, extermination)</td>
<td></td>
</tr>
<tr>
<td>• More markers of humor</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.4 Preliminary results from both studies

<table>
<thead>
<tr>
<th>Emphasis of a liberal worldview</th>
<th>Emphasis of a conservative worldview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nurture</td>
<td>Nature</td>
</tr>
<tr>
<td>Human beings are basically good</td>
<td>Human beings are basically weak</td>
</tr>
<tr>
<td>Systemic Causation</td>
<td>Direct Causation</td>
</tr>
<tr>
<td>Tolerance of ambiguity</td>
<td>Need for clarity</td>
</tr>
<tr>
<td>Social Constructionist</td>
<td>Essentialist/Positivist</td>
</tr>
<tr>
<td>Focus on environmental/systemic control</td>
<td>(Binaries: black/white; good/evil)</td>
</tr>
<tr>
<td></td>
<td>Focus on individual control</td>
</tr>
</tbody>
</table>

**Methods chosen for this study**

The methodology used in this study is comprised of a mixed method approach that uses methods taken from linguistic, rhetorical, and critical discourse analyses to gather both qualitative and quantitative data about the Torture Memos. A mix of methods from **critical discourse analysis** (CDA), **grounded theory**, and **quantitative analysis** proved to be a perfect amalgamation for this project. The recursive analytical approach included a combination of methods, as well as areas of
research, that evolved as the project progressed, the various domains of which I circled fluidly through, in no particular order, throughout the research. The table also provides an overview of the methodologies and methods I used, as well as their rationales:

Table 3.5 Methodology, Methods, and Rationales

<table>
<thead>
<tr>
<th>Methodology</th>
<th>Methods</th>
<th>Rationale/Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grounded theory</td>
<td>• Read documents</td>
<td>▪ Helped avoid predetermined assumptions/conclusions about findings</td>
</tr>
<tr>
<td></td>
<td>o Identified key concepts/features at all four levels of text</td>
<td>▪ Assisted in organizing and categorizing patterns, elements, and features of the texts</td>
</tr>
<tr>
<td></td>
<td>o Initial holistic reading proved crucial to seeing the documents as a whole</td>
<td>▪ Helped match coded features to aspects of CDA at all four levels of linguistic granularity</td>
</tr>
<tr>
<td></td>
<td>o Guided the research into further areas for study, e.g. context of production, legal issues, etc.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Created initial notes and coding</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Developed focused coding: identifying main strands</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Developed rhetorical, discursive, and lexico-grammatical categories</td>
<td></td>
</tr>
<tr>
<td>Critical Discourse Analysis</td>
<td>Four Levels of Analysis (Huckin)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• High Concept</td>
<td>▪ Helped locate features of text in context</td>
</tr>
<tr>
<td></td>
<td>• Text/Intertextual</td>
<td>▪ Assisted in identifying all levels of granularity &amp; markers of each</td>
</tr>
<tr>
<td></td>
<td>• Sentence</td>
<td>▪ Assisted in coding and interpreting each level/marker</td>
</tr>
<tr>
<td></td>
<td>• Word/Phrase</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Contextual</td>
<td>▪ Helped unpack underlying features of the text</td>
</tr>
<tr>
<td></td>
<td>• Discursive</td>
<td>▪ Revealed textual elements and focus not readily apparent</td>
</tr>
<tr>
<td></td>
<td>• Rhetorical</td>
<td>▪ Crucial in informing and developing qualitative analysis</td>
</tr>
<tr>
<td></td>
<td>• Textual</td>
<td></td>
</tr>
<tr>
<td>Quantitative Analysis</td>
<td>• Concordancing</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(AntConc 3.2.0 Macintosh OSX 2006)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Collocations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Argument Structures</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Patterns of word usage and placement</td>
<td></td>
</tr>
</tbody>
</table>
The study combines a few of the methods of analysis used in the two previous studies, notably van Dijk’s ideological square, identification of frames, and attention to conceptual metaphor, along with additional strategies of critical discourse analysis. These include Lazar and Lazar’s examination of outcasting, Patricia Dunmire’s analysis of threat, and examinations of how identity is constructed in language. Further, I used Lawrence Anthony’s AntConc 3.2.0m concordancing software to conduct an analysis of the texts at the level of word and phrase, including word lists, collocations, and concordances. Fairclough’s concept of recontextualization, or the use of words and phrases in new contexts so that meaning shifts, also proved crucial to the research.

The first step in analyzing the documents was document and explore the social and cultural contexts in which they were produced. In order to structure my analysis of context, I first of all used Kenneth Burke’s dramatistic pentad to identify the act, the agents, the agency, the scene, and also to explore the purposes for which they were written, as shown in the diagram below:

Figure 3.1 Burke’s dramatistic pentad
Using the dramatistic pentad not only helped set the context for the documents, it also helped uncover some of the prevailing themes in the narrative of 9/11 and the war on terror, themes that also informed the memos. After the dramatistic analysis was complete, I focused on constructions of time, material reality, and identity in the memos, as discussed in Chapter VIII.

For each phase of analysis, I used a structure recommended in a 2002 study by Thomas Huckin entitled “Critical Discourse Analysis and The Discourse of Condescension.” Huckin, like Fairclough, views text as best understood in context and sees a need for what he calls “context-sensitive forms of discourse analysis” that combine close readings with “consideration of discursive practices, intertextual relations, and sociocultural factors” (157). Those will be the criteria upon which this methodology is based. Critical discourse analysis, for Huckin, is related to cultural studies but is more focused on text; according to Huckin, it “puts more emphasis both on the fine-grained details of text and the political aspects of discursive manipulation” (157). A central assumption of CDA is that “public discourse often serves the interest of powerful forces over those of the less privileged” (158) and essentially often facilitates abuses of that power. A central question of CDA, and of this study, is what aspects of the language facilitate such manipulation and abuse.

Huckin identifies four levels of granularity on which he bases his analysis; these provide the framework for the analysis of the Torture Memos. The four levels are listed in the table below:
Table 3.6 Huckin’s two-way four-level method of analysis

<table>
<thead>
<tr>
<th>Huckin’s Four Levels</th>
</tr>
</thead>
<tbody>
<tr>
<td>Of Analysis</td>
</tr>
<tr>
<td>• Contextual</td>
</tr>
<tr>
<td>• Discursive</td>
</tr>
<tr>
<td>• Rhetorical</td>
</tr>
<tr>
<td>• Textual</td>
</tr>
<tr>
<td>Of Granularity</td>
</tr>
<tr>
<td>• Higher Level Concepts</td>
</tr>
<tr>
<td>• Text/Intertextuality</td>
</tr>
<tr>
<td>• Sentence/utterance</td>
</tr>
<tr>
<td>• Word/phrase</td>
</tr>
</tbody>
</table>

Huckin recommends that researchers begin with the highest order and move downward consecutively to the final level at the lowest order. I found it impossible, however, to follow this procedure exactly. The following chapters begin with a more global and contextual examination, and move through various areas of analysis that emerged from the initial data collection to the minute and detailed word analysis in the penultimate chapter, but the levels did not perform as discretely functioning processes with clearly defined boundaries that I could easily separate into ordered tasks. The lexical item defense, for example, functioned at both a word level of the text and as a higher level concept; because language consistently defies neat categorizations, all four levels of granularity often necessarily proved interrelated and impossible to see completely separately.

The four tables below provide examples of the kinds of analysis, coding, and categorizations with which I began the research. Note that these tables demonstrate my starting point; I ultimately used some, but not all, of these initial categorizations to code the data that actually emerged through repeated reading and study of the
memos as I circled through the various content and rhetorical domains listed below in figure 3.2:

Figure 3.2 Domains of analysis

Table 3.7 Level of granularity IV: Higher level concepts from Huckin

<table>
<thead>
<tr>
<th>LEVEL OF GRANULARITY IV: HIGHER LEVEL CONCEPTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possible evidence of</td>
</tr>
<tr>
<td><strong>Central vs peripheral processing</strong> – how closely they are paying attention. Central includes critical scrutiny. Info overload leads to peripheral processing, which makes people vulnerable to manipulation by text producers. Cognitive shortcuts used by time-pressed readers heuristics. “Assuming the intended reading position” if the same heuristics and the same reading positions are repeatedly invoked, it leads to <strong>naturalization</strong> of the ideas presented; that is, they come to seem ‘natural’ or commonsensical” (162) – especially if the ideas conform to widely accepted <strong>cultural models and myths</strong>, e.g. American Dream, US as innocent victim or exporter of democracy. Such “common interest” appeals co-opt reader resistance. <strong>THIS EQUALS HEGEMONIC DISCOURSE</strong>, the aim of which is to defuse political resistance and maintain existing power structures (Eagleton, Gramsci). <strong>Ideology</strong> – constructs discourse; analysts should identify ideological themes AND interests that motivate producers of text. <strong>Argumentation</strong> should be analyzed as well. <strong>Alignment</strong>: assumed difference in status between speaker and listener; rhetorical considerations of audience, positionality</td>
</tr>
</tbody>
</table>
Table 3.8 Level of granularity III: Text

<table>
<thead>
<tr>
<th>LEVEL OF GRANULARITY III: TEXT</th>
<th>Possible evidence of</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Genre</strong> – recognizable type of text a piece of discourse embodies (Swales). A patterned response to similar rhetorical situations (Miller). Can be manipulated for rhetorical effect (Bazerman, Berkenkotter and Huckin, Myers).</td>
<td></td>
</tr>
<tr>
<td><strong>Heteroglossia</strong> – inclusion of discursive differences, register shifts, multiple “voices” (Bakhtin). Points to intertextual linkages (called <em>lemke</em>), situating it firmly in its sociocultural context.</td>
<td></td>
</tr>
<tr>
<td><strong>Coherence</strong> – Ability of a text to “hang together.” Cues include verb tense, sentence topics, pronoun reference, etc. Active interp. Looks at what background knowledge the text is evoking.</td>
<td></td>
</tr>
<tr>
<td><strong>Framing</strong> – slant or “spin” – casting a story in a certain light</td>
<td></td>
</tr>
<tr>
<td><strong>Extended metaphor</strong> – continues beyond a single sentence. Contributes to textual coherence, serves as a framing device</td>
<td></td>
</tr>
<tr>
<td><strong>Fore grounding/backgrounding</strong> – prominence given to parts of a text, by physical placement – size – emphasis through word choice or syntactic structure. Backgrounding – choices to emphasize or de-emphasize a piece of information. The ultimate form of backgrounding is omission.</td>
<td></td>
</tr>
<tr>
<td><strong>Omission</strong> - Textual silence: ideological or tactical.</td>
<td></td>
</tr>
<tr>
<td><strong>Auxiliary embellishments</strong> – sound, graphics, etc.</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.9 Level of granularity II: Sentence/utterance

<table>
<thead>
<tr>
<th>LEVEL OF GRANULARITY II: SENTENCE/UTTERANCE</th>
<th>Possible evidence of</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Transivity</strong> – agent/patient relations in a sentence, or the encoding of the main action of a sentence. See Fairclough, Discourse. Central question: Who is doing what to whom?</td>
<td></td>
</tr>
<tr>
<td><strong>Semantic agent (actor)</strong> is typically depicted as having more power than the patient. Status of agent (e.g. if agent remains the same from sentence to sentence, he has more power/higher status).</td>
<td></td>
</tr>
<tr>
<td><strong>Deletion</strong> – the deliberate omission of information in a sentence. Example: the agent is omitted altogether, e.g. “Many women are subjected to domestic violence” – by men is omitted, the causative agent. <strong>THE AGENTLESS PASSIVE</strong> is one of the most common forms of agent deletion.</td>
<td></td>
</tr>
<tr>
<td><strong>Topicalization</strong> – positioning a sentence element to give it prominence; <strong>foregrounding</strong>. In the sentence above, “many women” is topicalized.</td>
<td></td>
</tr>
<tr>
<td><strong>Register</strong> – word usage, phrase usage, sentence structure. Shifts of register can be syntactical or lexical.</td>
<td></td>
</tr>
<tr>
<td><strong>Politeness</strong> – interpersonal stance, e.g. pronoun usage, terms of address, register</td>
<td></td>
</tr>
<tr>
<td>Positive politeness =&gt; solidarity</td>
<td></td>
</tr>
<tr>
<td>Negative politeness =&gt; independence, privacy</td>
<td></td>
</tr>
</tbody>
</table>
Presupposition – assumptions underlying terms, word choices
Insinuation – manipulation that requires background knowledge.
Intertextuality – borrowing phrases from another source

Table 3.10 Level of granularity I: Word/phrase

<table>
<thead>
<tr>
<th>LEVEL OF GRANULARITY I: WORD/PHRASE</th>
<th>Possible evidence of</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>classification</strong> – naming and labeling, positioning of speaker/author, in-and out-group identifications</td>
<td></td>
</tr>
<tr>
<td><strong>connotation</strong> – associations and nuances of meaning that go beyond a dictionary definition; also</td>
<td></td>
</tr>
<tr>
<td><strong>code words</strong></td>
<td></td>
</tr>
<tr>
<td><strong>linguistic metaphor</strong></td>
<td></td>
</tr>
<tr>
<td><strong>lexical presupposition</strong> – linguistic device that can be used to manipulate readers; words or phrases that “assume the truth of the statement in which they are found,” possessives, other linguistic constructions that serve as presupposition triggers</td>
<td></td>
</tr>
<tr>
<td><strong>modality</strong> – modal verbs and phrases such as <strong>might, should, will, we think, commands,</strong> etc. that project authorial “voice” or attitude</td>
<td>“Modal constructions facilitate various forms of manipulation including the hedging of claims in advertisements and reporters’ accounts of statements from sources” (160).</td>
</tr>
<tr>
<td><strong>register</strong> – markers of a distinct register (e.g. legalese)</td>
<td></td>
</tr>
</tbody>
</table>

Again, because this is a grounded theory approach in which the data found determined the categories used to describe them, the final list of items that proved most useful was selective and partial, not exhaustive or systematic. As Huckin describes the process,

A critical discourse analyst should use his or her best judgment as to which concepts are most appropriate to an insightful understanding of the text at hand. In most cases, the basic insight is gained during an initial reading of the text, before the CDA concepts are fully applied. In other words, CDA is not a ‘discovery’ mechanism per se; rather, it serves to confirm, explain, and enrich the initial insight and to
communicate that insight, in detailed fashion, to others” (163).

The methods of analysis used combined some of Huckin’s categories in the tables above, along with framing, van Dijk’s ideological square, Lazar and Lazar’s outcasting, and other pertinent methods of analysis to code and categorize the data, as mentioned above. The methodology also included the gathering of data from both collocations and concordances of particular key documents.¹ The word counting work done at Level I, including for example tracking most frequently used words, preferential order of content words, etc., became the most quantitative portion of the analysis but which also proved to be one of the most valuable aspects of the study, one that perhaps more than any other shifted the focus of the qualitative analysis. An overview of the most important strategies identified in the memos is listed in the table below:

Table 3.11 Key markers of semantic, linguistic, and discursive strategies used in the Memos

<table>
<thead>
<tr>
<th>Representations of / suspensions of:</th>
<th>Discursive, Rhetorical, and Linguistic Strategies in The Torture Memos</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Time/space</td>
<td>—Naturalization (“common sense”)</td>
</tr>
<tr>
<td>-Specific acts and events, both potential and actual</td>
<td>—Argumentation</td>
</tr>
<tr>
<td></td>
<td>—Metaphor/Extended metaphor</td>
</tr>
<tr>
<td></td>
<td>—Framing</td>
</tr>
<tr>
<td></td>
<td>—Intertextuality</td>
</tr>
<tr>
<td></td>
<td>—Topicalization (Foregrounding/Backgrounding)</td>
</tr>
<tr>
<td></td>
<td>—Nominalization</td>
</tr>
<tr>
<td></td>
<td>—Transivity (agent/patient relations)</td>
</tr>
</tbody>
</table>

¹ I will confess here that despite months of exploration (and frustration), I as well as numerous other relatively savvy were not able to find a way to convert all of the texts to a text processing-friendly format. Working with differently imaged files proved to be the biggest challenge the research posed. I am still exploring ways to do so; however, I was able to analyze many of the key documents through a text processing program, which proved invaluable to the analysis.
The process of matching of categories to text and vice versa was an ongoing, recursive one in which I continued to read theory from varying fields and explored different approaches for the linguistic, rhetorical, and critical discourse analyses.

Ultimately, the work crystallized into a circular repetition of reading and research in four areas, as the analysis slowly emerged: 1) Contextual analysis, i.e. extensive readings on the context in which the memos were produced (e.g. Mayer, Sands, Goldsmith, Worthington); 2) linguistic and critical discourse analysis, (e.g. Huckin, Fairclough, Dunmire, Lazar and Lazar); 3) legal analysis (e.g. Clark, Luban, Horton, Sands); and 4) political and social theory on authoritarianism (e.g. Altemeyer, Feldman, Hetherington and Weiler; see Figure 3.2, above.) The legal analysis proved to be the most difficult piece by far (other than the actual manipulation and management of the texts). Reading toward a basic understanding of some of the core legal issues the memos addressed was challenging enough; equally challenging was the ongoing struggle to avoid becoming enmeshed in discussing and evaluating the legal points of a particular argument. I am not convinced I completely succeeded on either front; I finally developed a strategy of delineating or at least flagging the legal aspects of an issue without going into it too deeply, then pulling myself back to the four levels of discursive, rhetorical, and linguistic analysis I was
conducting. During this process I was hoping to build a mosaic of methods of analysis that matches key lexical items and markers to key concepts and their frames, semantic fields, and presumptive underpinnings. This mosaic will, I hope, provide an overarching process—an analytical springboard, in other words—for discovering and applying different methods, each chosen individually according to the subjects to be analyzed and the research questions, that might best facilitate and enable close analysis of other sample texts.

A last word about the analytical process and the shift in focus I mentioned above that came about through the quantitative portion of the analysis. I mentioned previously that, early on, I was determined not to allow my own biases to color my coding and interpretation of the data as far as I was able. Because of the nature of both the documents and my larger project of attempting to understand a worldview that remained foreign to me, I began this particular analysis with a presumption of benevolence. That is, I started the exploration that begins in the following chapter with the conscious assumption that, however wrong-headed I believed the authors of the memos to have been, they meant well; their motives, in other words, were fundamentally benevolent. For reasons I trust will become clear in the following chapters, during the latter stages of the data-gathering, coding, and analysis—particularly when I reached Level of Granularity I, the word-level analysis—I largely dropped that assumption, at least as it pertained to a number of key members of the administration who were involved in the production of the memos. I had sought to find specific strategies of enactments of power, the how that better explained the
what I assumed I would encounter; I believe that the four levels of analysis, however, particularly Level I, also point toward possible alternative suggestions as to why.
CHAPTER FOUR:

THE SCENE, THE AGENTS, THEIR AGENCY, AND THEIR PURPOSE:

CONCEPTIONS OF POWER AND THE TORTURE DEBATE

“Our political heritage is to be skeptical of executive power.”

--Bruce Fein, Republican legal activist

One assumption of critical discourse analysis is that text is best and most completely understood when it is also considered in context. This may arguably be especially true of the Torture Memos. Created in a unique moment in history, the memos helped officials push far beyond previously acceptable boundaries of sanctioned behavior and opened doors that had remained closed for decades in both domestic and international law.

The thirty-nine documents that form the focus of this dissertation stem from a collection of key documents in the war on terror from the website torturingdemocracy.org. The website contains an enormous archive of links to further government documents, timelines, transcripts of interviews, etc., along with a vast collection of further material from the aftermath of 9/11. A link is also
Table 4.1, below, provides an overview of the thirty-nine memos that are the focus of this dissertation, detailing as a whole the progression toward approving torture between 2001 and 2003 as well as the numerous, vehement attempts from various quarters to halt that progression. As can be seen, the first four memos declare a state of emergency and then lay out an expanded vision of presidential power on the basis of that emergency, including the President’s unlimited power to use military force at his “unreviewable” discretion. Memos 3 & 4, authored by John Yoo, suspend FISA limitations on wiretaps (i.e., the necessity of obtaining a warrant for a wiretap within 72 hours); suspend Fourth Amendment restrictions on searches and on military action within the boundaries of the United States; and essentially suspend the First Amendment as well, allowing for possible restrictions on free speech. These expansions of presidential power are justified as necessary to national security.

Documents 5 through 7 pertain to U.S. treatment of detainees, giving the president the authority to hold detainees indefinitely without trial; to deny petitions of habeas corpus; and to try prisoners using military commissions rather than in the courts. Document 8 is a letter from the Secretary General of Amnesty International, Irene Khan, warning Donald Rumsfeld against violations of the Convention Against
Torture, or CAT treaty. Khan’s letter is followed by a series of memos, Docs 9 through 17, which argue over the applicability of the Geneva Conventions to the U.S.’s prosecution of the war on terror; the internal debate ultimately concludes with a memo by Jay Bybee, followed by a proclamation by George W. Bush, that the Geneva Conventions do not apply to al Qaeda and Taliban militants. Doc 18 also suspends laws governing the proper treatment of American militants, such as the right to counsel and the inadmissibility of illegally obtained evidence.

Doc 19 paves the way for the Bush Administration’s new program of extraordinary renditions (see section below) and essentially suspends domestic and international laws that prohibit the U.S. from transferring prisoners to countries known to torture. Doc 20 puts military commissions under the sole authority of the President, while Doc 21 suspends the Posse Comitatus Act, which limits the government’s use of the military for domestic law enforcement.

Doc 22 is known as “The Torture Memo”; authored by Yoo and signed by Jay Bybee, the memo suspends numerous domestic and international laws that prohibit torture and redefines torture so that the word becomes virtually meaningless. Docs 23 & 24 affirm that harsh interrogation techniques are not subject to future prosecutions for war crimes because a) the president has declared that the Geneva Conventions do not apply, and b) the specific intent is to gather intelligence, not to inflict pain. Doc 25 is record of a visit to Guantanamo by William Haynes and David Addington. Docs 26 through 28 document an email exchange detailing differing views among members of the military on certain interrogation techniques; Doc 27 is
a request for approval of SERE techniques (a training program used prior to 9/11 solely to teach U.S. military personnel how to resist methods of interrogation first implemented by the Nazis and the Soviets), and Doc 31 is further evidence of the link between U.S. interrogations and SERE training techniques. Doc 28, authored by the SouthCom commander, forwards the request for approval but expresses concern about some of the techniques, in particular death threats, which have long been prohibited by law. In Doc 29, Rumsfeld approves a large number of the techniques but later (temporarily) rescinds them in Doc 33.

In the meantime, as an FBI agent warns his superiors in Doc 30 that the Constitution and U.S. law prohibit some of the coercive techniques under consideration, two SERE specialists follow a “high-level directive” to train 24 Guantanamo interrogators in those same controversial techniques, as Doc 32 documents. Docs 34 through 37 pertain to the Working Group Report, in which a group of senior level military lawyers commissioned by Donald Rumsfeld study the legality of various techniques. Despite the “vigorous dissent” (TD) of many of the lawyers evidenced in Doc 35, Haynes presents the group with Doc 36, an expanded version of Yoo’s August 1, 2002 Torture Memo, as the group’s “controlling authority”; the 85-page Working Group Report, Doc 37, is ultimately issued in the name of the group members, who are not informed of its final contents and who remain long unaware of its implementation. In Doc 38, Rumsfeld then reauthorizes 24 of the 35 techniques. Doc 39 is a request for interrogators to submit their “wish list” of techniques for authorization; Doc 40 authorizes almost word for word the
same techniques for Iraqi detainees that Rumsfeld authorized for those in GTMO, extending the policies and practice to Abu Ghraib and elsewhere. This analysis ends with Doc 39.

Those first thirty-nine documents and the linguistic,grammatical, and rhetorical strategies the authors of key memos use to legitimize and normalize torture are the focus of this dissertation, which will also attempt to explain and illuminate some of the underlying assumptions that lead to the shift. As stated previously, it is my belief that a close study of the documents helps illuminate and clarify some of the presuppositions, values, perceptions, and objectives of the people involved in the writing of the memos as well as those who subscribed to, supported, and continue to support the point of view reified in and by key “Torture memos” such as Doc 22. As a whole, of course, and even as discrete texts, the documents incorporate many points of view, but a fundamental reverse at the level of policy—that is, an official backing away from the notion of the legitimacy of torture—occurs only with the forty-first document, authored by the new head of the OLC, Jack Goldsmith (and even then is only temporary). Doc 41 declares that the Geneva Conventions do, after all, apply to detainees in Iraq, specifically “citizens and permanent residents of Iraq”—even those who “commit hostile acts against the occupying power” (Goldsmith qtd in Jones). Even after this change, however, it is clear that the new common sense regarding the permissibility and legitimacy of torture cannot be as easily rescinded as, say, the suspension of the Geneva Conventions or other laws the authors of the memos essentially rendered, for a
time, legally and practically null and void.

Table 4.1 List of key documents identified by torturingdemocracy.org

<table>
<thead>
<tr>
<th>#</th>
<th>Date</th>
<th>Author / Recipient</th>
<th>Subject</th>
<th>Description*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>9/14/2001</td>
<td>George W. Bush</td>
<td>President Bush’s military order declaring a national emergency.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>9/25/2001</td>
<td>From: John Yoo,</td>
<td>Lays out in detail Yoo's view that the President's power to respond to</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Deputy Assistant</td>
<td>threats with military force cannot be limited in any way; authorizes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Attorney General, OLC**</td>
<td>the doctrine of pre-emption.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To: Tim Flanigan,</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Deputy Counsel to</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>the President</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“The President's Constitutional Authority to Conduct Military Operations Against Terrorist and Nations Supporting Them”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>9/25/2001</td>
<td>From: John Yoo</td>
<td>Discusses possible changes to laws governing wiretaps for intelligence gathering and opens the possibility of legalizing warrantless searches in the interest of national security</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To: David Kris, Assoc. Deputy Attorney General</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the ‘Purpose’ Standard for Searches”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>10/23/2001</td>
<td>From: John Yoo and Robert Delahunty, Special Counsel, OLC</td>
<td>Suspends the Fourth Amendment prohibition on illegal searches and possibly the First Amendment re free speech in the interest of national security and “the overriding need to wage war successfully”</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To: Alberto Gonzales, White House Counsel, and William J. (Jim) Haynes, General Counsel to the DoD (Rumsfeld)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Authority for Use of Military Force to Combat Terrorist Activities within the United States”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>11/6/2001</td>
<td>From: Patrick Philbin,</td>
<td>Authorizes military commissions to try prisoners deemed enemy combatants (later overturned by the Supreme Court)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Deputy Assistant Attorney General, OLC</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To: Alberto Gonzales</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Legality of the Use of Military Commissions to Try Terrorists”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>11/13/2001</td>
<td>From: George W. Bush</td>
<td>Military order declaring the President’s unilateral authority to hold prisoners in the war on terror indefinitely.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Date</td>
<td>From</td>
<td>To</td>
<td>Summary</td>
</tr>
<tr>
<td>---</td>
<td>------------</td>
<td>-------------------------------</td>
<td>------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>7</td>
<td>12/28/2001</td>
<td>From: John Yoo and Patrick Philbin</td>
<td>To: Jim Haynes</td>
<td>Concludes that federal district courts lack jurisdiction to accept habeas petitions from prisoners held at Guantanamo.</td>
</tr>
<tr>
<td>8</td>
<td>1/7/2002</td>
<td>Irene Khan, Secretary General of Amnesty International, to Donald Rumsfeld, Secretary of Defense</td>
<td>&quot;Urgent letter concerning the treatment of detainees in U.S. custody&quot;</td>
<td>Warns against &quot;cruel, inhuman or degrading treatment or punishment&quot; such as hooding and blindfolding as a violation of the Convention Against Torture.</td>
</tr>
<tr>
<td>9</td>
<td>1/9/2002</td>
<td>From: John Yoo</td>
<td>To: Jim Haynes</td>
<td>Concludes that Geneva Conventions do not apply to al Qaeda or the Taliban</td>
</tr>
<tr>
<td>10</td>
<td>1/11/2002</td>
<td>From: William Taft, Legal Advisor to the State Department</td>
<td>To: John Yoo</td>
<td>&quot;Response to Yoo's memo from 1/9/02&quot;</td>
</tr>
<tr>
<td>11</td>
<td>1/19/2002</td>
<td>From: Donald Rumsfeld</td>
<td>To: Joint Chiefs of Staff</td>
<td>Concludes that al Qaeda and Taliban detainees are not entitled to prisoner-of-war protections under the Geneva Conventions</td>
</tr>
<tr>
<td>12</td>
<td>1/22/2002</td>
<td>From: Jay Bybee,</td>
<td>To: Jim Haynes</td>
<td>Signs off on Yoo’s 1/9/02 draft suspending the Geneva Conventions, using the justification of self-defense</td>
</tr>
<tr>
<td>13</td>
<td>1/25/2002</td>
<td>Alberto Gonzales to President Bush (acc. to Mayer, actually written by David Addington, Legal Counsel to Vice President Dick Cheney)</td>
<td>&quot;Application of Treaties and Laws to Al Qaeda and Taliban Detainees&quot;</td>
<td>Outlines the benefits of not complying with the Geneva Conventions and argues that doing so would provide a “solid” legal defense against any future prosecution.</td>
</tr>
<tr>
<td>14</td>
<td>1/26/2002</td>
<td>Colin Powell to Alberto Gonzales</td>
<td>&quot;Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the&quot;</td>
<td>Warns that opting out of the Geneva Conventions reverses over a century of U.S. policy, undermines the war, and opens the door to foreign prosecutions of official and troops.</td>
</tr>
<tr>
<td>Date</td>
<td>Authors/Signatories</td>
<td>Summary</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/1/2002</td>
<td>John Ashcroft to George W. Bush</td>
<td>Concludes that opting out of Geneva protects American officials from future prosecutions for violations.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/7/2002</td>
<td>From: Jay Bybee, Assistant Attorney General, OLC To: Alberto Gonzales</td>
<td>Defines detainees as “unlawful combatants” and concludes that the President can ignore Geneva's requirement for hearings to determine their status as POW’s.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/7/2002</td>
<td>George W. Bush</td>
<td>Presidential declaration that the U.S. need not follow the Geneva Conventions protecting POWs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/26/2002</td>
<td>Jay Bybee to Jim Haynes</td>
<td>Suspends the rights of American citizens captured in the war on terror (re John Walker Lindh) and declares evidence admissible in court even if obtained without benefit of counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3/13/2002</td>
<td>Jay Bybee to Jim Haynes</td>
<td>Underpins extraordinary rendition; suspends domestic and international law to argue that the U.S. can transfer prisoners to countries where they may be tortured without liability.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4/8/2002</td>
<td>Patrick Philbin to Daniel J. Bryant</td>
<td>Declares unlimited authority of the President to regulate military operations, including military commissions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6/8/2002</td>
<td>From: Jay Bybee</td>
<td>Suspends the Posse Comitatus Act, which limits the government’s ability to use the military for law enforcement, and confers legal authority on the military to detain Jose Padilla, a U.S. citizen arrested on U.S. soil, as a prisoner of “international armed conflict.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8/1/2002</td>
<td>John Yoo to Alberto Gonzales</td>
<td>Claims interrogations of al Qaeda cannot constitute a war crime because the President has determined the Geneva Convention applies.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Date</td>
<td>Sender/Recipient</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>------------</td>
<td>---------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>8/1/2002</td>
<td>Jay Bybee to the CIA</td>
<td>Declares that CIA interrogation methods do not violate the statute against torture because the “specific intent” of procedures is to gather intelligence, not inflict pain or suffering.</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>10/2/2002</td>
<td>N/A</td>
<td>Email exchange detailing disagreements among CIA and military officials about interrogation techniques being employed at Guantanamo and the possible ramifications.</td>
<td></td>
</tr>
</tbody>
</table>
| 27| 10/11/2002 | From: Major General Michael Dunlavey, Commanding Officer, Joint Task Force 170, Guantanamo

To: Gen. James T. Hill, commander of USSOUTHCOM

“Counter-Resistance Strategies”

<table>
<thead>
<tr>
<th></th>
<th>Date</th>
<th>Sender/Recipient</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>10/25/2002</td>
<td>Gen. James T. Hill</td>
<td>Forwards request to Chairman of the Joint Chiefs, but expresses worry in particular about death threats to detainees and their families (prohibited by domestic and international law).</td>
</tr>
<tr>
<td>29</td>
<td>11/27/2002</td>
<td>Jim Haynes to Donald Rumsfeld</td>
<td>“Action memo” to be signed off by Rumsfeld approving a list of harsh interrogation techniques. Rumsfeld signs off on all Category I &amp; II techniques, allows for the possibility of but reserves blanket approval for Category III techniques such as waterboarding.</td>
</tr>
<tr>
<td>30</td>
<td>11/27/2002</td>
<td>Unnamed FBI agent</td>
<td>Agent warns superiors that some coercive techniques being considered are prohibited by the Constitution and U.S. law [18 U.S.C. § 2340 (Torture Statute)]</td>
</tr>
<tr>
<td>31</td>
<td>12/10/2002</td>
<td>Lt. Col. Ted Moss, JTF-GTMO ICE Chief</td>
<td>Directly links SERE techniques (used for building resistance of U.S. military personnel) to interrogations techniques used against U.S. detainees</td>
</tr>
<tr>
<td>32</td>
<td>1/15/2003</td>
<td>John F. Rankin, SERE Training Specialist and Christopher Ross, SERE Coordinator</td>
<td>Per a “high level directive,” two SERE instructors train 24 GTMO interrogators in SERE techniques based on “Biderman’s Principles” and including death threats, degradation, and “induced debilitation.”</td>
</tr>
<tr>
<td>No.</td>
<td>Date</td>
<td>Author(s)</td>
<td>Description</td>
</tr>
<tr>
<td>-----</td>
<td>------------</td>
<td>------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>33</td>
<td>1/15/2003</td>
<td>Donald Rumsfeld</td>
<td>Rumsfeld rescinds his authorization of Category I &amp; II techniques.</td>
</tr>
<tr>
<td>34</td>
<td>1/15/2003</td>
<td>Donald Rumsfeld</td>
<td>Order for a Working Group of senior military lawyers to study the legality of various techniques.</td>
</tr>
<tr>
<td>36</td>
<td>3/14/2003</td>
<td>John Yoo to Jim Haynes</td>
<td>Expands on Yoo’s 8/1/2002 memo and authorizes even more expansive techniques. Haynes presents the memo to the Working Group as its “controlling authority” re proposed techniques.</td>
</tr>
<tr>
<td>37</td>
<td>4/4/2003</td>
<td>Unknown</td>
<td>85-page Working Group Report authorizing 35 techniques of harsh interrogation, signed in the name of the group members, who were not informed of the final contents.</td>
</tr>
<tr>
<td>38</td>
<td>4/16/2003</td>
<td>Donald Rumsfeld to Commander of US Southern Command</td>
<td>Authorizes 24 of the 35 techniques for use at GTMO.</td>
</tr>
<tr>
<td>39</td>
<td>8/14/2003</td>
<td>N/A</td>
<td>U.S. Army military intelligence requests from interrogators a wish list of techniques to break detainees, as “the gloves need to come off.”</td>
</tr>
<tr>
<td>40</td>
<td>9/14/2003</td>
<td>Gen. Ricardo Sanchez</td>
<td>Guidelines authorizing techniques for Iraqi detainees, an almost verbatim copy of those issued by Rumsfeld for GTMO.</td>
</tr>
</tbody>
</table>

* Descriptions from the Website Torturing Democracy: “The Key Documents”
** All positions given refer to position held at the time the documents were written

The Memos

The Torture Memos are not only powerful documents; they are documents specifically about power and are, as will be seen, profoundly authoritarian. As unique artifacts of a unique moment in history with ongoing global impact, the
memos enact a certain and specific understanding of power, as defined by authorities deemed legitimate, over human beings deemed illegitimate, by and in the documents themselves.

The analysis this chapter begins to undertake is structured, as was stated in the previous (methodology) chapter, according to the categories identified in Burke’s dramatistic pentad. The analysis includes an examination of the principle actors involved in the conception and production of the texts; a discussion of their agency or authority; a detailed description of the scene, or context, in which the documents were produced; and an examination of the various possible purposes, both stated and unstated, that the documents fulfilled or sought to fulfill. The chapter that follows continues the analysis with an examination of acts that were authorized by a number of the documents, acts that were subsequently (or even prior to their authorization) carried out. As stated, I also add a sixth component to the dramatistic pentad, which I would place at the center of the figure: the subjects (recipients or objects) of those acts. In other words, I also include a brief (and necessarily incomplete) detailing of some of the real and material consequences that occurred in conjunction with the acts, agents, agency, scene, and purposes pertaining to the writing of the memos. This chapter first of all attempts to trace some of the fault lines that delineate the memos’ dramatistic components as well as several of the sites of contention that characterize them. By acts, first of all, I mean the production of the memos themselves as well as the numerous other acts that occurred as a consequence of their production—for which, in other words, they
provided the agency.

As has already been discussed in the literature review, critical discourse analysis is first and foremost concerned with examining and describing enactments of power in language, beginning perhaps with the uses, definitions, and contested spaces occupied by the lexical item *power* itself. CDA assumes that text is best and most completely understood when considered not only as a self-contained artifact, but also in its greater context. This may arguably be especially true of the torture memos. Created in the wake of a singular historical event, the memos pushed far beyond previously acceptable boundaries of sanctioned behavior and opened doors that had remained closed for many decades in both domestic and international law. Mapping the genealogy of the memos will help set the stage and create a greater—if partial—understanding of the motivations, goals, desires, assumptions, and decisions that not only drove their conceptualization but brought them into existence. Needless to say, it is impossible in this space to give a complete accounting of the documents and the events that formed the context in which they were written; nonetheless, I will try to give as thorough an overview of the scene, the actors, their agency, and their purposes as possible in this format. This will include, but not be limited to, a detailed examination of the language John You and others use to formulate, characterize, and define different aspects of the memos’ rhetorical situation.
Memos as Agency: Authorization for torture

As mentioned previously, the set of documents used in this study have been identified as “key documents” on the website torturingdemocracy.org. Specifically, this dissertation comprises an in-depth examination of the first 39 of those documents (up until the moment Jack Goldsmith took over the Office of Legal Counsel and began to rescind some of the most controversial decisions); these 39 documents pertain directly or indirectly to the approval of methods of interrogation used in the prison camps at Bagram Airbase in Afghanistan and in Guantanamo Bay, Cuba by both CIA officials and military personnel, and later in the Abu Ghraib prison in Baghdad. The six final documents, Docs 40-45, were written after a personnel shift during the second term of the Bush Administration, when Jay Bybee left his position as head of the Office of Legal Counsel (OLC) and was replaced, for a brief term, by Jack Goldsmith. Goldsmith reviewed and ultimately rescinded the approval for several of the memos— and, according to New York Times reporter Jeffrey Rosen, simultaneously handed in his resignation to ensure that his decision would stand.

This dissertation focuses on the earlier thirty-nine documents because they are where the groundwork for torture is laid; the documents form a series of interrelated steps, each building on the last, toward the legalization of methods that had long been prohibited by the laws of myriad countries, including the U.S., and by international treaties. As will be seen, the later documents repeat, reiterate, and expand on legal opinions that had been written in the previous documents, and which sanctioned methods of interrogation that were implemented at some point
along the way—including, as subsequent analysis has shown, before some of key memos permitting those methods were actually written. The documents provide evidence both of a tug-of-war that occurred among members of various branches of the administration and the military, and are also evidence of how certain of those members purposefully pushed the legal boundaries regarding the permissible treatment of detainees to the edge of legality where, as CIA Director Michael Hayden put it, their “spikes [would] have chalk on them” (Mayer, Dark 78).

The 39 documents at the heart of this study are a collection of legal briefs, opinions, official letters, public written statements, and email exchanges concerning the United States government’s response to terrorism in the aftermath of 9/11. If 9/11 is the inciting incident, by Bitzer’s definition, that leads to the rhetorical situation, the aftermath and response are the scene in which the memos were produced. Although the documents identified as key by torturingdemocracy.org include writings from sources as varied as Amnesty International and members of Congress, those that provide the basis for the in-depth study conducted here are the internal memos produced by lawyers, particularly Jay Bybee and John Yoo, in the Office of Legal Counsel, and by other key figures in the Bush Administration, including the president himself.

Ordinarily, legal memos are documents produced internally by junior level lawyers as an unbiased evaluation of the legal landscape for internal purposes . . . A memo typically (and ideally) starts with a question, looks at all sides
(pros/cons, strengths/weaknesses of given arguments or strategies)
and then reaches a conclusion about the position that should be taken.

(Meeker, 2010)

These memos, however, were different. While the ordinary legal memo is usually written by junior members of a firm or organization for the purpose of giving an overview of the pertinent cases, the Torture Memos were produced by the OLC, an office Goldsmith describes as having “exalted status” (Mayer, *Dark 9*) and the “authority to issue legal opinions that were binding throughout the executive branch” (23). Written under the official imprimatur of the Justice Department, these opinions remained binding unless specifically rejected by the attorney general or the president—a rare occurrence. As Mayer explains it,

The OLC plays a unique role in the federal government. Sometimes referred to as the Attorney General’s law firm, its small but often brilliant staff of lawyers, many of whom are political appointees, issue opinions that are legally binding on the rest of the executive branch. If the OLC interprets the law in a certain way, unless the attorney general overrules it, the government must too. (65)

Georgetown law professor Jeffrey Rosen describes it similarly:

Working for the office is one of the most prestigious jobs in government ... The Office of Legal Counsel interprets all laws that bear on the powers of the executive branch. The opinions of the head
of the office are binding, except on the rare occasions when they are reversed by the attorney general or the president. ("Conscience")

As such, the perlocutionary aspect of the OLC legal memos, that is, their power to affect social and material reality and confer agency on members of the government and military, that is, the ways in which these particular memos actually changed the material, cultural, and historical landscape, cannot be overstated. As will be shown, the language used in the memos

- defined others in unprecedented ways
- created new spaces within which to place those others, both metaphorically and actually
- newly defined and delineated what actions were permissible inside of those spaces.

Quite literally, the memos opened up legal, social, political, and material realms that had not previously existed. Linguistically and semantically, the OLC lawyers made possible a physical, extralegal space—an alternate universe, seen by some as a “legal black hole” (Goldsmith 119)—that operated under new and different rules and in which their extralegal prisoners, i.e. the persons they deemed “unlawful” (arguably, lesser or not fully human), were ultimately placed and held.

The creation of this realm was completely intentional. As an oft-quoted colleague in the State Department explained to lawyer David Bowker during the early days after 9/11, the goal of certain members in the Bush Administration was “to ‘find a legal equivalent of outer space’—a ‘lawless’ universe” (Isikoff) that was
beyond the reach of any court, U.S. or international. The prison in Guantanamo Bay, Cuba, was created specifically for that reason; unlike the military bases in U.S. territories, GTMO would not be "under the jurisdiction of the often-liberal Ninth US Circuit Court of Appeals" (sourcewatch) and was thus, at least for the time being, beyond legal intervention.

This freedom from legal constraints led to an extreme imbalance of power, a \textit{physicality} of power that one set of human beings was afforded over another, however one might characterize the nature of that power (e.g. benevolent or otherwise). The memos demonstrate a tacit awareness and clear response to the possibilities inherent in that kind of material power; in particular, Yoo’s August 1, 2002, memo contained a series of lexico-grammatical, rhetorical, and discursive moves that essentially crafted a new set of rules and special protections for the personnel operating in those extralegal spaces—a “golden shield,” as one CIA official dubbed it in a conversation with Jack Goldsmith. The golden shield “provided enormous comfort” (Goldsmith 144) to CIA interrogators and their supervisors, essentially serving as a legal firewall between them and the ‘outside’ world. This linguistic and legalistic shield was intended to protect them, as far as possible, from subsequent scrutiny or judgment—and, apparently, from any possible future legal consequences for their actions.

Agency, of course, is power, the ability to act—and the signifier \textit{power} is crucial to a discussion of the torture memos, both their context and content. At their most fundamental level, the memos are a bid for agency—much needed agency, in
the eyes of some. Goldsmith spends numerous pages in *The Terror Presidency* discussing what he sees as an overwrought culture of legal constraints, and thus an extreme aversion to risk, which in his view (and in the view of many others) have hamstrung the U.S.’s prosecution of the war on terror. The descriptors he chooses to depict this are among the most vivid in the book. The following passage, for example, is telling:

> For the first time ever, the president’s ultimate obligation to do what it takes to protect the nation from devastating attack was checked by a hornet’s nest of complex criminal restrictions on his traditional wartime discretionary powers—restrictions that the White House feared would later be construed uncharitably in our shifting, polarized political culture. Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. (italics mine 69)

Goldsmith of course is not actually making the claim that the laws of war ultimately destroyed the Bush administration’s ability to prosecute war at all and/or protect the nation from attack—quite obviously, the Bush Administration was able to prosecute not just one, but two, wars through the near-wholety of Bush’s presidency after 9/11, and almost absolutely as those in power deemed fit. The ‘killing’ metaphor Goldsmith uses, however, LAWS = MURDER, reveals much about the view of at least some in the administration of the nature of power; that is, real power lies
outside the law, and the law is anathema to power, or \text{LAWS} = \text{POWERLESSNESS}.

This opposition, power versus law (understood here, perhaps, as a way of building agreement and collaboration among various interests), comes through quite clearly in Goldsmith’s description of Dick Cheney and the Vice President’s own legal counsel, David Addington:

He [Addington] and, I presumed, his boss [Cheney] viewed power as the absence of constraint. These men believed that the President would be best equipped to identify and defeat the uncertain, shifting, and lethal new enemy by eliminating all hurdles to the exercise of his power. They had no sense of trading constraint for power . . . They believed cooperation and compromise signaled weakness and emboldened the enemies of America and the executive branch . . . they viewed every encounter outside the innermost core of most trusted advisors as a zero-sum game that if they didn’t win they would necessarily lose. (126)

Goldsmith, on the other hand, seems to at least acknowledge the benefit of working with other entities, rather than “blowing past” them, as he characterizes Addington of often doing: “It seemed never to occur to them that it might be possible to increase the President’s strength and effectiveness by accepting small limits on his prerogatives in order to secure more significant support from Congress, the courts, or allies” (126). Ultimately, of course, Goldsmith’s goal is similar to that of Addington, Cheney, the OLC, and many others in their neo-conservative spheres: to
grant the President as much power as possible—power many of them felt had been lost, or at least seriously eroded, during the second half of the twentieth century. The war on terror served, among other things, as a chance to restore that power. Indeed, a primary purpose for war may be that it is a premier tool for circumventing ordinary, prevailing law.

Not surprisingly, Goldsmith interprets the drive to “restore . . . ‘eroded’ presidential power” (89) in a benevolent light. This became the focus, he claims, after 9/11. He does admit that Bush, Cheney, Addington, and Gonzales had long been committed, even anxious, to expand presidential powers; according to Goldsmith, however,

it is not right to say, as some have done, that these men took advantage of the 9/11 attacks to implement a radical pro-President agenda. But their unusual conception of presidential prerogative influenced everything they did to meet the post 9/11 threat. (89-90)

Patricia Dunmire, however, disagrees. In her detailed study, “9/11 Changed Everything” Dunmire draws parallels between the language used by the Project For a New American Century, Colin Powell, and others prior to 9/11, and language the Bush administration used after 9/11. Dunmire provides repeated examples of language in both instances that calls for the same sort of expansion of executive powers; further, she details parallels between the war on terror and other, earlier stated ideological goals, including a purposeful linguistic ambiguity and a clear disregard for international law. For Dunmire (as for other observers of the
administration), 9/11 was an excuse, not a reason; it gave perfect cover for pursuing goals that had long been articulated by neo-conservatives, but which had previously been unpalatable to much of the American public. In a similar study, Lazar and Lazar compare the language of pre-9/11 policy documents to those written after 9/11, maintaining that “it is within and through this policy that ‘defense’ serves as ‘a technology of power’ for coercively maintaining and preserving the American-led security order” (“Enforcing” 56). Defense, as will be seen, is a key thematic formation in justifying the memos’ claims to power.

Interestingly, one of the examples Goldsmith uses to illustrate the 60-year shift in political and wartime culture he so decries was Roosevelt’s wartime defiance of his own Attorney General, Francis Biddle. Biddle strongly advised against the internment of over 70,000 Japanese Americans, and 30,000 more Japanese, as “ill-advised, unnecessary, and unnecessarily cruel” (qtd in Goldsmith 44); unfortunately, he ultimately acquiesced to his boss. Goldsmith mentions that the ACLU later described the internment, which has since been widely condemned, as “the worst single wholesale violation of civil rights of American citizens in our history” (44), yet Goldsmith never seems to fully acknowledge that the internment ultimately proved to be a grave mistake. The idea that constraints on power are there for good reason remains peripheral to the discussion in The Terror Presidency—and, notably, is utterly absent from the OLC memos themselves.

Instead, Goldsmith uses Roosevelt’s actions to demonstrate the difference between then and now. To him, the contrast is illustrative of the legal constraints
that have since been placed on the executive branch before, during, and after wartime, a phenomenon Goldsmith describes in a chapter entitled “The Commander in Chief: Ensnared by Law,” [LAWS = ENTRAPMENT] using such terms as “lawfare,” “the judicialization of warfare” (61), and “the hyperlegalization of warfare” (81). In wonderment, Goldsmith describes how such “harassment” with “asymmetric legal weapons” (59), for example such as Henry Kissinger was occasionally forced to endure after Viet Nam, has made members of the executive branch overly cautious and afraid of repercussions, so that by the time Goldsmith reaches the OLC, members of the executive branch will actually ultimately follow, if reluctantly and even angrily, his legal advice regarding the memos. To Goldsmith, and even more to others in the administration, the thought that the President might be constrained by the other branches, or that the United States might be constrained by international law, is simply untenable. Goldsmith characterizes the sources of this oversensitivity to the purported illegalities of war as “peaceniks,” “human rights advocates,” “the human rights culture,” and “media elites”—groups Henry Kissinger, for one, contemptuously dismissed as implementing a “dictatorship of the virtuous” (qtd in Goldsmith 57)—one that included inquisitions and witch hunts. Ultimately, the prospect of limiting presidential power seems far more horrific to holders of the view that LAWS = POWERLESSNESS than, say, the manifold abuses of power committed by the U.S. (among many others)—abuses that helped destroy people’s trust in their own government, led to the permissive “lost legal culture” (49) Goldsmith so mourns and the “super-legalistic culture” (79) he decries, and that
contributed to broad cultural and political shifts over the last 60 years. Those shifts included an ever-greater awareness of human rights, and a trend in domestic and international law to limit abuses of the state against those rights.

Goldsmith bases his assessment of the situation that gave rise to the memos and, indeed, bases his entire analysis throughout the book, on five unquestioned assumptions, assumptions he shares with the authors of the Torture Memos and which also inform the larger discourses on both torture and the war on terror:

1) the explicit “good faith” assumption that the central goal of those working in the Bush administration and various agencies devoted to national security, and of those in the military, is to protect the American people and “their way of life” (thematic formation defend);

2) that this worthy goal justifies any number of aggressive acts (although not all) that might be deemed controversial, but which are ultimately beneficial to “U.S. interests”;

3) the unstated but ever-present implicit assumption that these controversial acts are in fact more effective than other, less controversial (i.e. aggressive) acts;

4) the unstated but implicit assumption that the U.S. normally refrains from such acts out of innate nobility and moral superiority, but that in egregious and unusual circumstances that noble stance can justifiably be abandoned; and finally
5) the “bad faith” assumption that people who have been deemed enemies or terrorists are indeed exactly that, and if so, deserve any possible treatment meted out to them.

These assumptions also underlie the Good vs. Evil meme that has been central to much of the discourse of the war on terror; they are also closely linked, as will be seen, to the positive-us/negative-them characterizations in van Dijk’s ideological square.

In light of the legal and political culture in which the memos were written, therefore, one of their prime objectives in conferring agency was to provide operatives in the War on Terror with a golden shield, a protection against the “retroactive discipline” so feared by members of the government. Defense, therefore, applied as much to the U.S.’s own operatives against the legal constraints described above as it did to the official purpose of the War on Terror, to defend the country against terrorist attack. Awareness of the continually shifting cultural, social, and political ground created the fear that “no matter how much political and legal support an intelligence operative gets before engaging in aggressive actions, he will be punished after the fact by a different set of rules created in a different political environment” (91). According to Goldsmith, one operative joked that letters of reprimand should be automatically included when superiors handed out assignments for covert operations.

One might argue, however, that the golden shield might also be evidence of other, perhaps unacknowledged, difficulties: for one, those difficulties that are
inherent in the exercise of power, particularly as expressed in “aggressive actions” (more on this below) and the consequences that could follow; and for another, to combat a possible underlying sense of guilt or culpability for undertaking such actions, no matter how solid the legal cover. As will be seen, the authors of the memos and the men at whose behest the memos were written knew they were pushing the boundaries. The memos served to legitimize behaviors that had long since, and deeply, been viewed as culturally and morally unacceptable; another main purpose of the memos, then, was legitimation. In that capacity, the memos did the complex double work of both preserving the “we’re the good guys” trope while at the same time legitimizing “bad guy” behaviors. As we will see, Yoo’s use of the word "defendant" in the memos to mean—in almost every instance, with a few notable exceptions—the personnel conducting interrogations, rather than the person who is the subject of them, is evidence of his intent to create a layer of invulnerability against future prosecutions. To be fair, it was admittedly, for some at least, a difficult environment in which to work. Lawyers, claims Goldsmith, are a “cautious bunch” (92), which at times hinders them from providing the desired support:

Wishy-washy legal advice understandably infuriates the men and women who are asked to take aggressive action and want to know whether what they are about to do is legal or not, period. When they hear a government lawyer talking about shades of gray and degrees of
risk, they understandably hesitate, especially when criminal laws are in play. (93)

Arguably, negotiating such territory becomes even more difficult when the motives driving the need for “aggressive action,” and the assumptions that help shape that need, go largely unacknowledged, undiscussed, and unquestioned.

The Actors: The Men Behind the Memos

The memos in question were originally highly classified and not meant for public scrutiny. They were conceived of, written, and circulated among a select group of upper-level officials in the White House, the Pentagon, and the Department of Defense. The key memos are the brainchildren of the OLC and a group of men whom New Yorker investigative reporter Jane Mayer identifies as the Bush Six, most of whom were also members of a group that called itself the ‘War Council.’ Some of these men authored the texts, while others, such as David Addington, Cheney’s legal counsel, and Dick Cheney himself, remained in the background but, by many accounts, were directly involved and centrally influential in shaping both the intent and the content of the memos.

Table 4.2 Top level officials during the first term of the Bush Administration

<table>
<thead>
<tr>
<th>WHITE HOUSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>George W. Bush, President</td>
</tr>
<tr>
<td>* **Alberto Gonzales, White House Counsel</td>
</tr>
<tr>
<td>* Tim Flanigan, Deputy Counsel to the President</td>
</tr>
</tbody>
</table>

| Dick Cheney, Vice President |
| * **David Addington, Legal Counsel to Vice President Dick Cheney |
One figure whose name never appears as author on the documents, but who emerges as a key player in guiding their creation, is David Addington, Cheney's legal counsel and right hand man. Where there was controversy within the administration, as Washington Post reporter Dana Milbank has pointed out, Addington was often not far behind. According to Mayer, together Cheney and Addington had "set up the most powerful vice presidency in history" (Dark 62).

Lawrence Wilkerson, top aide to Secretary of State Colin Powell, describes the rise to power as follows:

Cheney brings this accumulation of power and ability to influence the bureaucracy to a fine art. He surpasses Kissinger even. But he turns everything on its head and he becomes the power. And he does it
through his network. This is a guy who’s an absolute genius at bureaucracy and an absolute genius at not displaying his genius at bureaucracy. He’s always quiet. (qtd in Murphy and Purdum 4)

Addington proved the perfect aid to Cheney; as left-wing blogger John Amato dubbed him, he served as Cheney’s “chief enforcer” in the Bush administration.

Above all, although Bush had famously reminded the world that he was the Decider, Cheney and Addington controlled the flow of information that determined how decisions would be made. Another lawyer on the White House staff describes how Cheney, “without drawing attention to himself . . . often drastically narrowed Bush’s choices” by restricting the two avenues that led to the President: “the paper flow—determining what the president gets to read . . . [and] access—determining whom he sees and talks with” (Mayer, Dark 63). Mayer’s unnamed source explains how Cheney controlled who saw the President, while Addington controlled what paperwork reached him; Addington would

‘review every proposed executive order before it reached the President for his signature. Frequently he would single-handedly rewrite the entire thing, even though it had already been vetted by the interagency process. He’d slash a red line straight through it and start over from scratch, making it read the way he wanted. Only then would he send it on to the President.’ (63)

In essence, the two of them determined what information reached the President, and what did not.
Cheney and Addington put into place a whole team of people who were working to expand and enshrine executive power, John Yoo chief among them—power that ultimately lay in Cheney’s hands, and by extension Addington’s, not least because Bush largely left national security issues up to their far greater experience and expertise. Hans Blix, for example, chief U.N. weapons inspector for Iraq, recalls a “remarkable” talk his team had with Cheney during a visit to the White House in the run up to the invasion of Iraq:

To our surprise, we had no idea we would be taken to Mr. Cheney first, but we were . . . Much of it was fairly neutral discussion, but at one point he suddenly said that you must realize that we will not hesitate to discredit you in favor of disarmament. It was a little cryptic . . . I was a little perplexed, because it was a total threat, after all, to talk of discrediting us. Later, when I reflected on it, I think what he wanted to say was that if you guys don’t come to the right conclusion, then we will take care of the disarmament. (qtd in Murphy and Purdum 6)

The exchange is remarkable not only as one more example of the way justifications and events before the war were being manipulated, but also because it reveals (as do many other eyewitness reports) exactly who was doing the manipulating.

By several accounts, Cheney’s rise to power, and thus Addington’s with him, had been carefully planned and executed. Stu Spencer, a friend of Cheney’s, called Cheney’s selection of himself as Bush’s running mate “the most Machiavellian
fucking thing I’ve ever seen” (qtd in Mayer, Dark 62). Lawrence Wilkerson, who worked in the State Department under Powell and, like Powell, was often deliberately excluded from the inner circle, gives a description of the Bush/Cheney administration that is worth including in full:

We had this confluence of characters—and I use that term very carefully—… which allowed one perception to be “the dream team.”

It allowed everybody to believe that this Sarah Palin–like president—because, let’s face it, that’s what he was—was going to be protected by this national-security elite, tested in the cauldrons of fire. What in effect happened was that a very astute, probably the most astute, bureaucratic entrepreneur I’ve ever run into in my life became the vice president of the United States.

He became vice president well before George Bush picked him. And he began to manipulate things from that point on, knowing that he was going to be able to convince this guy to pick him, knowing that he was then going to be able to wade into the vacuums that existed around George Bush—personality vacuum, character vacuum, details vacuum, experience vacuum. (qtd in Murphy and Purdum 1)

Under Cheney, the bureaucracy in the Bush administration functioned differently than in previous administrations, a change Addington benefited from greatly.

Unlike his predecessors, Addington had access to “all of the important governmental documents that went to Alberto Gonzales, and . . . was always in the room when
Gonzales was discussing an important legal issue” (Goldsmith 26). Mayer quotes another unnamed source, a former national security lawyer, who says of Addington’s relationship to the Pentagon’s legal office: ‘it’s obvious that Addington ran the whole operation’” (Dark 63). As Goldsmith admits, to those who knew how the White House Counsel’s Office normally operated, Addington’s constant presence in Gonzales’ chambers might seem “odd.” But Addington’s years as Cheney’s special assistant and then legal counsel had give him “a more comprehensive knowledge of national security law than anyone in the executive branch, and made him one of the savviest manipulators of the byzantine executive branch bureaucracy” (Goldsmith 77). Goldsmith describes the relationship between the two men as key to the bureaucratic shift:

Access wasn’t the only source of Addington’s power. Power also came from the full backing of his boss, the redoubtable Vice President. Addington had known Cheney and worked closely with him for nearly twenty years. I never once heard Addington invoke Cheney’s authority. But it was clear to all that he was Cheney’s “eyes, ears, and voice,” as former Solicitor General Ted Olson put it. When Addington spoke in Gonzales’s office, everyone knew what the Vice President would be telling the President before a final decision was made. (77)

Essentially, between the two of them, Cheney and Addington determined national security policy, while John Yoo, perhaps more than Jay Bybee or any other, gave them the legal cover for enacting that policy.
Descriptions of Addington from both defenders and detractors are vivid. Goldsmith calls him a “brash bureaucratic browbeater” (86) who always seemed to be the largest man in the room—one who walked around with a tattered copy of the U.S. Constitution in his pocket, which he quoted from often and “with reverence” (88). Wilkerson uses the words “brilliant . . . a strange beast . . . [Cheney's] brains trust” (qtd in Murphy and Purdum 4); Goldsmith mentions, among other things, his impressive but “idiosyncratic” command of the issues as well as his “fierce temper . . . [and] sarcastic manner” (78). A 2004 Washington Post article by Dana Milbank points to Addington’s superlative “devotion to secrecy” in an administration already noteworthy for its lack of openness, and adds that even in a White House dedicated to conservative philosophy, “Addington is known as an ideologue, an adherent of an obscure philosophy called the unitary executive theory that favors an extraordinarily powerful president” (“Cheney's Shadow” A21). Goldsmith, while admitting that he often disagreed with Addington’s policy decisions, commends his “perverse integrity” (129) in abiding by his principles; as he told Rosen in a 2007 New York Times interview, “I admired and respected Addington, even when I thought his judgment was crazy. They thought they were doing the right thing” (qtd in Rosen). Elsewhere Goldsmith writes, “Addington’s power from above was supplemented by a deadly seriousness within: about the presidency, about separation of powers, about defeating the terrorists” (77). Richard Schiffren, the Pentagon’s deputy general counsel for intelligence, thought that Addington “doesn’t believe there should be coequal branches” (qtd in Mayer, Dark 64), but like others
who questioned Addington’s judgment, Schiffren did not question his single-minded
dedication to his beliefs.

Political opponents and detractors interpret Addington similarly, if less
kindly. Senior Washington correspondent Dan Froomkin describes him this way:

A compelling and well-supported (if partly circumstantial) narrative
casts Addington as the dominant figure in the interagency push to
step up the pressure on terror suspects. This is not surprising, as
Addington is thought to have been at the red-hot center of pretty
much every one of President Bush’s most extreme assertions of
unfettered executive power. The 51-year-old lawyer is Cheney’s most
able and devoted henchman, his sharpest knife, his lead loyalist
among the legion salted throughout the executive branch. Indeed, he
is widely thought to have ghost-written memos and public statements
ascribed to better-known figures such as Alberto Gonzales, John Yoo,
and William Haynes. (“20 Questions”)

In fact, there are differing accounts as to who, exactly, authored a number of the key
memos; one of the most noteworthy features of some of the key memos is
continuing ambiguity and conflicting reports as to their exact authorship. Note that
this study will generally follow the author designations provided on
torturingdemocracy.org.
Conceptions of Power

Addington and Cheney had worked together since at least 1987, when Addington served as Counsel to the Congressional Committees Investigating the Iran-Contra Affair, of which Cheney was a member. As Counsel, Addington provided the research for The Minority Report of the Committees; Cheney was one of its seven co-authors. The Minority Report, which among other things accused Congress of “aggrandizing” itself and claiming foreign policy powers it did not have, provided a sharply dissenting opinion from the scathingly critical Majority Report. It is possible that Cheney and Addington chafed at the restrictions laid out in the report because of a genuinely held view that power indeed is “the absence of constraint” (Goldsmith 126), and that, simply put, they believed that a “weakened” president, i.e. one whose powers are limited in any way, was not only illegal but dangerous to national security. Interestingly, however, the language used in the Majority Report is intriguingly similar to later eyewitness characterizations of Cheney and Addington:

“A small group of senior officials believed that they alone knew what was right” . . . These men “viewed knowledge of their actions by others in the Government as a threat to their objectives.”40 The Majority Report believed that the Iran-Contra policies resulted from “secrecy, deception, and disdain for the law,” as well as “disrespect for Congress’ efforts to perform its Constitutional oversight role in foreign policy.”31 (Goldsmith 87)
Schiffren, for example, describes Addington as strikingly strident. “He’d sit, listen, and then say, ‘No, that’s not right.’ He was particularly doctrinaire and ideological. He didn’t recognize the wisdom of the other lawyers. He was always right. He didn’t listen. He knew the answers.” (qtd in Mayer, *Dark 64*)

It is highly possible that Cheney and/or Addington were truly primarily concerned about violations to the Constitution. It is also possible that they were affronted by congressional limits on presidential power not merely out of ideological conviction but above all because they felt personally affected by the caustic criticisms articulated in the Majority Report, although perhaps they were simply unable to recognize themselves in the mirror. In any case, the two subscribed to, and based policy decisions on, the theory that, to quote OLC lawyer Steven Bradbury, “the president is always right” (qtd in Milbank, “Bush’s Way” 1). Or as blogger Jan Frel described the theory of the unitary executive, “It’s not too far from King of Everything, really” (“Unitary”). Arguably, the Nixonian argument that “if the president does it, it’s not illegal” had simply found a new incarnation. Jane Mayer pinpoints a further problem with using this principle to shape policy in the Bush administration—of whom, she notes, surprisingly few top officials possessed law degrees:

None of this would have been of more than passing interest except that this insular, unelected, self-reinforcing group, with virtually no experience in law enforcement, military service, counterterrorism, or
the Muslim world, was in position to make many of the most fateful legal decisions in the post-9/11 era. (Mayer, *Dark 66*)

Not only were they in that powerful position, but the key players had come into it with their agenda already laid out.

**Ideological Provenance of the Memos**

The neoconservative belief in the unitary executive, at least as it took hold in the Bush administration, can be traced back to a slew of defining, kindred moments in recent history: Vietnam, the Watergate scandal under Nixon, the Iran-Contra Affair under Reagan, a series of scandals over secret CIA overreach. As traumatic as these events were for the national psyche, Watergate and Iran-Contra in particular were arguably equally traumatic for, among others, Dick Cheney and David Addington—albeit for different reasons than for most of the rest of the country. If a majority interpreted Watergate and Iran-Contra as signs of the dangers of unfettered presidential power, Cheney and Addington (among others, including Karl Rove) came away having learned exactly the opposite lesson. Cheney blamed the entire Iran-Contra scandal on attempts by Congress to constrain presidential power in the first place; if the president couldn’t act as he saw fit, then subterfuge, secrecy, and manipulation were the logical consequences. According to Cheney, the scandals had only occurred because the executive had been stripped of powers that should rightfully be his by a nervous and overstepping legislative branch.

In essence, as Mayer describes it, many of the major players who had seen
themselves on the losing side during Watergate were still reeling from the attempts of other branches of government and watchdog organizations to reign in Presidential power when 9/11 occurred; not only were those players reliving the battle, it seemed, but they continued to battle for a different outcome—and now, many alleged, with more justification than ever. As Jane Harmon, ranking Democrat on the House Intelligence Committee, put it, Cheney and Addington had come “to believe that they were stuck in a time warp, still fighting Watergate” (Mayer, Dark 58). Fear, the desire to push back, and rebellion against the constraints placed on the Presidency by Congress after the abuses of power by Nixon and Reagan formed the backdrop for the presidency of Bush II. The stated goal, even before 9/11, was to restore the executive branch to its former glory. Whether that “glory” reflected a state of the presidency that had ever been past reality, however, or whether it was the product of the nostalgic imaginations of thwarted and disgruntled bureaucrats, Dick Cheney and David Addington chief among them, is very much up for debate. Arguably, Addington had a valid point in maintaining that “presidential power was coextensive with presidential responsibility” (Goldsmith 79). If the President would be blamed for the next attack, as surely he would, he needed every power at his disposal to prevent it—even if the official Bush Administration’s version of the events of 9/11 as something no one could have foreseen, as coming “out of a clear blue sky,” immediately became the reigning narrative—a narrative that was never, like so much else about the attacks, seriously questioned. Thus not one government official or group of officials under Bush were ever “held accountable,” i.e. ever
deemed responsible in any way, sanctioned, or punished. Further, a thorough discussion of the root causes of the attacks, as well as how to best prevent further attacks, never took place. The initial reigning assumptions, the Good vs. Evil meme chief among them, were never questioned, at least not in a way that dominated the national discourse.

One thing, in any case, is clear; the phrase *unitary executive* signifies a key concept found throughout the torture memos, one espoused by neo-conservatives such as Federalist society member and Supreme Court Justice Samuel Alito long before 9/11, a further example of the intertextuality of pre- and post-9/11 narratives such as Dunmire and Lazar and Lazar have identified. Whoever penned each of the actual memos, Addington’s influence in developing the legal justification for this concept should not be underestimated, even when it required the legal stamp of the OLC lawyers. For example, although the principle memo (called by various sources “The Torture Memo” or “The Bybee Memo”), Doc 22, was published August 1, 2002, under Jay Bybee’s signature, and John Yoo has admitted to its actual authorship, Addington, as Milbank writes, undoubtedly also functioned as “a principle author” (“Cheney’s Shadow” A21). *Washington Post* staff writers Gellman and Becker report that in an interview, Yoo revealed “that Addington, as well as Gonzales and deputy White House counsel Timothy E. Flanigan, contributed to the analysis” (Gellman and Becker). Characterizing the relationship between the two men in an article discussing the appearance of both Yoo and Addington before the

---

2 As Mayer points out, there may be good reasons for this. To blame a single government official or small group for an event that surely had multiple causes and manifold contributing factors would be scapegoating at its worst, and even for those who had some culpability, likely too horrific to bear.
House Judiciary Committee, former Washington Post columnist Dan Froomkin wrote: “There’s not much point in asking Yoo anything—why waste time with Charlie McCarthy when Edgar Bergen is sitting right next to him?” (1). Goldsmith describes Yoo as speaking of David Addington in “reverential tones” (27) and telling frequent stories of him “slaying the legal wimps . . . who stood as an obstacle to the President’s aggressive anti-terrorism policies” (27). Goldsmith reports that there were tensions in the Justice Department because Yoo often bypassed his official boss Ashcroft, who was not part of the inner circle, to work with Gonzales, who was. In any case, Yoo proved invaluable in enacting the agenda set by Cheney and Addington; he was deemed by Goldsmith and others to be “a ‘godsend’” (qtd in Rosen) to White House officials—who, as mentioned above, were clearly keenly aware that what they were advocating could conceivably lead to future prosecutions for war crimes.

Like Addington, according to Mayer and others, Yoo was ideologically driven. The function he performed for the OLC thus became less about fulfilling the stated historical mission of the office—that is, to provide a legal framework of balance to otherwise unchecked executive power, or as Gonzales put it, “to keep the president out of legal trouble” (Goldsmith 27)—and more about (eagerly) doing the bidding of his superiors. Ultimately, Mayer writes,

Yoo left early mentors feeling deceived about the depth and extremism of his views—he had learned apparently to mask them behind moderate-sounding language—but in time it became clear that
he acted less as a lawyer judiciously guiding the government than as a single-minded advocate for a cause. (Mayer, Dark 65)

As will be seen, Yoo’s talent for masking extremist views behind moderate-sounding language played an key role in his authorship of the memos. Just how extreme the views were that shaped the memos he wrote is perhaps nowhere illustrated more clearly than in his oft-quoted exchange during a debate with Notre Dame professor and human rights scholar Doug Cassell:

**Cassel:** If the President deems that he’s got to torture somebody, including by crushing the testicles of the person’s child, there is no law that can stop him?

**Yoo:** No treaty.

**Cassel:** Also no law by Congress. That is what you wrote in the August 2002 memo.

**Yoo:** I think it depends on why the President thinks he needs to do that. (qtd in Watts)

Yoo’s infamous statement has come to be seen, at least in some circles, as the quintessential illustration of extreme neoconservative views on unfettered presidential power—the unconstrained agency the memos seek to enact.

If unconstrained agency was what the principle actors wanted, Yoo was only too eager to provide it. Mayer describes the August, 2002, memo, Doc 22, as “bursting with creative though idiosyncratic interpretation, and written impressively fast . . . vintage John Yoo” (Dark 65). Yoo gave nervous bureaucrats
what Goldsmith calls the service of dispensing “get-out-of-jail-free cards” (Goldsmith 97) that made him very popular with the executive branch. Having Yoo in the OLC was a “political bonanza. It was like having a personal friend who could write medical prescriptions. With Yoo’s authority to issue official opinions, their views could be transformed into the law of the land” (Mayer, Dark 65-66).

Incredibly, as a colleague of Yoo’s told Mayer, John Yoo and David Addington ended up “almost running the war on terror on their own” (Dark 66). Key to prosecuting the war they wanted was the claim that the war-time powers of the president could not be constrained. Another key purpose of the memos, therefore, was to circumvent, and legitimate the circumvention of, laws passed by Congress with which Cheney, Addington, and other key officials in the Bush administration vehemently disagreed.

The initial purpose, of course, for many reasons, was to set the scene by declaring the situation a war.

**To Protect and Defend**

While many of Addington’s colleagues were purportedly “astonished by his radical absolutism” (Mayer, Dark 51)—one administration lawyer recalls asking himself during a meeting with Addington, “How did a lunatic like this end up running the country?” (qtd in Mayer, Dark 51)—Addington’s friends, supporters, and admirers describe him as a man they are happy to have on their side. Cheney’s former press secretary, Juleanna Glover, states that “anyone who worked with him
knew [that] he was someone who, in a knife fight, you wanted covering your back” (qtd in Mayer, *Dark* 53). (Mayer, interestingly, points out the prevalence of knife metaphors in descriptions of Addington.) Bradford Berenson, a deputy in the White House Counsel’s Office, likened Addington to “the Marines. No better friend—no worse enemy” (qtd in Mayer, *Dark* 53). Perhaps the comment that most succinctly depicts Addington’s fierce dedication to his cause, however, is from Republican lawyer Steve Berry, who had worked with Addington as legal counsel to the House Intelligence Committee back in 1983: “For Dave protecting America isn’t just a virtue. It’s a personal mission. I feel safer just knowing he’s where he is” (qtd in Mayer, *Dark* 55). In this setting, fear was thus integrally connected to purpose; the fear of a formidable and unpredictable enemy must have been exponentially worse for those working in the government who were charged with the redoubtable task of ensuring there would be no further attacks.

There is no doubt that one of the core purposes behind the writing of the memos, arguably the core issue, was safety—particularly in the raw, stunned days immediately after the 9/11 attacks. Clearly, for most of the world, 9/11 caused varying and multiple degrees of trauma: personally, nationally, professionally. Berenson described the mood in government circles this way:

At a moment like that, there’s an intense focus of responsibility and accountability on the person of the President. It’s a responsibility to protect the nation. It’s visceral. You feel the President owes all of his power to preventing another attack. (qtd in Mayer, *Dark* 49)
Goldsmith speaks of the “profound anxieties that pervaded the Bush administration” (71) after 9/11; one of his goals in writing the book, in fact, is to try to “give a sympathetic account of the unusual psychological pressures on executive branch officials who are personally responsible for preventing hard-to-fathom terrorist attacks that could kill thousands” (12). This, then, provides not only purpose but sets the scene; the memos emerged from a climate of widespread fear that was vastly intensified within various branches of government by round-the-clock intelligence such as the daily threat matrix report from the Counter-Terrorism Center, or CTC. The threat matrix, often dozens of pages long, is a compilation and analysis of billions of phone calls, emails, messages from informants, satellite photos, etc., from around the globe that might provide information about any possible attack, conventional or involving “catastrophic weapons of mass destruction” (72), against the U.S. or its allies. The threat matrix, by many accounts, created a pervasive sense of fear that was arguably close to paranoia. Goldsmith warns it would be “hard to overstate the impact [of] . . . the incessant waves” (72) of possible threats, whether credible or based on false accusations, that clearly affected the judgment of the people reading them every day.

According to Goldsmith, then-CIA Director George Tenet gives an accurate description of the attitude of those who were regularly bombarded with the reports:

‘You simply could not sit where I did and read what passed across my desk on a daily basis and be anything other than scared to death . . .
You could drive yourself crazy believing all or even half of what was in’ the threat matrix. (qtd in Goldsmith 72)

Then Head of the Office of Intelligence Policy and Review, Jim Baker, also speaks of growing paranoia and of “suffer[ing] from sensory overload” (72); former Deputy Attorney General Jim Comey, whom Goldsmith describes as “the most levelheaded person I knew in government” (72), states that relentlessly imagining ever more severe threats eventually "becomes an obsession" (72). Steve Berry also acknowledges the psychological toll the reports take on their readers, describing a kind of “bunker mentality that set in among some of the national-security-policy officials after 9/11” (55). Part of the problem, according to Baker, is the hidden nature of the enemy. Roosevelt, for example, had charts and maps, flags and pins, that showed enemy formations and troop movements, if often partially or inaccurately. Baker likens this new kind of war, terrorism, which elevated the “chronic obscurity” (73) of war to new heights, to having to play a soccer game in which the ball is invisible, the opposing team is invisible, the sidelines are shifting and blurred, and the rules are constantly changing. Further, the goalie has one chance only to stop the goal, or the game is lost.

One of the core questions around which the discourse of terror continually swirls concerns the nature and gravity of the terrorist threat. The central disagreement stems from a clash between (at least) two competing versions of reality. In one version, terrorism is a real but not an overriding threat; responses to terror must be balanced with other considerations, for example of law, ethics, and
the protection of civil and human rights. In that world, 9/11 was, without a doubt, horrific and devastating, but not a foundational life-altering occurrence. The tectonic shifts that occurred afterwards—including the focus of this dissertation, the legitimation of torture—happened primarily in the response to 9/11, rather than as an inevitable and unavoidable result of the event itself; there would have been any number of other possible responses with different outcomes, some perhaps less costly in blood and treasure. This view, in other words, challenges the meme that 9/11 changed everything. Certainly it did not change core constitutional values or key elements of our much-touted “way of life,” at least not until we changed things ourselves. That is, the ensuing changes resulted primarily from our actions, not those of the terrorists.

In the other version, terrorism is a threat that trumps almost all other concerns. The first prong of this worldview is what Ron Suskind calls the Cheney Doctrine: “Even if there’s just a one percent chance of the unimaginable coming due, act as if it is a certainty” (Suskind 62), as Cheney reportedly told Condoleeza Rice and George Tenet in a November 2001 meeting. Protecting the American people from another terrorist attack becomes the primary stated objective, which takes precedence above all else. The word protect, which lies at the heart of the discourse, becomes a magic word that opens any door, justifies any action. One direct result of this doctrine, as Suskind points out, is that material reality—human actions, responses—becomes divorced from evidence and analysis. In essence, facts no
longer matter. Cheney's strategy, Suskind also notes, suited George W. Bush's analysis-averse, gut-reaction style of decision-making particularly well.

The big question, of course, is not only which version of reality is more accurate—perhaps envisioning accuracy as moving along a spectrum, and not fixed or a simple binary—but what underlying motivations, justifications, assumptions, etc., inform each. Are proponents of the first interpretation simply in denial, out of fear or other reasons? Are proponents of the second version seizing upon terrorism as a justification for the larger goal of exercising greater power in the world? Goldsmith, for one, a first-hand participant in an administration that espoused version II, disagrees with Suskind's assessment of the administration's motives. As he sees it, although Suskind rightly

captures the attitude that pervades the government, he

misunderstands its source and significance. It does not result from idiosyncratic Bush and Cheney marching orders. Its source lies deeper, and is not unique to this presidency. Rather it flows from the same combination of factors that caused Roosevelt to take superaggressive actions in the Japanese internment to meet a threat of subversives that pales in comparison to the post-9/11 threat. The 9/11 directive to John Ashcroft and the one percent doctrine are natural responses by an executive branch entirely responsible for protecting the safety of Americans but largely in the dark about where or how the next terrorist attack will occur. (Goldsmith 75)
As Goldsmith sees it, there is only one legitimate explanation for the administration’s actions in the post-9/11 world. In other words, his is also an assumption of benevolence; they may have been misguided, but their intentions were good.

The second prong of this worldview can be best summed up in another post-9/11 meme: *whatever it takes.* On one level, the compulsion to do anything at all to avoid another attack was not only understandable and justifiable—it was laudable. Goldsmith explains: “The President had to do what he had to do to protect the country. And the lawyers had to find someway to make what he did legal” (81).

Addington’s standard question, whenever some official or other seemed to be ‘going soft,’ was, “Are you telling me that the Constitution doesn’t empower the President to do what he thinks is necessary to prevent an attack?” (qtd in Goldsmith 78).

Certainly all the post-attack second-guessing, blaming, and “finger-wagging” (Goldsmith 74), including from the 9/11 Commission (despite the feeling of many that no one in the Bush administration, the CIA, or the FBI was ever truly held accountable for allowing the attack to occur), created a clear imperative, one the administration took very seriously: *Don’t let this happen again.* Goldsmith’s self-described attempts to interpret administration officials as charitably as possible are based on what I will call “the defense defense”—the presumption that the desire to protect and defend was both the primary underlying motivation, as well as the justification, for every or nearly every decision Bush administration officials made.

With agency, then—the power and ability to act—came burdensome responsibility.
Indisputably, much of what followed 9/11 was done in the interest of national security and out of a sincere desire to protect “the American people” (another contestable phrase) by officials who likely, as Goldsmith characterizes them, “risk their lives to protect the nation” (69). What remains in dispute, however, is whether to protect and defend was the sole motivation—or at times even the primary one—behind either Bush administration decisions and policies, or the actions of people, government and military, who carried out those policies. Presumably, other motives, other purposes, were in play. For one thing, administration officials, openly or privately, must have been mortified by the failure to prevent 9/11; they would be understandably determined not to let it happen again, even without the Commission’s directive, as a matter of professional pride. Bush administration officials, therefore, arguably had at least two other strong, primary reasons (plus, conceivably, a host of other reasons, including economic, psychological, and ideological) for the push to seize executive power after 9/11. Beyond the above-mentioned post-Watergate drive to “restore” the presidency to its former (mythical?) glory, one was the desire to save and restore face, and the other was to exact revenge.

As interesting as the discourse of the war on terror is, of equal interest is what is missing. There is little overt acknowledgment, for example—unsurprisingly, if one assumes here a hypermasculine construction of national identity—of the great embarrassment that 9/11 must have caused the Bush Administration. Goldsmith alludes to it only indirectly. Tracing parallels between the aftermaths of
Pearl Harbor and 9/11, Goldsmith uses a description from Frances Biddle to explain the government’s response: “The military ‘had not forgotten that . . . they had been caught with their pants down at Pearl Harbor’ . . . and they ‘did not propose to be put in that awkward position again, or to take any chances’” (48). Further, no one took clear responsibility for the grave mistakes that were made, even though, for example, in *Spying Blind: The CIA, the FBI, and the Origins of 9/11*, Amy B. Zegart traces “more than 20 specific instances where the CIA or the FBI missed chances to stop the 9/11 attacks” (Dickey). Mayer also details what FBI agent Jack Cloonan called the “ordinary incompetence” of individuals, the everyday mistakes and human failures, that ultimately allowed the attacks to occur. Tom Kean, the Republican chair of the 9/11 Commission, informed the *New York Times* that 9/11 “was not something that had to happen” (qtd in Goldsmith 74), but there would be no apology from any public official until Bush’s counterterrorism chief, Richard Clarke, told the “loved ones of the victims” during the 9/11 hearings that “your government failed you, those entrusted with protecting you failed you and I failed you . . . And for that failure, I would ask . . . for your understanding and your forgiveness” (Suskind 306). A much more immediate and prevalent response from public officials was the careful linguistic construction of their collective identity as a resolute, determined force that, above all, was in control of the situation. The hypermasculinity prevalent in the discourse after 9/11, the need of the administration to present themselves as strong and powerful after being “caught with their pants down” served to compensate for the weaknesses that the attacks
clearly exposed, but that were never fully publicly acknowledged. Instead, the
deflection of responsibility, in the aftermath, was swift and absolute.

Understandably, the humiliation undoubtedly felt by government officials
after 9/11 quickly flipped into anger; as Michael Rolince, head of the International
Terrorism Operations Section of the FBI, put it, the mood was the “rule-of-law be
damned” (Mayer, Dark 34). Also understandable was the desire for revenge. Cofer
Black, head of the CTC, articulated what many were arguably feeling:

I don’t want Bin Laden and his thugs captured. I want them dead . . .
They must be killed. I want to see photos of their heads on pikes. I
want Bin Laden’s head shipped back in a box filled with dry ice. (qtd
in Mayer, Dark 42)

Bush described the emotional state of the nation in a speech on Sept 21, 2001 as
follows:

Tonight we are a country awakened to danger and called to defend
freedom. Our grief has turned to anger, and anger to resolution.
Whether we bring our enemies to justice, or bring justice to our
enemies, justice will be done. (qtd in Mayer , Dark 48)

During later internal, high-level discussions at the CIA about how far to go in
employing harsh methods of interrogation, one official reportedly told Newsweek
that many officials thought that “these people were just scum and they wanted to
waterboard them everyday forever” (Dickey). In a revealing passage, Mayer details
the experience of a CIA officer John Kiriakou, who on the advice of his mentor, which
included warnings of the “slippery slope” of harsh interrogations, turned down the opportunity to become a special interrogator and eventually left the Agency. During his stint in the counterterrorism unit, Kiriakou admits to supporting “the harshest of treatment for [detainee] Zubayda. ‘I was so angry,’ he said, acknowledging an emotional current underlying the rush toward torture that is rarely admitted” (qtd in Mayer, Dark 142). Alternative motivations for actions such as bounties, roundups, renditions, harsh interrogations, torture, etc., however, often remained tacit. In the larger picture,

what was missing [in the Bush administration] was a discussion of policy—not just what was legal, but what was moral, ethical, right, and smart to do. This discussion rarely if ever happened. (Mayer, Dark 55)

Neither did the discussion at the other end of the spectrum, i.e. what might be the most dangerous, immoral, unethical thing to do, and how to avoid it. Missing was any acknowledgment that granting human beings raw power over others could easily feed and enable their darkest impulses, from the need to lash out to, in isolated cases, taking sadistic pleasure—one of the most extreme expressions of power—in meting out retribution and punishment. Any such impulse, similar to the will to power, remained masked behind the collocates protect and defend.
**Linguistic and semantic masking**

In the discourse of the war on terror, as in other discourses, the word *justice* closely aligns with the *good versus evil* frame from the domain of religion (in this case clearly a discourse of wrath and vengeance, however, not one of forgiveness) and serves as a linguistic mask for the formation *revenge,* just as *enhanced interrogation* serves as a linguistic mask for *torture.* The formations *protect* and *justice,* also from the domain of religion (like Bush’s oft-used word *prevail*), dominated the discourse of terror from the beginning. They formed an integral part of the Bush administration’s post-9/11 identity construction—an ironic reversal in light of the reality that had just occurred, i.e. that under their watch, terrorists had killed more American civilians than ever before in history. *Protect and defend* and *justice,* linked to the *good versus evil* narrative that includes the formations *punishment, guilt,* and *innocence,* exemplify strategies of the ideological square frequently employed in the discourse of the war on terror (WOT). Such strategies serve to construct the Evil Other and thus make all further discussion moot.

The discourse of the WOT that prevailed in the administration after 9/11 was framed with language that supported the terror-trumps-all view, borrowing in particular from the linguistic domain of *good versus evil,* and that also reflected the hyperbolic nature of the frame. Michael Scheuer, for example, first chief of the CIA’s Bin Laden unit, was one of many who “saw the terrorist threat in apocalyptic terms” (Mayer, *Dark* 35). Similarly, Mayer characterizes “doomsday expert” (9) Cheney as seeing “the terrorist threat in such catastrophic terms that his end, saving America
from possible extinction, justified virtually any means” (7). Lawrence Wilkerson, Powell’s former Chief of Staff, said that, for Cheney,

American security was paramount to everything else. He thought that perfect security was achievable. I can't fault the man for wanting to keep America safe. But he was willing to corrupt the whole country to save it. (Mayer, *Dark 7*)

Goldsmith, too, describes an infamous exchange with Addington during his first months on the job. When he insisted to Addington and Gonzales that Iraqi terrorists had a right to legal protections—over Philbin’s warnings that Addington and Gonzales were “going to be really mad . . . they've never been told no” (41)—Addington reportedly “lost it” (75). He told Goldsmith disgustedly, “If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands” (qtd in Goldsmith 71).

Ironically, Addington’s utterance projected a body count onto a possible attack that was far more likely to stem from an act of war, such as the U.S. invasion of Iraq, than from an act of terror.3 This does not minimize the horror and trauma of September 11th, in which approximately 3,000 were killed, but it is an interesting numerical reversal that arguably corresponds to remote possibility, at best, and serves to elide important realities in the war on terror as well as the fallacies,

---

3 One hundred thousand is, in fact, roughly the number of Iraqi civilians who have died since the invasion in 2003 over a period of almost seven and a half years, according to the website *iraqbodycount.org*, which tallies only documented deaths. The Iraq Body Count puts the number as of August 5, 2010, between 97,172 and 106,047. Of course, Addington could not have known the war would reach these casualty levels half a year after the invasion began, which was roughly when the exchange with Goldsmith took place. Important is that the very real possibility of high casualties in a campaign of “shock and awe” seems never to have been a central, deciding factor in the discussion.
exaggerations, and contradictions inherent in the *good versus evil* construction. It is also sharply revealing of Addington’s perception of threat and his location squarely in the terror-trumps-all frame. A core characteristic of that frame is a highly selective awareness of the ongoing victimization of others who may be deemed innocent, perhaps, but who are ultimately unimportant—the “collateral damage” of counter-terror that mirrors the intentional damage of terror. The purported intent is different—the random dead are a by-product, not necessarily a desired end—but the result is similar and the numbers in many cases are ultimately far greater. Further, both the forces of terror and those of counter-terror actually target those in power on the random bodies of innocent bystanders, whether intentionally or randomly.

Rumsfeld’s campaign of “shock and awe” is another example of the indifference, in this frame, to the lives and experiences of others as a result of the U.S.’s militaristic actions—and also, arguably, clear evidence of a celebration of raw military power such as is often found in hypermasculine discourses of physical prowess and military power. A related narrative constructs the Evil Other, i.e. Islamic terrorists, as barbaric, and therefore perhaps not fully human, because they behead—as though the dividing line between good and evil is whether one kills another by chopping off his head or uses other, less “primitive” means. Perhaps the most central assumption in the discourse of counterterrorism (and not only this discourse), and of the terror-trumps-all frame, is the unstated presumption that not all human lives—even “innocent” lives—are of equal value or deserving of equal
protection. Here, just as in the frame that justifies terror in the first place, the suffering of some—the in-group, however it is defined—is foregrounded, while that of others, lesser or out-groups, is ignored or even celebrated.

The final and perhaps the most important consideration in seeking to uncover some of the underlying motivations and assumptions behind the language of key officials in the Bush administration is that there are a number of indications that these people did, indeed, have reasons beyond the desire to prevent another attack for doing what they did and making the decisions that they made. We will likely never know with certainty why the Bush administration invaded Iraq; parsing through the tangle of reasons given at various times and unraveling the complex chains of events that preceded George W. Bush and Cheney’s rise to power is certainly beyond the scope of this dissertation. It has been amply demonstrated that key officials knowingly and publicly used false intelligence to build the case for invading Iraq. Further, not everyone who worked in the administration interpreted the actions of its officials as sympathetically as Jack Goldsmith attempts to do, or ascribes motives to those actions that are ultimately benevolent. Lawrence Wilkerson, for example, claims that when

the administration authorized harsh interrogation in April and May of 2002—well before the Justice Department had rendered any legal opinion—its principle priority for intelligence was not aimed at pre-empting another terrorist attack on the U.S. but discovering a smoking gun linking Iraq and Al-Qaeda. (“truth about”)
So fervent was the desire to create that link, according to Wilkerson, that when the interrogation team waterboarding one detainee, Ibn a-Shaykh al-Libi, reported to Cheney’s office that he “‘was compliant’ (meaning the team recommended no more torture)” (“truth about”), the office ordered them to continue until he gave them the information they wanted, i.e. until he “revealed” links between Baghdad and Al-Qaeda, which he ultimately did. Al-Libi, one of the CIA’s “ghost detainees” who had been in custody since 2001 and who was then being held in Egypt, was not only waterboarded, but according to Michael Isikoff and David Corn in *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War*, he was also given a “mock burial,” i.e. buried alive in a box that was 20” high for 17 hours, then knocked to the floor and beaten for another 15 minutes before he was given one last chance to “confess.” Although a Defense Intelligence Agency report had concluded in February 2002 that al-Libi was lying, and Dan Coleman of the FBI (which had been pulled off al-Libi’s case when the CIA — and the administration — decided to render him to torture in Egypt) had no doubt that the emir of an Afghan training camp would know nothing about Iraq, (Worthington, “al-Libi”)

Bush nevertheless used the statements al-Libi gave under torture in an October 7, 2002 speech, “just days before Congress voted on a resolution authorizing the President to go to war against Iraq” (Worthington, “al-Libi”). Infamously, Colin

---

4 One of dozens who “vanished into the secret detention system run by the Bush administration” (Finn), according to the *Washington Post* and other sources.
Powell used the same false claims that Iraq was training members of Al-Qaeda in the making and use of bombs, poisons, and deadly gases in his speech before the United Nations in February 2003.

The *Washington Post* later described al-Libi as the detainee who “provided bogus information” and “gave false Iraq data” (Finn); Reuters identified him as the man who gave “fabricated testimony” ("Libya Reports Suicide"); even journalist Andy Worthington, who meticulously details the treatment that compelled al-Libi to make those statements (as well as his difficulty in coming up with a story that would placate his abusers), also refers to them as "false allegations" (Worthington, “al-Libi”). Prevailing characterizations of the incident, in other words, place the responsibility for the fabrications that helped lead to war solely with the man who was tortured until he gave officials the information they sought. Al-Libi ultimately disappeared into the CIA’s secret prison in 2006 because, speculates Tom Malinowski, head of the Washington office of Human Rights Watch, “he was such an embarrassment to the Bush administration” (Finn). Interestingly, al-Libi died two weeks after Human Rights Watch had finally located him in a Libyan prison, three years later, and requested an interview—a request he angrily refused, asking where they had been when he was being tortured. Newspaper accounts of the cause of death range from “apparent suicide” to tuberculosis, a disease that—incidentally or not—some accounts have linked to waterboarding.
Others have confirmed that torture served other, more sinister purposes in the Bush administration's war on terror. An April 21, 2009 McClatchy report states that

the Bush administration applied relentless pressure on interrogators to use harsh methods on detainees in part to find evidence of cooperation between ad-Qaeda and the late Iraqi dictator Saddam Hussein's regime according to a former senior U.S. intelligence official and a former Army psychiatrist. (Landay)

These are only a few examples; a complete list of the body of evidence that indicates that the Bush administration used torture to manufacture evidence they needed to achieve their goals is beyond the scope of this dissertation. There is an inherent logic, furthermore, to that version of events; torture—as many career interrogators have repeatedly pointed out—is not a reliable means for obtaining general information one doesn't have, but it is a highly reliable means for creating specific information one wants to get. It is a particularly effective method for coercing subjects into saying what they think one wants to hear. Although the CIA destroyed countless interrogation tapes, ensuring that we will never know exactly what happened during thousands of hours of interrogations, and although the "ticking time bomb" narrative (more on that below) has been used repeatedly by Cheney and others to justify doing whatever it takes to protect and defend the American people, torturing prisoners likely served many other purposes, including restoring a sense of power and control, exacting revenge and punishment, and creating the
intelligence desired to justify actions they could never otherwise have undertaken. Cheney came into the White House, as he told Bush, determined to "leave the office stronger than they found it" (Mayer, *Dark 7*), and surrounded himself with like-minded individuals who would assist him in achieving that end. In short, a wealth of evidence points to the Bush administration having committed egregious abuses of power, overstepping the bounds of agency vested in them, for purposes that can be called highly questionable, and further that they laid a shroud of secrecy over the creation of the legal sanctions that allowed them to do it. While all of the above have been amply documented elsewhere, subsequent chapters of this dissertation examine the language that not only permitted them to occur, but brought them into being.

It is possible to imagine radically different responses to the events of 9/11 that would point to fundamentally different motivations and goals—other acts, other purposes, other ways to set the scene, and alternative uses of agency. Another administration might have been mindful that a post-9/11 world was fraught with numerous dangers, many of which instead remained unacknowledged. In such a moment, the need to retaliate would be hard to withstand and the potential for abuses of power would be great. Arguably, 9/11 was a moment that called for greater restraint, not less. Frances Biddle, in a speech to the Library of Congress a week after Pearl Harbor, gave what ACLU Director Roger Baldwin has called "the most eloquent and practical words of any public man about civil rights in wartime" (qtd in Goldsmith 44):
The war would test whether our freedoms could endure... And although we had fought wars before, and our personal freedoms had survived, there had been periods of gross abuse, when hysteria and fear and hate ran high, and minorities were unlawfully and cruelly abused. Every man who cares about freedom must fight for it for the other man with whom he disagrees. (qtd in Goldsmith 44)

Even knowing what he knew, however, Biddle—like his less mindful successors—was ultimately unable to withstand the pressure that would spiral his own historical moment into a fresh cycle of “gross abuse.”
CHAPTER FIVE:
TORTURE AND THE LAW

The discourse of torture, a subset of the discourse of the WOT that shares many of its core characteristics, is, paradoxically, a discourse fraught with both ambiguities and presumptive absolutes. Lazar, using Foucault’s definition, sees discourse as “comprised of a field of related statements—revealed in a concrete context across time and space—which produces a particular order of reality” (“New World” 224). Torturing and taking life are perhaps the two purest forms of power one human being can exercise over another; in order to better understand how this kind of power was enacted in recent U.S. law, shifting one order of reality into one that seems unrecognizable, it is important first to examine the language of law that has traditionally been used to ban torture. This chapter will seek to further situate the Torture Memos within their socio-historical context.

Georgetown law professor David Cole suggests that almost nothing is absolute in law; nearly every term, every concept, every act is open to debate, interpretation, and contextual analysis—except one: the universal ban on torture. As Cole puts it:
The law recognizes few absolutes. Virtually all of the law’s highest principles acknowledge exceptions. Thou shalt not kill—except in self-defense, or if the target is a military opponent during wartime, or, in the United States, if a jury issues a death sentence after a fair trial . . .

Torture is different. International and U.S. law provide that torture is never justifiable, under any circumstances, for any reason, in war or peace. (6-7)

Acts of torture have been prohibited by both domestic and international law for longer than fifty years, and indeed the view that torture is unacceptable has been part of the fabric of the country since its founding. George Washington, as general, decreed that any soldier “so base and infamous as to injure” a prisoner should be severely punished, with death if necessary, “for by such conduct they bring shame, disgrace and ruin to themselves and their country” (qtd in Horton, “Two Georges”).

The Revolutionary army was to treat prisoners with humanity, unlike the British; we would not, Washington determined, follow their brutal example. As human rights attorney Scott Horton explains it, “Washington sought to shame his British adversaries, and to demonstrate the moral superiority of the American cause” (“Two Georges”). The precedent was set; we would lead by, as John Quincy Adams put it, “the benignant sympathy of our example” (Adams), a policy that would continue through the country’s most difficult hours. As Horton writes, under longstanding American military tradition, set down from 1863, “military necessity” was defined always to exclude torture. As President Lincoln had
ordered: “Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture. (Horton, “Shogunate”)

Until 9/11 the U.S., at least officially, subscribed to and abided by those laws.

For the first time in history, then, the Torture Memos brought about radical changes in official, if secret, U.S. policy. These changes reflected emerging ideological shifts that helped subtly undermine the common sense narrative We do not torture. Officially, the narrative stood; on numerous occasions, both Bush and Cheney made public statements proclaiming that the U.S. did not engage in torture. In a Jan. 25, 2005 interview, for example, Bush assured the New York Times that torture was “never acceptable” and that the U.S. also did not “hand over people to countries that do torture” (Bumiller, Sanger and Stevenson 2). In a particularly cynical moment on June 26, 2003, the United Nations International Day in Support of Victims of Torture, Bush released a statement proclaiming that the U.S. is

“committed to the world-wide elimination of torture and [is] leading this fight by example.” Bush called on all nations to join the U.S. in “prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent cruel and unusual punishment.” (Human Rights Watch, “Timeline”)

Such public statements turned out to be demonstrably false.
The absolute ban on torture in the "civilized" world, whatever the practice around the globe may be at any given moment, has been clearly enacted in law. Torture is not only prohibited under both international and domestic law, but the U.S. is also prohibited from cooperating with or enabling countries that torture or treat prisoners in cruel, degrading or inhuman ways, such as happened when the U.S. worked with the Egyptian authorities during the “interrogation” of Ibn a-Shaykh al-Libi. As Jane Mayer explains,

in 1998, Congress passed legislation declaring that it is “the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” (“Outsourcing” 1)

Other key points in U.S. legislation include the ban on cruel and unusual punishment in the Eighth Amendment and the ban on depriving any person (not merely any “citizen”) of life, liberty or property without due process of law in the Fifth and Fourteenth amendments. The Writ of Habeus Corpus in Art. I Sec. 9 of the Constitution, which states that persons cannot be detained without just cause, is an ancient Anglo-Saxon law that predates the Magna Carta—that is, it was conceived of and articulated in law before 1215 A.D. (Robertson). Such laws are not uniquely American, but are arguably part of the long, slow progression of civilization toward the recognition of inviolable basic human rights.
In the U.S., the War Crimes Act of 1996 made it a felony to violate the restrictions of the Geneva Conventions, which categorically forbid not only torture but “the use of ‘violence,’ ‘cruel treatment’ or ‘humiliating and degrading treatment’ against a detainee ‘at any time and in any place whatsoever’” (Gellman and Becker).

Article 18 Section 2340 of the U.S. Code defines torture as follows:

Table 5.1 Article 18 Section 2340 of the U.S. Code: the definition of torture

<table>
<thead>
<tr>
<th>§ 2340. Definitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>As used in this chapter—</td>
</tr>
<tr>
<td>(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;</td>
</tr>
<tr>
<td>(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—</td>
</tr>
<tr>
<td>(A) the intentional infliction or threatened infliction of severe physical pain or suffering;</td>
</tr>
<tr>
<td>(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;</td>
</tr>
<tr>
<td>(C) the threat of imminent death; or</td>
</tr>
<tr>
<td>(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and</td>
</tr>
<tr>
<td>(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.</td>
</tr>
</tbody>
</table>

Article 18 Section 2340A of the U.S. Code defines the crime of torturing as follows:
Table 5.2 Article 18 Section 2340 of the U.S. Code: the crime of torture

§ 2340A. Torture

(a) OFFENSE.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) JURISDICTION.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) CONSPIRACY.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

The language used by the United Nations is even stronger. Both Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights “provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (United Nations). The U.N. Convention Against Torture or Other Cruel Inhuman or Degrading Treatment or Punishment, written in part in response to the horrific atrocities committed by the Nazi regime, recognizes “the equal and inalienable rights of all members of the human family,” which they define as the “foundation of freedom, justice and peace in the world”; they also recognize that “those rights derive from the inherent dignity of the human person” (U.N.). The stated purpose of
the charter is “to promote universal respect for, and observance of, human rights and fundamental freedoms” (U.N.):

Table 5.3 The United Nations Convention Against Torture

<table>
<thead>
<tr>
<th>CONVENTION AGAINST TORTURE and Other Cruel, Inhuman or Degrading Treatment or Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>The States Parties to this Convention, Have agreed as follows:</td>
</tr>
</tbody>
</table>

**Part I**

**Article 1**

- For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
- This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

**Article 2**

- Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
- No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
- An order from a superior officer or a public authority may not be invoked as a justification of torture.

**Article 3**

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

**Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any
The U.N. Convention Against Torture (CAT) was signed, although not ratified, by the U.S., and it was also signed and/or ratified by dozens of other countries; it has traditionally generally been accepted as common international law by the U.S. as well as others. The historical precedent for an absolute ban on torture is relatively long, and there are strong arguments against torture beyond mere precedent. As was stated previously, a core assumption of this project is that, as a matter of law, torture is ethically, morally, and legally unacceptable under any circumstances in accordance with the U.N. CAT and other domestic and international legislation. In short, torture should never be legally sanctioned.

Nonetheless, among the tectonic shifts that have occurred in the ten years since 9/11 has been an opening of the debate on torture—debate about its efficacy, its validity, its shifting definitions, and its status in law. The boundaries surrounding acceptable “interrogation techniques” have blurred; the cultural consensus that existed, arguably, before the September 11 attacks, no longer applies. With the language, the territory that formerly constituted the shared ground of core national values has shifted as well. The linguistic strategies used by the Bush administration and its representatives to exploit the slipperiness of the thematic formation torture—and many other formations as well—and to disrupt prevailing definitions, understandings, and common sense about what is
permissible, and necessary, have at least in part successfully shifted semantic construals of the term toward new, preferred, alternative meanings—and the principles that undergird them.

As far as this dissertation is concerned, the question of the acceptability of torture was settled amply approximately 2400 years ago by Aristotle, who soundly rejected torture not on ethical grounds (although there are plenty of those as well) but because it is simply not a viable means of obtaining reliable information:

It is necessary to say that tortures are not reliable; for many slow-witted and thick-skinned persons and those strong in soul nobly hold out under force, while cowards and those who are cautious will denounce someone before seeing the instruments of torture, so that there is nothing credible in tortures (108).

Although I would argue that the ethical reasons for banning torture are even more compelling than its inadequacy as a tool of persuasion, this study also concurs with the opinion of Aristotle about the lack of validity and reliability of methods of torture. Nonetheless, one key characteristic of the cultural shift after 9/11 has been an increasing acceptance on the part of many of the need to do *whatever it takes* to *keep us safe*, including secretly torturing people in our custody and, clandestinely or otherwise, collaborating with countries who torture suspects as matter of policy.
Semantic shifts and their material enactments

Exactly what constitutes torture is the first complicated question in the attempt to more closely analyze the discourse surrounding it. A quick search on amazon.com reveals an exponential increase in books that discuss torture starting in 2004, evidence of how the thematic formation torture has become increasingly contested in the public sphere since the war on terror began. A recent discussion centers around how key news outlets have avoided using the word torture to describe techniques the U.S. has used on detainees—even, as Glenn Greenwald has pointed out, if they use the word torture to “describe the exact same methods when used by other countries” (Greenwald, emphasis in original, “nice, new euphemism”). The public defense of torture from Bush administration officials and apologists such as Liz Cheney ranges from variations of “We don’t torture (and anyway it’s not torture)” to an array of arguments, generally unsubstantiated for reasons of “national security,” that “harsh interrogations” were legal and/or necessary to successfully protect the country.

Another recent study by Harvard’s Kennedy School traces the use in major news media of the word “waterboarding,” a term that according to the Oxford English Dictionary first appeared in 2004, to describe a technique that had been known during the Inquisition as “the water torture.” The study showed that in 2002 a “significant and sudden shift” (Horton, “Hypocrisy”) took place. Whereas from 1930 to 2004, the practice was called torture over 81% of the time by the New York Times and almost 97% of the time by the Los Angeles Times, from 2002-2008, the
word torture virtually disappeared in discussions of waterboarding in the NYT, the LA Times, the Wall Street Journal, and USA Today—unless, that is, another country was the perpetrator. In those cases, the word was used to describe the procedure at least 80% of the time.

The term *waterboarding* is morphologically similar to such terms as *snowboarding* and *surfboarding*—words with radically different connotations that help to both mask and to trivialize the actual process being referred to. (The Germans call this *Verharmlosung*, i.e. ‘making harmless.’) Similarly, terms such as *enhanced methods* and *intense interrogation* serve to mask the material reality behind them. Norman Fairclough calls the process of appropriating words for new purposes recontextualization, which he defines as the process of “placing linguistic elements or particular textual items from one context within a temporally and situationally distinct context [that] ultimately results in the transformation of meaning and meaning potentials” (Dunmire, “9/11” 198). Practices such as trivialization, normalization, and recontextualization use familiar and/or innocuous-sounding words in new and unfamiliar contexts to effect subtle and gradual shifts in meaning. These techniques of appropriation, like equivocation, linguistic masking, the use of euphemisms, and a technique I will call semantic reversal, in which words come to mean their opposite, are often employed, as George Orwell called it, in “defense of the indefensible” (Orwell). As Horton has pointed out, Victor Klemperer, the man who did a “masterful study” of the ways in which the Nazis manipulated language—including their invention of a term called
verschärfte Vernehmung, i.e. “enhanced interrogation”—calls it administering “little doses of arsenic” (Horton, “Hypocrisy”). The full effects of the shifts in meaning go unnoticed until the damage they conceal is irreversible.

The rhetoric of the war on terror, particularly in the organizational frame that the war on terror trumps all else, is also rife with what Fairclough, Lazar and Lazar, and others describe as overlexicalizations. Fairclough explains the concept this way:

One task for textual analysis is to see how antagonists are represented as malign. This is a matter of what critical linguists (Fowler et al 1979) have called ‘overlexicalization,’ i.e. antagonists are lexicalized in a variety of ways (‘dictator’, ‘crime’, ‘evil’), a sort of lexical ‘overkill’. This can be seen as articulating together what we can loosely call ‘discourses of malignity’ from several social domains—politics (‘dictators’), law and order (‘crime’), and religion (‘evil’) (“Blair” 6).

Overlexicalization is often a marker of contested realities and spaces; the more terms are used to describe something, the more troubling the entity or process is for the culture struggling to define it. Agreed-upon terms generally stand. According to Wisler and Tackenberg, “overlexicalization suggests an area which is particularly problematic in a culture, the existence of a social problem” (5). The overlexicalization of the discourse of torture includes any number of euphemisms, alternative expressions with varying, more neutral-sounding connotations, and creative naming of specific practices, such as the “frequent flyer program” for
prolonged sleep deprivation. Alternative terms include “enhanced” or “intense interrogation”; “harsh treatment”; “aggressive action”; “loosening” or “softening someone up”; “giving someone the treatment”; “special interrogation techniques” or “methods”; “running the SERE module” on a detainee; using an “alternative set of procedures”; or, as then-CIA Director Porter Goss labeled waterboarding in a Senate hearing, “professional interrogation techniques” (Human Rights Watch, “Whitewashing”). Such terms not merely legitimize, but they elevate methods of treating prisoners that have long been universally condemned to privileged, even elite, status.

Two things are important here. One is that the ambiguity of terms and the co-optation of the discourse, including the destabilization of the meaning of such concepts as torture until they become increasingly legitimated and normalized, served the Bush administration well in pursuing their goals unhindered. Contesting what had never before been seriously contested, using the “uniqueness” of the 9/11 attacks as a justification for breaking “all the rules,” created confusion and disrupted the “common sense” discourse that had previously deemed torture, or invading countries that had not attacked us, as wrong. The second is that the language used in the laws cited above—“cruel and unusual punishments [shall not be] inflicted,” respect for “the equal and inalienable rights of all members of the human family,” “the inherent dignity of the human person,” as well as “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 of torture”—form the
only barrier that stands between the lone individual and the unleashed fury of the State.

“Civilization’s fight”

On Sept. 14, 2001, George W. Bush signed a “Declaration of National Emergency by Reason of Certain Terrorist Attacks,” Document 1 of the key documents identified by torturingdemocracy.org, which declared a state of emergency after the 9/11 attacks. This set the tone of the rhetoric of crisis and exceptionalism that characterizes 9/11 discourse. Eleven days later, on Sept. 25, John Yoo sent a memo (Doc 2) to White House Deputy Counsel Tim Flanigan entitled “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them.” In this memo, Yoo laid “out an expansive vision of presidential power” (“Key Documents”), essentially beginning the argument he would make over and over in subsequent documents, that the president “has the plenary constitutional power to take such military actions he deems necessary and appropriate” in response to the attacks—without limits.

According to Yoo,

force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or
organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. (Doc 2, 19)

The document begins with a statement that authorizes the president to “deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11” (Doc 2, 1). The shift is subtle; “pre-emptive,” which appears at the beginning of the memo in the second above quote, connotes imminence, the swift circumvention of an impending attack that is in some way already materializing. By the end of the document, Yoo has substituted pre-emptive with the word “prevention,” as seen in the first quote above, thereby encompassing a much broader temporal field and legitimizing any action, at any time, against any and all future possibility. This small semantic shift is not an insignificant one; it opens the door that much wider to the use of military force against anyone the U.S. perceives might, at some point in the future, pose a threat, and removes imminence—temporality—from the equation. Further, the document performatively inaugurates a cluster of new concepts into the discourse, concepts that were later materially enacted in Iraq: preemptive strike, preventive intervention, preventive war. These terms served to legitimize attacks on countries who had not attacked the U.S. first and whom those in power perceived or simply declared to be a threat, whether
immediate, possible, or remote; this semantic shift also served to frame acts of aggression as their opposite, as acts of self-defense.

Among the motivational strands embedded in Yoo’s justification of the use of force are retaliation, a secondary motivation that is often present in the WOT discourse but never foregrounded, and its foregrounded motivation prevent and deter. The theme of prevention is highlighted both through the coupling of two similar verbs, prevent and deter, and the subsequent explanation in the above quote; Presidential power is granted against any threat to the security of the U.S. Safety, therefore, is presented as paramount, with retaliation as a lesser goal.

Yoo’s use of the word plenary is also interesting (a word that appears countless times throughout the documents). The word does not appear in the Constitution, and as far I have been able to discover has mainly been used in reference to “the Supreme Court’s immigration jurisprudence since the late nineteenth century” (Morrison), i.e. immigration is a matter for the federal judiciary, not that of individual states. The meaning Yoo intends here, i.e. “possessing full powers or authority” (“Plenary”), appears in law chiefly to confer specific powers that are not subject to judicial review, such as the president’s power to grant pardons or the power of Congress to regulate interstate commerce. Ironically, the term “plenary” was used to criticize Johnson’s handling of the Vietnam War; Johnson was accused of exercising “virtually plenary power to determine foreign policy” and that it was time to “end the continual erosion of legislative authority” (“Presidential”) that had originally been intended as a check and balance on
presidential war powers. In an effort to forestall needless and reckless wars, the Founding Fathers had divided war powers in the Constitution between the Commander-in-Chief, who has the authority to wage war, and Congress, which has the power to fund and to declare war. As a result of the overstepping of both Johnson and after him Nixon, in Vietnam, Congress passed the War Powers Resolution, overriding Nixon’s veto, in 1973. In Doc 2, Yoo calls on exactly that Resolution, which was specifically intended to limit presidential power and to authorize the “Presidential use of force only in a narrow range of circumstances” (Dorf),\(^5\) to instead expand presidential powers in wartime beyond any interpretation of them since the inception of the country.

According to Yoo, Congress has the power to recognize the president’s authority to conduct war through statutes such as the War Powers Resolution and the Joint Resolution passed by Congress on Sept. 14, 2001; Congress, however, has no power to

place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make. (Doc 2, 19)

This includes, according to Yoo, the President’s authority to “deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of

\[^5\] An attempt to curb presidential powers that, admittedly, proved only mildly successful.
September 11” (Doc 2, 1). In other words, according to Yoo, the President’s powers in wartime are unlimited. Just two weeks after 9/11, therefore, Cheney and Addington’s vision of unconstrained executive power was enacted by the OLC into law.

Three performative utterances helped make this possible. First, it was important to declare the state of the union an emergency. This was a reasonable and understandable move; arguably, it was a national emergency, as anyone who lived through it can attest, and as far as anyone knew there remained a “continuing and immediate threat of further attacks” (Bush Doc 1). Declaring a national emergency, however, also opened the door for virtually unrestrained and unprecedented action in response; the normal or “before world” was gone and the country was suddenly in a new, unknown world, the rules of which were, as yet, undefined. As Bush told the country on Sept. 20, 2001 in an address to a joint session of Congress, “All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack” (Bush “Speech”). The meme they hate our freedoms, in fact, became one of the most oft-cited motivations for the attack.

Secondly, for the Bush administration, it was important to call the attackers terrorists; this put them outside of the normal world of law and order and performed the important work of outcasting. Similar to van Dijk’s ideological square, out-casting serves to dehumanize the other. It is, as Lazar and Lazar define it,
a macro-strategy that encompasses the four micro-strategies of ‘enemy construction,’ ‘criminalization,’ ‘orientalization,’ and ‘(e)vilification,’ all which rest upon a logic of binarism . . . [S]uch a discursive bi-polarity perpetuates . . . a blueprint for heightened difference and conflict. (223)

In an interesting analogy elsewhere in the same speech, Bush placed the terrorists higher on the scale of human depravity than the mafia (another devil-term): “Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world—and imposing its radical beliefs on people everywhere.” (Ironically, at the same time Muslim extremists were making the same accusations against the U.S., i.e. that we were attempting to remake the world, also often through the use of violence, and impose our beliefs on others—and the attacks were cited by them as retaliation and deterrence for U.S. interference in Islamic countries.)

Notably, in Bush’s equation above, the mafia is more acceptable than Al-Qaeda, in other words, because their “goal” ostensibly corresponds to a central aspect of American culture: making money. They are reprehensible, perhaps, but still understandable, still human, still, essentially, one of us. Casting al-Qaeda as having other, more nefarious goals, goals we can barely fathom that “threat[en] our way of life” (Bush “Speech”), makes them seem even more remote and alien. They cannot be seen as normal people with normal grievances, albeit ones who articulate those grievances in repugnant and unacceptable ways; the very suggestion of commonality or understandable human impulse on the part of terrorists remains, in
many circles, taboo.

The following chapter details, among other things, the struggle the authors of the Torture Memos underwent as they attempted to find a designation for the men fighting for the Taliban and al-Qaeda that would sufficiently dehumanize them, placing them outside of any protections or any judicial reach. The OLC could not (and would not) call them freedom fighters or soldiers, and particularly not prisoners of war; not only would that afford them legal protections, but it would humanize them to an undesirable extent. The enemy had to be defined, not only as outside the law, but outside of the moral order itself; delegitimation of the Other became an important rhetorical strategy for the authors of the memos.

Thirdly, and most importantly, it was important to frame the situation as a war. Among other things, this paved the way for Yoo’s rapid—and legally binding—declaration of unlimited presidential power. Bush Administration officials were quick to define this attack as a war, although previous terrorist attacks, such as the first bombing of the world trade center, the attack on the U.S. Cole, and the bombings of U.S. embassies in Kenya and Tanzania, had not been defined as acts of war and even major military conflicts, such as those in Korea and Viet Nam, were never officially termed war but rather conflict. Framing the attacks and the response as war was perhaps the single most crucial rhetorical move in positioning the administration to enact, in the OLC memos and elsewhere, its subsequent exercise of “plenary” executive power—including, ultimately, the right to torture. The rhetoric of exceptionalism and of crisis, exemplified by the terminology of war,
paved the way for actions far outside the purview of ordinary political and/or military response. As will be seen, however, even the framing as *war* shifts throughout the memos as needed, according to the goals the author attempt to achieve; alternately, frames of law and order (e.g. interrogation) and of religion (good versus evil) are used where they better serve the purposes of the authors. In fact, as Yoo frames it, this is war, but it is an exceptional war in which even the ordinary rules of engagement do not apply.

For many, of course, calling the situation after 9/11 a *war* was logical and appropriate, if only because no previous attack on the United States in peacetime had even remotely approached the magnitude and scale of this one, both in sheer numbers and in its particularly horrific nature. Hours of compounded atrocities—the exploding fireballs, the trapped victims jumping to their deaths, the buildings collapsing on first responders, the United passengers who “rolled” on the hijackers—all of which “the entire world” had witnessed, live, and which the media replayed endlessly, became events and images that quickly reached iconic status. Arguably, 9/11 is perhaps the most powerful thematic formation in our current culture, one that, possibly uniquely, embodies the sway and authority of both a god-term and a devil-term. Among the vast array of polyphonic strands of 9/11 as a devil-term: the crashing of planes into walls of glass, the rain of debris, the billowing black smoke, the bewilderment, the growing horror, the lost innocence, the breathless magnitude, the inexplicability, the rage, the injustice, the *what-the-fuck?!,* the loss. The fear. The grief. Among its strands as a god-term: the sacredness, the
coming together of strangers, the sharing of the grief, the honoring of the sacrifices, the beloved we will not forget, the innocence lost, the vulnerability, the reverence for the dead, the heroism, the uniting of “the whole world,” the sudden holiness of place, the outpouring of sympathy. The awful, searing majesty of the images: Edmund Burke’s sublime writ large. 9/11 the divider of history: before and after.

9/11: the standard-bearer of American identity. Compared to 9/11, war itself is ordinary. Thematically, in its mystification, 9/11 attained the power to move mountains, to change reality. In the ensuing anger and grief, the desire for revenge and retaliation, the overriding thought that someone had to pay, were more than understandable.

An act of war

Nonetheless, calling it an act of war, and declaring war in return, was not inevitable. The attacks on 9/11 did not fit the usual criteria for an act of war; that is, no country had declared war on the U.S., and there was no clearly defined, specific territory of aggression to attack in return. The ambiguity of the situation enabled the administration to move in and out of the framework of war at will, at times following the rules of engagement, at others suspending them on the basis that this was not an ordinary war, according to whichever definition bested suited their purposes in any given moment. In the weeks before the U.S. invaded Afghanistan, the Taliban twice agreed (whether seriously or not) to turn over Osama Bin Laden, the purported mastermind behind 9/11, if the U.S. could produce credible evidence
that he was behind the attacks—a demand the Bush administration ignored.

Further, the declaration of war put the administration outside of the purview of the rule of law, except insofar as laws governed the prosecution of war—and under the new law of plenary power and preemptive prerogative, few laws would be binding if the administration chose to ignore them.

Benjamin Ferencz, who had been at Normandy, seen the corpses at Buchenwald, and served as prosecutor during the Nuremberg trials, argued shortly after 9/11,

what has happened here is not war in its traditional sense. This is clearly a crime against humanity . . . There is a confusion here. This is a crime against humanity because it is deliberate and intentional killing of large numbers of civilians for political or other purposes . . .

And it should be prosecuted pursuant to the existing laws. (Ferencz)

Sufficient laws were in place, Ferencz argued; they simply had to be employed. Notably, in two of the three previous terrorist attacks mentioned above, which had been treated as matters of international law enforcement rather than as acts of war, the perpetrators had been caught and imprisoned or executed. The investigation into the bombing of the USS Cole, admittedly, was hindered by the refusal of the Yemeni police force to cooperate with the FBI; nonetheless, there were some who, like Ferencz, preferred "law to war under all circumstances" (Ferencz), particularly as a way to avoid the inevitable unintended consequences, including the massive
“collateral damage” that indeed ensued, and the escalation of violence that necessarily follows.

Instead, through Yoo and others in the OLC, the Bush Administration began writing a series of secret new laws—and almost immediately declared war. Ferencz, who founded the Pace Peace Center at Pace University and who teaches international law, argues passionately against declaring war under any circumstances, as unsatisfying as that position might be to some: “It is never a legitimate response to punish people who are not responsible for the wrong done.” War, he claimed after 9/11, would inevitably do exactly that—killing the innocent, as others have also argued, and radicalizing new crops of terrorists in the vicious cycle that unavoidably results from the escalating violence. Regardless, and with little to no public discussion of whether, indeed, the situation at hand could legitimately be classified as a war, or whether military invasion was the best response, U.S. troops invaded Afghanistan on Oct. 7, 2001, less than four weeks after 9/11. Indeed, John Yoo in Doc 2 had already legally sanctioned ‘preemptive strikes,’ i.e. legitimized the Bush administration’s claim to the right to invade any country it determined might at some point in the future pose a threat.

Through a series of intertextual analyses, Dunmire and Lazar and Lazar have gathered evidence that “9/11 is not the sole or even primary context for understanding post-9/11 discourses” (Dunmire, “9/11” 196). In “9/11 changed everything: an intertextual analysis of the Bush Doctrine,” Patricia Dunmire traces the narrative of Bush administration that, in the name of security, “sanctions a
policy of preventive war” (195). Dunmire challenges the notion that 9/11 was the primary causal agent of Bush administration policies and traces parallels between key discursive formations after 9/11 and earlier post-Cold war documents that outline a vision of a New World Order, one that had been circulating long before 9/11 but that, until the attacks, had been deemed illegitimate. Dunmire argues that the post-Cold War and post-9/11 security discourses comprise an intertextual system that has been suppressed by articulations of post-9/11 discourses. Within this system, 9/11 serves as the legitimating device that enabled the Bush administration to sanction a security policy designed to maintain US global supremacy.” (195)

Arguably, the mood of violent retaliation and the desire for hypermasculine demonstrations of raw power that gripped the outraged country after 9/11, and which were fed and nurtured by such paradigms as victimhood, strength, and war, made alternative discussions such as Ferencz called for problematic if not impossible. The prevailing narratives of 9/11 created a discursive disjunction between the response to the attacks and the underpinnings of the ideology that had long preceded it. 9/11 therefore, wrongly, as meticulously laid out by Dunmire, Lazar and Lazar, and others, came to be viewed as the inciting incident, attacks out of the blue and without history, backstory, or provenance; thus war was naturalized in the discourse as the inevitable response to the attacks, creating a “mass amnesia” (Dunmire, “9/11” 198) as to the actual, pre-9/11 origins of national security policy. The thematic formation defend served to elide realities of virtually unconstrained
power; as Lazar and Lazar explain it, “It is within and through this policy that
‘defense’ serves as ‘a technology of power’ for coercively maintaining and
preserving the American-led security order” (56). In Dunmire’s view, 9/11 was not
the initiating factor, but merely a legitimization of—in other words, an excuse for—a
discursive and material enactment of long-held ideologies that sought to impose a
particular moral order, including unlimited executive power and unilateral global
domination. For a clearer picture of the authoritarianism that underpins these
enactments of power, let us now turn to the memos themselves.
CHAPTER SIX:
THE THIRTY-NINE DOCUMENTS

According to Fairclough, our knowledge of reality, both potential and actual, is always “contingent, shifting, and partial” (Analysing 14); we choose from among myriad possibilities the specific ways in which we represent the world. Fairclough identifies three broad types of representational meaning, in language:
representations of the physical world, the mental world, and the social world. In particular, this chapter will first give a general overview of the focus of the memos in chronological order, and then will discuss in more detail the various ways in which the memos represent the following physical, mental, and social realities:
- time and space, both physical and metaphorical
- specific acts and events, both potential and actual
- identity
I will also examine how the authors used certain linguistic, grammatical, and semantic devices not only to represent, but to create spaces, realities, and identities that had not previously existed—to enact reifications and representations, in other words, that had actual consequences, such as those described elsewhere in this
dissertation. These linguistic and rhetorical moves helped change the common
sense of the discourse regarding torture (among other things), normalizing it to
some degree, even if its legitimacy remains—as the memos themselves
demonstrate—hotly contested.

Ideology, according to Norman Fairclough, is fundamentally linked to
relations of power; a crucial aspect in understanding those relations, furthermore, is
the notion of “common sense.” If the workings of ideology are most effective when
they are invisible, as Fairclough claims, then notions of common sense that
“textualize the world in a particular way” (Language 71), that is, in the service of the
reigning ideology, also serve to sustain varying degrees of “unequal relations of
power” (70)—often without serious challenge. Such common sense notions and
their enactments bear closer scrutiny, especially if one assumes, as Fairclough does,
that “texts have social, political, cognitive, moral, and material consequences and
effects” (Analysing 14), i.e., their enactments are not merely linguistic. One way that
“common sense” is ideologically realized is through the normalization or
legitimation of social and material realities—such as the “necessity” of torture or the
negative consequences of “inevitable” globalization—that were previously
considered undesirable or unacceptable. This process often depends, as Fairclough
demonstrates, on the “mystification and obfuscation . . . of agency and
responsibility” (13). This chapter will examine this in detail below.

While the notion of the acceptability of torture is still highly contested, that
contest itself is remarkable; there has been an important shift around the “common
sense” of national security, including notions such as pre-emptive strikes and the new construal of extraordinary renditions, and particularly of the necessity, permissibility, and efficacy of torture. One common justification used, in the memos as well as in the broader debate, is the ticking time bomb scenario, a temporal narrative of immediacy and urgency. Temporal construals, in fact, play a crucial role in many of the memos; more specifically, the memos conflate immediacy and contingency—classic considerations of the Greek concept of kairos—with possible, imagined, but ultimately merely hypothesized presents and futures. Time and its rhetorical constructions, therefore, are as important to this analysis as are constructions of the Other, in particular the ways in which the immediacy and urgency of kairos are extended to apply to unlimited possible and contingent future scenarios.

**Exceptionalism and the Rhetoric of Crisis**

Undoubtedly, the events of 9/11 constituted a moment of crisis in United States history—one of epic proportion. Crisis rhetoric and a discourse of emergency characterize the language that constructs the war on terror, as does the idea that this is a unique—not merely an emergency—situation that allows for exceptional measures and the suspension of ‘ordinary’ laws and rules. One central claim of the larger discourse, exemplified in the memos, is that the situation is unprecedented, i.e. temporally as well as materially unique, and that therefore by implication the actions taken in response to the situation may be justifiably unprecedented as well.
Everything pertaining to the post-9/11 situation lies beyond and outside of the ordinary, pre-9/11 world. None of the usual rules apply: *9/11 changed everything.* This leads to the normalization and legitimation of methods of torture, outlined above, that is effected step by step through the memos in the growing progression I will examine in detail below.

Doc 1, George W. Bush’s declaration of national emergency, sets the stage for all that follows. The proclamation is a formal, performative rhetorical act that defines the United States as in a condition of “national emergency” and signals as yet unspecified but open-ended and sweeping changes in legal, material, political, and social realities. At the level of higher concept analysis, the rhetoric of emergency and of the unprecedented nature of the situation, as Dunmire explains, “construes 9/11 as the sole material and temporal context for understanding the Administration’s security policy and implies that the history of this policy began on September 11, 2001” (“9/11” 196)—a construal she, Lazar and Lazar, and others argue is demonstrably false. The “significant absence” (Fairclough, *Analysing* 37) of past reality, however, applies not only to post-9/11 policy; the prevailing narrative of the war on terror also construes 9/11 itself as an act of violence that has no history, no logic, and no location in the normal chain of cause and effect in which human action is embedded. Indeed, even suggesting that one look for reasons for 9/11, or seek to understand the causes and motivations for the attacks is often, as Fairclough has pointed out, met with a(n indignant) conflation of “understand” and “justify,” as exemplified in an Oct. 13, 2001 speech by Tony Blair: “Understand the
causes of terror. Yes, we should try, but let there be no moral ambiguity about this: nothing could ever justify the events of 11 September, and it is to turn justice on its head to pretend it could” (qtd in Fairclough, Analysing 48). One implication is that even if we “try” to understand, the reasons behind the attacks likely remain beyond our comprehension and are ultimately mysterious and unknowable—a framing that also casts the attackers and their supporters as utterly alien and incomprehensible. Another implication, of course, “is that those who call for an understanding of causes are thereby seeking to justify the events of September 11” (Fairclough 48).

In the dominant rhetoric surrounding the memos, 9/11 exists as a disembodied event, free of past constraints, contingencies, and explanations, a “Big Bang” moment that ushers in a new, previously unimagined space-time reality. The narrative thus serves to elide agency on the part of the United States—not culpability, but agency—in unfavorable world events and casts the U.S. not as an actor or participant in an ongoing, larger sequence of global relations but, simply, as the innocent victim of unforeseeable and incomprehensible evil.

If actual causal events in the past are absent from the narrative, actual and possible present and future events are conspicuously intertwined and foregrounded. With all the weight of a presidential decree, Doc 1 performatively proclaims that “a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States” (3). The collocates continuing, immediate, and further appear here with the word threats, as they and
similar collocates (*imminent, impending, future*) appear repeatedly throughout the memos. The threat is not only immediate, but ongoing, located on an open-ended time continuum that spans both present and indefinite future. The threat, in other words, is both specific and vague, particular and universal; furthermore, if the threat is not constrained, presumably, then neither can the actions taken in response logically be constrained.

A peculiar hallmark of the discourse of the war on terror is the categorization of terrorism as an existential threat. Remarkably, the literature is permeated with apocalyptic characterizations of terrorist attacks, as described previously when Addington imagines the next terrorist attack claiming a hundred thousand lives as he looses a tirade against Jack Goldsmith. Both Jane Mayer and Philippe Sands repeatedly report similar assertions from various interviewees. Mayer admits that “it is nearly impossible to exaggerate the sense of moral and existential danger that dominated the thinking of the upper rungs of the Bush Administration” (*Dark* 4) in the months following the attacks. This sense, for many, did not abate with time. Much later military investigators told Sands, for example, that they saw themselves as “the tip of the spear in the struggle against an existential threat to the United States” (qtd in Sands 124). Major General Michael Dunlavey, Commanding Officer at Guantanamo until November 8, 2002, saw terrorism as “the destruction of our culture as we know it, our way of life” (Sands 68) and described Detainee 063, al-Qahtani, as the guy who “may have been the key to the survival of the United States” (qtd in Sands 44)—a remarkable description by any standard. As mentioned above,
Mayer spoke to a number of officials who "saw the terrorist threat in apocalyptic terms" (Dark 35). In the dominant discourse, the existential nature of the terrorist threat is never questioned; it is also, arguably, adequately explained.

Many further examples, both from the language of the memos and the larger WOT discourse, characterize the enemy both as an existential threat of mythic, even superhuman proportion, and also dehumanize the enemy. Another interesting example—by no means the only one, but particularly illustrative—is evident in a thread of commentary to a blog Scott Horton posted on Yale law professor Jack Balkin's blog, Balkinization, a collection of blog entries from legal scholars. Horton's entry discussed a study of 108 deaths “in the detention in the War on Terror, with a substantial part clearly linked to the Bush Administration’s controversial new coercive interrogation practices. Some of the most egregious cases involved the CIA” (Horton). In the course of a heated argument about whether Geneva protections should apply, one of the commenters, Jonathan, writes,

Mr. Gitting... takes a “straw cat” example of a sabre tooth tiger to establish the proposition that you do not have to be a beast to fight a beast. Let's “change the facts” as we used to say in law school: How about if we're up against an alien beast, like in the movie ALIEN. Same result, Mr. Gitting?" (Jonathan)

No one in the thread ever questions the commenter's characterization, nor do they challenge his language or his underlying assumption that the enemy is essentially not human.
The verity of such emotions after the devastating attacks of 9/11 is certainly unquestionable; it is important, however, to question both the rationality of basing policy on fear, particularly disproportionate fear—as well as the use of the fear of others to achieve further, different goals. Following the work of sociologist Dick Hebdige, who highlights the importance of looking at how the future is imagined and thus enacted, Patricia Dunmire sees a vital need to examine and understand the “linguistic and discursive means through which the future is claimed and appropriated by dominant groups and institutions” (“Emerging” 19). Again, if our knowledge of present reality, as Fairclough reminds us, is always “contingent, shifting, and partial” (Analysing 14), our knowledge of the future is even more uncertain. Crucial, then, is a greater awareness of how “particular discursive strategies open up or close down particular lines of possibility; how they invite or inhibit particular identifications for particular social fractions at particular moments” (Hebdige qtd in Dunmire, “Emerging” 19), including the nature of the threat posed by terrorism. Defining the future, in fact, is a key strategy for negotiating and making meaning of the past; what is more, as Foucault recognized, prophetic discourse “not only announced what was going to happen but helped to make it happen, carrying men’s minds along with it and thus weaving itself into the fabric of destiny” (22). Controlling the interwoven narrative of past, present, and future, therefore, both its promises and its threats, its inclusions and exclusions, is an ideological imperative that serves to inhibit or silence resistance and challenge to dominant interpretations and assumptions. What Dunmire calls the “tropos of
threat,” with its numerous attendant iterations and articulations, is thus a core component in framing the future in the discourse of the war on terror. Reigning articulations of the future help form the legitimations of, and justifications for, present actions deemed necessary in response to that deterministically described future of ongoing threat envisioned throughout the memos.

My point here is not to claim that there was no threat of another attack after 9/11, but to look at how the nature of that threat is framed in the ensuing discourse, to “draw attention to relations between what is actually present [in the text] and what might have been present but is not – [those] ‘significant absences’” (Fairclough, Analysing 37), again, that shape the discourse in certain crucial and meaningful ways. The elision of imminent or immediate threat with ongoing, continuing, or possible future threat, for example, independent of temporal and material conditions, creates the same conflation between present reality and unknown future that Ron Suskind describes in The One Percent Solution, discussed in the previous chapter. Here again, perception of threat, particularly when it is characterized as an existential threat, is the only criterion for action; evidence, constraints, contingencies, realities are of lesser importance. No distinction is made, in other words, between prophecy and actuality. In this paradigm, critical thinking and a considered evaluation of evidence, situations, and circumstances simply do not matter.

The assertion that there is no material difference between perceived threat and actual threat is the bridge that allows Yoo, over the course of the next
document, Doc 2, to progressively expand, step by step, the field of military action, as outlined in his opening summary. Specifically, Yoo moves from confirming the president’s authority to “take military action in response to the attacks” and to “retaliate against any person, organization, or State suspected of involvement in terrorist attacks,” to authorizing him to take action against foreign States “suspected of harboring or supporting such organizations,” and finally, to “deploy military force preemptively against terrorist organizations” or those “that harbor or support them, whether or not they can be linked to the incidents of September 11” (1). That is, Yoo moves from the justifications of response and retaliation against actual actors for actual acts to the claim that “preemptive” or preventive—that is, unprovoked—action against potential threats is equally valid. Note, too, that “harbor and support” is never further defined. Just as Yoo’s understanding of executive power to use military force is wide open and not subject to limits, so now is the global field of battle in the war on terror, temporally as well as spatially. Concepts such as *kairos* and *prepone*—considerations of the right action at the right moment, and of the appropriateness of particular responses—are extended into infinity and cover an unlimited range of action.

As Dunmire points out, such discourse—discourse that appropriates possible futures and equates them with the actual present—fosters the illusion of control, exerting “power by projecting deterministic representations that render particular future scenarios as known and inevitable—as future reality” (“Emerging” 22). In Yoo’s construal (and in the view of many), even the possibility of an attack is enough
to position the executive, as the principle social actor and the “sole organ of the Nation in its foreign relations” (1), as not merely authorized to respond with force, but obligated to do so. It further defines the field of action as unlimited and executive decisions not only as the president’s alone to make, but as “unreviewable” and absolute. In a single memo, Yoo moves from legitimate response to attack and the urgency of self-defense, to justifying any action the president deems appropriate in the interest of national security as he (the president) defines it—including unprovoked invasions of any country or against any individual or group the president deems a present or potential ‘threat.’ In essence, the narrative of innocent victimhood enables the United States to reframe any and all acts of offense, hostility, or aggression as acts of self-defense.

**National Security**

*Defense and protection, i.e. national security,* are justifications the OLC authors use extensively, not only in Doc 2 but throughout the memos, to legitimize claims of unlimited executive military power. Doc 2 is worth examining in detail because it exemplifies many of the rhetorical, linguistic, and semantic strategies repeatedly employed by Yoo, Bybee, and the other OLC authors. Here, concepts pertaining to *defense, protection,* and *national security* are foregrounded; for example, the following phrases appear within the first two pages of the 23-page document (italics added):
1) Our review establishes that all three branches of the Federal Government - Congress, the Executive, and the Judiciary - agree that the President has broad authority to use military force abroad, including the ability to deter future attacks.

2) The President's constitutional power to defend the United States and the lives of its people must be understood in light of the Founders' express intention to create a federal government "clothed with all the powers requisite to [the] complete execution of its trust."

3) Foremost among the objectives committed to that trust by the Constitution is the security of the Nation.

4) the circumstances which may affect the public safety are [not] reducible within certain determinate limits.

5) "there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency" (Hamilton qtd in Yoo, Doc 2)

6) It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."

7) the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the Nation and its interests in accordance "with the realistic purposes of the entire instrument."
8) Nor is the authority to *protect national security* limited to actions necessary for "victories in the field"... The authority over *national security* "carries with it the inherent power to *guard against* the immediate renewal of the conflict."

John Yoo uses the first two pages of the document to build a solid case for the president's ability to use military force, which Yoo frames as an issue of national security and imbues with a sense of urgency ("guard against the immediate renewal"). ‘National security’ is defined, as it is throughout the dominant narrative of 9/11, as *physical* safety; threats are defined as threats to life and property (as opposed, for example, to threats to civil rights or to the Constitution).

Yoo’s argumentative strategy here is typical of the memos. He combines a relatively stable and less questionable claim, e.g. that the president has “broad authority” to use military force where necessary, with more controversial and problematic aspects of his argument, e.g. preemption, essentially embedding his more contentious assertions within statements that can be viewed as self-evident. The argument the president has the power to deploy military force where needed, a point not many would presumably dispute, is subtly conflated with the far more controversial point that the president’s war powers are absolute. Yoo barely acknowledges the distinction; he addresses the point only once in the entire memo, on the second last page:

To be sure, some interpreters of the WPR [War Powers Resolution—see below] take a broader view of its scope. But on *any* reasonable
interpretation of that statute, it must reflect an explicit understanding, shared by both the Executive and Congress, that the President may take *some* military actions – including involvement in hostilities - in response to emergencies caused by attacks on the United States. Thus, while there might be room for disagreement about the scope and duration of the President’s emergency powers, there can be no reasonable doubt as to their existence. (18, italics in original)

Yoo has, in essence, spent the previous 16 pages or so arguing for just that, the existence of the president’s authority to use military force; he documents numerous instances and cites precedents in which presidents have taken military action, with or without authorization by Congress. The distinction between the authority to use force and the *absolute* authority to use force is backrounded; after the above passage, Yoo simply goes on to briefly conclude (in a single paragraph) that because other presidents have employed military force during conflict without specific authorization, no limits can be placed on the president’s decisions to use military force, and indeed (in his final footnote) that they are “for him alone and are unreviewable” (23).

This interweaving of claims of absolute presidential power with less dubious statements about presidential authority allows Yoo to expand the scope of executive power to unprecedented lengths by authorizing, for the first time in history, a doctrine of pre-emption without ever actually discussing, at any length, the core question of “absolute” power. He simply equates what he repeatedly calls the
president’s “broad constitutional power” with unlimited military power. Yoo concludes:

In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President's constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. (19)

Yoo’s conclusion, however—and indeed his entire argument—ignores several important points. First of all, from the beginning, the Founders sought to create a system of checks and balances, in which powers—including war powers—were divided or “unbundled,” as Yoo himself admits, rather than concentrated in the hands of a single authority. The Constitution divides war powers between the executive branch and Congress; the President, therefore, is Commander-in-Chief of the military, while Congress has the power to declare war (although, Yoo argues, not to make war—here he distinguishes meticulously) and to provide for its funding. While exact legal interpretations of the Constitution have been debated since its inception, the Founders’ overriding intent to enshrine the separation of powers remains clear. Indeed, the idea of absolute power as anathema to democracy is a core tenet of our republic. As Republican legal activist Bruce Fein put it, “Our
political heritage is to be skeptical of executive power” (qtd in Mayer, Dark 51).

Yoo’s silence, amid his arguments in favor of “plenary” executive power, on the Founder’s overriding intent to create a system of government as immune as possible from abuses of power, is perhaps the most “significant absence” in Doc 2.

Secondly, although Yoo cites Alexander Hamilton extensively in Doc 2 as he argues for securing “all federal executive power in the President to ensure a unity in purpose and action” (4), he overlooks Hamilton’s primary purpose in making the arguments he does. It is true that in The Federalist No. 70, for example, which Yoo cites repeatedly in Doc 2, Hamilton calls for a centralization of authority in the person of the president. Hamilton argues that the “UNITY of the executive of the State was one of the best of the distinguishing features of our constitution” (Hamilton, “No. 70,” emphasis in original), meaning that Hamilton considers one executive preferable to two, many, or a deciding council. Yoo uses Hamilton’s words to create a new role for the president as the ‘unitary executive,’ a concept that first appears in pre-9/11 writings of neo-conservative Federalist Society members such as Antonin Scalia (under whom Yoo served as law clerk), but that does not appear anywhere in the original Federalist papers Yoo cites. The idea of the unitary executive, a new incarnation of the discredited Nixonian concept of an ‘imperial presidency,’ first appears in Doc 2 in the following passage:

in [crucial] matters of national defense, war and foreign policy … a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far
superior to any other branch. As Hamilton noted, “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.” *Id* at 391. (4)

Thus Yoo twists Hamilton’s words calling for a single “vigorous” executive (as opposed to rule by committee) into the concept of a “unitary executive” who is above the dictates of the other branches and in whose hands military power is absolute.

At first glance, Hamilton might arguably agree. It is also true that in *The Federalist* No. 74, from which Yoo also quotes, Hamilton states that the propriety of the Constitutional provision that appoints the president as Commander in Chief of the armed forces is so evident in itself . . . that little need be said to explain or enforce it. Even those . . . [States] which have in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority (“No. 74”).
Yoo construes this passage as a conferral of unlimited military authority that is not subject to review. While it is true that Hamilton views putting decisions of war in the hands of a single commander as the most efficient method of prosecuting that war, here again Yoo ignores the larger picture. Hamilton’s main objective in both of these papers—similar to that of the Founding Fathers—is not to confer absolute military power on a single executive, but to consider how to construct good government—one that, above all, precludes possible abuses of power. Hamilton’s core argument in No. 70 is that a single executive is preferable to multiple executives because shared executive power “tends to conceal faults and destroy responsibility” ("No. 70"), allowing each member to blame the others and more easily conceal his own agency, thus avoiding responsibility. An executive above all, according to Hamilton, must be held accountable, especially to the people:

the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it. ("No. 70")
In other words, power of the executive is concentrated in a “single hand,” according to Hamilton, not merely in order to facilitate difficult decisions during wartime, as Yoo claims, but above all to ensure that the executive retains responsibility for his own decisions. In fact, Yoo’s construal of the absolute and “unreviewable” power of the president resembles more closely Hamilton’s description of the British monarch, who is “the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion” (“No. 70”), than the single “vigorous” executive of the republic Hamilton is envisioning. In general, Hamilton clearly states in *The Federalist* No. 70, power is clearly “safer in the hands of a number of men than of a single man,” but a single executive will remain more accountable than a group; further, how to best ensure *that* kind of safety, i.e. how to best prevent abuses of power, is Hamilton’s central question in *Paper* No. 70.

Yoo employs several strategies here that recontextualize Hamilton’s words so that they serve, essentially, a purpose diametrically opposed to Hamilton’s original intent. First, Yoo enacts a subtle linguistic shift, changing the “unity of the executive,” i.e. a single leader who can be more accountable than a group, to “unitary executive,” i.e. a leader who holds all the power and whose military decisions cannot be questioned. (As mentioned previously, this idea is not original to Yoo but to Scalia and other neo-conservative members of the Federalist society.) Secondly, he lifts words and phrases out of their original context so that the higher concepts that inform the original, such as the separation of powers or protection from abuses of power, become divorced from the words he uses, which then lose their original
meaning and purpose. Yoo also conflates his own dubious argument, e.g. the absolute power of the executive over the military, with less contentious arguments such as the power of the executive as commander in chief; he then argues the latter point to “prove” the former, foregrounding self-evident claims while embedding and backgrounding those that are most controversial. In this way, he also ultimately legitimizes pre-emption—the aggressive and offensive use of military power—by re-framing it as self-defense. Finally, Yoo’s strategy of recontextualization, which is employed throughout the memos, also uses familiar words, phrases, and concepts to enact crucial semantic shifts, i.e. changes in meaning, even as the words themselves continue to connote normalcy and legitimacy. Thus, radical shifts—the doctrine of pre-emption, the concept of the unitary executive who holds absolute military power—are masked as self-evident and logical conclusions.

Another example of this masking is Yoo’s use of the War Powers Resolution in Doc 2. The War Powers Resolution of 1973 was enacted by Congress to “circumscribe the President’s authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization, yet provide enough flexibility to permit him to respond to attack or other emergencies” (Grimmett 1). The WPR has been in dispute ever since it was passed, overriding a veto from Nixon; its stated purpose is to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States
Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations. ("War Powers")

The WPR limits—or attempts to limit—the president’s power to engage U.S. armed forces in hostilities to three sets of circumstances: 1) a declaration of war; 2) specific statutory authorization; or 3) a national emergency created by an attack. It is beyond the scope of this dissertation to even delineate the legal dispute surrounding the WPR; the point is that the extent of presidential authorization to engage in hostilities, even without Yoo’s extraordinary claim of plenary executive power, has long been contentious. Nonetheless, Yoo uses the WPR as an illustration of Congressional recognition of executive war powers even as he claims that the constraints that the WPR places on the president are not legally binding. Without acknowledging the scandal-ridden origins of the ongoing debate, and therefore eliding the purpose of the Resolution, Yoo instead uses the Resolution to justify his own vastly extended counter-interpretation:

The President has broad constitutional power to take military action response to the terrorist attacks on the United States on September 11, 2001. Congress has acknowledged this inherent executive power in both the War Powers Resolution and the Joint Resolution passed by Congress on September 14, 2001. (1)

He goes on, as has been stated previously, to justify not only retaliation for the
attacks, but pre-emptive strikes against any terrorist organizations or the nations that support them. Thus again Yoo ignores the original intent of a law specifically intended to curb presidential power, and instead uses its language to further his goal of expanding that power. All other considerations, such as the history and future possibility of the abuse of power, are significantly absent.

Yoo's evocation of the War Powers Resolution is not the only law he turns “on its head” (Mayer, *Dark 47*) in Doc 2, “trampl[ing] this distinction between unrestricted presidential power and regulated presidential power, where Congress had purposefully imposed limits” (47). Yoo also uses a Supreme Court ruling by Justice Robert Jackson, which set the precedent for limiting presidential powers even during wartime, to argue the opposite. According to Jackson,

> even the commander in chief had no authority to disobey the law. “No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming a military role,” Jackson ruled. (47)

Ignoring the part of the ruling cited above, and its overall purpose of balancing the powers of Congress and the laws they enact with executive powers in wartime, Yoo uses various quotes from the same ruling to essentially argue the opposite: “The President can be said to be acting at the apogee of his powers if he deploys military force in the present situation” (Doc 2, 16); again, however, Yoo is conflating the “maximum” powers of the president in an emergency situation with the absolute power to use military force at his own “unreviewable” discretion.
A final example of strategic recontextualization is Yoo’s use of the word *plenary*. He uses the word 13 times in Doc 2, and every instance refers to the President’s absolute and “unreviewable” power, control or authority in prosecuting war and conducting military operations. Below is a table listing all 13 instances with five word collocations on each side (see also figure 5.1, below):

Table 6.1 Collocates for plenary

<table>
<thead>
<tr>
<th>Collocates</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>
| vests the President with the **plenary** authority, as Commander in Chief our view, acknowledge the President’s **plenary** authority to use force to constrain the President’s independent and **plenary** constitutional authority over the use Rather, the Framers unbundled some **plenary** powers that had traditionally been Further, the Framers altered other **plenary** powers of the King, such understood to grant the President **plenary** control over the conduct of consistently to assert the President’s **plenary** authority in foreign affairs ever it is “the very delicate, **plenary** and exclusive power of the the exercise of the President’s **plenary** control over the conduct of President is vested with the **plenary** power to use military force that the President has the **plenary** power to use force even that the President has the **plenary** constitutional power to take such In the exercise of his **plenary** power to use military force

Figure 6.1 Screen shot of concordance for plenary

<table>
<thead>
<tr>
<th>Concordance</th>
<th>Concordance Plot</th>
<th>File View</th>
<th>Clusters</th>
<th>Collocates</th>
<th>Word List</th>
<th>Keyword List</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>on vests the President with the <strong>plenary</strong> authority, as Commander in Chief and 2</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Rather, the Framers unbundled some <strong>plenary</strong> powers that had traditionally been 4</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>understood to grant the President <strong>plenary</strong> control over the conduct of 6</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>consistently to assert the President’s <strong>plenary</strong> authority in foreign affairs ever 8</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>it is “the very delicate, <strong>plenary</strong> and exclusive power of the 10</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>the exercise of the President’s <strong>plenary</strong> control over the conduct of foreign 12</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>President is vested with the <strong>plenary</strong> power to use military force</td>
<td>Doc 2 Y</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Each Term | Word | Case | Range | Concordance Hits | Search Window Size |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>plenary</td>
<td></td>
<td></td>
<td></td>
<td>13</td>
<td></td>
</tr>
</tbody>
</table>
The Oxford English Dictionary defines plenary as follows:

1. Full, complete, or perfect; not deficient in any element or respect; absolute. Freq. in plenary indulgence, plenary power. See also plenary inspiration.

2.a. Of an assembly, conference, etc.: having all member in attendance; fully constituted, fully assembled, esp. attended by all participants, who otherwise meet in smaller groups. Now freq. in plenary session.

3. Law. Of a suit, action, etc.: dealt with under full formal procedures. Opposed to summary.

4. Possessing full powers or authority. Obs. Rare. ("Plenary")

In common usage, the semantic formation plenary power applies to interpretations of immigration law by the President and the Congress, which traditionally cannot be challenged in the courts. The Constitution also confers on the president other specific plenary powers, particularly the unreviewable authority to grant pardons and the ability to make treaties with the consent of two thirds of the Congress; as a legal concept, however, the word plenary primarily pertains to immigration. As Adam Cox and Cristina Rodriguez explain in the Yale Law Review, “scholars and courts generally understand the plenary power doctrine in immigration law to sharply limit judicial scrutiny of the immigration rules adopted by Congress and the President” (460). The Center for Immigration Studies concurs: “the ability of Congress and the executive branch to regulate immigration largely without judicial
intervention is what has come to be known as the political branches’ ‘plenary power’ over immigration” (Feere 1). In other words, plenary power typically means that immigrants cannot use the courts to challenge laws pertaining to their status. Admittedly, the use of the word *plenary* in its usual context could be seen as tangentially related to Yoo’s new usage, in that it pertains to the power of the United States government to include, exclude, deport, and otherwise regulate (insofar as they affect the United States) human beings defined as Others. This meaning, however, remains tangential. Further, Yoo’s construal of *plenary* corresponds closely to definition 4, above, which is not the customary reading of the word but, on the contrary, is marked in the OED as an obsolete or rare usage.

Notably, the word *plenary* never appears in the Constitution; the Founders conferred specific powers but no “plenary power” on the executive, military or otherwise. In fact, the concept “plenary power doctrine” did not exist until the late nineteenth century, when it was formulated in response to a sharply rising influx of immigrants. Yoo’s construal of the word *plenary* to connote the President’s absolute authority to use military power is a two-fold conflation, and idiosyncratic at best. The first conflates the *authority to conduct foreign affairs* with the *unconstrained use of military force*, as though the two concepts were interchangeable; this oddly equates the hostile use of military force with, for example, the power he describes on page 6 of Doc 2 (citing a Supreme Court decision) as "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations" (6). For Yoo, as the language he employs
demonstrates, there is no difference between authority over foreign affairs and absolute military power. Further, though he cites the 1936 Supreme Court decision to argue the absolute executive power, he conveniently omits the second, crucial half of the sentence he quotes. Here, the sentence in full:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. (United States, emphasis added)

Here again, executive powers, even wartime powers, do not give the president unlimited authority. No matter what the circumstances, the president is subject to law.

The second conflation signals a semiotic shift that redefines plenary, a specifically granted federal power to regulate immigration, as the unreviewable executive power to use military force against other nations. Thus, despite the absence of evidence for a constitutional bestowal of plenary military power upon the executive, and in fact despite a wealth of evidence, beginning with the separation of war powers in the Constitution, that the Founders had no intention of
placing absolute power over the military (or over virtually anything else) in the hands of a single man, Yoo claims repeatedly in Doc 2 that “given this context, it is clear that Congress’s power to declare war does not constrain the President’s independent and plenary constitutional authority over the use of military force” (3), or that “Constitutional text, structure and practice demonstrate that the President is vested with the plenary power to use military force, especially in the case of a direct attack on the United States” (17). This is not to say that the president does not have broad constitutional authority to use military force; clearly he does. The president’s authority to employ military force where he deems necessary is not in dispute here; it is Yoo’s addition of the word *plenary* as a collocate for military power, both at the level of word usage as well as the level of high concept, that remains questionable. In any case, the use of the word *plenary* is vital to Yoo’s construction of unlimited and absolute presidential power to deploy the United States military forces as the president alone sees fit; thus one man’s perception of threat is the only criterion for using military force around the globe.

**Defense**

Unsurprisingly, Yoo’s application of *plenary* to connote absolute presidential power is not the only problematic word usage in Doc 2. In addition to Yoo’s generous interpretation of the powers the Constitution confers upon the president, we see here, too, an expansion of the meaning of *beyond* pertaining to the present
moment into something much larger and less clearly defined. All interpretations of power are framed around a narrative of protection:

Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas (19).

A close examination of Doc 2 at all four levels of analysis, however, from higher concepts to the textual level, provides strong evidence that Yoo’s main agenda in writing the memo is not to empower the president to best protect the United States from further attack, notwithstanding that the thematic formation protect, as has been stated, is foregrounded as the primary motivation. Yoo’s primary objective is to empower the president, period.

Yoo’s repeated use of the collocates sudden and unforeseen with attacks and emergencies, which appear six times in Doc 2, also implies injured innocence. In that version of the events of 9/11, there were no warnings, no way anyone could have known that attacks were imminent, and no one is thus accountable for the events that occurred. As was stated in previous chapters, the “out of the blue” narrative
took hold almost immediately and held, despite numerous investigations, formal and informal, and numerous accounts that told a different story. Yoo’s analysis is based solely on the no one could have foreseen version of events.

As outlined above, Yoo’s core argument is structured around the idea of defense, which as has been shown above is foregrounded in the first pages of the memo. At the beginning of Doc 2, authority over national security “carries with it the inherent power to guard against the immediate renewal of the conflict” (2). Just as pre-empt or pre-emptive implies striking the first blow to fend off an attack that is already in some stage of implementation, Yoo begins the memo by implying imminence, e.g. he speaks of an “immediate renewal of the conflict.” By the end of the memo, however, he has enacted an important discursive shift; Yoo’s final paragraph expands his legal understanding of the legitimate response to the attacks not only to this incident itself, but to all possible future incidents:

The President’s broad constitutional power to use military force to defend the Nation, recognized by the Joint Resolution itself, would allow the President to take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters. (19)

In other words, force can be used to to prevent and deter future assaults as well as to respond to or retaliate for attacks that have already occurred—words that move far beyond the scope of immediate response, and even pre-emption, into unknown future possibility:
Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. (19, italics in original)

*Prevent* and *deter*, arguably, can be seen to belong to different temporal territory than *defend* or *pre-empt*. Where the latter imply imminence, the former imply a long-term or an indeterminate time frame. Notably, the word *preemptively* appears twice on the first page of the document, in the abstract and the introductory sentences of Yoo’s argument; it never appears again in the document, however, and Yoo never actually revisits the concept in the next 18 pages of arguing to establish the president’s military authority. The word *pre-empt* does appear once more, just before the conclusion, at which time Yoo proceeds as though he has sufficiently established the authority for preemptive strikes; the conclusion that the president’s authority to respond to threats equals unlimited authority to use military force under any circumstances has been reached without actual further discussion of the doctrine of preemption.

Similarly, despite Yoo’s ostensible consideration of the “most efficacious defense” (2), *deter* is used to argue for military force without any acknowledgment that the examples Yoo uses could well be seen to call the effectiveness of such tactics
into question. He cites Clinton’s bombing of Afghanistan and the Sudan in retaliation for the bombings of the U.S. embassies in Kenya and Tanzania, for example, as justification for further force: “The strike was ordered in retaliation for the bombings . . . and in order to deter later terrorist attacks of a similar kind against United States nationals and others” (13). The word deter appears nine times in the document, three times as often as the formation preempt; significantly absent is any discussion of the failure of the Clinton bombings to deter future attacks. Strikingly, the bombings Yoo uses (among many other examples) to justify further military action occur just three years before the Sept. 11 attacks—and thus can hardly be seen as strong support for Yoo’s argument that the use of military force is an effective deterrent.6 As Yoo ignores or at best backgrounds other, alternative considerations for employing force—the need to retaliate, the desire for revenge, as a restoration of face after humiliation, the abuse of power to establish dominance are only a few—also significantly absent from Yoo’s argument is any discussion of the cycle of violence or an acknowledgment that the use of force generally leads to ever greater escalations of force, arguably on both sides.

Written in the context of both the War Powers’ Resolution and the Joint Resolution of Sept. 14, 2001, the memo includes a four-part analysis that purportedly calls on precedent, recent history, and relevant practice to claim the U.S. has an unconstrained right to use military force, even preemptively. Yoo attempts to make the claim that such actions are both precedent and

6 The lyrics of satirist Tom Lehrer come to mind; as he sang of the Germans, “We taught them a lesson in 1918, and they’ve hardly bothered us since then” (Lehrer).
unprecedented; in essence, he implies that the rationale has always existed and therefore ample precedent exists, but argues on the other hand the situation is unprecedented—exceptional, in other words. By implication, there has simply been no demand for such a response as pre-emption up to now. All of this is justified as a matter of self-defense; Yoo cites *Haig vs. Agee* on page 2 to reiterate that it is “obvious and unarguable” that “no government interest is more compelling than the security of the Nation” (qtd in Doc 2, 2). The President’s authority to protect that interest is therefore necessarily unlimited. Yoo quotes from Alexander Hamilton *Federalist Paper No. 23*:

> because the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency (Hamilton qtd in Yoo 2).

The “most efficacious defense . . . in accordance with the realistic purposes of the entire instrument” (2), therefore, is not limited to actions necessary for “victories in the field.” Thus acting without laws or constraints, without the checks and balances that ordinarily characterize “the entire instrument” of our three branches of government, is cast by Yoo as the “realistic purpose” of the office, i.e. in accordance with the original intent of the Founding Fathers.
Importantly, a closer look at Hamilton’s Federalist Paper No. 23, which Yoo uses to justify expanding presidential powers as if in accord with original intent, reveals that Yoo is actually changing the intended purpose of Hamilton’s words to fit his own, different interpretation. *Federalist* No. 23 addresses the powers of the federal government as opposed to that of individual states. The ability to prosecute war has not worked, according to Hamilton, by leaving it up to individual states alone; he talks about the “defective” powers of the Confederation of states as it has stood up to that point in time and calls for a change. This paper argues that the federal government rightly has powers to act and should not be limited by individual states. The context in which Hamilton is writing is very different, therefore, from the context in which Yoo is writing. Yoo is addressing—attempting to pre-empt, as it were—the system of checks and balances put in place through the three branches of government by the authors of the Constitution. Hamilton is addressing the fact that individual states do not have the power to limit the President’s prosecution of war. This does not apply, however, to Congress or the judiciary.

As Yoo uses the above quote, however, Hamilton would seem to be vesting the federal government with altogether unlimited powers. Once again, this misuses and distorts what Hamilton is actually saying. Yoo’s core argument, in other words, does not actually exist in the original writing; he is changing the meaning of the phrase to apply to general unlimited executive powers—powers Hamilton, by contrast, clearly qualifies: “A government, the constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any
government, would be an unsafe and improper depositary of the national interests” ("No. 23," emphasis in original). Further, Yoo adds the word “all” to executive power, to emphasize the plenary or absolute nature of power as he is defining it. Several paragraphs later, Hamilton gives an opinion with slight but important variation: the President's constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action ("No. 23"). In Hamilton's understanding, the president's power is not plenary, but very much subject to context and circumstance. In a sense, Yoo could be seen to be making the same argument—the context of 9/11 grants the president unlimited power to respond, and an “exceptional” situation calls for an “exceptional” response—but this, in his interpretation, leaves no room for any limits or constraints, no matter what the circumstances.

Such discursive, rhetorical and lexico-grammatical strategies as seen above—changing the context to alter the original meaning, adding and subtracting words, shifting meanings at all levels of granularity, from the overarching concepts, to sentences, to words and phrases—can be found throughout the memos written by Yoo, Bybee, Philbin, Delahunty—and, presumably, with Gonzales, Haynes, and Addington. The question then arises as to the actual purpose and intent of such
strategies. A closer look at Doc 2 at the textual level provides crucial evidence for the document’s true purpose. As has been stated, words around the thematic formations of threat and defend, such as prevent, deter, and respond, are foregrounded in Doc 2. The following chart shows the frequency of a cluster of words pertaining to security and defense as they occur in Doc 2, both according to their frequency of use in the document, and their rank according to a word list of most frequently occurring words to least. Note that two or more words occurring at the same frequency are ranked alphabetically; thus “deter” has a higher rank than “protect” even though both appear in the document nine times:

Table 6.2 Frequency of words pertaining to the defense frame

<table>
<thead>
<tr>
<th>WORD</th>
<th>FREQUENCY</th>
<th>RANK</th>
</tr>
</thead>
<tbody>
<tr>
<td>security</td>
<td>23 times</td>
<td>73</td>
</tr>
<tr>
<td>defense</td>
<td>11 times</td>
<td>170</td>
</tr>
<tr>
<td>deter</td>
<td>9 times</td>
<td>201</td>
</tr>
<tr>
<td>protect</td>
<td>9 times</td>
<td>212</td>
</tr>
<tr>
<td>prevent</td>
<td>7 times</td>
<td>282</td>
</tr>
<tr>
<td>safety</td>
<td>7 times</td>
<td>287</td>
</tr>
<tr>
<td>defend</td>
<td>6 times</td>
<td>308</td>
</tr>
<tr>
<td>safe</td>
<td>2 times</td>
<td>1040</td>
</tr>
</tbody>
</table>

TOTAL FREQUENCY: 74 occurrences in 23 pages

Note too, that “self-defense” occurs exactly once, listed as one of the 11 occurrences of “defense,” and that of those 11, four refer to “Secretary of” and one occurs as part of a web address in the footnotes. Effectively, then, defense is used to connote some aspect of the protection of the nation six times in Doc 2, for a total of 69 construals of the above words that pertain directly to defense.
In contrast, the two charts below show the highest ranking words in the documents, both content and non-content words.

Figures 6.2 & 6.3 Word list 1 & 2 sorted by frequency
A textual examination of word frequency demonstrates that the most frequent content word in the document is *President*, which appears 208 followed by *United* and *States* and then *authority*, ranked as the sixteenth most frequent word in the document—and the fourth most frequent content word—appearing no less than 80 times. Not only that, but *authority* is directly followed by *military*, the fifth most frequent content word appearing a total of 78 times, and a collocate of *authority* no less than thirteen times.

Within the first two pages of the second document, therefore, Yoo widens the scope of Presidential powers to powers beyond all restraint; the field of battle to any country on earth; and the purpose beyond immediate response or retaliation into action against any unspecified possible future attacks. Thus not only is the President’s power to prosecute war unlimited, but the territory involved, and the subjects targeted, are without limits as well. Essentially, according to Yoo, the entire world is now the legitimate battleground of the War on Terror, subject solely to the discretion of the Commander-in-Chief and not “subject to review” (Yoo 23). Under “the defense defense,” anything goes.

**War/Not war**

As stated previously, using a warfare model to frame the 9/11 attacks and the subsequent military response in Afghanistan and eventually Iraq served many purposes for the Bush Administration; in particular, it freed the U.S. from the legal
constraints using a law enforcement model would impose. Rather than classifying the attacks as crimes against humanity, as Amnesty International defined them, or classifying them as an international incident subject to international law enforcement, the model both Spain and Britain used in response to terrorist attacks in Madrid and London, the Bush Administration used a war metaphor to characterize their response. Oddly, this metaphor of war applied more to the abstract “war on terror” than to actual military action; this, as is carefully argued in the memos, fell most frequently under designations such as “armed conflict,” “military force,” or “military action” rather than war, which ensures the president a full scope of action but places him outside of the constraints not only of the law, but of war.

In the memos, this proved to be a delicate rhetorical negotiation; if the armed conflict were classified as a war, for example, everyone the military captured could be classified as a prisoner of war, and the Administration did not want detainees to qualify for protection under the Geneva Conventions. The language in memos exemplifies the difficult negotiation involved in responding rhetorically to attacks and especially of finding designations for detainees that put them outside of the protections of law; here, the war meme is not employed, although attacks are. Referring not to the general and metaphorical war on terror, but the actual war, Yoo repeatedly terms the response “taking military action” and “using military force,” e.g. making the claim, “The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces,
because the power of Commander in Chief is assigned solely to the President” (2). Precedent (the Civil War, Viet Nam, Cambodia), according to Yoo, affords the
President a “substantive grant of authority”; the President has “complete discretion in exercising the Commander-in-Chief power” (3). Yoo also differentiates between conflicts, hostilities, and actual war: “Congress’s power to declare war does not constrain the President’s independent and plenary constitutional authority over the use of military force” (3). Military force, therefore, is beyond war and thus beyond any act of Congress that might constrain the president, according to Yoo’s fancy rhetorical footwork, despite the fact that the founding fathers clearly did not intend for presidential powers to be unlimited, whether in time of peace or of war. The most charitable interpretation would be to assume that Yoo was caught up in the post 9/11 panic, but the facts do not bear this out. Further, as law professor Lawrence Rosenthal put it, that would be the first defense he had heard “where a lawyer is saying he lost his head in giving an opinion . . . His job is to keep his head” (qtd in Coker). Again, it seems questionable that is a correct interpretation of the documents or of the events surrounding their production, and I argue that there is considerable evidence to the contrary, including at the textual level, as seen above. In any case, also up for debate is whether Yoo’s argument follows either the spirit, or the letter, of the United States Constitution.
CHAPTER SEVEN:

THE “SEMANTIC TAP-DANCE”:

Discursive, Rhetorical, and Lexico-Grammatical Strategies

in The Torture Memos

The previous chapters have covered in detail the context in which the memos were written, including a dramatistic analysis based on the Burkean pentad, and an in-depth examination of some of the key concepts that underlie both the memos and the intrinsically related discourse of the war on terror. Those analyses took place at all four levels identified by Huckin, from the higher order concepts and examinations of whole text and intertextual features of Levels III and IV, to the sentence, utterance, phrase, and word considerations of Levels I and II. This chapter will continue the four-level analysis begun in the previous chapters by outlining in greater detail, using specific examples, some of the key strategies employed by the memos’ authors to enact an authoritarian worldview that culminates, I argue, in the legitimation of torture—and that, further, is antithetical to the ideals of American democracy (although frequently not its practice) and to the framers’ original intent.

In looking at the argument structures and discursive strategies used in the
memos, this chapter will necessarily touch on some of the legal issues that have arisen in the surrounding debate. Obviously, a thorough or even a truly knowledgeable discussion of the legal validity (or lack thereof) of the memos is beyond the scope of this dissertation. A closer examination of the language used in key memos, however, including a discussion that highlights some of the more interesting rhetorical and linguistic moves made by the authors, will shed further light, I hope, on the underlying issues that I believe shaped the writing of the memos, as well as illuminating some of the issues they directly address. While this chapter (and indeed, the entire dissertation) cannot pretend to be an exhaustive analysis of any of the documents, I hope to raise questions that clearly point to areas in urgent need of further study.

The faulty argumentation, lapses in logic, egregious manipulations of language, and fundamentally shoddy reasoning that in my opinion characterize the key memos are not—nor should they be—solely a subject for legal analysts. Admittedly, a number of legal experts, from Georgetown law professor Marty Lederman to New York human rights attorney Scott Horton, have already provided damning assessments of the memos from a legal standpoint. A number of commentators view the Bush OLC lawyers not, in the words of Robert Parry, as “diligent lawyers providing professional advice, . . . [but as] Mob consiglieres counseling crime bosses how to evade the law” (Parry alternet). Even Jack Goldsmith, whose book The Terror Presidency was an attempt to defend key Bush administration officials as perhaps misguided but always well-intentioned, wrote
that the OLC’s legal arguments reflected "bad judgment, . . . [were] poorly reasoned" and demonstrated an opinion that was both “unnecessary and overbroad” (165). In his testimony before Congress, the dean of Yale Law School described the main OLC torture memo, Doc 22, as "the most clearly legally erroneous opinion I have ever read" (qtd in Horton, “Golden Shield”), and the American Bar Association called the legal argumentation in Doc 22 “clearly incompetent” (qtd in Horton, “Golden Shield”). Although not every legal scholar agrees, there is a broad consensus that much of the legal reasoning used in the memos is fatally flawed. Indeed, one wonders how a carefully constructed, step-by-step edifice of legal arguments, based on a “king-of-everything” premise that ultimately leads to the highly dubious conclusion of overturning decades of domestic and international precedents against torture, could legitimately be considered sound. One might conclude that the memos indicate that the authors lost sight of the forest for the minute legalities of the trees—assuming, of course, that delineating the forest was their main purpose.

This dissertation, in any case, focuses on language rather than legal precedent. In this chapter, I argue that apart from the dubious legal footing upon which the memos stand, there is ample evidence that the strategic use of language throughout the memos is equally questionable, from the slipperiness of meaning that arises from the way words, phrases, and concepts are employed—or avoided and omitted—to the redeployment of those words, phrases, and concepts in contexts that—arguably—utterly change their original meaning and intent. I hope, further, to demonstrate other ways in which the OLC authors manipulated language,
quite possibly in order to fulfill a purpose far different from the motivations cited repeatedly in their defense by Jack Goldsmith and others. In the “new common sense” of the legitimacy and permissibility of torture—at least when the U.S. undertakes it—that is now an ineradicable part of our national debate, it becomes vital to examine the logic of the preeminent authoritarian discourse that shapes that position and the ways in which hegemony persists and is operationalized and institutionalized, as exemplified in the Torture Memos. As van Dijk explains, “CDA is specifically interested in power abuse, that is, in breaches of laws, rules and principles of democracy, equality and justice by those who wield power” (255). As a genre, legal documents are among the most elite forms of communication we have; they are embedded many levels above ordinary day-to-day discourse, protected and privileged even without the shroud of secrecy that surrounded the creation and quiet dissemination of the Torture Memos. This chapter will seek to unlock some of the discursive strategies that legitimated new-old forms of domination and control and that naturalized a “new” social order of the acceptability of cruelty with which we have yet to fully come to terms.

Undeniably, fear and the desire to protect the country from another attack were strong motivators for many in the Bush administration (as well as beyond). Undeniably too, there will always be disagreement as to the best ways to both alleviate fears and to protect the nation. A closer look at the discursive, rhetorical, semantic, and lexico-grammatical strategies the OLC authors employed, however, would seem to indicate that neither the desire to alleviate fear, nor the paramount
goal of protecting the nation, can adequately explain the use of tortured logic, unusual or “odd” semantic moves, and flawed reasoning that are hallmarks of the OLC memos. Other factors seem to be in play. We will examine this in detail below.

**Authoritarianism and the Torture Memos**

Social scientist Robert Altemeyer, who has been studying authoritarianism since 1966, argues “that the greatest threat to American democracy today arises from a militant authoritarianism that has become a cancer upon the nation” (2). According to Altemeyer, authoritarians fall into two groups: leaders and followers. His term “right-wing authoritarians” designates not their political ideology but rather their desire to preserve and maintain existing power structures and institutionalized authorities, and/or to submit to those who do. (Left-wing authoritarian groups, on the other hand, Altemeyer categorizes as submitting to authorities who seek to overthrow existing power structures and authorities and establish others in their place. Thus those in the former Soviet Union who fanatically supported their communist government were also high RWAs, i.e. they supported the institutionalized power structures instead of seeking to overturn them.) Altemeyer describes authoritarianism as something authoritarian followers and authoritarian leaders cook up between themselves. It happens when the followers submit too much to the leaders, trust them too much, and give them too much leeway to
do whatever they want—which often is something undemocratic, tyrannical and brutal. (2)

Altemeyer’s research, based on a set of survey questions he has meticulously developed and revised over roughly forty years of research, assigns people an RWA (right-wing authoritarianism) score and places them along a scale of low to high authoritarianism. According to Altemeyer, high RWA followers have three primary characteristics:

1) a high degree of submission to the established, legitimate authorities in their society;

2) high levels of aggression in the name of their authorities;

3) a high level of conventionalism. (9)

Altemeyer describes the aggression of high RWAs not as overt, direct aggression but as sanctioned, authority-driven, and morally self-righteous aggression, at levels much higher than in other sectors of the population. Altemeyer characterizes them as the first ones to saddle up when the sheriff (or the lynch mob) calls for a posse—especially against those who have traditionally belonged to out-groups, but also even when the targets are people they might normally support, such as the Ku Klux Klan:

Authoritarian Aggression. When I say authoritarian followers are aggressive I don’t mean they stride into bars and start fights. First of all, high RWAs go to church enormously more often than they go to bars. Secondly, they usually avoid anything approaching a fair fight . . .
It’s striking how often authoritarian aggression happens in dark and cowardly ways, in the dark, by cowards who later will do everything they possibly can to avoid responsibility for what they did. Women, children, and others unable to defend themselves are typical victims. Even more striking, the attackers typically feel morally superior to the people they are assaulting in an unfair fight. . . . research evidence [shows] . . . that this self-righteousness plays a huge role in high RWAs’ hostility. (21)

A wealth of evidence Altemeyer has gathered also shows that authoritarians support trusted authority figures against any and all evidence that might de-legitimize them as corrupt or evil, and that high RWAs also consistently blame the victims of authoritarian aggression above the trusted authorities themselves, even in the face of overwhelming evidence of corruption and abuse.7 They also tend to support far harsher punishments for transgressors, including capital punishment, and in fact they’d send just about anyone to jail for a longer time than most people would, from those who spit on the sidewalk to rapists. However, as noted earlier, authoritarian followers usually would go easy on authorities who commit crimes, and they similarly make allowances for someone who attacks a victim the authoritarian is prejudiced against. (22)

---

7 Notably, for many reasons (including his sexual behavior, which outraged conventional-thinking RWAs, his support of many out-groups, and his preference for negotiation with over annihilation of opponents, for example), Bill Clinton was not seen as a legitimate authority figure and was thus under constant—many would say particularly vicious—attack from high RWAs. Barack Obama fares similarly, for different but related reasons.
The most vilified targets, of course, are those who belong to traditional out-groups, such as gays. High RWAs are highly responsive to in-group and out-group categorizations, which are often delineated by trusted authorities. It is the exercise of authority, for whatever reason, that seems to matter most for authoritarians, however. In the early 1970s, for example, Altemeyer ran several studies using elements of Stanley Milgram’s infamous 1960’s experiments on obedience to authority, in which subjects were told to administer higher and higher electric shocks to learners who failed to properly master memorization tasks.\(^8\) In his experiment, Altemeyer gave subjects the choice of deciding how high the level of shocks should be and discovered that “the higher the subject’s RWA scale score, the stronger [were] the shocks delivered” (23).

This is not to demonize a certain sector of the population (and thus create yet another out-group to be vilified); as Altemeyer also points out, high RWA followers are “earnest, hard-working, happy, charitable, undoubtedly supportive of people in their in-group, good friends” (221), those they accept, etc. The enormous downside of members of this group, however, according to Altemeyer’s research, is that they are most susceptible to supporting authority that could turn out to be malevolent, most able to live with cognitive dissonance in the face of disconfirming evidence of cherished beliefs, and least able, it seems, to exercise critical thinking. Altemeyer’s research has found high RWAs, unlike those who scored lower on the scale, to be

\(^8\) Milgram’s experiment has been duplicated and his results confirmed many times in at least six countries.
“blissfully toler[ant] . . . [of] many illegal and unjust government actions” (18) such as

- a police burglary of a newspaper office to get confidential information.
- Drug raids carried out without search warrants because judges wouldn’t give them.
- Denial of right to assemble to peacefully protest government actions.
- “Dirty tricks” played by a governing party on the opposition during an election.
- Immigration office discrimination against radical speakers.
- Placing *agents provocateurs* in organizations to create dissension and bad press relations.
- Burning down the meeting place of a radical organization.
- Unauthorized mail openings. (18)

In other words, high RWAs were more likely to condone abuses of power and brute force against their own fellow citizens by government authorities, not to mention abuses directed against those deemed “terrorists” or enemies, than any other sector of the population. In a democracy, as Altemeyer points out, “no one is supposed to be above the law” (18); authoritarian followers, however, “appear to think that authorities are above the law, and can decide which laws apply to them and which
do not” (18). They are also least likely to support holding trusted authorities accountable for abuses of power.

Above all, authoritarian followers are also most susceptible to authoritarian leaders, who share their followers’ belief in the rightness of authority but who see themselves as the ones to fulfill that role, by any and all means necessary. Authoritarian leaders, or as Altemeyer calls them, “Double Highs,” score high on the Social Dominance Orientation scale (which measures the desire for personal power) as well as on the Right-Wing Authoritarian scale. For them, winning is everything; they see themselves (as their followers see them) as above the law. According to Altemeyer, most social research so far has concentrated on authoritarian followers, whose love of authority (as exercised by someone else) has been generally been deemed more puzzling than the desire for personal power. In the studies he has done, however, Altemeyer sees a “huge red flag” in Double Highs’ answers to two items in particular on his Exploitive-MAD scale:

“The best reason for belonging to a church is to project a good image and have contact with some of the important people in your community.”

And,

“It is more important to create a good image of yourself in the minds of others than to actually be the person others think you are.” (179)

The only real agenda of the Double High, for example, is power; where following the rules of trusted authorities is highly valued by authoritarian followers, for example, a Double High sees rules only as for other people to follow, preferably in service to
their own ends. Unlike other social dominators who score low on the authoritarian scale, and thus perhaps see the world as less dangerous, are less dogmatic, and less self-righteous, Double Highs have the “best chance of attracting . . . [an] army of yearning and loyal supporters” 181). A Double High comes packaged as “one of our own,” one of the in-group. He not only shares their prejudices, their economic philosophy, and their political leanings, he also professes their religious views, and that can mean everything to high RWAs . . . you can expect to find a Double High leading most of the right-wing authoritarian groups in our country.

(181)

Another question on the Exploitive-MAD scale says, “One of the best ways to handle people is to tell them what they want to hear.’ Or, as Abraham Lincoln is said to have put it, ‘You can fool some of the people all of the time’” (179)—which, as George W. Bush joked at a Gridiron Club Dinner in March 2001, “are the ones you want to concentrate on” (193 Footnote 9). Manipulation, deception, veiled contempt that is met, conversely, with staunch and open adoration, seem to be core characteristics of the relationship between authoritarian leaders and their followers; RWAs, however, seem incapable of recognizing any of the above machinations at play.

A last point: in another, earlier study, Altemeyer asked U.S. lawmakers to rank the concepts *freedom* and *equality* among nine core values; interestingly, *freedom* was ranked number one by nearly everyone who answered the survey, but
equality averaged a rank of third from the top for low RWAs and third from the bottom, or seventh out of nine, for high RWAs. Disdain for equality is an identifying marker of social dominants, which suggests, not surprisingly, that most of the lawmakers who scored as high RWAs were also Double Highs. Equality is anathema to authoritarians, whose worldview is deeply hierarchical in nature; for both followers and leaders, the world is more strongly divided into in-groups and out-groups, i.e. the deserving and the undeserving (those who have been outcast, vilified, criminalized, dehumanized, etc., by trusted authorities) than for others. Equality, for example, is often essentially coded by authoritarians as “giving a hand-out” to those who haven’t earned it. Altemeyer’s research also suggests a definition of freedom that, for Double Highs, means solely the unconstrained ability to seize, maintain, and above all, to exercise power. Authoritarianism, in short, whether held by leaders or followers, is at its heart a profoundly anti-democratic worldview, in which the common good—including the common defense—has little meaning, and of which the premier goal is the exercise of power over others.

The Torture Memos are best understood as documents that, above all, seek to solidify, preserve, and fortify executive power beyond the reach of any laws or external checks and balances, and as such are fundamentally and intrinsically shaped by the authoritarian worldview described above. Viewed in this light, much in the documents begins to make more sense, with avid RWA followers Yoo, Haynes, Bybee, Philbin, Gonzales, and others enabling Double High leaders George W. Bush, Dick Cheney, and David Addington.
Framing

Table 7.1 below provides an overview of the key frames, metaphors, and paradigmatic concepts used to construct the arguments the memos make, as well as some of the chief strategies employed. Note that all of these occur at more than one level of analysis and that it is difficult—at times impossible—to assign specific strategies to a single discrete level of operation. The frames used are, as has been shown previously, also key frames that characterize aspects of the war on terror as a whole. Three of the chief frames employed are good versus evil, a quasi-religious frame that characterizes the U.S. as the Innocent Victim and thus elides social, historical, and material global realities; a rhetoric of crisis that includes characterizing the threat of terrorism as existential; and the re-emergence of a form of American exceptionalism that views both the United States as a country, and the situation she finds herself in, as unique in history and thus exempted from ordinary rules, conventions, or laws. Two frames in particular, however, underlie many of the above paradigms and permeate the core arguments made throughout the memos. The first is the frame of defense, which “serves as ‘a technology of power’ for coercively maintaining and preserving the American-led security order” (Lazar and Lazar 56)—a frame that, in other words, uses the mantle of national security to justify virtually any actions the U.S. may take. The other pervasive frame is the characterization of executive power as unlimited and unconstrained, particularly in wartime. How this power is enshrined in language will be examined in further detail below.
**Table 7.1 Major frames and language-based strategies**

**HEGEMONIC DISCOURSE**  
*In all four levels of the Torture Memos*  
(to defuse political resistance and maintain/increase existing power structures)

<table>
<thead>
<tr>
<th>Representations</th>
<th>Paradigmatic Choices Frames / Metaphors / Schema</th>
<th>Some key Rhetorical, Semantic, and Lexico-Grammatical Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time/space</strong></td>
<td>Protect and Defend Exceptionalism of</td>
<td>Use of intertextuality structures</td>
</tr>
<tr>
<td>Specific acts/Specific events:</td>
<td>• the country</td>
<td>Topicalization</td>
</tr>
<tr>
<td>• potential</td>
<td>• the post-9/11 situation</td>
<td>(Foregrounding /backgrounding)</td>
</tr>
<tr>
<td>• actual</td>
<td>Good vs evil (religious/innocent</td>
<td>Nominalization</td>
</tr>
<tr>
<td>Identity</td>
<td>victim frames - morality</td>
<td>Transivity (agent/patient relations)</td>
</tr>
<tr>
<td></td>
<td>tropes)</td>
<td>Naturalization (“common sense”, e.g. of torture)</td>
</tr>
<tr>
<td></td>
<td>Legal black hole – into which to put “the bad</td>
<td>Deletions (agentless passive)</td>
</tr>
<tr>
<td></td>
<td>guys”</td>
<td>Outcasting - 4 microstrategies:</td>
</tr>
<tr>
<td></td>
<td>Golden shield – to protect “the good Guys”</td>
<td>evilification, criminalization, orientalization, enemy</td>
</tr>
<tr>
<td></td>
<td>Rhetoric of Crisis / Tropos of Threat:</td>
<td>construction</td>
</tr>
<tr>
<td></td>
<td>• Existential and Imminent (“Ticking Time Bomb</td>
<td>Semantic shifts and reversals</td>
</tr>
<tr>
<td></td>
<td>Scenario”)</td>
<td>Substitutions / Euphemisms</td>
</tr>
<tr>
<td></td>
<td>• War vs. law enforcement vs armed conflict</td>
<td>Hyperlexicalization</td>
</tr>
<tr>
<td></td>
<td>frames)</td>
<td>Overlexicalization</td>
</tr>
<tr>
<td><strong>Omissions</strong></td>
<td>Suspension of time/space</td>
<td>Recontextualization</td>
</tr>
<tr>
<td></td>
<td>• Potential = actual, Perceived = real (1%</td>
<td>Simplification</td>
</tr>
<tr>
<td></td>
<td>doctrine)</td>
<td>Universalization (to de-politicize and de-ideologize)</td>
</tr>
<tr>
<td></td>
<td>Suspension of cause-effect</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Suspension of critical thinking</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(evidence does not play a role)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conflations / Elisions</td>
<td></td>
</tr>
</tbody>
</table>
Argument Structure

In Chapter VI, I outlined the argument structure Yoo uses in Doc 2 to enact two core and highly controversial concepts: 1) the legitimacy of pre-emptive strikes, and 2) the notion that executive power cannot be constrained, especially in wartime. Briefly, Yoo places the conclusion he has reached at the beginning of the memo, makes an in-depth argument of a related point or points without drawing adequate connections between his more and less controversial ideas, then assumes his conclusion proven. In other words, he spends most of the document building a case that seems relatively self-evident and then draws a quick, dubious conclusion at the end. In Doc 2, for example, the word “preemptively” appears at the beginning of the document only, twice on page 1 in the abstract and opening paragraphs, and then the concept is never revisited. The word “pre-empt” does appear once toward the end, in the sentence just prior to his concluding remarks, with the collocate “respond”; a few paragraphs previously, he admits that the Joint Resolution of Sept. 14, 2001 affords the president powers narrower in scope than his own broader reading of the constitution. In between intro and conclusion Yoo has argued, using many precedents, that the president has the power to respond militarily to attacks, even—when circumstances demand it—without specific authorization from Congress; notably, Yoo conflates “respond” with “prevent” and “deter,” both of which appear a total of seven and nine times, respectively, in the document. The rhetorical and material space between “military response to attacks” and “pre-emptive strikes” is vast; Yoo, however, never actually directly discusses the
difference—neither in meaning nor in practice—between the various concepts of prevent, deter, defend, and pre-empt. Instead, he conflates all of them both with each other and with the president’s authority to employ military force as he sees fit. By the end of the document he arrives at a doctrine of preemption without ever engaging in a thorough examination or even any discussion of what such a doctrine might entail, legally or any other way.

This structure of argument or its mirror image can be found repeatedly throughout the documents: introduce a controversial (or non-controversial) concept, conflate it with a more self-evident (or conversely, a more controversial) concept, build a comprehensive argument around the self-evident concept, then briefly take the more controversial point as proven at the end of the memo (by implication “proving” also the controversial point elided behind the innocuous one). Altogether, the conflation of words and concepts, e.g. controversial and non-controversial, repeatedly serve as a key component of the arguments the OLC authors make; conflations appear at all four levels of analysis (another reason why it is difficult to completely separate the different levels of analysis from one another), which allows the authors’ arguments to seem legitimate while their more unusual aspects are elided behind innocent-sounding and hard-to-argue-with thematic formations such as “defense” or “national security.”

**Conflation**

Two further examples of the overarching structure of elision and conflation
throughout the memos are Yoo’s arguments in Docs 3 and 4. In Doc 3, he discusses the possibility of legalizing warrantless searches, using examples of warrantless searches to argue for their acceptability, and thus for a lowered standard for searches requiring warrants as well. In Doc 4, he suspends not only the Fourth Amendment prohibition on illegal searches but possibly the First Amendment: “First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully” (Yoo, Doc 4 24). The war on terror thus trumps all other concerns, from conventional constitutional readings to considerations of civil rights.

Yoo’s core argument in Doc 3, written on Sept. 25, 2001 and entitled “Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to change the ‘Purpose' Standard for Searches,” consists of the minute but important shift from the definite to the indefinite article—behind which is embedded his argument in favor of warrantless searches. In Doc 3, Yoo changes the “purpose standard” of searches as laid out by FISA (i.e., that searches conducted for law enforcement purposes, as opposed to intelligence gathering purposes, must follow Fourth Amendment requirements) to a purpose standard, laying the field wide open to a number of conflations: law enforcement with intelligence purposes; searches requiring a warrant with searches that do not; the standard of “reasonable” purposes with “probable cause”; and perhaps most importantly, the conflation of domestic and foreign surveillance. As Yoo puts it, 9/11 demonstrates that “the fine distinction between foreign intelligence gathering and domestic law enforcement has broken
down" (12). Essentially, Yoo’s fundamental argument over 13 pages remains the same as his argument in Doc 2 over 23 pages; i.e., the president has the constitutional authority to take any actions he feels necessary, without constraint or oversight. In Doc 3 Yoo readily admits that "the courts have been exceedingly deferential to the government and have almost invariably declined to suppress the evidence, whether they applied the 'primary purpose' test or left open the possibility of a less demanding standard" (1); moreover, he also concedes that the courts would likely continue to be similarly deferential in light of the war on terror. He nonetheless essentially claims the right of the executive to bypass constitutional constraints either before or after the fact on searches, warrantless or otherwise, and on surveillance, domestic or foreign, in the interests of national security.

During a talk at the National Press Club, a telling exchange between Knight Ridder reporter Jonathan Landay and General Michael Hayden, Bush’s “No. 2 man on intelligence” (Grieve), reveals that despite the White House’s insistence that it could “be trusted to protect Americans’ civil liberties . . . the National Security Agency wasn’t, in fact, using the legal standard that the FISA court would have applied if the NSA had asked for a warrant as the law requires” (Grieve). After a back and forth exchange about whether the Fourth Amendment mandates a probable cause standard, as Landay claims, or uses a standard that merely prohibits unreasonable search and seizure, as Hayden contends, Landay finally interrupts, insisting that “the legal standard is ‘probable cause,’ General . . . And a FISA court, my understanding is, would not give you a warrant if you went before
themand say ‘we reasonably believe’; you have to go to the FISA court . . . and say, ‘We have probable cause.’ And so what many people believe—and I’d like you to respond to this—is that what you’ve actually done is crafted a detour around the FISA court by creating a new standard of ‘reasonably believe’ in place of ‘probable cause’ because the FISA court will not give you a warrant based on ‘reasonable belief,’ you have to show ‘probable cause.’ Could you respond to that, please?”

Hayden: “Sure. I didn’t craft the authorization. I am responding to a lawful order. All right?”

The authorization, of course, was crafted by John Yoo in Docs 3 and 4, notwithstanding his own citation in Doc 3 of a First Circuit court admonishment that FISA was “not to be used as an end-run around the Fourth Amendment’s prohibition of warrantless searches” (Doc 3, 9). The argument structure in Doc 3 is typical of the memos. As he argues his case to change the purpose to a purpose of government searches in foreign counterintelligence, and writes claims for the validity of this shift into both his introduction and conclusion, Yoo is actually not merely arguing about purpose at all; he is making an argument throughout the body of the memo for the legitimacy of warrantless searches in the interest of national security. The memo thus uses the article substitution to widen the field of executive power to include conducting warrantless searches for almost any purpose on domestic as well as foreign soil. Certainly, this is a vastly different reading of the legitimate scope of
government surveillance than pre-9/11 interpretations, at least post-Watergate.

Doc 3 thus provides several examples of seemingly minor linguistic substitutions that have major consequences. The Fourth Amendment says that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (“U.S. Constitution”)

Doc 3, however, lowers the standard from “probable cause” to “reasonable searches and seizures,” which in Yoo’s view applies generally as the standard for gathering intelligence, and further suspends FISA through that minute but notable grammatical shift from definite to indefinite article. His argument is that because the new language defines intelligence gathering as a purpose of searches rather than the purpose of searches, it “cannot cause a facial violation” (italics Yoo’s)—that is, it does not violate the Fourth Amendment in every possible instance—as the new language includes old, valid searches as well as those conducted according to the new standard of “reasonableness” in the wake of 9/11. In order to avoid using warrantless searches solely for law enforcement or criminal investigation purposes, prosecutors must simply refrain from becoming “too involved in the planning and executing of FISA searches” (1)—while at the same time Yoo allows for a new, ostensibly legitimate “collateral interest in obtaining information for a criminal
prosecution” (10). Further, Yoo argues, the standard for “reasonable” intelligence gathering searches was already lower than for law enforcement; after 9/11 it is even lower. This single change in article and subtle shift in focus from “probable cause” to what Yoo calls the new “reasonableness calculus”—a shift I initially overlooked, even after several readings—open vast new legal spaces within which the executive can operate with far less judicial interference or oversight.9

While I make no claim to understanding or being able to critically assess the intricacies of the legal debate over Yoo’s amendments to the FISA act, the core issue here, as Yoo himself recognizes, pertains to the limits (or lack thereof) on executive power, specifically the interests of government versus the rights of the individual: “As we have noted earlier, the Fourth Amendment’s reasonableness test for searches generally calls for a balancing of the government’s interest against the individual’s Fourth Amendment interests” (3). In these documents, however, there is little evidence of balance: “a lower [reasonableness] standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded” (12). In essence, despite the clear and arguably overriding purpose of the Founding Fathers in writing the United States Constitution, particularly the Amendments—namely, to protect individuals from the inevitable and all too easy overreach of the powerful forces of government—Yoo clearly and repeatedly places the interests of

9 Actually, on p. 8 Yoo warns against what he calls “the calculus [that] has shifted in light of the September 11 attacks and the increased counter-terrorism threat.” Presumably he means here the increased threat of terrorism.
government over the individual. Citing a 1985 Supreme Court ruling, Yoo states that “under the totality of circumstances, the ‘importance of the governmental interests’” outweighs the “nature and quality of the intrusion on the individual’s Fourth Amendment interests” (2). Yoo in fact argues that “the courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others” (8)—and if the use of deadly force is reasonable, then warrantless searches certainly are. Despite his acknowledgement of a Fourth Circuit court opinion from 1980 recognizing that “because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount” (4), it is hard to imagine a situation in which, for Yoo, the interests of the executive would not be paramount.

As occurs throughout the documents, Doc 3 also uses three of the core arguments listed in Table 7.1, above, to enshrine broadly unlimited executive power. First, Yoo calls upon the defense defense, i.e. that the defense of self or others, especially post-9/11, justifies any action the government may take, including the use of aggressive force and the suspension of judicial oversight:

the factors favoring warrantless searches for national security reasons may be even more compelling under current circumstances than at the time of these lower court decisions. After the attacks on September 11, 2001, the government interest in conducting searches
related to fighting terrorism is perhaps of the highest order—the need to defend the nation from direct attack. (5)

He also cites numerous cases in which "exigent circumstances" make warrantless searches reasonable, particularly those pertaining to threats to the health and safety of law enforcement officers or third parties, and "situations of grave and unforeseen emergencies" (6). As he does in at least four other documents, he uses this quote from Hamilton regarding national security: “it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy” (5); note, however, that Hamilton is referring in this passage to the total powers of the federal government, not the powers of the executive alone. Further, Yoo writes that “as a result of the direct terrorist attacks upon the continental United States, the government’s interest has reached perhaps its most compelling level, that of defending the nation from assault” (12). Thus the “government’s interest,” which according to Yoo has “shifted upward” (12), has changed from merely conducting foreign intelligence surveillance in order to counteract intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself, by any and all means. Yoo cites both the nation’s right to self-defense and the government’s “heightened interest in self-defense” (8). Again, the use of force becomes self-defense; defense and offense are conflated. Any action the U.S.
engages in, whether government, law enforcement, or military, is defined as defense.

Secondly, Yoo uses the idea of **exceptionalism**, characterizing the “needs” of government in light of the “special” circumstances it finds itself in as leaving the field wide open for broad governmental action beyond Fourth Amendment or FISA constraints, whether for national security or law enforcement purposes. Yoo cites several Supreme and Circuit Court decisions to support this view; the Court writes that “a warrantless search can be constitutional ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable’” (2, emphasis added). He also cites a Fourth Circuit decision in which “the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following Keith, ‘unduly frustrate’ the President in carrying out his foreign affairs responsibilities” (4, emphasis added). “Special needs” exceptions, however, do not merely apply to matters of national security; Yoo also reminds us that “when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable” (2, emphasis added). Yoo qualifies this by adding that “this is not to say that FISA searches would be constitutional no matter how little foreign intelligence purpose is present in the warrant application” (8); rather than attempting to negotiate the delicate balance between government and the individual, however—note that there
is no discussion, conversely, of cases pertaining to the special needs of the individual—Yoo seems intent in both Doc 3 and 4 on expanding executive reach as far as possible under his interpretation of the law.

Thirdly, he uses the **ticking time bomb scenario**, using for example the hypothetical situation of an “appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee” (3) to further underscore claims of the legitimacy of warrantless searches. In a phrase he uses in at least 6 of the memos (Docs 2, 3, 4, 36, 37, and 38), he reminds us that “if the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat” (7). In other words, threat is imminent if immediate action is not taken—another justification for suspending judicial review that conflates “imminent” with “immediate” with “future” threat or attacks. Important to remember is Yoo’s goal throughout; he is seeking to cement the absolute authority of the executive branch in taking any action it deems fit, including military action, and to suspend any oversight by the judiciary or Congress regarding those actions.

Noteworthy is that before 9/11 and the crafting of Docs 3 and 4, FISA did not actually limit decisive action on the part of the executive, i.e. did not curtail the ability to act that Yoo so staunchly and repeatedly defends. It merely required “neutral, independent oversight” for such action, a system of checks and balances; otherwise, the Court observed, “the absence of neutral and disinterested
magistrates governing the reasonableness of the search impermissibly left ‘those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks’” (Doc 3, 3).

Further, this oversight was required not prior to or even immediately after action taken, but (as far as I have been able to discover) FISA allowed, depending on the circumstances, from a 72-hour to a 15-day window for warrant applications to be submitted for any actions requiring review. With this memo, any such oversight is broadly suspended and decisions lie solely in the hands of the executive. Yoo enacts this goal by conflating, among other things, the use of military force and intelligence surveillance; by expanding the arena of the war on terror to include the domestic front; and—yet again—calling upon the exceptionalism of the situation to bypass the constraints placed on executive power by the Constitution, specifically FISA and, by extension, the Fourth Amendment.

**Elisions and Substitutions**

As is by now clear, conflation of concepts and terms is one of the most frequent and wide-reaching strategies the memos use to move from a given Point A to an often—to many—surprising Point B. One of the most common conflations that permeates the texts—readily seen, for example, when one re-reads the section above—is the conflation of the words “government” (also “federal government”), “executive” (also “executive authority,” “executive branch”), “president,” and “authority.” Throughout the memos, the OLC authors often use the terms
interchangeably. On page 5 of Doc 3, for example, we find the following oft-cited series of sentences and quotes that support the authors’ expansive vision of presidential powers, all of which appear in at least five or six of the thirty-nine documents; all are illustrative of another common conflation of human actor(s) with the role, office, or function he or she fulfills. Note, too, the widespread use of nominalizations and passive tense in the examples below, and the lack of transitive sentences (see Levels II and I below for further discussion); there is not a single human agent in any of the sentences below, except for one author, Hamilton, who is being quoted. Throughout the texts, even the Supreme Court functions as an institutional entity rather than as a group of human beings:

1. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order—the need to defend the nation from direct attack.

2. As the Supreme Court has said, “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981).

3. The compelling nature of the government’s interest here may be understood in light of the Founders’ express intention to create a federal government “cloathed with all the powers requisite to the complete execution of its trust.” *The Federalist* No 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
4. As Hamilton explained . . . because “the circumstances which may affect the public safety” are not “reducible within certain determinate limits,” it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

5. Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interest in accordance “with the realistic purposes of the entire instrument.” Lichter v. United States, 334 U.S. 742, 782 (1948).

6. Nor is the authority to protect national security limited to that necessary “to victories in the field.” Application of Yamashita, 327 U.S. 1, 12 (1946).

7. The authority over national security “carries with it the inherent power to guard against the immediate renewal of the conflict.” In other words, it is the “government” who conducts warrantless searches, has a compelling interest in conducting them, and also the authority to do so.

At the top of page 6, however, immediately following the sentence above, the language shifts—without any acknowledgment of any distinction between any of the terms—from “government” and “authority” to “the President”: “The text,
structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies” (6), and this shift in language from institutionalized entity to human entity continues for the rest of page 6 (and beyond). Not only does the president thus appear, repeatedly, as the sole human actor in the protection and defense of the nation, but as its representative, he becomes synonymous with all the powers and interests of “government” the authors are arguing in favor of. In other words, in the language of the documents, the president does not merely represent the government; he often is the government. As the authors’ intent requires, the language moves seamlessly between calling upon all the powers of the institution, to all those of the executive branch, to the human agent, and the role or office he embodies, and back again, either making or eliding the distinctions between each; the words are used interchangeably, or not, as serves the purposes of the text.

Yoo’s implicit conclusion that the president broadly embodies and enacts the powers of “government,” particularly in matters of national security, is certainly plausible in many circumstances, including many he and the other OLC authors hypothesize in detail throughout the memos. Again and again, however, the authors of the key memos cite precedents, laws, and court rulings to conflate the powers of government with the powers of the executive branch, essentially using these terms as though they are interchangeable—at least when it suits their conceptions of power. Thus the memos cite powers granted the government as a whole, in the
Constitution and in Supreme Court rulings, to argue, in essence, for unconstrained *presidential* power. It is perhaps the most fundamental—and egregious—conflation found in the memos. There are, of course, vast differences between conferring “all the powers requisite to the complete execution of its trust” (Hamilton qtd in Doc 3, 5) upon the federal *government*—that agency entrusted with “all the powers which a free people *ought to delegate to any government*” (Hamilton, “No. 23” 156)—and conferring them upon a single man in the person of the president—which was most decidedly *not* the intent of the framers. The torture memo authors, however, repeatedly use the concept—and the language—of *governmental* powers to cement their vision of expanded *presidential* powers. A vast difference exists between the powers of government and the powers of the president, but in all of the documents, whenever a conflation of the two is expedient to their purposes, Yoo and his fellow authors never once make the distinction.

**Intertextuality**

An extremely interesting phenomenon in the Torture Memos is the relation of the texts to one another. That is, as alluded to above, there is repeated use of whole paragraphs and even entire sections of text, verbatim or with extremely minimal changes, from document to document. The Torture Memos, in other words, are intertextual and mutually referential in the most concrete way imaginable. While I have not been able to find any discussion in general of the permissibility of re-using legal text in different documents, and thus cannot say whether this is an
acceptable practice in law, I can say with utmost certainty that this is not an acceptable practice in academic settings. There may be nothing wrong with an OLC (or any other) lawyer re-using his writings from one memo to next; Kathleen Clark, for example, in her analysis of the ethical and legal difficulties of the Torture Memo, meticulously documents verbatim passages in Docs 22 and 37 without citing it specifically as an ethical problem. This leads me to believe that it may not be an unusual practice in law. In any case, a clear recycling of actual text, rather than an expansion or elaboration on core ideas, threads through the memos.\(^{10}\)

The end result is that the body of the documents as a whole seems far more substantial than it actually is. The arguments made from memo to memo seem to carry more weight as though each memo supports the last in a scaffolded expansion of core arguments—until one examines the language more closely and realizes that the foundation of the entire complex structure rests merely on a limited number of identical or nearly identical paragraphs. The expanded versions of several of the memos, most notably Docs 22, 36, and 37, thus appear to be more thoroughly argued than they actually are. Single chunks of legal opinion that span no more than a few paragraphs each, in other words, set the arguments in repeated documents that ultimately cover hundreds of pages.

The comparisons below, in Table 7.2, provide several examples from the documents. Note that this is by no means an exhaustive sampling:

\(^{10}\) Also interestingly, self-citation (i.e., the author of the memo, in this case Yoo, citing his own previous opinions as precedent) was blacked out in redacted portions of at least one of the de-classified documents, which I subsequently found an unredacted version of online. (It is not best practice, apparently, for lawyers to cite their own written opinions in support of further opinions.)
Table 7.2 Intertextuality example I

| Doc 2 | p. 9-10 | Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to deter the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." The Apollon, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the "power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety." Duncan v. Kahanamoku, 327 U.S. 304,335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635,668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force... without waiting for any special legislative authority."); Kahanamoku, 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity" for emergency measures); United States v. Smith, 27 F. Cas. 1192,1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty ... of the executive magistrate ... to repel an invading foe"); see also 3 Story, Commentaries § 1485 ("[t]he command and application of the public force ... to maintain peace, and to resist foreign invasion" are executive powers). |
| Doc 3 | p. 9 | Judicial decisions since the beginning of the Republic confirm the President’s constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." The Apollon, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the "power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety." Duncan v. Kahanamoku, 327 U.S. 304,335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635,668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force... without waiting for any
special legislative authority.”); Kahanamoku, 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity” for emergency measures); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is “the duty ... of the executive magistrate ... to repel an invading foe”); see also 3 Story, Commentaries § 1485 (“[t]he command and application of the public force ... to maintain peace, and to resist foreign invasion” are executive powers).

Judicial decisions since the beginning of the Republic confirm the President’s constitutional power and duty to repel violent attacks against the United States through the use of force, and to take measures to deter the recurrence of such attacks. As Justice Joseph Story said long ago, “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.” The Apollon, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the “power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety.” Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary, including the use of military force abroad. As the Court declared during the Civil War: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force ... without waiting for any special legislative authority.” See, e.g., The Prize Cases, 61 U.S. at 668. In the Civil War context, the President used this authority to respond militarily to a threat from within the United States itself.
magistrate .•. to repel an invading foe’); see also 3 Story, Commentaries § 1485 (“[t]he command and application of the public force ... to maintain peace, and to resist foreign invasion” are executive powers).

| Doc 37 | p. 23 | Judicial decisions since the beginning of the Republic confirm the President’s constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.” The Apollon, 22 U.S. (9 Wheat.) 362, 366-67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. See e.g., The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force ... without waiting for any special legislative authority.”); United States v. Smith, 27 E. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is “the duty ... of the executive magistrate .•. to repel an invading foe”); see also 3 Story, Commentaries § 1485 (“[t]he command and application of the public force ... to maintain peace, and to resist foreign invasion” are executive powers).

Table 7.3 Intertextuality example II

| Example II: Docs 2, 3, 22, and 37 |
|---|---|
| **Doc 2** | p. 2 | The President’s constitutional power to defend the United States and the lives of its people must be understood in light of the Founders’ express intention to create a federal government "clothed with all the powers requisite to [the] complete execution of its trust." The Federalist No. 23, at 122 (Alexander Hamilton) (Charles R. Kesler ed., 1999). Foremost among the objectives committed to that trust by the Constitution is the security of the Nation. (1) As Hamilton explained in arguing for the Constitution’s adoption, because "the circumstances which may affect the public safety are [not] reducible within certain determinate limits, ... it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency." Id. (2) |
| **Doc 3** | p. 5 | The compelling nature of the government’s interest here may be understood in light of the Founders’ express intention to create a federal government "clothed with all the powers requisite to the complete execution of its trust." The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution’s adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits," it must be admitted, as a necessary consequence, that
there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

Doc 22
p. 36-37

The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "clothed with all the powers requisite to the complete execution of its trust." The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not reducible within certain determinate limits, it must be admitted, as necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.

Doc 37
p. 22

The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "clothed with all the powers requisite to the complete execution of its trust." The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not reducible within certain determinate limits, it must be admitted, as necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.

Table 7.4 Intertextuality example III

<table>
<thead>
<tr>
<th>Example III: Docs 2 &amp; 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Doc 2</strong></td>
</tr>
<tr>
<td><strong>Doc 3</strong></td>
</tr>
</tbody>
</table>
entire instrument." Lichter v. United States, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary "to victories in the field." Application of Yamashita, 327 U.S. 1,12(1946). The authority over national security "carries with it the inherent power to guard against the immediate renewal of the conflict." Id.

Table 7.5 Intertextuality example IV

<table>
<thead>
<tr>
<th>Example IV: Docs 2 &amp; 19</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Doc 2</strong>&lt;br&gt;p. 10</td>
<td>Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: &quot;a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.&quot; Youngstown Sheet &amp; Tube Co., 343 U.S. at 610-11 (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: &quot;'the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.'&quot; Mistretta v. United States, 488 U.S. 361, 381 (1989) (citation omitted).</td>
</tr>
<tr>
<td><strong>Doc 19</strong>&lt;br&gt;p. 7</td>
<td>Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: &quot;a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.&quot; Youngstown Sheet &amp; Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: &quot;'the Constitution... contemplates that practice will integrate the dispersed powers into a workable government'&quot; Mistretta v. United States, 488 U.S. 361, 381 (1989) (citation omitted).</td>
</tr>
</tbody>
</table>

As stated, these are only a few examples; there are many more. Perhaps the most important repetitions, however, are the large swaths of identical text that run through arguably the most crucial of the documents: Doc 2, which enshrines executive power; Doc 22, also known as “The Torture Memo”; Doc 36, an expanded version of Doc 22; and Doc 37, known as the Working Group Report, which in large
measure duplicates Doc 36 (and thus much of Doc 22. (For a further comparison, see Kathleen Clark’s chart of verbatim passages between Docs 22 and 36 in her article “Ethical Issues Raised by the OLC Torture Memorandum”). Essentially, the body of documents that enshrined torture can, in part at least, be redefined as a single, overarching, and much less substantial piece of text than the hundreds of pages taken individually seem to indicate; pieces of the documents are used repeatedly as needed throughout the individual memos, serving the purpose of solidifying power in the hands of the executive.

The provenance of Doc 37 bears tracing in full. After CIA interrogators and certain members of the military in Afghanistan and Guantanamo had begun implementing certain “harsh interrogation” techniques, significant dissenters at different levels of the military and the FBI had begun protesting in turn, some of them insistently and repeatedly working their way up the chain of command. Chief among them was General Counsel of the Navy Alberto Mora; according to Philippe Sands, Mora had several conversations with Rumsfeld’s lawyer, William “Jim” Haynes, whom Mora ultimately realized was surprisingly uninterested in the possibility that interrogations of detainees might be crossing legal and ethical boundaries. Mora finally drafted a memo detailing abuses, which he then threatened to make public if the administration persisted in pursuing what amounted to torture. In response, Rumsfeld temporarily rescinded certain approved interrogation techniques, in Doc 33, and commissioned a working group of military and legal experts to investigate various methods of interrogation that
they would ultimately provide with a stamp of approval. According to accounts told to Sands, among others, the working group was essentially a sham. Although Rumsfeld seemed to finally acquiesce to Mora’s insistence that they bring defense policy more in line with existing domestic and international law, the working group was given to understand from the outset that Doc 36—the expanded version of Doc 22, the Torture Memo—would provide the basis for their findings.

Despite vigorous opposition to many of the proposed techniques from top military lawyers in the working group, expressed in a series of memos that became Doc 35, the Working Group Report ultimately authorized 35 harsh techniques without the knowledge or consent of the group’s own members (at least one of whom, according to Sands, only found out a year after the fact that a final version of the report had indeed been released). With its release, Rumsfeld re-approved 24 of the 35 techniques in Doc 38. Thus policy that had been initially enacted was re-enacted without further investigation, exploration, or legal deliberation, despite the attempt to create appearances to the contrary.

Important about this story, and about the recycling of language throughout the memos, is the strong indication that policy was set from the beginning and that the memos fulfilled the specific purpose of consistently legitimizing certain predetermined outcomes, rather than providing measured considerations of policy, which is, in the view of many, the OLC’s core purpose. The true function of the OLC seems up for debate (see the discussion below); a wealth of evidence, however, indicates that the intent of the authors was to legally make work, one way or
another, whatever the president and his associates asked for. As Goldsmith himself recounted, during his stint in the OLC, Philbin had warned him on the way to a meeting with Gonzales and Addington that they were "going to be really mad . . . they've never been told no" (Rosen, "Conscience"). Rosen describes the OLC as having

- two important powers: the power to put a brake on aggressive presidential action by saying no and, conversely, the power to dispense what Goldsmith calls "free get-out-of-jail cards" by saying yes. Its opinions, he writes in his book, are the equivalent of "an advance pardon" for actions taken at the fuzzy edges of criminal laws.

(Rosen, "Conscience")

Problematically, as Mayer and others have documented, the OLC never said no to George W. Bush, Dick Cheney, or David Addington. It is difficult to imagine a "fuzzier" edge of the law than the legitimation of torture, despite the steady, step-by-step progression toward its legalization that the memos demonstrate, but the OLC lawyers served only the purpose of creating "get out of jail free cards" for whatever the administration wished to do, never for putting on the brakes. As Clark explains (referring to Doc 22 as "The Bybee Memorandum"), perhaps adequately informing their client did not apply because the Bybee Memorandum was never intended as legal advice in the traditional sense. In fact, David Luban and other scholars have speculated that this Bybee Memorandum was not intended as legal advice at all, but
instead as an immunizing document, to ensure that CIA officials who engage in torture would not be prosecuted for that conduct. (468)

Similarly, in *The Torture Papers: The Road to Abu Ghraib*, Karen J. Greenberg describes the memos as

the systematic attempt of the U.S. government to prepare the way for torture techniques and coercive interrogation practices, forbidden under international law, with the express intent of evading legal punishment in the aftermath of any discovery of these practices and policies. (front jacket)

Clark also notes in her analysis of (what *Torturing Democracy* calls) Docs 22 and 37 that the earlier OLC memos demonstrate at least some evidence of an attempt by the authors to give a balanced consideration of the issues and precedents, therefore fulfilling the OLC’s intended purpose of providing legal advice to the president as opposed to merely using the law to advocate for a particular position. Clark points out that in Doc 7, for example, although Philbin and Yoo conclude that Geneva protections do not apply to detainees in Guantanamo, an opinion the Supreme Court later overturned, they at least acknowledge arguments of the opposing position and warn that they “cannot say with absolute certainty that any such petition would be dismissed for lack of jurisdiction” (Doc 7, 1). As Clark observes, however, later documents do not even attempt to provide a balanced view of the legal issues and ramifications.
The textual evidence the documents as a whole provide seems to support the interpretation of the OLC authors as seeing themselves in an advocatory, rather than in an advisory, role. With the strong intertextuality and “recycling” of core opinions, the actual body of the documents’ overall argument forms a straight but narrow trajectory in a single direction—toward enshrining executive power beyond the reach of any effectual checks or balances. In other words, the real objective of the OLC authors in writing these memos may well have been to function, essentially, as Robert Parry describes them: as mob consiglieres for torturers and their enablers. Alternatively, the memos may be evidence of the fanatic single-mindedness of adoring authoritarian followers, seeking by any and all means to enable their authoritarian leaders who—for whatever reasons—are hungry for power.

**War / Not War, Continued**

Doc 4, “Authority for Use of Military Force to Combat Terrorist Activities Within the United States,” written on Oct. 23, 2001, by John Yoo and Robert Delahunty to Alberto Gonzales and Jim Haynes, provides a good example of the kind of “semantic tap-dance” (Giroux) that Bush administration officials and their lawyers engaged in as they attempted to construct a post-9/11 paradigm that justified a “new vision of an infinitely expandable, unilaterally determined, limitless war” (Bennis qtd in Dunmire, “9/11” 203). Dunmire sees the ultimate goal of the administration, and the lawyers who enabled them, as making the “constitutional argument that presidential power is unconstrained by law” (Giroux) in order to
maintain U.S. military preeminence across the globe. As mentioned previously, however, re-defining the post-9/11 situation as a war, rather than as a matter of law enforcement—and note that, as we have seen, in general there are greater constraints on the government’s use of force for law enforcement purposes than for national security purposes—is problematic for several reasons. The Supreme Court finding that it is “‘obvious and unarguable’ that no governmental interest is as compelling as the security of the Nation” (Doc 2, 2; Doc 3, 5; Doc 4, 34; Doc 36, 61) appears in at least four of the core documents. As previously discussed, however, using the paradigm of war, framed as an issue of national security, was not unproblematic; while it afforded the administration the freedom from many laws that law enforcement is subject to, it also meant the administration would have to find a way to re-define the enemy and thus find a way around the Geneva conventions protecting prisoners of war. This became a core objective of several of the memos, which from Doc 1 on frame the issue as a matter of war.

Doc 4 provides a good example of the complexities, and particularly the benefits, of framing the issue as war. The first paragraph of Doc 4, section I includes a quote from a speech given by President Bush on Sept. 20, 2001: “On September the 11th, enemies of freedom committed an act of war against our country” (Doc 4, 2). Also early in the document, Yoo and Delahunty remind us (quoting Lewis “Scooter” Libby) that “it is vital to grasp that attacks on this scale and with these consequences are ‘more akin to war than terrorism’” (Doc 4, 2). The same passage, making the same arguments, appears also in Doc 22, as well as essentially two
paragraphs in Doc 4 that detail various terrorist strikes, beyond the description of the 9/11 attacks, ending with the claim in Doc 4 that “a pattern of terrorist activity of this scale, duration, extent, and intensity, directed primarily against the United States Government, its military and diplomatic personnel and its citizens, can readily be described as a ‘war’” (Doc 4, 2). The next two paragraphs, however, detail the ways in which the new situation is not war, or at least not a typical war; the conflict does not follow the pattern of previous wars the United States has been engaged in. For one thing, it takes place both on domestic soil and abroad, and thus combines the theaters of civil law with the laws of war abroad; and for another, no country has officially attacked the U.S. Instead, a group of combatants—often visibly unidentifiable—strikes without warning and otherwise intermingles, undetectable, among civilian populations.

Doc 4 takes Yoo’s suspension of Fourth Amendment concerns, begun in Doc 3, even further. Where Doc 3 conflates foreign and domestic counter-intelligence purposes, and reasonable search with probable cause, essentially justifying warrantless searches, Doc 4 argues that it is legitimate to use military force within the United States against terrorists— and if necessary, against civilians. In other words, Yoo is claiming here that the Fourth Amendment does not apply to domestic military operations, in essence giving the U.S. military free reign inside the country’s borders at the president’s discretion, again in the interests of national security: “We conclude that the President has ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the
United States” (1). He does not stop there, however. In Yoo’s view, the ability of the president to prosecute war as he sees fit suspends even protections of U.S. persons in the interest of national security:

our forces must be free to “seize” enemy personnel or “search” enemy quarters, papers and messages without having to show “probable cause” before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally “reasonable.” They must be free to “use any means necessary to defeat the enemy’s forces, even if their efforts might cause collateral damage to United States persons. (Doc 4, 26)

Similarly, in their discussion of the Geneva Conventions, the authors note that “unintentional, isolated collateral damage on civilian targets would not constitute a grave breach” (6) of the Conventions because “the killing or injury . . . must have been ‘wilful’” (6). The people he expressly purports to protect, his ultimate stated purpose for all of these suspensions of longstanding interpretations of law, become in such an instance merely “civilian targets” and “collateral damage.”

This is not to say that, in the case of another terrorist attack within the U.S., those entrusted with heat-of-the-moment prevention and/or response to the attack would not be faced with agonizing choices, weighing the lives and liberties of one individual or group against others and even the lives of specific present, existing persons against an unknown number of possible, hypothetical, future victims.

Again, however, response occurs on a broad time-space continuum that ranges from
immediate action to long-term changes in policy; it is useful, therefore, to
differentiate between the temporal and material conditions of various responses.
Note, too, that previously in Doc 3, Yoo not only essentially erased the barrier
between law enforcement and national security purposes for the use of force, but
suspended the need for neutral and independent oversight of either area as far as
the executive branch in concerned. Thus such potentially catastrophic choices are
not made in structured and reasonable collaboration, under the measured
consideration of many key stakeholders and with the checks and balances vital to
good government, but rather in isolation by a few and without review. Certainly,
this seems antithetical to the intention of the framers and their aversion to excessive
concentrations of power.

The conclusion Yoo and Delahunty draw here, which uses similar conflations
as detailed in Doc 3, above, stands in direct opposition to the Posse Comitatus Act of
1878, which substantially limits the Federal government's powers to use the
military for law enforcement purposes, except where expressly authorized by
Congress or the Constitution. Here again, however, 9/11 is “unprecedented in
recent American history” (Doc 4) and no longer a matter of law enforcement as
other terrorist attacks have been; a suspension of “ordinary” law such as the Posse
Comitatus Act is therefore in the authors’ view acceptable. As well, the concept of
exceptionalism is used to justify what is, arguably, essentially an often dubious re-
interpretation, even suspension, not only of the Constitution but of long-standing
human rights such as *habeas corpus*, “one of the oldest rights in western law”
(Altemeyer 18), a right Doc 7 suspends. Doc 4 thus declares, early on, that even the “rules of engagement designed for the protection of non-combatant civilian populations . . . come under extreme pressure when an attempt is made to apply them in a conflict with terrorism” (Doc 4, 3). Once more, this creates an “exceptional” situation in which the conflict takes precedence and certain civilians may need to be sacrificed, ostensibly, for the protection of others. Further speculating, Yoo and Delahunty keenly imagine, in detailed, probabilistic terms, possible uses of force against civilian targets:

- targeting and destroying a hijacked civil aircraft in circumstances indicating that hijackers intended to crash the aircraft into a populated area;
- deploying troops and military equipment to monitor and control the flow of traffic into a city;
- attacking civilian targets, such as apartment buildings, offices, or ships where suspected terrorists were thought to be;
- and employing electronic surveillance methods more powerful and sophisticated than those available to law enforcement agencies. These military operations, taken as they may be on US soil, and involving as they might American citizens, raise novel and difficult questions of constitutional law. (Doc 4, 4).

The framework of war becomes vitally important to their core argument regarding executive power, as “these cases show the Court’s consistent recognition that the protections of the Bill of Rights are tempered by the circumstances of war” (Doc 4, 33). Providing several examples from the Civil War, the authors argue that both
Fifth and Fourth Amendment rights would "give way before the government's compelling interest in responding to a direct, devastating attack on the US, and in prosecuting a war successfully against international terrorists—whether they are operating abroad or within the US" (Doc 4, 34). As we have already seen, in this reading of the law, First Amendment rights can be curtailed in wartime as well. Clearly, the war paradigm is the most effective frame for circumventing the usual legal constraints, whether or not one considers their suspension justified.

Hyperlexicalization and the Ideological Square

Doc 4 also provides ample evidence for various strategies of out-group creation that characterize the core memos and the war on terror in general. Hyperlexicalization is one such strategy; it is a direct articulation of the maximized "negative out-group representation" in van Dijk's ideological square, such as the detailed descriptions of terrorist attacks above. For example, more than in the documents directly preceding it, perhaps because Delahunty is a co-author here, the two authors do not merely describe 9/11 as “unprecedented in recent American history” (2), but in minute detail. The following passage from Doc 4, mentioned above, thus provides a prime example of the strategy of hyperlexicalization that is also employed in other key memos:

Four coordinated terrorist attacks took place in rapid succession on the morning of September 11, 2001, aimed at critical Government buildings in the nation's capital and landmark buildings in its financial
center. The attacks caused more than five thousand deaths,\textsuperscript{[11]} and thousands more were injured. Air traffic and telecommunications within the United States have been disrupted; national stock exchanges were shut for several days; damage from the attack has been estimated to run into the tens of billions of dollars. (Doc 4, 2)

The same passage, word for word, appears in Doc 22 and Doc 36. Doc 2 also gives a long and detailed description of various other terrorist attacks against the U.S. and its military personnel around the globe, which is combined with the passage above in Docs 22 and 36 to describe the “War with Al Qaeda”; that paragraph argues for the war paradigm, contrasting a string of attacks by Al Qaeda, including in Yemen, Kenya, Tanzania, and Somalia as on a “different scale of destructiveness” than the single “destruction of the Murrah Building” (Doc 22, 32) in Oklahoma City—along with, of course, the 160 dead and 680 further casualties from the Oklahoma attack that remain unmentioned in either memo. By contrast, Docs 4, 22, and 36 use dramatic descriptors, such as seen in the passage above, to describe the events of 9/11, e.g. “coordinated terrorist attacks,” “thousands of deaths,” “violent campaign,” “air traffic and telecommunications . . . disrupted,” “damage . . . [reaching] tens of billions of dollars,” etc., to describe the threat from (Islamic extremist) terrorism and place it in a special category of menace.

Arguably, terrorist attacks from Al Qaeda do constitute a special category of menace; again, however, as discussed previously, the highlighting of the threat from

\textsuperscript{[11]} The final, best count was just under 3,000 direct casualties of the attacks of 9/11 (“9/11 by Numbers”). An untold number of indirect casualties, including but not limited to widespread illness and disease among first responders, must be added to that number.
Al Qaeda elides both U.S. actions in the world and any consequences resulting from their policies in the Middle East—including, for example, the half a million “‘excess deaths of children under 5’ (Mahajan) due to U.S. sanctions in Iraq, according to a 1999 UNICEF report. This was one of many reasons repeatedly cited by Osama bin Laden for the Sept. 11 attacks, although in his Nov. 24, 2002 “Letter to America” (bin Laden), for example, he claimed in a hyperlexicalization of his own that not half, but one and a half million children had died as a result of U.S. sanctions. A short glimpse into the ancillary debate about U.S. sanctions against Iraq provides a further illustration of hyperlexicalization and van Dijk’s ideological square. For example, in a March 2002 reason.com article entitled “The Politics of Dead Children” (a title that seems to imply that any discussion of children dying under international sanctions is merely a political move), columnist Matt Welch writes that

> while firefighters were still pulling out warm body parts from Ground Zero, foreign policy critic Noam Chomsky and his followers on college campuses and alternative-weekly staffs nationwide were insisting that it was vital to understand the "context" of the September 11 massacre: that U.S.-led sanctions were killing "5,000 children a month" in Iraq. Meanwhile, on the Iraqi government's own Web site, the number of under-5 deaths from all causes for the month of September was listed as 2,932. (Welch)

In a few short sentences, Welch makes several interesting rhetorical moves. First, he maximizes the emotional impact of the attacks using the graphic image of
firefighters—perhaps the ultimate symbol of 9/11 heroism—“pulling out warm body parts from Ground Zero,” a hyperlexicalization, and using the word “massacre,” thus rhetorically maximizing the suffering of the in-group. He juxtaposes that image with the mention of Noam Chomsky and “his followers on college campuses and alternative-weekly staffs nationwide,” symbolizing by implication the out-group of a small ivory tower elite far removed from the grim reality of the firefighters, to discredit the point of view that calls for a discussion that puts 9/11 into its elided context. He further attempts to discredit Chomsky (and by extension all critics of U.S. foreign policy) by disputing his numbers and indirectly accusing Chomsky of exaggeration and hyperbole—ignoring, of course, Chomsky’s larger point. Instead, Welch essentially dismisses the question of dead children merely as a political ploy by alluding to the issue only as 1) a question of an (unknowable) exact number and, 2) a matter of politically motivated emotional manipulation.

Despite Welch’s attempt to minimize or ignore the deaths of Iraqi children, those deaths are arguably part of the “context” of 9/11, at least in the mind of the man who has claimed responsibility for the attacks. Welch even rejects any attempts to determine an exact body count, elsewhere in the article, as “purely speculative.” Essentially, Welch is implying that the U.S. is innocent of any action that has caused the deaths of children, further evidence not only of the “Innocent Victim” characterization typical of WOT discourse, but also of the shroud of Not Knowing, i.e. minimization to the point of obscurity and invisibility, that lies over
any negative representation of the U.S.—the in-group in this ideological square. The frame of Not Knowing, even of Unknowability, applies to a wealth of aspects of 9/11, from the details of its contextual origins to the number of innocent casualties in its subsequent wars—as evidenced by General Tommy Franks’ insistence (perhaps in light of reactions to images of body bags being shipped home from Viet Nam) that “We don’t do body counts” ("Iraq Body Count"). Not Knowing—not seeing or looking too closely, deliberately mystifying and obfuscating the discourse—is a core strategy, in the memos and elsewhere, that serves to minimize the negative aspects and actions of the in-group.

Arguably, in the war paradigm, foreign civilians become (if indeed they have not always been defined as) a lesser subcategory of in-group; shielding them from the devastating effects of war is clearly not as important as defeating the terrorists. In the official narrative, civilian casualties should be minimized wherever possible, but the dead of the Others, even innocent, are not meticulously counted, named, and renamed as the casualties of 9/11 are, despite the arguably comparable innocence of foreign versus domestic civilians; they too are, to use Rumsfeld’s term, collateral damage. The hyperlexicalized arguments for the war frame, examined in the section above, also beg the question of what happens to the rules of engagement that normally apply to others, not just to civilians, but to enemy combatants—the core question a number of the key memos seeks to resolve.

The hyperlexicalized repetition of the attacks of September 11 and the evil deeds of the other side also enables the authors to make positivistic assumptions
about the future. In Doc 6, for example, George W. Bush’s military order of Nov. 13, 2001, entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” the certain either-or future is described using the modal will, after an account of the previous attacks, in vivid detail:

Individuals acting alone and in concert involved in international Terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government. (Doc 6, 1).

Again, the threat is cast as at least possibly existential; further, note that the purpose of this document is to suspend the writ of habeas corpus and allow the U.S. to detain, indefinitely, without due process, anyone it deems a terrorist.
CHAPTER EIGHT:
CONSTRUCTIONS OF IDENTITY

The discourse of the Torture Memos, as of the war on terror, is fraught with ambiguities of meaning as well as linguistic and semantic shifts, transformations, and reversals. As Dunmire has pointed out, the “liberalizing of circumstances justifying self-defense is key to the Administration’s preventive paradigm [that] . . . ‘prefers open-ended standards to clear rules,’ which enable it to ‘exploit ambiguities whenever possible’ (Cole and Lobel, 2007:55)” (qtd in Dunmire 201). The overarching narrative good versus evil, however, is anything but ambiguous. As Foucault explains, “the public moral order is built up normatively vis-à-vis the articulation of the aberrant ‘other’ or ‘threat’ which, at the same time, justifies the identification, division and excision of that threat” (qtd in Lazar 227), i.e. the battle lines must be clearly drawn so the public moral order can be properly defended, “whatever it takes.” Thus, in the overarching narrative that closely informs the memos, as well as in the memos themselves, in other words, we find linguistic and semantic ambiguity, but not a hint of moral ambiguity.
In the discourse of the war on terror, polarization and the legitimation of polarization were achieved from the beginning, in part, through morality tropes—
deserve, punish, bring justice, good versus evil—that both obscured the realities of the war and the administration's prosecution of it. The unacknowledged confusion in the rhetoric served to obfuscate possible motives for going to war beyond the official paradigm, as well as many of the costs. The key rhetorical strategies—outcasting, dehumanization, justification, legitimation, etc.—used to create a sense of violated moral order that had to be violently restored were enormously successful, and in neo-conservative circles (and far beyond) there was little deviation in the narrative. In now attempting to delineate the strategies used to construct the identity of both the self and the other, it is first important, I argue, to illuminate some of the material, social, historical, and cultural realities that lay behind the framing of the U.S. response as a just and necessary war, and the treatment of the people thus designated as the enemy.

When the U.S. went into Afghanistan roughly two months after 9/11, the military sought to keep soldiers from engaging in on-the-ground combat and to instead rely “on American air power, opposition fighters and bounty hunters” (Jones 3). The bombing, which began on Oct. 7, 2001, included an array of weapons of mass destruction. Among these, according to retired Sergeant Major Herbert Friedman, the U.S. had dropped at least three 15,000-lb BLU-82Bs, also called superbombs or daisy cutters, by the end of 2001. The largest non-nuclear bomb in existence, superbombs eradicate everything above ground within an approximate 1-
mile radius without causing a crater. Within the first year, the U.S. had also dropped 1,228 cluster bombs containing 248,056 bomblets, which according to the Cluster Munition Coalition kill civilians 60% of the time and which were colored bright yellow, the same color as the food packages the U.S. was also dropping. Within six months, the number of civilian Afghan casualties had surpassed the death toll of 9/11, according to economics professor Mark W. Herald, who from 2001 to 2004 complied as meticulous a body count as possible using both domestic and international news reports and other published sources. As Al-Qaeda retreated into the mountains bordering Pakistan, however, leaving the civilian population behind to face the brunt of the onslaught unprotected, “the Pentagon increasingly relied on [the] bounty hunters” (3) to round up those they wanted to find.

In addition to the bombing campaigns that included heavily populated areas, hundreds of thousands of “propaganda bombs” carrying multiple millions of flyers and leaflets were dropped on Afghanistan by psychological operations, or psy ops, teams. Some were safety warnings, some declarations of benevolent intent, some offered rewards, including 25 million dollars for information leading to the capture of Osama bin Laden. According to Torturing Democracy, “any Arab in the region was at risk of being turned in as a terrorist” (Jones 4). Tens of thousands of copies of one flyer, for example, showed an Arab-looking man with the caption: “Get wealth and

---

12 Interestingly, it has proven almost impossible to track down even a plausible estimate of the number of Afghani civilians killed; the numbers vary widely according to who is doing the accounting, and officially the U.S. does not count civilian casualties (see previous chapter). Most reliable estimates range from approximately 6,000 to 10,000 in the nine years since the war began.
power beyond your dreams. Help the Anti-Taliban forces rid Afghanistan of murderers and terrorists” (Friedman). The back read,

You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life.

Pay for livestock and doctors and school books and housing for all your people. (Friedman)

In the documentary, Muslim cleric Javed Ibrahim Paracha mimics U.S. military calls for aid from locals as follows:

Where is Arab? Where is Arab? Where is Arab? You get thousand dollar for one Arab. Thirty thousand, forty thousand, sixty thousand.

And helicopter loud speaker announcing these things. (Jones 4)

_Torturing Democracy_ includes numerous eyewitness accounts of U.S. actions in Afghanistan in the fall of 2001, including threats of death to them and their families, shots, insults, and beatings. Footage shows soldiers herding long lines of hooded men, their hands and feet shackled, into containers—although, as Amnesty International reminded Donald Rumsfeld in Doc 8, a letter from 7 Jan. 2002, hooding and blindfolding detainees, at least during interrogation, constituted cruel, inhuman, and degrading punishment and was therefore prohibited treatment of detainees under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
One northern Afghan warlord, General Abdul Rashid Dostum, rounded up hundreds of men and turned them in for cash; since Bush had widened the scope of the CIA’s authority to hunt and kill terrorists around the world, “in the chaos of Afghanistan, agents took their pick of prisoners” (Jones 8). Some who had been captured denounced others in hopes of gaining their own freedom. Torturing Democracy has video footage of this exchange between an operative and a prisoner, standing near a horde of prisoners seated on the ground:

CIA Agent: “These are terrorists?”

Prisoner: “Yes, these are terrorists I believe.”

CIA Agent: “These men are terrorists. All these men are terrorists. I think you’re a terrorist. You come here to Afghanistan to kill people.”

(8).

According to a report by MSNBC, “bundles of cash” changed hands; rewards were reportedly between $5,000 (for members of the Taliban) to $25,000 (for Al-Qaeda), often collected by fellow Afghans who were “cash-poor neighbors or personal enemies” (Wright) of the people they turned in, or who, by more than one account, used the opportunity to cover up crimes they themselves had committed, delivering innocent men into the hands of all-too-willing Americans both to curry favor and to halt further investigation (see below). According to retired U.S. Army Reserves Colonel and former diplomat Ann Wright, this resulted in hundreds of innocent prisoners being wrongfully detained, some for years, some for nearly a decade.
Many of these were transported at some point to Guantanamo, the people Rumsfeld would later famously call “the worst of the worst.”

Wright, who was part of the team that reopened the U.S. embassy in Afghanistan in December of 2001, calls the various rewards programs run by the U.S. in Afghanistan “extraordinarily unsuccessful.” As she points out, in 2007, 300 uncharged prisoners from 2001 were still in Guantanamo and according to the Bush administration would never be charged, but were still being held. Further, 370 of those still in Guantanamo had been originally turned in, not captured, and

of the approximately 770 persons imprisoned in Guantanamo over the past 5 and one-half years, over 400 have been released and never charged with any offense by their home country when returned. Only one of the 770 imprisoned in Guantanamo has been charged and convicted. (Wright)

That occurred after the prime minister of his home country, Australia, complained to Cheney about the lack of due process and detainee David Hicks was then returned home and sentenced to nine months. Richard Shiffrin, who was Deputy General Counsel in Intelligence for the Department of Defense from 1998 to 2003, says U.S. actions in Afghanistan were “premised on the idea that everyone we captured and detained really was a bad person. As it turns out, a large percentage of them were merely shepherds” (Jones 7). Many of those shepherds ended up in Guantanamo; a number of them fared worse.
A statement by Dick Cheney on Nov. 14, 2001 reveals the mind-set behind the mass round-ups: “We think it’s the appropriate way to go. We think it guarantees that we’ll have the kind of treatment of these individuals that we believe they deserve.” The mass round-ups were based on the crassest form of racial profiling and were evidence of the enormous assumptions being made about rightness or wrongness, good versus evil, the deserving and the undeserving, as well as a general or at least widespread indifference to differentiating between those who truly sought to harm the United States and those who had simply gotten caught up in the net, for any number of reasons—a process of dehumanization that demonstrated a blatant indifference to (or frank contempt of) basic human rights. In Viet Nam, the military had used individual tribunals to differentiate among the captured between hapless civilians and actual combatants; even during the first Gulf War under George H. W. Bush, the military “held 1196 hearings before such tribunals. Most of them found the prisoner to be an innocent civilian” (Lewis Intro xiv). After 9/11, individual guilt or innocence was no longer a concern.

A statement in April, 2007 by Mark P. Denbeaux, Director of the Seton Hall Law School Center for Policy and Research, revealed the results of an in-depth study of Guantanamo Bay documents, obtained after the Supreme Court recognized habeas corpus for Guantanamo detainees, overruling the opinion of John Yoo and Patrick Philbin in Doc 7. The study showed that, according to government records, 92% of those detained at Guantanamo were not captured by Americans; 66% were not even picked up in Afghanistan and only a
handful of detainees were ever accused of shooting any weapons at Americans. (Denbeaux 2)

Among the ostensible “worst of the worst,” the documents showed, were a detainee who had been conscripted into the Taliban as an assistant cook and a detainee whose only act of hostility against the Americans had been to flee when U.S. forces bombed his camp:

In reality, more than 55% of those detained in Guantanamo are not accused of ever having committed a single hostile act against the United States . . . [and] should be described as enemy non-combatants, or civilians. Only 8% of the detainees were characterized by the DOD as “al Qaeda fighters.” Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% have no definitive affiliation with either al Qaeda or the Taliban. (Denbeaux 6)

Even the acts of hostility the remaining 45% were accused of were often “very slight” (6), such as the fleeing of bombs described above. As Denbeaux put it, “the reality is that a very large fraction of the detainees seem to be, at most, a ragtag collection of ‘support’ personnel for low-level foot soldiers” (6) for the Taliban, or otherwise loosely associated with the group that was, as Denbeaux points out, “the governing authority of Afghanistan at the time” (2). Despite the appalling lack of evidence against the vast majority of detainees, many are still being held without knowing if and when they will be released.
This is not to claim that no one in Guantanamo is guilty of actual hostile acts against the United States—although the legality of and ethical justification for indefinite detention, even when there is evidence of guilt, remains a serious issue. Statistically, however, far from being the “worst of the worst,” inmates at Guantanamo Bay over the years have committed more acts of violence against themselves than against each other or their captors; records show incidents of what the government calls “manipulative self-injurious behavior,” including the euphemistically termed “hanging gestures” (Denbeaux 16) (i.e. suicide attempts by hanging), than assaults against guards, most of which are for trivial (if insulting) offenses such as cuts, scratches, and spitting. Further, there is ample evidence that many personnel involved with the detainees were well aware of their low value; as Major General Michael Dunlavey told Philippe Sands, he had reported to Douglas Feith in February 2002, after arriving in Guantanamo, that “half the people at Guantanamo posed no threat, were unconnected with terror, and should be sent home” (Sands 99). Mike Gelles, a clinical forensic psychologist with the Naval Criminal Investigation Service (NCIS) also told Sands,

“I remember going down in Camp X-Ray and wandering around . . . an seeing a couple of very psychotic folks and thinking ‘What’s going on here?’ Why would you fly a guy who’s flagrantly psychotic from Afghanistan to Guantanamo Bay? It didn’t make any sense.” (124).

Perhaps most damningly, according to the Seton Hall report, the average number of interrogations of detainees in Guantanamo Bay was once per month. Certainly,
there was no rigorous attempt to discover high-value intelligence from the “worst of the worst” detainees. That statistic alone calls into serious question the idea that gathering information to prevent further attacks was the primary goal of holding detainees in Guantanamo.

In the “legal revolution” (Jones) brought on by the Torture Memos in service of the larger ideological revolution, individuals caught on the wrong side in the war on terror were no longer treated as individuals, but classed as a group: nameless, faceless, stripped of identity, of context, of history. Essentially, their personhood and all the protections inherent in it were taken away under the banner—and the thematic formation—of war, while at the same time the people caught in the net were denied the status of prisoners of war with the attendant adherence to treatment that recognized their basic human rights. A new, heretofore unknown extrajudicial status, like the extralegal spaces in which it would flourish, was created by the memos and then enacted—one consequence of what Cheney famously called, in an interview with Tim Russert on Sept. 16, 2001 on NBC’s Meet The Press, “work[ing] ... the dark side” (qtd in “House Committee” 72).

Working the dark side, however, led to far more egregious abuses of power than merely wrongfully imprisoning innocent men, without legal recourse or even knowledge of the allegations against them, for lengthy and indeterminate periods of time. It is impossible to examine in detail or even list here the full scope of human rights violations committed by the U.S. and their allies since 9/11, but among them was the mass killing of between 1,500 to 2,000 Taliban soldiers—a group that had
not directly attacked the United States—during the 2001 invasion by the same
Afghan warlord, Gen. Dostum, who was on the payroll of the CIA and turning in
people for cash. Both James Risen of the *New York Times* and Terri Gross of National
Public Radio have reported that attempts to investigate the mass grave by
Physicians for Human Rights were repeatedly blocked by the Bush administration,
and by 2008 the site had been obviously tampered with, i.e. bulldozed. Further,
according to Nathaniel Raymond, the physician leading the investigation, State
Department documents obtained “through a Freedom of Information Act request
[show] that at least four witnesses—innocent men—who were bulldozer drivers
and truck drivers have been tortured, killed, and disappeared” (Leaning).

Torture, it seems, is not the worst crime that has been committed during the
war on terror with the knowledge or complicity of U.S. forces and/or government
agents, under the implicit or explicit countenance of those who engineered the
memos. The memos demonstrate an integral part of the overall mind-set that
justifies denying others basic rights by dehumanizing and devaluing them as the
enemy. It is impossible here to present the full scope of the material reality that
resulted from the torture memos, and of what becomes both possible and even
permissible in an atmosphere created from the will to power mixed with a desire for
vengeance that is driven by unchecked righteous anger. As senior commander of
U.S. forces in Iraq, Lieutenant General Ricardo Sanchez would later write, accusing
the Bush administration of “gross negligence” and “dereliction of duty, . . . the
civilian leaders at the highest levels of our government . . . unleashed the hounds of
Hell, and no one seemed to have the moral courage to get the animals back in their cage” (qtd in Mayer, *Dark* 242).

In 2006, British professor of Peace Studies Paul Rogers wrote that in the war on terror “some 70,000 people have been detained. Of these, barely one thousand have been brought to trial and about half of these have been acquitted” (3). That means that over 99% of those detained in the war on terror are either innocent, as has often turned out to be the case, or that they cannot be proven guilty, either because there is insufficient evidence or because the evidence has been tainted by unacceptable methods of interrogation. Further, as mentioned above, there are numerous cases where detainees continued to be held even after there was proof of innocence, as Mayer, Worthington, the law group at Seton Hall, and others have amply documented.

Glenn Greenwald has perhaps put it most succinctly with his #1 rule regarding the war on terror: “The fact that the Government labels Person X a ‘Terrorist’ is not proof that Person X is, in fact, a Terrorist” (“Lynch-mob”). Arguably, an administration truly committed to justice, rather than power, might have done things differently.

**Outcasting**

Outcasting—creating the picture of the enemy that the authors of the Torture Memos needed to create, in order to enable the architects of presidential policy to pursue their interests unhindered—included various strategies of definition,
redefinition, conflation, elision, and other moves designed to create (among other things) in- and out-groups. Like the moves outlined in previous chapters that placed Guantanamo and similar spaces outside of any legal constraint, anyone defined as the enemy was also placed as far outside of legal protections, and their treatment beyond legal constraints, as possible. Early in the Doc 4, for example, as mentioned in the previous chapter, the authors include Bush’s depiction of the perpetrators as “enemies of freedom” (Doc 4, 2). America thus is cast as embodying freedom and the attackers are out-cast as not sharing that most core American value, freedom, and therefore essentially as outside, not just of those who share “American values,” but arguably even the human family, another conflation that defines the in-group as those who are afforded special rights against the out-group who are not. The they hate our freedoms narrative has been amply challenged; even conservative columnist Charley Reese wrote, “It is absurd to suppose that a human being sitting around suddenly stands up and says: ‘You know, I hate freedom. I think I’ll go blow myself up’ (Reese). Many commentators from all sides of the political spectrum have called for a more nuanced and thoughtful interpretation of the attackers’ possible motives. Bush, however, used the meme they hate our freedoms in speeches over and over, casting not only the U.S. as Innocent Victim but also portraying the attackers as barbaric, incomprehensible, and alien. Here, as well as in nearly every aspect of the documents, the notion of unconstrained executive power is used as the justification for outcasting, the macrostrategy Lazar and Lazar have identified that includes four microstrategies: enemy construction, criminalization, (e)vilification,
and orientalization. The memos show a number of clear examples of all four strategies; we will examine a number of these below.

Creating a *Feindbild*, i.e., enemy creation or in the literal translation from the German, a “picture of the enemy,” is essential to winning widespread acceptance for perpetual war and for breaking longstanding rules of engagement regarding the prosecution of that war. The criminalization, evilification, and orientalization defined by Lazar and Lazar as part of the outcasting process play important roles in constructing the enemy, similar to the related (and at times identical) strategies of demonization and dehumanization. One central move in creating an enemy is denying them\(^{13}\) rights; in the war on terror, rights seem to be a zero sum game. The fewer rights the enemy possesses, the more freedom we have to deal with them as we choose. As the documents demonstrate, the denial of rights to the point of re-definition is a key component of an authoritarian approach to dealing with terrorism.

One striking aspect of the language the authors use is a seeming conflation of “human rights” and “constitutional rights”; more precisely, in the paradigm that shapes key memos, there seems to be a keen awareness and discussion of legal and constitutional rights and to whom they may or may not apply, but no awareness or recognition whatsoever of the overarching concept of basic human rights. The memos seem to interpret a suspension or denial of “constitutional rights” as

\(^{13}\) The semantic formation “the enemy” poses an interesting grammatical dilemma; the enemy essentially functions here as a mass noun, and is therefore singular, but at the same time “they,” the individuals who belong to an enemy group, are part of a singular-plural formation. Similar to other pronoun-related difficulties in the English language, such as the use of “they” to denote a gender-neutral singular, I cannot resolve but will acknowledge this one.
essentially the forfeiting of all basic human rights for “certain non-citizens” (Doc 4, 1). A corollary issue can be seen in the use of the words *citizens* or *U.S. persons* versus words used to describe others, including *aliens*—the latter a frequently used word with clear orientalizing, even non-human, connotations. Designating detainees, moreover, as “aliens” and “enemy aliens” is at best odd, considering that most members of the Taliban are being captured on their own soil. *Non-citizens* are seen as possessing fewer, if any, of the rights guaranteed to the *persons* referred to frequently in the founding documents—including, among others, the right of all human persons to legally defend oneself, e.g. through petitioning for a writ of habeas corpus, against indefinite detention, although this idea long predates the Constitution and is internationally broadly recognized.

The memos provide many examples of the elision of human rights as they pertain to the enemy, despite Geneva Convention protections arguably designed to prevent exactly such an occurrence. In Doc 4 Yoo and Delahunty write: “Certain basic constitutional rights do not apply to the enemy, and ... even US citizenship may not negate the possibility that one may have the legal status of an enemy” (Doc 4, 33). Further, in Doc 18, referring to the Fifth Amendment Clause stating that “nor shall any person ... be compelled in any case to be a witness against himself” (qtd in doc 18, 6), Bybee argues that “in extending the right to ‘any person,’ the Framers may have intended to encompass only a limited class of ‘person[s]’ who could claim the protections of the Constitution” (Doc 18, 6). Certainly, rights guaranteed to “persons” or “citizens” in the U.S. Constitution do not apply to any person on the
planet, but they do, arguably, apply to anyone on U.S. soil, citizen or not, and Bybee's suggestion that the Framers intended to create different classes of persons to which constitutional laws and protections differently apply is controversial at best. In combat, of course, “military targets” have no rights; persons *hors de combat*, a category covered by the Geneva Conventions, are a different matter.

Conversely, however, the language of the memos extends the battlefield to a global-wide war on terror, essentially expanding the definition of “combat” beyond limits, while at the same time denying the enemy—that is, any of the “hundreds of suspects and possible witnesses [who] have been taken into custody” (Doc 4, 2)—status as a legal combatant. Just as the memos justify extralegal spaces, they also create a special legal—or rather, extralegal—identity for the enemy, putting him outside the purview of human rights considerations or protections. This redefinition of the enemy proves to be another key performative act of the memos. Once legal rights and protections are taken away from detainees, as occurs despite the vigorous debate evidenced through Doc 17, the memos shift focus to expanding rights for the interrogators of those detainees through Doc 39, also despite vigorous protest and debate in various of the documents. Ultimately, the right of the U.S. to treat detainees as it chooses is extended to cover methods clearly prohibited in both domestic and international law.

One of the first steps the OLC authors undertake is to define the enemy so that every person categorized as such can be declared “illegal” and, like Guantanamo itself (and also Bagram and other sites, including later Abu Ghraib), beyond the law.
As Philbin explains in Doc 5,

acknowledging that the laws of armed conflict may be applied to the present conflict does not mean in any way acknowledging the terrorists as legitimate combatants with any rights under the laws of armed conflict. To the contrary based on their actions to date, the terrorists are all unlawful combatants stripped of any protection under the laws of armed conflict and are subject to trial for their violations” (Doc 5, 24 FN 19).

The complexity and ambiguity in this attempt at identity construction is evidenced by the overlexicalization of the enemy, i.e. an overabundance of signifiers that, as we saw in Chapter 6, suggests that the signification, and then underlying signified, are problematic in some vital way. Across the various documents, the authors refer to detainees using numerous different designations, depending at least in part on the authors’ objectives and purposes. A list of many of the signifiers includes

illegal combatants; illegal or alien detainees; unlawful combatants or detainees; unlawful belligerents, enemy belligerents, unlawful enemy belligerents; enemy prisoners [of war]; the enemy; enemy aliens or the alien enemy; enemy soldiers, forces, soldiers, or combatants; the source [i.e. of intelligence] or the HUMINT [human intelligence] source; the individual [being interrogated—e.g. used throughout Doc 24 to refer to Abu Zubaydah, who was subjected to waterboarding]; the subject; Detainee X [e.g. Detainee 063 at GBC was Mohammed al-
Qahtani]; unprivileged or illegal belligerents; lawful targets; the EPW [enemy prisoner of war]; al Qaeda and the Taliban militia; alien unlawful combatants; enemy alien belligerents; terrorists; alien terrorists; terrorist militants; alien prisoners; and [occasionally], simply, prisoners.

An example of how the varying designations shift to suit specific rhetorical purposes can be found in Doc 22, also known as “The” Torture Memo. One of the key purposes for this memo in particular is to legitimize torture and thus create legal immunity for torturers. Whereas in most of the other documents, applicable U.S. personnel are referred to as “interrogators,” in this memo Yoo repeatedly refers to them as “defendants” as he lays out arguments for a possible future legal defense. In contrast, the word “prisoner” is largely avoided in other documents, presumably to avoid the association with the term “prisoner of war,” as a core argument of the OLC is that POW protections do not apply to WOT detainees. Here, however, detainees are more than once referred to as “prisoners,” arguably because Yoo can better respond to and refute specific laws prohibiting torture using the language written into those laws (see below for examples and more detailed analysis). In numerous ways, the designations of both captives and their captors are a crucial component of the linguistic construction of the war on terror.

Notably, an important component of the enemy construction enacted in the memos is the erasure or elision of individual agents or actors. First, the language conflates each member of a group with the whole, i.e. “al Qaeda” and “the Taliban”
stand for any and all persons affiliated in any way, or deemed to be affiliated, with either group—in essence, for any and all persons in custody. Doc 12, for example, describes in hyperlexicalized detail, quoting Rumsfeld and various State Department and newspaper reports—all dated, interestingly, after Sept. 11, 2001—how “the Taliban ‘are using mosques for ammunition storage areas. They are using mosques for command and control and meetings places. They are putting tanks and artillery pieces in close proximity to hospitals, schools, and residential areas” (20). The paragraph further describes how the Taliban conducted mass executions, massacres of civilians, repeatedly “put the Afghan civilian population in grave danger by deliberately hiding their soldiers and equipment in civilian areas” (20), used villagers as human shields, etc. Doc 9 describes the situation in Afghanistan similarly:

- at the outset of this conflict, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. (Doc 9, 17)

A characteristic of in-group/out-group construction in general, therefore, particularly in the language of war, is arguably not merely an imbalance between positive and negative attributions, but also an imbalance between recognitions of group and individual characteristics. For example, individual suffering in the out-group is ignored or denied, while the suffering of individuals in the in-group can
reach mythical status. The semantic formation “collateral damage” to denote civilians unintentionally killed or wounded in the war on terror is an example of this. Another example are the logs of the interrogation of Detainee 063, Mohammed al-Qahtani, at Guantanamo, which show that one of the methods repeatedly used to “break” the detainee (among a series of many others) was to surround him with pictures of victims of 9/11, including taping the photos to his trousers.

Secondly, the OLC documents, and the WOT language generally, essentially conflate the two enemy groups with each other. William Taft points out in Doc 10 that even if some members of an armed force violate the laws of war, this does not necessarily implicate all members of that force: “the commission of violations of the law of war by one, some or many members of an armed force do not thereby implicate the status of all of the members of such armed forces” (Doc 10, 20 FN 33). Doc 9, on the other hand, conflates not merely all members of one group but declares the Taliban “functionally indistinguishable from al Qaeda” (Doc 9, 23), a claim made in other documents as well. Doc 9 also defines Afghanistan as a failed state and concludes that therefore none of the Geneva Conventions apply. This elision of both individuals and groups, and one group with another, is apparent not only throughout the memos, but is a key characteristic of the language of the war on terror as a whole; in general, al Qaeda and the Taliban are consistently lumped together as terrorists. In a debate on whether to treat terrorists as enemy combatants or as criminals, for example, conservative columnist Marc Thiessen declares, using a conflation that is arguably typical of the discourse, that
when you capture someone who’s a member of Al Qaeda or the Taliban or is carrying, for example who tries to set his underwear on fire on a Detroit airplane and blow up a plane over Detroit that could’ve killed hundreds of people – our position is that that’s an enemy combatant. (19-20)

In a rebutting statement for the opposing position, however, military lawyer David Frakt makes what is indisputably a rare distinction, pointing clearly to the need to distinguish between Al Qaeda and Taliban. The Taliban is a fighting force in Afghanistan and Pakistan. They just want us to leave. They are not terrorists. They’re not launching international terrorist attacks. Al-Qaeda is. I would argue that the Taliban was essentially the lawful military government and military force of Afghanistan at the time we attacked and therefore was entitled to Geneva Convention status protection as prisoners of war. But we did not afford them that. (21)

An in-depth examination as to whether Afghanistan was indeed a failed State is impossible here; important, however, is that in Doc 12, for example, the OLC lawyers define it as such and thus declare not only members of al Qaeda and the Taliban “illegal,” but criminalize the Afghanistan government—defined repeatedly in the memos as barbaric, violent, essentially unrecognizable as government from a western point of view—itsel. This criminalization and orientalization then serve as an excuse to exempt the U.S. from following international law; throughout this
series of memos, in which the human rights of detainees are stripped away step by step, Yoo and others argue that if the enemy does not follow the law, then the U.S. is not required to either. In Doc 9, for example, Yoo writes: “Nonperformance of a particular treaty obligation [by the enemy] may, in the President’s judgment, justify withholding performance of one the [US’s treaty obligations, or contravening that treaty” (Doc 9, 28). This argument is made repeatedly, once more grounded in the assumption of unlimited Presidential power, including the power to suspend treaty obligations at will—a claim Taft strongly disputes in Doc 10. The president’s unilateral authority to terminate treaties as he wishes is, as Cass Sunstein describes it, one of Yoo’s more “ambitious” arguments.

Arguing the merits of Afghanistan as a failed state is far beyond the scope of this dissertation, but the term itself is worthy of note. In commentary on the concept of a failed state, for example, SourceWatch, the Center for Media and Democracy’s website, quotes Australian film maker and war correspondent John Pilger:

poor countries are “failed states”; those that oppose American are “rogue states”: an attack by the west is a “humanitarian intervention.”

In other words, the phrase “failed state” is an aspect of neo-colonialism where outsiders with superior technology and what they claim is a superior culture, assess the value of a state or what powers they say a state must have. (sourcewatch “Failed”)
Certainly the reasons Yoo and Delahunty give for deeming the Taliban and Al Qaeda illegal, both as militant groups and as individual combatants, bear the hallmarks—and the distinctive language—of a neo-colonialist perspective that hyperlexicalizes the evil and alien aspects of the two groups:

at the outset of this conflict, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. (Doc 9, 17)

Others, however, including Taft, have pointed out that the Taliban imposed a strict order on the people of Afghanistan.

In any case, Doc 8, from Jan. 7, 2002, takes an alternative view of the U.S.’s responsibility to honor its treaties. In this letter addressed to Donald Rumsfeld, dated four days before the first prisoners arrive at Guantanamo, the Secretary General of Amnesty International, Irene Khan, expresses serious concern about the treatment of prisoners in U.S. custody. Khan “urges that all suspects in U.S. custody be treated humanely with full respect for the USA’s obligations under international standards” (Doc 8, 1). The letter outlines in detail treatment that is prohibited under international law, such as hooding or other “holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or his awareness of place and the passing of time” (Doc 8, 1). The letter provides a striking contrast to
the OLC memos, using language that humanizes individual detainees: “we are concerned by photographs which have recently appeared in the press showing Al-Qaeda suspects hooded while under guard by U.S. troops” (1), and which reminds Rumsfeld that treatment such as “restraining in very painful conditions; playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee” (2) is prohibited.

Further, Khan’s use of the word “suspects” is also a stark counterpoint to the absence of the word, largely, in the memos authored by members of the OLC, at least as far as it is used—i.e. not used—to designate anyone in U.S. custody. The language used to describe and in essence to criminalize this “new” breed of terrorist/enemy in fact elides the semantic formations suspicion and suspect and instead assumes guilt—another semantic shift that is then enacted in time-space reality. Ron Dudai, a research fellow in the School of Law, School of Oriental and Asian Studies at the University of London and current policy advisor for Amnesty International, notes that “no . . . country in the world recognized the term ‘illegal combatants’” (Dudai) until the U.S. essentially legalized the category in 2002—although a year before Israeli lawmakers had attempted to pass an “illegal combatants” bill, an attempt that failed but would later succeed after the U.S. legitimized the term. The designation “illegal combatant,” similar to its many variations listed above, serves in essence to enact a crucial change: it shifts the burden of proof of guilt from the state to the suspect and suspends all of the usual legal safeguards for prisoners in custody. As Dudai explains,
not only does the Illegal Combatants law create a new category not recognized in international law, it reverses the burden of proof. Once an order is signed . . . , the burden of proof is on the defendant: he has to prove to the court that he is not an enemy combatant. Proving this becomes particularly difficult when defining any and all detainees as “illegal” allows the state to refuse to let the suspect view or even know the evidence against him; to refuse to hold a trial in civilian or military courts; and refuse to convene a tribunal to determine not guilt, but mere status, i.e. whether the detainee is a civilian or a combatant. The OLC memos enact just such a series of refusals, essentially suspending core ideals of both domestic and international humanitarian law.

A thorough analysis of the legal intricacies of various interpretations of the Geneva Conventions is once more far beyond this dissertation, but it is worth delineating some of the core issues that play into the dehumanization, criminalization, orientalization, and construction of those deemed to be the enemy in the war on terror. Article 5 of the Third Geneva Convention (GPW) grants prisoner of war status (and its consequent protections) to all persons who have fallen into the hands of the enemy “until such time as their status has been determined by a competent tribunal” (ICRC “Bybee”)—particularly in cases where there is doubt as to their status. Proper determination of the status of detainees is a requirement of the Geneva Conventions, a requirement the U.S. followed until the war on terror. Doc 16, however, written by Jay Bybee on Feb. 7, 2002, simply erases
the idea that doubt as to the status of detainees exists; essentially, he defines any
and all questions about the identities of individual prisoners out of existence. He
does this by once again calling upon presidential power:

The presumption and tribunal requirement are triggered . . . only if
there is “any doubt” as to prisoner’s Article 4 status . . . the President
possesses the power to interpret treaties on behalf of the Nation . . .
the President could reasonably interpret GPW in such a manner that
none of the Taliban forces fall within the legal definition of POW’s as
defined by Article 4. A presidential determination of this nature
would eliminate any legal “doubt” as to the prisoners’ status, as a
matter of domestic law, and would therefore obviate the need for
Article 5 tribunals. (Doc 16, 8)

In other words, in Bybee’s view, the legal concept of individual persons, in
individual circumstances, no longer exists; the U.S. designates anyone they capture
in the War on Terror as the enemy without any necessity to investigate further.

The term “illegal combatants” and the language that justifies using it thus
serve to orientalize and (e)vilify detainees, strategies readily apparent elsewhere in
the memos. In Doc 9, Yoo and Delahunty argue that neither Al-Qaeda nor the
Taliban is a “legitimate” military that deserves Geneva protections, just as
previously in Doc 7, as already discussed, Yoo and Philbin argue that members of
either militia cannot file habeas corpus petitions with U.S. courts, a judgment the
Supreme Court will later overrule. In Doc 4, Yoo and Delahunty argue that al Qaeda and Taliban forces are illegal because

like terrorists generally, Al-Qaeda’s forces bear no distinctive uniform, do not carry arms openly, and do not represent the regular or even irregular military personnel of any nation. Rather, it is their apparent aim to intermingle with the ordinary civilian population in a manner that conceals their purposes and makes their activities hard to detect.

(Doc 4, 3)¹⁴

In addition, Yoo and Delahunty use the argument that Afghanistan is a failed State to then declare that Al Qaeda and the Taliban are non-State actors and thus outside of the protection of international treaties—a unique reading of the Geneva Conventions, and according to a broad consensus in the literature, as well as later the Supreme Court, an erroneous one. According to Yoo and Delahunty,

we do not believe al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva conventions nor the WCA [War Crimes Act] regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict. (Doc 9, 2)

---

¹⁴ This description of the “militia” could easily have applied to the ragtag band of minute men attacking the formally dressed British army in unconventional fashion, breaking the laws of war of the time. Arguably no moral equivalency exists between the two groups, especially regarding their affiliation with Al Qaeda, a group that specifically targets civilians (note that the extent and nature of that affiliation is also up for debate), but there may well arguably be a material one, at least regarding Yoo’s definition above.
Just as Guantanamo is defined as a space of extralegality, members of Al Qaeda and then the Taliban are also simply defined as illegal human beings and therefore outside the reach of any and all legal protections: “Afghanistan’s status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions” (Doc 9, 2)—although notably, the “failed state” definition, like the official concern for human rights under the Taliban, seems to have become a central part of official governmental discourse only after 9/11. In Doc 10, for examples, William Taft’s strong rebuttal to Doc 9, he points out that in a briefing on Sept. 25, 2001, Rumsfeld was still referring to the “Taliban government” (Doc 10 comment 17), and in a U.N. address on Oct 7, 2001, U.S. officials referred to the “Taliban regime” (17).

Doc 10, written by William Howard Taft IV, legal advisor to the State Department, and addressed to John Yoo, is a meticulous rebuttal of Yoo and Delahunty’s claim in Doc 9 and elsewhere that the Taliban is fundamentally, as a category of persons, “illegal.” Taft’s memo is too wide-reaching to detail here; suffice it to say that he provides ample precedents showing that the GPW requirement for Article 5 tribunals to determine the POW status of individual prisoners would be triggered by the circumstances in Afghanistan, and POW protections would apply to at least some members of the group. (Minimum human rights standards, including the right to be treated humanely, would also apply to the others.) Taft also disputes factual claims: “our experts report that Taliban soldiers did wear uniforms and sought additional uniforms regularly, recognizing that
resources were often not available to purchase them” (Doc 10, 21-22). Further, Taft speaks directly to the orientalism in Yoo’s arguments: “Department of State experts suggest that the Taliban command structure differed from the kinds of structure we might find in our own armed forces, but we do not think the structure was such as to fall outside the bounds of Article 4(A)(3)” (20)—noting, too, that this would release any less structured army outside of Geneva Convention obligations.

Taft’s memo, Doc 10, disagrees with Yoo and Deluhanty’s conclusions in Doc 9 in the strongest possible terms. Taft makes an impassioned plea for preserving Geneva protections that outlines many logical flaws in the Yoo/Delahuntay memo, including that the memo “badly confuses the distinction between states and governments in the operation of the law of treaties” (Doc 10, 1) and that it fails to recognize that the Geneva Convention treaty was “among the earliest treaties to extend its protections directly to individuals, whether combatants or civilians” (Doc 10, comments 11). According to Taft, there is no support for the idea that failed states are not parties to treaties, thus Yoo’s conclusion that the U.S. need not abide by treaties is invalid; his argument in part is “confused and inaccurate” (Doc 10, comments 4) and his conclusions are “actually incorrect as well as incomplete” (2).

Taft provides a number of precedents for his claims, and in an attached commentary to the Yoo/Delahuntay draft memo that spans forty pages also outlines numerous logical and factual flaws in Yoo’s suspension of the Geneva Conventions. Taft’s core argument is that if customary laws of war do not apply, both the legal basis for applying customary international laws such as the legitimacy of military tribunals,
which Yoo argues for elsewhere, as well as protections for U.S. military personnel both as POWs and as lawful belligerents themselves, fall away, putting U.S. troops at risk in numerous ways.

Altogether, Taft disagrees with nearly all of Yoo and Delahunty's definitions and claims, particularly the notion that the Geneva Conventions only apply when the other side complies with them first. Geneva protections are not merely reciprocal, Taft argues, again citing precedent; he also contests Yoo’s definition of Afghanistan as a failed state: “The Taliban qualify as a ‘government or authority’ and, as a category, Taliban forces could meet factual tests of ‘regular armed forces’” (Doc 10, comments 1). Finally, Taft contests Yoo’s definition of plenary presidential power: “it [is] likely that neither the Congress nor the Supreme Court would agree that the President has plenary power over the interpretations of treaties and international law” (Doc 10, comments 9 FN 16). Furthermore, there are legal procedures for opting out of treaties, which are not retroactive; the Bush administration did not meet those requirements.

As discussed in previous chapters, a broader—and arguably traditional—interpretation of the protections of the Geneva Conventions construes them as meant to apply to all persons, in whatever circumstance. In 1949, arguably, the authors of the Conventions simply couldn’t conceive of the coming complexities of world relations, and thus the new modes of armed conflict that would transcend the boundaries of traditional States and traditional warfare, enough to include them in specific articles of the Conventions. Yoo and Delahunty recognize this; on page 10 of
Doc 9, for example, they describe the “traditional, State-centered view of international law” (Doc 9, 10) that dominated during the original writing of Common Article 3. Given the doctrinal understanding of the time, it seems to us overwhelmingly likely that an armed conflict between a Nation State and a transnational terrorist organization, or between a failed State harboring and supporting a transnational terrorist organization, could not have been within the contemplation of the drafters of common Article 3. (Doc 9, 10)

During the rapidly transformative latter half of the 20th century, in other words, the many methods and incarnations of warfare changed; despite Yoo and Delahunty’s clear recognition of these shifts, as articulated above, they nonetheless argue later in the same paragraph that situations not covered specifically in common Article 3 were intentionally omitted:

it is telling that in order to address this unforeseen circumstance [of anti-colonialist wars of independence], the State Parties to the Geneva Conventions did not attempt to distort the terms of common Article 3 to apply it to cases that did not fit within its terms (10).

The implication here is that all situations not specifically covered in the Geneva Conventions must have been deliberately omitted; essentially, Yoo and Delahunty are making the claim that there was no intent to protect humans in any circumstances other than those actually named by the drafters—essentially turning
the intent of the Conventions on its head. Thus, no protections exist for those
deemed “terrorists” in the current armed conflict—a circumstance the drafters
could not, as the authors themselves admit, have envisioned and thus included. Yoo
and Delahunty’s core presumption in re-interpreting the Geneva Conventions thus
excludes certain broad groups of people, utterly contrary (in the view of many) to
the Conventions’ original intent, and generalizes from the exclusion of one specific
situation of war, anti-colonialist wars of independence, to all conflicts that do not fit
a traditional, and perhaps obsolete, war model. Definitions again are crucial here; it
is a “war” or at least an “armed conflict,” but not a war in the traditional sense, and
therefore, again, the traditional rules need not apply.

Arguably, this logic does not hold up under scrutiny, nor does it fulfill—or
even recognize—the higher purpose of the Conventions in the wake of the mass
slaughter that characterized multiple theaters of WWII—that is, to protect all
persons hors de combat, i.e. anyone not directly and immediately engaged in armed
combat. With Doc 9, the authors nonetheless put into place a narrow interpretation
of the Conventions as applying only to those situations specified, rather than a
broad interpretation that applies generally to human rights protections in and
around situations of armed conflict, despite substantial evidence that the broader
interpretation is closer to the intent of the drafters. Similar to the idea that torture
is wrong under any circumstances, the notion of human rights as an absolute has
gained increasing legal footing over the last half century. According to human rights
professor Margaret Denike, for example,
the apparent willingness of the so-called “international community” to affirm the aspirations of human rights is truly exceptional: as Louis Henkin has repeatedly emphasized, they are “the only political-moral idea that has received universal acceptance”; the *Universal Declaration of Human Rights* was approved by “virtually all governments representing all societies” when it was adopted in 1948; and “virtually every one” of the member states of the United Nations enshrine human rights in their constitutions (Henkin 1990, 1). Leveraging notions of the inherent dignity of human beings, the universalizing impulse speaks of providing certain standards of treatment to all individuals, simply by virtue of being human. (Denike 96)

In order to define the enemy as “illegal,” in other words, Yoo and Delahunty must also ignore the existence and legitimacy of basic and inherent human rights.

While a legal analysis of the judicial enforceability of treaties is (once again) beyond the scope of this dissertation, it is worth noting that the president’s power to make treaties, for example, is limited in the Constitution to the consent and approval of a two-thirds majority of the Senate—hardly an example of the claims for unlimited executive power that lie at the heart of every memo Yoo and the other OLC authors wrote. Further, Article VI of the Constitution, also known as the Supremacy Clause, declares that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” (“Constitution”). Georgetown University law professor Carlos Manuel Vazquez
argues that this clause “gives treaties a domestic judicial sanction that they would otherwise lack” (600), making them “presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content” (602). To put it more simply, despite OLC arguments for plenary presidential power, the president (or his lawyers) cannot simply suspend treaties at will or define them out of existence.

Taft identifies a number of other, shifting definitions in the Yoo/Delahunty memos, for example characterizing Yoo’s argument delegitimizing the Taliban as having a “basic factual and legal flaw” (Doc 10, comments 13 FN 23). As seen above, after first declaring al Qaeda illegal combatants, Yoo and Delahunty then conflate them with the Taliban, essentially defining the two groups as indistinguishable—a characterization Taft strongly disagrees with in a detailed rebuttal. He also presents a logistical problem that arises from Yoo’s shifting definitions; on the one hand, Yoo defines the Taliban as a “government” recognized by only three states, including Pakistan, and on the other as a “militia,” failing to distinguish between the two terms even as he defines Afghanistan as “stateless” (Doc 10, comments 13 FN 23). As Taft points out, these conflicting characterizations create irreconcilable legal difficulties when the U.S. and Pakistan join forces to fight the Taliban. Among many other logical flaws in Doc 9, as well as the factual errors he uses sources to rebut, Taft also takes issue with the assumption that the U.S.’ failure to recognize the Taliban “automaticallyexclude[s] the Taliban soldiers from the scope and operation of the GPW [Geneva Protections for Prisoners of War]” (Doc 10, comments 16). Taft
argues strongly against Yoo’s definition of the Taliban as an “illegitimate” armed force; violations of one or even many members of the group, he argues, do not automatically delegitimize the entire group. Ultimately, however, his main argument rests on the concern that suspending the Geneva Conventions also suspends protections for U.S. troops, putting them directly in harm’s way; further, it makes U.S. personnel vulnerable to future prosecutions.

The dispute outlined above over the definition of al Qaeda and the Taliban as “legal” or “illegal” armed forces point to another logical flaw in Doc 9, one Taft does not mention: the authors’ inconsistent use of precedent. On the one hand, Yoo and Delahunty argue that new modes of warfare call for new, less restrictive laws; in this non-traditional kind of armed conflict, the Geneva Conventions are inapplicable and essentially outdated, unable (and, as the authors argue, were also not intended) to address combat the authors characterize as unprecedented and unforeseen. As Alberto Gonzales famously puts it in Doc 13, picking up the thread of Yoo’s argument (a document Mayer claims was actually written by Addington, and which argues that non-compliance with the Geneva Conventions provides a “solid” legal defense against future prosecution),

the war against terrorism is a new kind of war . . . this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific
instruments” (Doc 13, 2).

Note here how Gonzales (or Addington) pairs “strict limitations on questioning of enemy prisoners,” a central tenet of the Conventions’ ban on torture and inhuman or degrading treatment, with minor secondary provisions such as “scrip . . ., athletic uniforms, and scientific instruments”—as though the two sets of provisions have equal weight and are similarly “quaint.” In any case, in Doc 9, Yoo and Delahunty define Al Qaeda as merely a violent political movement or organization and not a nation-state. As a result, it is ineligible to be a signatory to any treaty.

Because of the novel nature of this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict. (Doc 9, 1-2)

The Taliban is then essentially equated with Al Qaeda and their rights as legal combatants or detainees are suspended. In the follow-up rebuttal to Taft’s response and commentary, Doc 12, Jay Bybee signs off on Yoo and Delahunty’s Doc 9 draft, adding new material regarding the War Crimes Act to wide swaths of duplicate text from the earlier memo and picking up on some of Taft’s objections, particularly regarding possible liability for war crimes. Doc 12 uses the familiar narratives of self-defense, plenary executive power especially in the prosecution of war, and the
exceptional situation after 9/11, to make essentially the same arguments made in Doc 9.

Yoo’s flawed logic, however, reaches further than just factual and interpretive differences. Despite repeated claims that laws from 1949 intended to protect basic human rights have been rendered obsolete in the grim new post-9/11 world, Docs 9, 12, and the penultimate memo in the exchange by Alberto Gonzales, Doc 16, “Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949,” all use exactly the same 1949 Conventions to bolster the overall argument that al Qaeda and the Taliban are illegal enemy combatants. All three documents rest on the definition in Article 4 of the Third Geneva Convention to exclude both al Qaeda and the Taliban from prisoner of war status. The convention, the authors argue, defines POWs only as members of the armed forces, the militia, or of other “volunteer corps” who fulfill the following four conditions:

a) “being commanded by a person responsible for his subordinates”;
b) “having a fixed distinctive sign recognizable at a distance”;  
c) “carrying arms openly”;  
d) “conducting their operations in accordance with the laws and customs of war.” (Doc 16, 1)

Despite previous assertions by Yoo, Delahunty, Bybee, and Gonzales that parts of the Conventions, at least—those that grant rights and protections—are quaint and obsolete, the above definitions that exclude combatants who do not fulfill all four requirements are unquestioningly presumed to apply, without regard for the “new
paradigm” of the war on terror or the construction of a “new” and unprecedented enemy. As Yoo himself acknowledges in Doc 9, without a hint of irony, the above definition stems directly from an older, more obscure law, the Hague Regulations from 1907 (Red Cross). Essentially, the OLC authors are relying on traditional, pre-WWI definitions of combatants, in other words, to exclude members of al Qaeda and the Taliban from post-WWII human rights protections, even as they argue that, in the new paradigm, those protections no longer apply. Geneva Conventions requirements are valid, it seems, only when it suits the purposes of the authors.

Docs 9 through 17 thus evidence in detail the fierce ideological battle that occurred internally within the administration as a result of Yoo and Delahunty’s suspending the Conventions, as well as providing clear examples of various strategies of outcasting. Interestingly, the arguments both for and against applying Geneva protections to al Qaeda and the Taliban use not only the language of criminalization and vilification to construct the enemy, but also a language of orientalization. Taft, for example, claims that intelligence experts have mischaracterized Afghanistan under Taliban rule, a portrayal that is “fundamentally inaccurate” (Doc 10, 18) in its conflation of al Qaeda and the Taliban as indistinguishable forces in Afghanistan and that further rests solely “on four newspaper articles” (19). Taft then lists several reasons why the Taliban can be defined as the governing authority in the country:

* There is no question that the Taliban . . . did effectively control 90% of Afghanistan’s territory, and did exercise the functions of a
government therein, even though they may have done so in a manner incompatible with modern standards and sensibilities. The Taliban certainly thought of itself as the government. Indeed they may have brought about the most effective central control in Afghan history—albeit at a terrible cost to Afghanistan and its people.

* The Taliban’s objective was to turn Afghanistan into an Islamic state based on their particular interpretation of Islamic law. The Taliban staffed and operated those institutions of government that comported with their pre-modern conception of what a government ought to do.

(18)

They also “instituted and enforced a system of taxation,” Islamic courts, and appointed a Council of Ministers to run institutions such as foreign justice and education ministries as well as a “ministry for the promotion of virtue and eradication of vice” (18). As Taft remarks, “while we may and do find much of the Taliban’s criminal law abhorrent, we have no basis on which to deny that it was in fact a system, however primitive by our standards” (18-19). Despite language that casts the Taliban as primitive, pre-modern, and alien, Taft nonetheless recognizes a certain societal order and argues strongly for the Taliban’s basic legitimacy as a functional governing body as the de facto government of Afghanistan, as well as for the protections that combatants whose looks and behavior conform more to western expectations might enjoy.

The authors on the other side of the argument remain consistently dismissive
of Taft’s arguments. According to Gonzales, they have “no organized command structure whereby members of the Taliban militia report to a military commander who takes responsibility for the actions of his subordinates” (Doc 16, 2). They also lack a permanent, centralized communications infrastructure.

Periodically, individuals declared themselves to be “commanders” and organized groups of armed men, but these “commanders” were more akin to feudal lords than military officers. (2)

The Taliban, Gonzales asserts further, are fighting more “for their own tribal, local, or personal interests” than as an organized, traditional army; moreover,

to the extent the Taliban militia was organized at all, it consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures . . . Armed men who can be recruited from other units, as DoD states, through defections and bribery are not subject to a commander who can discipline his troops and enforce the laws of war. (Doc 16, 3)

Nor do they wear uniforms or clothes that set them apart; for example, although “some have alleged that members of the Taliban would wear black turbans, . . . apparently this was done by coincidence rather than design” (3)—another claim Taft disputes. In addition, the fact that they bear arms openly “is of little significance because many people in Afghanistan carry arms openly” (3); there is no way, in a country marked by decades of war, to readily distinguish them from the
rest of the population.

One of the most prevalent strategies of orientalization, it seems, is to categorize the enemy in various ways as “lawless”—a depiction that seems almost ironic in light of the strict laws enforced by the Taliban in a “fairly rigid and puritanical interpretation of Islam” (Jalali and Grau); such a depiction recognizes only western law as civilized. Gonzales writes,

there is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of the Geneva Conventions or any other body of law. Indeed, it is fundamental that the Taliban followed their own version of Islamic law and regularly engaged in practices that flouted fundamental international legal principles. Taliban militia groups have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities. They have killed for racial or religious purposes. Furthermore, DoD informs us of widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war. (Doc 16, 3)

In Doc 10, by contrast, Taft describes the strict order imposed by the Taliban in a country in which years of war had taken their toll. A 1999 report published by the Foreign Military Studies Office—which, it should be noted, does not “necessarily represent the official policy or position of the Department of the Army, Department
of Defense, or the U.S. Government” (Jalali and Grau)—describes the Taliban as a movement that “coalesced to bring order to a failed state. The Taliban’s commitment to fighting corruption and lawlessness won them massive popular support . . . This popularity led to predominant military might and a tentative legitimacy to rule the country” (Jalali and Grau)⁰; elsewhere in the article the authors claim that “despite negative press coverage in the West, there were many positive aspects to the Taliban cause. First, the Taliban brought order, security and purpose to large sectors of Afghanistan.” The Taliban’s varying classifications were often a matter, in other words, of the political expediency of the moment.

Lawlessness is also attributed to Al Qaeda. In more than one instance, the documents contain detailed lists of al Qaeda attacks, such as in Doc 12. Here, quoting Rumsfeld, Bybee lists acts that constitute war crimes:

> Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; they have deliberately targeted and killed thousands of civilians; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat. (Doc 9, 13)

---

⁰An exploration of exactly how much the U.S. supported, armed, and financed the Taliban before the events of 9/11, when they were fighting the Soviets, is also beyond the scope of this dissertation; the question, however, is a legitimate one.
Elsewhere, lists include numerous countries and dates of al Qaeda attacks, another example of hyperlexicalization. Clearly, the U.S. is defined as the civilized in-group; the enemy is the uncivilized out-group.

Thus the enemy—comprised, essentially, of a conflation of 19 hijackers, their mythically evil leader, various groups of militant Muslim fundamentalists from numerous backgrounds, locations, and motivations, along with a large portion of innocent bystanders, also from myriad backgrounds and caught by accidents of time and place—is constructed as so other, so evil, and so barbaric, that it becomes difficult to imagine any humanity, much less any actual individual human beings, as a characteristic of the out-group. The point is not that the above acts of violence did not and do not continue to occur, nor is it to minimize or trivialize those acts; rather, the point is what other, arguably no less atrocious acts of violence such acts both elide and are being used to justify.

Importantly, the ongoing debate is not merely about the construction of the enemy; it is also about the construction of the identity of the United States. Doc 39 provides further evidence of both in-group and out-group construction. This document, a series of emails with the subject “Taskers” that ends on Aug. 14, 2002, is an exchange between various members of the military as the legal sanction for torture was being put into place for implementation at Guantanamo. The first email contains strategies of orientalization; it supplies the answer to an apparent question about the legal definition of “unlawful combatants,” which the SJA (Staff Judge Advocate, i.e. military legal counsel) has given the author, whose name and rank
have been redacted. The author defines "lawful combatants" as "anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict . . . [who] receive protections of the Geneva Conventions and gain combat immunity for their warlike acts" (3), while "unlawful combatants" or "unprivileged belligerents" "may be treated as criminals under the domestic law of the captor" (Doc 39, 3). (Note that despite such interpretations, the Bush administration not only shifted the definition of the enemy to "illegal combatants" but conducted consistent and successful efforts to keep everyone they captured beyond the reach of domestic law.) The email then asks for an interrogation "wish list" from the "interrogation elements (Division/Corps)" (Doc 39, 3) and concludes with the following paragraph:

The gloves are coming off gentleman regarding these detainees. [Name redacted] has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks. I thank you for your hard work and your dedication. MI ALWAYS OUT FRONT! (Doc 39, 3)

The above email is forwarded with the brief commentary, "Sounds crazy, but we're just passing this on" (2); the response that follows is telling:

I sent [sic] several months in Afghanistan interrogating the Taliban and al Qaeda. Restrictions on interrogation techniques had a negative impact on our ability to gather intelligence. Our interrogation doctrine is based on former Cold War and WWII enemies. Todays
enemy, particularly those in SWA, understand force, not psychological mind games or incentives. I would propose a baseline interrogation technique that at a minimum allows for physical contact resembling that used by SERE instructors.\(^{(2)}\)

The author then goes on to describe in detail certain “techniques,” as a “minimum baseline,” that include open-handed facial slaps and back-handed blows to the midsection and, further, “close confinement quarters, sleep deprivation, white noise, and a litany of harsher fear-up approaches . . . fear of dogs and snakes appear to work nicely. I firmly agree that the gloves need to come off” \(^{(2)}\). The construction of the enemy, especially “those in Southwest Asia,” is again as brutal, primitive, and psychologically unsophisticated; this enemy understands only brute force.

The final email in the exchange takes strong issue with this construction, and further presents a different construction not only of the enemy, but also of the identity of the United States and specifically its military. The author of this email, whose name has also been redacted, first points out that, in his opinion,

\(^{16}\) Southwest Asia

\(^{17}\) SERE techniques, or techniques taught to military personnel in the “Survival Evasion Resistance and Escape” School, had never been intended for use against enemy captives; the techniques stemmed directly from training originally designed to teach military personnel to resist torture, not employ it. This “reverse engineering” of interrogation techniques had been developed from techniques earlier employed by the Soviets and the Nazis; the SERE training program was based in part on a classified document known as the 1963 KUBARK Manual, “regarded as the bible of psychological torture” \(^{(160)}\). SERE was, as Mayer describes it, “a repository of the world’s knowledge about torture, the military equivalent, in a sense, of the lethal specimens of obsolete plagues kept in the deep-freeze laboratories of the Centers for Disease Control” \(^{(158)}\). In another example of semantic reversal, under the Bush administration and specifically in the hands of the CIA—whose interrogation techniques often go unmentioned in the memos, when (token) restraints are being placed on military personnel—SERE became “a blueprint for abuse” \(^{(158)}\), according to sources Mayer interviewed who were reportedly close to the program.
everyone we are detaining at this point is an unprivileged [sic] belligerent, since we have taken over the country and there is no longer any force opposing us that 1) wears recognizable uniform; and 2) bears arms openly. So I think everyone we detain is in that category. (Doc 39, 1)

He then goes on to argue, in essence, that abusive treatment constructs the identity of the abusers as much it constructs the identities of those they abuse:

As for “the gloves need to come off…” we need to take a deep breath and remember who we are. Those gloves are most definitely NOT based on Cold War or WWII enemies—they are based on clearly established standards of international law to which we are signatories and in part the originators… It comes down to standards of right and wrong—something we cannot just put aside when we find it inconvenient… “The casualties are mounting…” we have taken casualties in every war we have ever fought—that is part of the very nature of war. We also inflict casualties, generally many more than we take. That in no way justifies letting go of our standards. We have NEVER considered our enemies justified in doing such things to us… if you cannot take casualties then you cannot engage in war. Period.

(1)

His final lines are again a direct construction, his view of the United States military:

“BOTTOM LINE: We are soldiers, heirs of a long tradition of staying on the high
ground. We need to stay there” (1). We are, in other words, “better than that”—
even if “our enemies” not always are.

The documents thus evince a bitter contest over the identity constructions,
ultimately, not only of the enemy but of the United States. In Doc 10, Taft is
constructing U.S. identity along lines of understanding mapped out in previous
generations—for example, as discussed in Chapter V, by both Lincoln and
Washington. That construction sees the U.S. as taking the high road, as not so
terrified of the other that it is willing to give up its most cherished principles in
exchange for a sense of protection or desire for vengeance, i.e. as a country that is
also mindful of the nobler and “better angels” of human nature. Specifically, that
point of view places the U.S. squarely in the domain of functioning as a leader in the
protection of basic human rights. As Taft explains,

    in previous conflicts, the United States has dealt with tens of
thousands of detainees without repudiating its obligations under the
Conventions. I have no doubt we can do so here, where a relative
handful of persons is involved. Only the utmost confidence in our legal
arguments could, it seems to me, justify deviating from the United
States [sic] unbroken record of compliance with the Geneva
Conventions in our conduct of military operations over the last fifty
years. (Doc 10, 2)

Similarly, in Doc 14, Colin Powell warns Alberto Gonzales that Yoo, the OLC, and the
executive branch are reversing over a century of U.S. policy as well as opening up
the possibility of foreign prosecutions for acts of war. In Doc 15, however, Ashcroft argues the opposite; he claims that opting out of the Geneva Conventions protects American officials from future prosecutions—a very different construction of U.S. identity, among other things (such as the objectives of the Geneva Conventions) than Taft’s, Powell’s, and that of the unknown final author in Doc 39.

Both William Taft in Doc 10 and Colin Powell in Doc 14 protest the suspension of the Geneva Conventions in unequivocal terms; under Bush, however, the opposite interpretations of the OLC and the Department of Justice of what treatment of detainees is permissible will prevail until the Supreme Court reinstates Geneva Convention and habeas corpus protections in Rasul v. Bush (2004), Hamdan v. Rumsfeld (2006), and Boumediene v. Bush (2008). Even more importantly, perhaps, as a result of policies articulated in the OLC memos, however, these protections as well as many other core arguments in the Torture Memos are still being contested and are subject to ongoing legal (and other) debate, the full extent of which is far beyond the scope of this dissertation. Again, the core fallback argument is an authoritarian argument of plenary executive power: “we conclude that customary international law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution” (Doc 9, 2).

The narrative that carries through Docs 9 to 17, which culminates in Bush’s presidential declaration that none of the Geneva protections apply to combatants in
the war on terror, is in part a prime example of the "humanitarian" narrative that, according to Margaret Denike, politically produces and co-opts "human rights discourse ... as a justification for the public violence of military intervention" (97). Denike sees such narratives of

progress and human-rights triumphalism, and their concomitant campaigns of fear against an allegedly lawless and evil other, as performative gestures in and by which the very distinctions between civilized and uncivilized states are constituted; and the legitimacy or illegitimacy of their public acts of violence are forged ... the utilization of human-rights discourses, in conjunction with the language of self-defense, relies on and reinforces the selective and strategic denial of humanity and citizenship to the very groups of people—such as Muslim women and refugees—that have been made to symbolize its cause (Chinkin, Wright, and Charlesworth 2005, 28).

(97)

Arguably, that denial applies to other, often largely powerless out-groups as well. The discourse of humanitarianism and human rights, according to Denike, referencing Costas Douzinas' "detailed genealogy of human rights" (96), has been co-opted by imperialist forces looking to create a new norm that legitimizes the "'exceptional' use of force against sovereign territories, providing a moral gloss to occlude the imperialist interest in such force, and effectively spelling the 'end of human rights' as we know them" (96). Along with "self-defense," the semantic
formation “just cause” has been used to rationalize the obliteration of the concept of basic human rights for all, inalienable rights granted them simply by virtue of being human, that has been detailed above. As Denike describes it,

there is a certain political economy to the strategic deployment of human-rights discourses by colonial and imperial states that have sights set on the profits of war, the operations and effects of which can be mapped through a resurgence of new modalities [of] state sovereignty. My examination of these processes . . . entails an exploration of how such "just causes" as human rights operate on gendered and racial lines, demonizing others as tyrants and terrorists and circumscribing women within normative paternalist roles in what Iris Marion Young calls the “protectionist racket” of security states (2003). (97)

In the name of protecting the United States, its citizens, their “way of life,” their national security, members of the OLC and the War Council—Yoo, Bybee, Philbin, Haynes, Gonzales, and the men who kept their own names out of the policies they helped shape—carefully crafted scenarios and the legal underpinnings in which the rights of those citizens, of others who got in the way, and particularly of the guilty, could legitimately become “collateral damage.” They failed to protect the laws that are the only route to upholding and fostering what Lincoln described it in his First Inaugural Address as the “better angels of our nature” (Lincoln). They chose instead the route to power.
A great irony here is that it was exactly the hyperlegalization of war that Jack Goldsmith decried that allowed them to go as far as they did, as authoritarians seeking to legally enshrine unconstrained presidential power within a system based on democratic principles and the rule of law. The memos are evidence that the war on terror the Bush administration was prosecuting was as much a war of rhetoric as it was of weaponry, a war by definition: the shifting of words, spaces, semantics, identities, etc., ultimately without regard for larger picture humanitarian concerns such as human rights or the overriding purpose of the Geneva Conventions, the Convention Against Torture, the War Crimes Act, and other laws that clearly prohibit torture under any circumstances; the recontextualizations used to enact semantic shifts and reversals, so that words take on new meanings or come to mean their opposite; the elision and occlusion of earnest judicial inquiry or contrary points of view, such as in Doc 9, in which Yoo claims on page 8 that his “interpretation is supported by commenters” and then wholly omits interpretations from any commenters that do not agree, as Taft subsequently amply demonstrates; the inexplicable indifference to the dangers, to the troops, of suspending the Geneva Conventions, as well as to how granting permission to torture might affect military personnel. The single-minded devotion to all of these things, more amply evidenced in the memos than this dissertation can adequately show, serves a single overriding purpose: to authorize, endorse, and effect unlimited executive power.
CHAPTER NINE:

CONSTRUCTING TORTURE

In a review of John Yoo’s 2006 book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, Harvard law professor Cass R. Sunstein takes apart a number of the arguments Yoo makes about the war on terror and evaluates his more controversial claims. The argument style Yoo uses in his book, as Sunstein describes it, seems much the same as the methods Yoo uses for constructing arguments in the memos. In his review in the *New Republic*, entitled “The 9/11 Constitution,” Sunstein makes the following critique:

Much of this cheerfully one-sided book reads like a lawyer’s brief, trying to justify a particular set of pre-determined conclusions. Counterarguments are rarely given in their strongest form. Sometimes they are not given at all. On some issues, Yoo writes as if every imaginable source fully supported his conclusion—as if the analysis were ridiculously simple, and as if those who disagree with him were not merely wrong in their conclusion, but wrong on every detail.
Elsewhere in the review, however, Sunstein makes the surprising claim that "some of Yoo's best arguments are textual"; Sunstein, it seems, is referring to Yoo's analyses of specific passages of legal text, particularly the way Yoo picks apart the language of statutes to argue for a particular interpretation. One example is his parsing of the Constitution's use of the phrase “to make war,” an executive power, versus “to declare war,” a congressional power. Not surprisingly, Yoo essentially argues that wars can be and often have been fought without any formal declaration, solely at the president's discretion, which he interprets as proof that the executive branch has unlimited powers in wartime. As I have said elsewhere in this dissertation, I can make no evaluation of the legal validity or strength of Yoo's arguments. I can, however, make judgments about his use of text, the rhetorical moves he and the other authors employ, and the way he and the others use, recontextualize, twist, shift, and otherwise manipulate both language and meaning. Textually, if not in a legal, then certainly in a rhetorical sense, Yoo's work, like that of his OLC and other colleagues in the White House and Departments of Justice and Defense under George W. Bush, is deeply flawed.

This final analysis chapter explores some of the key semantic, rhetorical, and linguistic moves the OLC authors used to enshrine power, such as passive agent deletion and transivity, as well as some of the most egregious examples of textual manipulation. This includes as in-depth an analysis of Doc 22, the Torture Memo Yoo authored and Bybee signed, as time and space will allow. As has been shown, semantic reversals are one of the strategies employed by the OLC authors to enable
the administration to enact controversial policy. This strategy goes beyond the subtle, transformative shifts that occur when terms are used in new ways and in new contexts, gradually changing the meaning. Here, not only are meanings elided, obfuscated, transformed, but words are employed in ways that ultimately shift their original meanings until they connote even their opposite. We begin with an example central to the war on terror, below.

Semantic reversal: Extraordinary rendition

Doc 19, written by Jay Bybee on March 13, 2002, entitled “The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations,” argues that his “plenary constitutional authority, as the Commander in Chief” (Doc 19, 1) gives the President “full discretion” to transfer individuals who are captured and held outside the U.S. to the control of another country. Presidential authority, according to Bybee, is “supported by two centuries of historical practice to detain and transfer enemy prisoners captured in wartime” (1). Bybee reviews the GPW (Third Geneva Convention Regarding the Treatment of Prisoners of War) and the U.N. CAT (Convention Against Torture), which states in Article 3 that “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” (UN CAT). He also notes that such transfer is contrary to U.S. domestic law as well. Bush himself declared on numerous occasions (counter-factually, but in lip service to U.S. laws against both torture and against
complicity with countries that engage in it) that we neither torture, nor do we rendition suspects to other countries that do. While acknowledging the existence of laws against transferring captured enemy prisoners to other countries, Bybee states that “these conventions do not apply to the factual situation posed by the transfer of Al Qaeda and Taliban prisoners” (1) because none of this is occurring on U.S. soil: “the President has full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries” (1). He bases his claims in Doc 19 largely on arguments made in previous documents, which we have discussed in preceding chapters, specifically on Docs 9 through 17 that debated and ultimately resulted in Bush’s suspension of Geneva protections for al Qaeda or Taliban detainees and created extralegal, material spaces for their containment. Here, Bybee rests his argument in part on immigration laws pertaining to the “removal” of non-citizens, but he also performs many of the rhetorical, semantic and linguistic moves we have examined in previous chapters. For example, he calls on the same arguments that we are at war with an illegal enemy, that the situation is unique and therefore many of the usual rules don’t apply, that any act we undertake is an act of self-defense, and above all on claims of unlimited (military) executive power:

the centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and
make command decisions affecting operations in the field with a speed and energy that is far superior to any other branch” (Doc 19, 4).

As does Yoo in Docs 2 and 3, Bybee uses the same “single hand” quote from Alexander Hamilton’s Federalist No. 74 to underpin the OLC’s vision of unlimited presidential power. He further uses the same “academic-sounding doctrine called the ‘theory of the unitary executive’” (Mayer, *Dark* 61), a phrase—as discussed in a previous chapter—that does not actually appear in the Federalist papers but originates with the conservative Federalist Society of Samuel Alito and Stephen Calabresi, among others, and which ignores, in its singular interpretation of executive power, Hamilton’s overarching quest to find ways to innoculate the executive branch as much as possible against abuses of power. Doc 19, in other words, is another typical example of the OLC’s core purpose: to cement plenary presidential power, particularly during wartime.

The above arguments once more serve, in essence, to circumvent domestic and international law. Again, the situation is defined, not only as war, but as exceptional and of global reach: “Those treaties that purport to govern the transfer of detained individuals generally do not apply in the context of the current war against al Qaeda and other terrorist groups” (Doc 19, 2). Bybee’s use of the word “purport” is also striking here; it connotes skepticism and even, arguably, a note of contempt toward international law, which becomes even more apparent in a footnote on the same page dismissing such law: “A transfer that was inconsistent with a treaty would amount to a suspension of that treaty” (2). In other words, if the
president violates a treaty law, the law is no longer valid (similar, perhaps, to Nixon's famous phrase, "If the president does it, it's not illegal"). Even if the laws did apply, Bybee continues, they would not “impose significant restrictions on the operation of the President's Commander-in-Chief authority” (2) because—as Yoo also has repeatedly argued—"the courts have consistently recognized [that] the President's discretion in exercising the Commander-in-Chief power is complete, and his military decisions are not subject to challenge in the courts” (3). Claiming that the only applicable restrictions that might pertain are those regarding the transfer of POWs held inside the U.S. to other countries, Bybee warns that those held at home “may be subject to a more complicated set of rules established by both treaty and statute” (1). This set of memos fully reveals the importance of the legal “black holes” previous memos called into being.

Thus, Bybee's arguments for unlimited presidential powers in wartime are constructed similarly to Yoo's, using the same precedents and logic: “Quick, decisive determinations must often be made in the face of the shifting contingencies of military fortunes. This is the essence of executive action” (Doc 19, 4). Power over prisoners, detainees, suspects, and all others captured during wartime has long historical precedent, pages of which Bybee lists in detail; the power to transfer suspects, therefore, "lies within the discretion of the executive branch . . . as the President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents” (2). Torturingdemocracy.org summarizes the memo as “appear[ing] to underpin the so-
called ‘extraordinary rendition’ program. It argues that the President has an unfettered right to transfer prisoners captured in the war on terror to governments around the world without regard for whether they would be tortured” (“Key Documents”). Since the Geneva Conventions do not apply, moreover, neither do the restrictions of other treaties.

Bybee spends a great deal of the memo providing evidence for the president’s power over “captured enemies” and prisoners of war, even if he ultimately repeats the claim that these are not prisoners of war but illegal combatants, and thus the rules do not apply in any case:

historical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of all individuals captured incident to military operations,\(^\text{18}\) and not merely those individuals who may technically be classified as prisoners of war under relevant treaties. (Doc 19, 20)

Note that Bybee is calling on a “rich historical tradition” (19) of transferring detainees to other countries, but most of all the president’s power to dispose of prisoners as he pleases, without interference from Congress. In essence, the first 18 or so pages of the document argue for the president’s authority to determine the fate of prisoners, as well as for the legitimacy of transfer itself—points that are not actually in dispute, but which, as written, establish a clear precedent for unconstrained executive power: “historical practice clearly demonstrates that the

\(^{18}\) The phrase “incident to military operations” seems to directly contradict the intent of the Geneva Conventions to protect all persons captured hors de combat—a legal issue that cannot be resolved here.
President’s inherent authority over prisoners of war includes discretion to transfer custody and control over prisoners of war to other sovereign nations” (19). In essence, Bybee argues that the president has full discretion to “dispose of the liberty of captured enemy personnel as he sees fit” (19). Again, the foremost concern in the memo is to ensure plenary presidential power.

The real issue at stake here, however, is the humane treatment of prisoners and the limits imposed on detainee transfers by the GPW and the U.N. CAT. As Bybee acknowledges, Article 12 of the GPW mandates that “prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention” (Doc 19, 21). Bybee uses repeated close examinations and interpretations of specific words in the law to build his claim that extraordinary renditions are legal; the requirement, for example, that “the Detaining Power ‘satisfy itself’ that the Transferee Power is ‘willing’ to apply the GPW is . . . vague” (22). This is a legitimate criticism, perhaps, but he further argues that neither the GPW nor the UN CAT, in his view, apply to captured detainees, because technically we are not “expelling,” “returning,” or “extraditing” them to countries that torture. The language of the U.N. CAT, i.e. specifically “expelling,” “extraditing,” or “returning” a detainee, based on a Supreme Court decision, connotes removal from U.S. soil or being turned back at the border. Thus, the treaty applies only to those who have reached U.S. soil, not those who are already, and who remain, extraterritorial.
Bybee further points out that Article 12 “indicates that the Detaining Power’s responsibility is limited to ascertaining that the transforee nation will not breach the GPW ‘in any important aspect’ (Doc 19, 22 italics in original), a sentence the ICRC [International Committee of the Red Cross] has interpreted to mean only ““systematic violations of the Convention,’ breaches causing ‘serious prejudice to the prisoners,’ and ‘grave breaches of the Convention’” (22). Lastly, the U.S. is transferring detainees extraterritorially, which according to Bybee is not covered under any of the conventions: “Thus, the US is free from any constraints imposed by the Torture Convention in deciding whether to transfer detainees that it is holding abroad to third countries” (25). Strikingly, like Yoo, Bybee moves back and forth between using passages and phrases in the Conventions to support his point of view, to claiming that the Conventions do not apply in any case when they run counter to his arguments—a contradiction neither author ever resolves.

Bybee’s key argument, however, rests on the concept of intent, both legally and ethically, as well as the claim that outside of the United States the statutes simply do not apply. He notes that “the phrase ‘substantial grounds for believing that he would be in danger of being subjected to torture’ in Article 3” of the U.N. CAT means, as Congress interpreted the Convention, that “it is more likely than not that he would be tortured” (Doc 19, 23). In order, therefore, to “fully shield our personnel from criminal liability, it is important that the US not enter into an agreement with a foreign country, explicitly or implicitly, to transfer a detainee to that country for the purpose of having the individual tortured” (26). Finally, Bybee
advises that each case should be evaluated on an individual basis “according to the standards given: ‘surrendering an individual with knowledge that he will be tortured is clearly forbidden by the Convention” (29). The standard for breaking the law when renditioning a suspect to a country where he could be tortured, therefore, becomes incrementally higher; “substantial grounds for believing” becomes “more likely than not,” which then becomes extradition for the express purpose of having them tortured, which ultimately becomes not only “knowing” that he will be tortured, but transferring him intentionally for that specific reason. The intent to torture would also have to be proven, and as fulfills the legal concept of specific intent, not merely general intent.

Most striking, however, is how Bybee has subtly shifted the original language in this series of arguments to mean something arguably very different from the actual statute. The language of the original Convention is very broad; again, Article 3 prohibits rendition when there are “‘substantial grounds for believing that he would be in danger of being subjected to torture” (22 emphasis added). Rendition is prohibited not merely when there are grounds, in other words, for believing a suspect would be tortured, but merely good reason to think he would be in danger of it. This indicates a far broader interpretation than Bybee’s ultimate conclusion that for rendition to be illegal, it must not only be known to occur, but expressly intended.

In Bybee’s view, nonetheless, the president’s plenary executive power gives him immunity from prosecution under almost any circumstances. Any
interpretation of the law by Congress “would not be binding on the Executive, and indeed it would arguably constitute unconstitutional interference with the President’s constitutional authority over treaties” (Doc 19, 23). Furthermore, the president’s decision to transfer a POW to another country “would constitute a controlling executive act, and for domestic law purposes would displace any otherwise applicable norms of customary international law” (24 FN 94). Finally, according to Bybee, domestic law would not apply in this case either, although Article 18 U.S.C. § 2340A(a) (1994) prohibits both committing or attempting to commit torture outside the United States. Again, intent is what matters; as long as the United States does not intend for a detainee to be tortured post-transfer, however, no criminal liability will attach to a transfer, even if the foreign country receiving the detainee does torture him. For criminal liability to attach, the accused must be shown to have intended to effectuate the criminal object of the conspiracy [to torture]. (26)

Rendition, then, becomes a practical tool in the war on terror that the president can employ at his discretion, as long as there is no specific agreement among countries that a suspect will be tortured. Because the renditions occur solely outside of United States territory, international treaty obligations do not apply; i.e. they apply in Bybee’s construal only to extradition: “the United States is free from any constraints imposed by the Torture Convention in deciding whether to transfer detainees that it is holding abroad to third countries” (25). Nor do domestic laws
apply, unless specific intent has been clearly proven: “applicable domestic law constraints arguably amount to little more than precatory policy statements” (30)—statements, in other words, that function as mere pleas or entreaties, rather than as law.

In legalizing extraordinary renditions and suspending laws specifically designed to prevent inhuman treatment, Doc 19 performs the next vital step toward a policy of torture by enacting the shift away from granting basic human rights and protections to anyone the U.S. has detained, and toward the unfettered power of the state as embodied in the executive. In Doc 19, Bybee builds on the arguments outlined above to extend presidential powers beyond any previous reach. The phrase *extraordinary rendition* itself, as described in Alpha Phi Alpha’s 2006 World Policy Council (WPC) Report, “is one of those modern day, antiseptic euphemisms which cloak a process akin to the worst cruelties and barbaric practices of any age in human history” (Brooke, Dawson, and Ponder 20). The report describes the process as one in which the captured are stripped, subdued forcibly with drugs (itself a violation of international and domestic law), sometimes given enemas as well, swaddled in diapers, dressed in orange jump suits, blindfolded or forced to wear opaque goggles, sedated, handcuffed and shackled with leg irons, driven in convoys to private jets and flown to the country of rendition where questions are given interrogators who then torture them in a variety of ways. (21)
Over the course of the war on terror, hundreds, and by some accounts thousands, of prisoners have been renditioned to “black prisons” around the world, including Bagram and Guantanamo. According to Jane Mayer, there was “fierce internal resistance” against such a use of renditions from the start—and not just from “human rights activists but rather hard-line stalwarts in the criminal justice system with years of experience fighting terrorism” (Dark 110). As CIA officer told the Washington Post, “The whole idea has become a corruption of renditions . . . it’s not rendering to justice, it’s kidnapping” (Priest, “Long-Term” 2). Two serious problems arose from extraordinary rendition as practiced by the Bush administration. One, interrogators with actual long-time practice in gathering intelligence had good reason to doubt “the effectiveness of physical coercion as a means of extracting reliable information” (Mayer, Dark 110). Two, once “Kidnap, Inc.” (286), as one CIA officer called it, had taken prisoners “outside the realm of law” (110), it became surprisingly difficult to reintegrate them back into the legal system. Renditions thus made prosecutions more difficult, not less, as was their original intent; facilitating legal justice was arguably, however, not the primary goal of the Bush administration.

According to a Frontline investigative report, the “practice of capturing and transporting someone to another country without legal extradition” (“Extraordinary”) had existed long before the Bush administration came to power, but it was “originally used on an extremely limited basis and for a different purpose” (Mayer, Dark 108). Under Bush, however, in the words of one CIA official, it became
an “abomination” (Mayer, “Outsourcing” 1). For decades, U.S. law enforcement had occasionally used renditions to bring wanted suspects to the U.S for trial, and until 9/11 the FBI published a report every year on specific cases where it had been used. The Clinton Administration created a specific rendition program in the mid-1990s to try and capture Osama bin Laden. Rendition served as a way to circumvent the legal process of extradition, but although “snatch operations may occasionally have broken local laws” (“Extraordinary”), the practice had been endorsed by the Supreme Court and the ultimate goal was to bring suspects into the legal system to face a judge and/or jury. As the WPC Report describes it,

what began as a program aimed at a small, discrete set of subjects—

people against whom there were outstanding ... warrants—came to

include a wide and ill-defined population that the Administration terms ‘illegal enemy combatants.’ Many of them have never been publicly charged with any crime. (Mayer, “Outsourcing” 1, emphasis added)

In fact, by refusing to conduct tribunals to determine the status of captured individuals as the Geneva Conventions required, by suspending other Geneva protections, by legalizing indefinite detention without trial, by categorically declaring everyone they captured, as a class, an “illegal combatant,” the Bush administration with the help of the OLC had made virtually anyone outside the United States a potential target, for renditions or any other “treatment” they chose to apply.
The crucial point here is the semantic reversal that the term *extraordinary rendition* underwent under Bush administration policies—with the help of the OLC memos. Whereas before George W. Bush took office it had largely meant bringing suspects *to justice*, and was used only in exceptional circumstances to expedite the legal process, it was now used to spirit suspects away from the reach of the law. The captured were not brought into the legal system; they were placed outside of it, into those extrajudicial spaces the OLC authors created on paper that were then brought into being. Under the Bush administration, in other words, renditions became a way to circumvent, not the extradition laws of other countries, but essentially the rule of law itself.

Despite Bybee’s attempts to place U.S. officials (and their captives) as far as possible outside the reach of domestic and international law, it seems clear that the threshold he set for “specific intent” was nonetheless crossed. Renditions, which were kept utterly secret and which were perpetrated on possibly unknown hundreds of detainees, allowed the Bush administration to work hand in hand with countries known for severe human rights violations and torture. Most common among these were Egypt, Morocco, Syria, Jordan, Uzbekistan, and Afghanistan. A 2002 State Department Report detailed how the Egyptian secret police force, known for its brutality, treated detainees; they were

- stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or
other objects; subjected to electrical shocks; and doused with cold water [and] sexually assaulted” (Mayer, Dark 112).

According to Mayer (Dark 113), top level officials in the governments of both countries had to sign off on each rendition. Mayer points out how Alberto Gonzales, during his January 2005 confirmation hearings, “chuckled” when asked about rumors of rendition and torture, arguing that “the administration ‘can’t fully control’ what other nations do” (110). It was a specious argument. Not only did the U.S. actively cooperate with the Egyptian government, certainly with “specific intent,” but eyewitness accounts have attributed similar methods of treatment to U.S. forces and/or CIA interrogators as well.

Egypt for one had long been known to torture; Mayer describes, for example, how a suspect in the first world trade center bombing had been handed over to U.S. authorities wrapped in duct tape from head to toe, “like a mummy” (Dark 118), and authorities had pulled another from prison who was being mistreated. After 9/11, the U.S. was no longer rescuing detainees from aberrant countries; instead, the CIA built secret “black sites” around the world, into which “ghost detainees” disappeared. Far more evidence for this exists than can be even partially included here. Mayer writes that Egypt—the second largest recipient of U.S. aid after Israel, as Mayer points out, and a “key strategic ally” (112)—remained the most common destination; a Human Rights Watch report from 2007, on the other hand, claims that Jordan had the most renditions. In any case, we were no longer condemning such behavior, we were cooperating with and exploiting it not merely in isolated cases,
but as policy, at times even leading the way. American public identity, long
constructed as a leading protector of human rights across the world (however
much, at times, it had remained an ideal, a narrative, and a myth, rather than an
enacted reality), had been fundamentally transformed.

**Doc 22: The Torture Memo**

Doc 22, the 50-page memo known as The Torture Memo, was written on
August 1, 2002; a later draft of this memo became Doc 36, the expanded version,
and also the basis for the Working Group Report Rumsfeld commissioned in the
spring of 2003. Doc 22 is signed by Jay Bybee, but torturingdemocracy.org, Jane
Mayer, and most others attribute its actual authorship to John Yoo, who has claimed
that Gonzales, Flanigan, and Addington were materially involved in its production.
For the purposes here, I will assume that Yoo is the author. The memo, entitled “RE:
Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” is
addressed to John Ashcroft, and its stated purpose is to define standards of
interrogation. Doc 22 is one of two memos John Yoo wrote (or at least sent) that
day19; the other, Doc 23, is a memo addressed to Alberto Gonzales. As with all of the
Torture Memos, both documents rest on the similar sets of assumptions, including
that the Geneva Conventions do not apply to any enemy combatants and that
tribunals are not necessary to determine individual status. Doc 23 argues that
interrogations of al Qaeda cannot constitute a war crime, because the President has

---

19 Several sources have alluded to a third memo written on August 1, 2002 that has never been released.
“determined that al Qaeda members are not . . . entitled to the protections of any of the Geneva Conventions” (Doc 23, 6); nonetheless, the document ruminates on the possibility of a “rogue prosecutor” in the International Criminal Court (ICC) who might “ignore the clear limitations imposed by the Rome Statute,20 or at least disagree with the President’s interpretation of GPW” (Doc 23, 6). Both documents are thus, in essence, as clear an effort as possible to protect U.S. government and military personnel from the consequences of conducting harsh interrogations.

Doc 22 begins with John Yoo giving his views regarding “the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the U.S.C.” (1). Specifically, he frames the memo as an answer to questions that have arisen “in the context of the conduct of interrogations outside of the United States” (1), and argues that any acts that constitute torture must be extreme in order to violate Section 2340 and the Convention. According to Yoo, Section 2340

prohibits acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not

---

20 The most comprehensive and wide-reaching ban on torture to date, which the U.S. has neither ratified nor signed; the RS also establishes the International Criminal Court, which Yoo claims in Doc 23 has no jurisdiction over US actions regarding al Qaeda.
produce pain and suffering of the requisite intensity to fall within
Section 2340A’s proscription against torture. (1)

He then claims that the “possible defenses” he will examine “would negate any claim
that certain interrogation methods violate the statute” (1), and that only the most extreme and “egregious conduct” (2) is prohibited. In other words, one—if not
the—main purpose for his examination is to find legal defenses for acts that are
cruel, degrading, or inhuman or that could even, in the view of many, constitute
torture; the document is a profound trivialization of harsh and degrading treatment.

Yoo’s repeated use of the word “defendant” to signify the interrogator is also
striking; broad passages of the memo discuss various possible legal defenses. A
small sampling, by no means comprehensive, is listed below:

- the [CAT] treaty’s text prohibits only the most extreme acts by reserving
criminal penalties solely for torture and declining to require such
penalties for “cruel, inhuman, or degrading treatment or punishment.”
This confirms our view that the criminal statute penalizes only the most
egregious conduct. (1-2)

- Section 2340 requires that a defendant act with the specific intent to
inflict severe pain, the infliction of such pain must be the defendant’s
precise objective. (3)

- When a defendant knows that his actions will produce the prohibited
result, a jury will in all likelihood conclude that the defendant acted with
specific intent. (4)
- Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge. (8)
- If executive officials were subject to prosecution for criminal contempt whenever they carried out the President’s claim of executive privilege, it would significantly burden and immeasurably impair the President’ ability to fulfill his constitutional duties. (35)

As in other memos, Yoo’s core claim that the president possesses plenary executive power is crucial to Yoo’s defense of any and all actions the U.S. takes in the war on terror.

Throughout Doc 22, Yoo also uses the word “interrogation” to denote even the most egregious and extreme conduct. As he does in other memos, Yoo elides controversial terms and concepts (“torture”) behind commonly acceptable language (“interrogation”), foregrounding reasonable, common sense language and assumptions and backgrounding or obscuring the controversial and less generally acceptable aspects of his claims. For example, more than once he reminds us that “the practice of capturing and detaining enemy combatants is as old as war itself” (38 FN 22), and that “one of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy” (38). No one, however, claims that the president does not have the power to capture, detain, and interrogate prisoners. “To detain,” however, does not mean the same thing as “to imprison indefinitely without legal recourse.” As examined in previous chapters,
such conflations such as “interrogation” and “torture” here ultimately greatly destabilize the language and blur the boundaries between disparate concepts.

A list of further signifiers in Docs 22, 23, 36, and 37, among others, for what is essentially cruel, inhuman, or degrading treatment and torture is further evidence of trivialization. A partial list includes the following terms:

advanced interrogation (techniques), harsh interrogation, enhanced interrogation, intense interrogation, harsh treatment, aggressive action, loosening or softening someone up, giving someone the treatment, special interrogation techniques or methods, running the SERE module, using alternative sets of procedures, professional interrogation techniques, debriefing the prisoner.

The above list provides evidence of the use of euphemisms, trivialization, and clinical (i.e. emotional) detachment. This may be even more true of the designations of specific interrogation techniques; many, even most, of them are longstanding military terms, e.g. from the Army Field Manual, that demonstrate the emotional detachment, abbreviations, and dark humor that characterizes the language of subcultures such as the military. Prolonged sleep deprivation, for example, is called the “Frequent Flyer Program” because detainees are woken up and moved every few hours (or sometimes every 15 minutes), just as “Sleep Adjustment” denotes interfering with a detainee’s sleep, although to a lesser degree than actual sleep deprivation. “Rapid Fire” is firing questions at a detainee in quick succession; “Mutt and Jeff” refers to a good cop/bad cop dynamic used by two interrogators; “Fear Up
Harsh or Mild” denotes taking actions that increase a detainee’s fear; “Change of Scenery Up or Down” changes the conditions of confinement for better or worse, including temperature, noise, physical placement, etc. “Dietary Manipulation” signals a shift in food, for example reducing the amount or moving a detainee from regular food to MREs (Meals Ready to Eat, or field rations). “Pride and Ego Up or Down” can denote flattery, humiliation, or manipulation of other aspects of the detainee’s relationship to himself or others; “Isolation” is self-evident. These and other designations are described, debated, protested, and many ultimately approved in the later set of documents, Docs 22-40. The word “torture” itself is used to describe only the most extreme acts and, above all, to distinguish those egregious acts from the techniques up for approval—in other words, to describe what the interrogation techniques are not.

With all the requisite legal doors opened in previous documents, Doc 22 lays the foundation for the fundamental change in the treatment of detainees. Here, Yoo argues extensively for the legitimacy of “interrogation” as though that legitimacy were under dispute, particularly regarding the president’s authority; he writes, “As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy” (31). Section 2340 does not apply, claims Yoo, because of the president’s plenary authority: “The President’s power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief” (35). No one disputes the president’s authority to order
interrogations; however, most legal scholars agree that under domestic and certainly international law the president does not have the authority to order torture, despite Yoo’s oft-repeated claim (see Chapter VI) that, in essence, he does.\textsuperscript{21}

The following quote from Doc 22 is representative of Yoo’s view; it is also particularly revealing of an authoritarian mindset. Yoo writes:

\begin{quote}
Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States. (39)
\end{quote}

Here as well, no one is seeking to prevent the president from gaining intelligence; the argument is specious. Yoo words this as though the purpose of a law against torture (or against other acts during wartime) is expressly to constrain and proscribe the president from properly fighting a war. The implied assertion, here and elsewhere, that lawmakers are attempting to prevent the capture and interrogation of violent members of al Qaeda \textit{per se} is a strawman argument.

The purpose of such laws is in fact to protect a minimum standard of universal human rights, not to order the president to conduct warfare in a certain

\textsuperscript{21} Alan Dershowitz may be a notable exception. Cass Sunstein writes: “As far as American law is concerned, the president is probably allowed to torture enemy combatants, if they are not Americans, so long as Congress has authorized him to do so. (International law raises separate questions.) But … Yoo helped to write a memorandum suggesting … that the president can torture people even if Congress has said that he cannot torture them. Such a claim takes the president’s authority well beyond its reasonable limits. The president’s power as commander-in-chief of the Armed Forces does not mean that he can engage in barbaric practices against the instructions of the national legislature.” A full legal analysis of the issue, nonetheless, is not the purpose of this dissertation.
way or specify goals he must follow. Prohibiting certain acts from being committed is very different from ordering certain acts to be undertaken; the president has every freedom to act as he deems fitting and make decisions for the good of the country—as long as he stays within the law. Both domestic and international laws delineate boundaries no one is allowed to cross, not even the president; they do not, however, mandate what the president does within those boundaries. Yoo conflates the concept of proscribe with prescribe with regards to presidential action, although he does not use those specific words; as elsewhere in the memos, the language denotes restriction, constriction, hobbling, the stranglehold of law Goldsmith refers to, as though any law the president is required to follow—including and especially laws against torture—encumbers his ability to properly act. Note the language here, too, as well: “we will not read a criminal statute as infringing on the President’s ultimate authority in these areas” (34). In Yoo’s interpretation, manifest in Doc 22, not only must the president be above the law in order to fully carry out his duties, but Yoo also assumes that harsh interrogation, including methods typically considered torture, are an effective tool that the president should not be prevented from allowing if he deems it appropriate.

Doc 22 calls upon all the core arguments the memos have constructed, piece by piece, in the scaffolded justification of torture, using key passages from previous memos such as the section on plenary executive power. Exceptionalism reappears: “the situation in which these issues arise is unprecedented in recent American history” (31); in fact, phrases denoting special circumstances, e.g. under the present
circumstances, in the current situation, etc., appear repeatedly throughout the memo. So does plenary power: “The President enjoys complete discretion in the exercise of his Commander in Chief authority” (33). As does the looming and immediate threat: “If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary” (38 FN). The threat is also cast as nearly existential: “According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks. Indeed al Qaeda plans apparently include efforts to develop and deploy chemical, biological and nuclear weapons of mass destruction” (40-41). Arguably, that al Qaeda poses a threat is not in dispute—although the extent and magnitude of the threat may well be—but here as well Yoo is ignoring the language of the CAT treaty that recognizes “no exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency” (31) as a justification for torture.

Nonetheless, the defense defense also plays a crucial role. Yoo claims that even if the president violates Section 2340A, and even if his powers were not being constitutionally infringed by the statute as Yoo asserts, “we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to
prevent a direct and imminent threat to the US and its citizens” (39). This memo thus also includes sections on two possible defenses against accusations of torture, necessity and self-defense: “the capture and interrogation of such individuals is clearly imperative to our national security and defense” (33). As always, 9/11 is cast as an exceptional threat and used to justify harsh interrogation techniques:

we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the US and its citizens. (39)

Conduct that violates Section 2340, therefore, during “an interrogation . . . is justified on the basis of protecting the nation from attack” (45). Yoo also calls on what he terms “the ticking time bomb hypothetical” (31 FN 17), a speculative situation invented by the Israeli General Security Service to argue for extending the legal scope of their own interrogations.

Yoo’s other arguments in this memo are also familiar. He first reviews a history of the text and its ratification, then provides the detailed and arguably overlexicalized description of 9/11 and other terrorist attacks found in previous memos, foregrounding the threat of terrorism. He argues that the president can interpret treaties and thus that they only apply when the president chooses to abide by them, resting his arguments on plenary power. He casts any act committed by the United States as an act of self-defense, using here the “necessity defense”
described above that he claims “justify interrogation methods that might violate Section 2340A” (2), ostensibly protecting interrogators from prosecution. Yoo’s argument also rests, however, on two other crucial pillars that pick up threads of argument from Doc 19, Bybee’s defense ofrenditions: 1) a parsing of the legal concept of specific intent, and 2) a meticulously articulated, narrow process of re-definition, this time not of renditions, but of torture. This definition changes both the language of the law that prohibits it, and the precedent Yoo bases it on, to—as torturingdemocracy.org put it—“systematically [dismiss] numerous U.S. federal laws, treaties and international law prohibiting the use of torture, essentially defining the term out of existence” (“Key Documents”).

In order to see how Yoo interprets that statute, it may be helpful to look at the language from U.S. Code Section 2340, and the language Yoo uses to interpret the statute, side by side. The table below contains only direct quotes from each:

Table 9.1 U.S. Code vs. Yoo

<table>
<thead>
<tr>
<th>U.S. Code Section 2340</th>
<th>Yoo, Doc 23</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. &quot;torture&quot; means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control;</td>
<td>&quot;For an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure . . . [and] must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (1).</td>
</tr>
<tr>
<td>2. “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from</td>
<td>“For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm or significant duration, e.g. lasting for months or even years” (1)</td>
</tr>
<tr>
<td>(A) the intentional infliction or threatened</td>
<td>“We conclude that the mental harm also must result from one of the predicate acts</td>
</tr>
<tr>
<td>infliction of severe physical pain or suffering;</td>
<td>listed in the statute, namely:</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;</td>
<td>“threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality;”</td>
</tr>
<tr>
<td>(C) the threat of imminent death; or</td>
<td>“Threats of imminent death,”</td>
</tr>
<tr>
<td>(D) the threat that another person will imminently be subjected to death severe physical pain or suffering or the administration or application of mind-altering substance or other procedures calculated to disrupt profoundly the senses or personality.</td>
<td>“Or threatening to do any of these things to a third party” (1).</td>
</tr>
</tbody>
</table>

Throughout, Yoo changes the text in revealing ways. “Severe physical pain or suffering” becomes pain that must be “difficult to endure” and also “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (1). “Severe mental pain or suffering” becomes “purely mental pain or suffering”—the “purely” connoting perhaps a subtle trivialization of mental pain, as though mental pain is, in general, perhaps not as serious as physical pain. Further, “prolonged mental harm” is transformed into “significant psychological harm or significant duration, e.g. lasting for months or even years” (1). While the exact definition of the word “prolonged” as meant in the statute may be up for debate, the construction that it must cause significant psychological harm, be of significant duration, i.e. lasting months or even years, stems directly from Yoo and not any commonly understood
construal of “prolonged,” which is arguably a more subjective designation than “significant” and which, while it connotes duration, could refer to hours, days, or weeks as easily as to months or years depending on the context. Lastly, “disrupt profoundly the senses or personality” becomes “deeply disrupt the senses, or fundamentally alter an individual’s personality” (1). Clearly, Yoo is substantially raising the threshold here for both physical and mental torture by changing the language in the statute; a difference exists between “disrupting profoundly” and “fundamentally altering” someone’s personality.

Nonetheless, Yoo uses his own altered language to interpret the statute. He describes its legislative history as revealing “that Congress intended for the statute’s definition to track the Convention’s definition of torture and the reservations, understandings, and declarations that the US submitted with its ratification” (1); in other words, the U.S. has its own interpretation of the Convention Against Torture that does not necessarily “track” with the original. He follows with the claim that “the statute, taken as a whole, makes plain that it prohibits only extreme acts” (1); there are, he further claims, “a wide range of techniques that will not rise to the level of torture” (2) and thus are permissible. Clearly, Yoo is using an interpretation here of torture that more closely aligns with the language he uses above than the language actually written in the statute.

Trivialization is another rhetorical strategy Yoo employs in Doc 22. According to Yoo, “Section 2340A prohibits only the most extreme forms of physical or mental harm” (16); as a counter example, he uses the European courts’
prohibition against failing to acknowledge a prisoner’s sex change as a basis of comparison. He also trivializes U.S. law:

despite the Reagan and Bush administrations’ efforts to limit the reach of the cruel, inhuman and degrading treatment of language, it appears to still have a rather limitless reach . . . the 8th Amendment ban on “cruel and unusual punishment” has been used by courts to . . . “engage in detailed regulation of prison conductions, including the exact size cells, exercise, and recreational activities, quality of food, access to cable television, internet, and law libraries.” (18)

Elsewhere Yoo uses the most extreme examples of torture, such as electric shocks, beating with cables, forcibly removing teeth, etc., to set the bar as high as possible for the definition of torture, juxtaposed against what he sees as the most extreme examples on the opposite end of the spectrum to trivialize efforts to protect basic human rights. This also shows strategies of orientalization and the ideological square, positioning “barbaric” treatment, e.g. in Serbia, against the supposedly all too weak and overly humane treatment in U.S. prisons.

The discussion of intent is particularly revealing of Yoo’s approach to defining torture. Again, the question is one of specific intent; Yoo provides the definition from Black’s Law Dictionary, which is “the intent to accomplish the precise criminal act that one is later charged with” (qtd in Doc 22, 3). According to Yoo, “because Section 2340 required that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be defendant’s precise objective”
Only if the defendant specifically intends to inflict pain, in other words, is guilt legally established; that is, the “defendant had to act with the express ‘purpose to disobey the law’ in order for the mens rea [i.e. “guilty mind”] element to be satisfied”

If the defendant, on the other hand knew that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent . . . put differently, the law distinguishes actions taken “because of” a given end from actions taken “in spite of their unintended but foreseen consequences.” (4)

As Yoo explains it, general intent is normally associated with recklessness or negligence, as opposed to achieving an objective by taking deliberate action, which signifies specific intent. Yoo cites a Supreme Court example that is illustrative of the difference, in which a man robs a bank teller at gunpoint but then deliberately fails to make a quick getaway . . . in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying “general intent”), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy “specific intent”). (4)

A further example by the Supreme Court that Yoo provides, United States v. Bailey, pertains to murder; as the Court explains it, the “common law of homicide distinguishes . . . between a person who knows that another person will be killed as
a result of his conduct and a person who acts with the specific purpose of taking another's life” (4). If a defendant knows, therefore, that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.

(4)

As stated previously, I can make no definitive judgment as to the legal strength of this argument; logically, however, Yoo’s interpretation does not, I argue, make sense. His analogy likening torturers (whose primary goal, Yoo is probably assuming but never actually states, may be to extract information, not to inflict pain) does not hold up; the analogy would parallel this situation more closely if the bank robber had kept the money but, once it was secure, purposely allowed himself to be caught. An act of torture, in other words, cannot be undone. Once the crime has been committed, it is irrevocable; a torturer cannot demonstrate his lack of specific intent as easily as a bank robber can by handing back the money. Clearly, this robber never intended to keep the money (normally the presumptive primary objective of a bank robbery); a torturer cannot so easily reverse the consequences of his actions and thus demonstrate that those consequences were never his goal.

Secondly, it is odd that Yoo is conducting so in-depth an analysis of specific versus general intent without ever actually discussing the possible objectives of the
act, whether it is to purposely inflict pain or for any other reason. His single focus, it seems, is to prove what it is not; that is, it is not expressly intended to cause harm or inflict pain, at least as Yoo seems to define it here—even, he claims, if the defendant did not act in good faith, i.e. knew that pain might result from his actions. Perhaps this somewhat baffling argument structure is a function of the genre of legal memo, which may not typically include speculation about possible explanations for behavior, even when the topic is “specific versus general intent.” Clearly, however, the way the argument is structured allows Yoo to avoid discussing any of the other possible reasons why torture might be employed—to exact revenge, to exert force over an enemy perceived to be harmful and threatening, to extract a confession, to feel more powerful, to gather general information, to gather specific information one wants to hear, to avert a looming threat, to punish, are a few that come to mind.

Yoo’s construction of this argument also completely elides the “in order to” of torture; pain is invariably inflicted during torture in order to achieve any number of other, specific goals. This is, in fact, the definition of torture; it always has dual and perhaps multiple objectives. The Oxford English Dictionary defines torture as “the infliction of severe bodily pain, as punishment or a means of persuasion . . . for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information” (“Torture”). Without the pain, it is not torture; the fact that the pain serves other purposes does not negate or diminish its necessity in the equation. It seems disingenuous, at best, to attempt to separate
“torture” from “pain” or make any claim that torture can exist without the specific intent to inflict pain, whatever other purpose inflicting it may serve.

Yoo also claims that if a torturer acts in good faith, he is also not guilty of specific intent—although Yoo admits that “it is highly unlikely that a jury would acquit in such a situation” (Doc 22, 5). Good faith, as Yoo explains it, is when a defendant “acts with an honest belief that he has not engaged in the proscribed conduct” (4). Good faith, according to Yoo, also negates specific intent, and “a good faith belief need not be a reasonable one” (5). He uses the example that mailing something untruthful, while believing it true, does not constitute commission of mail fraud with specific intent. The success of this defense would seem to hinge on understandings of the word “severe”—as in, how severe was the pain inflicted?—as well as of “reasonable” and “unreasonable.” Is it reasonable to suppose that slamming someone against a wall, chaining them in a stress position for 18 hours, or continuously pouring large volumes of water into a subject’s mouth and nose to induce drowning, as described in the OPR report, does not cause “severe” pain? That is another legal question that cannot be resolved here, but again Yoo warns that “a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant’s belief” (5). Clearly here, Yoo is laying out possible arguments for a future defense along the lines of specific intent and how prosecution might be mitigated.
Doc 22 is also based on a careful consideration of the definition of “severe physical or mental pain or suffering” in section B of part I. In his meticulous consideration of the meaning and definition of particular words, Yoo begins with a quote by the Supreme Court: “This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used” (qtd in Doc 22, 5). In other words, Congress uses “the cluster of ideas . . . attached to each borrowed word in the body of learning from which [a term] was taken, and the meaning its use will convey to the judicial mind unless otherwise instructed” (12). Yoo then argues that Section 2340 does not prohibit the inflicting of pain or suffering, but only of “severe” pain or suffering—which the statute does not define. Yoo again quotes the Supreme Court: “in the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning” (qtd in Doc 22, 5). Yoo then uses two standard dictionaries, Webster’s and American Heritage, to conclude that severe pain or suffering must be so intense that it is difficult to endure.

So far so good, but Yoo has been heavily criticized by numerous legal scholars for the next step he takes in constructing his argument. Kathleen Clark, for example, outlines the three pillars of Yoo’s case—1) that torture is only the specific intent to cause organ failure or death; 2) interrogators have an affirmative defense; and 3) the torture statute cannot constrain any presidential action—and sums up the legal arguments as follows: “the memorandum’s claims about the state of the
law in each of these areas are grossly inaccurate” (Clark 459). Textually, however, the memo is also grossly inaccurate. Yoo uses what has been repeatedly characterized as an “obscure” medical statute that defines an emergency medical condition, taking the language to construct his own definition of torture. Yoo’s claim, in interviews with the Office of Professional Responsibility, is that he was looking for other statutory usages of the word “severe” in order to better understand its meaning under the law. However, as above, Yoo does not merely use the language in the statute; he changes it, altering both the text and its original meaning. Again, a side by side comparison, below:

Table 9.2 Yoo vs. medical statute

<table>
<thead>
<tr>
<th>Language from 8 U.S.C. § 1369 (2000)</th>
<th>Yoo writes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(d) &quot;Emergency medical condition&quot; defined</td>
<td>Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that “severe pain,” as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body function—in order to constitute torture. (Doc 22, 6)</td>
</tr>
<tr>
<td>For purposes of this section, the term &quot;emergency medical condition&quot; means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in – (1) placing the patient’s health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part.</td>
<td></td>
</tr>
</tbody>
</table>

(d) "Emergency medical condition" defined

For purposes of this section, the term "emergency medical condition" means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in – (1) placing the patient’s health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part.
Yoo’s first assumption here is that a single, brief passage in a law pertaining to the federal reimbursement of hospitals for the emergency treatment of illegal immigrants provides a definitive (legal) understanding of the term “severe pain.” That claim is, at best, highly dubious—particularly in light of Yoo’s larger purpose of attempting to define the boundaries of (and essentially legalize) treatment that arguably constitutes torture.

Even supposing, however, that the statute can actually be characterized as relevant, Yoo does not in fact use the language of the statute. He adds, subtracts, and changes the text; the first definition, for example, placing someone’s health in “serious jeopardy,” is completely eliminated, leaving only the requirement of actually causing “permanent and serious physical damage.” He also adds the word “permanent,” which is not in the original, and he does this twice. “Serious impairment to bodily functions” also becomes “permanent impairment of a significant body function,” changing “serious” to “permanent” and changing the requirement from the impairment of any bodily functions to impairing only a significant body function, a subtle but important shift in meaning that sets a much higher standard for physical damage. “Serious dysfunction of any bodily organ or part” becomes damage that “must rise to the level of death, organ failure, or the permanent impairment of a significant body function,” clearly also a significant shift in meaning.

This also, Yoo argues, applies to mental pain and suffering. If a defendant does not intend to cause prolonged mental harm, even if he commits the acts listed
in the statute, he has not committed torture, because again the intent, not the result, is what matters: “The statute requires that the defendant specifically intend to inflict severe mental pain or suffering” (Doc 22, 8)—which, Yoo reminds us, is expressly defined “in terms of prolonged mental harm” (8). Thus, if a defendant does not specifically intend to cause prolonged mental harm, or torture has not been committed regardless of its effect on the detainee. Yoo maps out a defense using the good faith argument: “if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture” (8). A defendant could demonstrate good faith, for example, by “surveying professional literature, consulting with experts, or reviewing evidence gained from past experience” (8). Also, Yoo adds, citing precedent, “the specific intent element ‘might be negated by, e.g., proof that defendant [sic] relied in good faith on advice of counsel” (8)—contrary in the case of torture, at least, to legal understandings that arose out of the Nuremberg trials.\(^{22}\) In other words, for Yoo, the “presence of good faith” (8) negates the specific intent to torture, and therefore is a “complete defense” (8) to any charges thereof.

Most important to this discussion, however, is that the statute Yoo uses is not actually defining, nor is its purpose to define, severe pain. It is defining an emergency medical condition, one symptom of which could be—but not necessarily always is, e.g. in cases of numbness or paralysis—severe pain. Yoo’s entire premise here, too, is false; he creates an absolute correlation that does not exist between all

\(^{22}\) Philippe Sands more thoroughly explores the responsibility of lawyers in war crimes committed by the state in his chapter on the Altstoetter case during the Nuremberg trials.
serious medical conditions and severe pain, then changes the description of those conditions so that they exclude all conditions that are not life-threatening and permanent, and then claims that severe pain therefore only occurs in situations that are life-threatening and permanent. It is a faulty syllogism based on faulty equations. Essentially, he is arguing that harsh treatment that does not result in life-threatening and permanent damage cannot cause severe pain, and thus is not torture. Elsewhere in the memo, he qualifies this claim: “Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage” (Doc 22, 7); here, however, he is clearly manipulating the extant language in order to narrow the definition of torture.

The patently false logic of this specious argument is disturbing on many levels, as is the language-twisting path Yoo takes to arrive at his (frankly absurd) conclusion. Whether or not Yoo was justified in using the statute in the first place is a matter of debate for legal scholars; arguably, however, he manipulates both language and meaning enough to invalidate his conclusion in any case. It is not merely the “sloppy legal work” (OPR 82) the OPR Report, Goldsmith, and others condemned. It is a blatant falsification of the facts.

A full parsing of the language of Doc 22, which spans fifty pages including footnotes and an appendix listing the most egregious cases of torture imaginable as a basis of comparison, is impossible here. I will, however, attempt to delineate a few other important rhetorical moves Yoo uses to raise the bar for the definition of torture. In one, reminiscent of his equation of “the” and “a” in Doc 3, he equates “or”
with “and”: “Section 2340 gives further guidance as to the meaning of ’severe mental pain or suffering,’ as distinguished from severe physical pain and suffering” (Doc 22, 6). Note that the shift here is Yoo’s; the statute never uses the phrase “pain and suffering,” but only “physical or mental pain or suffering” (6 emphasis mine). Again, the full text of Section 2340:

Table 9.3 U.S. Code Section 2340

<table>
<thead>
<tr>
<th>“torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control. The statute defines “severe mental pain or suffering” as:</th>
</tr>
</thead>
<tbody>
<tr>
<td>the prolonged mental harm caused by or resulting from—</td>
</tr>
<tr>
<td>(A) the intentional infliction or threatened infliction of severe physical pain or suffering;</td>
</tr>
<tr>
<td>(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;</td>
</tr>
<tr>
<td>(C) the threat of imminent death, or</td>
</tr>
<tr>
<td>(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. (U.S. Code)</td>
</tr>
</tbody>
</table>

Essentially, Yoo argues that “or” in fact means “and,” as “the statute does not define severe mental pain’ and ‘severe mental suffering’ separately. Instead, it gives the phrase ‘severe mental pain or suffering’ a single definition” (6 FN 3). Pain and suffering are thus identical, and once more the scope is narrowed.
Yoo bases his conflation of the two terms on snippets of definitions of “suffering” from no less than five separate dictionaries. All include the word “pain”; Webster’s Third International Dictionary, for example, defines suffering as “the endurance of . . . pain” or “a pain endured.” While pain and suffering are two related concepts, and it is not surprising to find them together in the dictionary, they are not completely synonymous; in all of the truncated definitions he provides, Yoo ignores the temporal dimension of suffering, i.e. the extended duration of pain over some period of time that suffering connotes, as seen for example in the word “endurance” above. In other words, Yoo instead argues that pain and suffering are the same thing, and further that because mental pain and suffering are the same thing, physical pain and suffering are necessarily also the same: “Because ‘pain or suffering’ is single [sic] concept for the purposes of ‘severe mental pain or suffering,’ it should likewise be read as a single concept for the purposes of severe physical pain or suffering’” (Doc 22, 6 FN 3). To constitute torture, therefore, an act must also lead to severe mental pain and suffering, which is not the language of the statute. Once again, Yoo is raising the bar for the point at which harsh interrogation becomes torture.

Necessarily, however, Yoo does address the temporal dimension in his discussion of the phrase “prolonged mental harm,” although here he finds no other use of the phrase in U.S. Code or in medical or human rights literature upon which to base his analysis. For prolonged mental harm to occur, according to Yoo, there must be “some lasting, though not necessarily permanent, damage” (Doc 22, 7)—beyond
what a suspect would experience during a police interrogation, for example.

Posttraumatic stress disorder or chronic depression, on the other hand, “might satisfy the prolonged harm requirement,” Yoo admits, noting that “posttraumatic stress disorder is frequently found in torture victims” (7). To constitute torture, however, “not only must the mental harm be prolonged to amount to severe mental pain and suffering, but it also must be caused by or result from one of the acts listed in the statute” (8). Further, that list of acts was intended to be “exhaustive,” an interpretation Yoo characterizes as “the most natural reading” (8) of the list. In other words, anything not covered in the statute cannot constitute torture; the statute “requires the specific intent to cause prolonged mental harm by one of the acts listed in Section 2340(2)” (8) only.

Throughout the memo, Yoo thus manipulates language in various ways to redefine what qualifies as torture. Parsing the phrases in the statute, he consistently argues for the most extreme interpretation possible. He cites the Reagan administration’s construal that “torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct” (Doc 22, 19). A defendant is only liable for administering mind-altering drugs, for example, if he has “consciously designed the acts to produce such an effect” (10). Yoo parses the word “disrupt,” again using truncated definitions from at least five different dictionaries, to further argue the nature of a profound disruption. Yoo construes this to mean not merely “‘forcibly separate’ or ‘rend’ the senses or personality; rather, such acts “must penetrate to the core of an individual’s ability to perceive the world around
him, substantially interfering with his cognitive abilities, or fundamentally alter his personality” (11). Further, a threat must be an act a reasonable person would construe as a threat, and a “threat of death alone is insufficient; the threat must indicate that death is ‘imminent’” (12). In other words, “a vague threat that someday the prisoner might be killed would not suffice” (12). According to Yoo, “a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm” (9)—further evidence that only the most “extreme acts” (13), in other words, constitute torture.

In essence, Yoo is defining a continuum of cruel and inhuman acts that inflict pain and suffering, suggesting that such acts only qualify as torture if the pain and suffering are sufficiently severe, while his orientalizing language suggests that only other, less civilized cultures commit acts severe enough to qualify as torture. The examples he provides in the appendix arise from cases in the countries such as Nigeria, Libya, Iraq, Iran under Saddam Hussein, the Philippines, Guatemala, Haiti, Zimbabwe, China, and Bolivia. He avoids completely any discussion, for example, such as took place in Britain regarding the treatment of Irish terrorists in the 1970s—treatment the British government later renounced, and which might serve as a counterbalancing precedent. In essence, however, Yoo seeks to justify and legitimize a broad spectrum of acts of cruelty. He even uses the U.N. Convention Against Torture to make his argument; CAT “establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties” (15)—
his chief objective here. Torture alone, according to Yoo, is at the farthest end of the spectrum of impermissible actions; everything else is essentially fair game. It is simply a matter of degree, nothing more.

**Agent deletion**

A number of legal scholars have also pointed out that Yoo uses only the most “extreme acts” (13) to define the threshold for what constitutes torture. As mentioned above, Yoo’s claim that believing that one’s actions do not cause severe pain immunizes one from the consequences of those actions, especially during harsh interrogations in the context of war. This opens a broad space for, encourages, and rewards a dehumanizing mind-set. In Yoo’s view, perhaps based on legalistic premises, the subject (victim) of torture does not matter, nor do his mental or emotional states except as a way to categorize the most extreme effects of interrogation. Yoo considers only the mind-set of the interrogator as he considers how to best protect him under the law.

The language throughout the extended discussion of harsh interrogation methods in the memos is striking for its elision of both agency and subjectivity. One common sentence structure is passive agent deletion; that is, through the use of the passive tense the actor is completely removed from the language so that things occur, as Fairclough describes it, as (often inevitable) processes rather than as human acts by human agents through human agency, i.e. human decision and will. The following sentence is only one example: “For drugs or procedures to rise to the
level of ‘disrupt[ing] profoundly the sense or personality, they must produce an extreme effect” (Doc 22, 10). Agency here belongs to the drugs or the “procedures,” not to the human beings administering them, just as in this phrase: “By requiring that the procedures and the drugs create a profound disruption, the statute requires more than that the acts “forcibly separate” or “rend” the senses or personality” (11 emphasis in original). Again, the active verb—create—belongs to the drugs and procedures, not to the actors; the human actor, in fact, appears nowhere in the sentence. Passive agent deletion is used extensively throughout the documents.

Nominalization—changing verbs to nouns, thereby removing the actual act from the sentence and connoting inevitability—is also a common grammatical strategy used to separate actors from both their acts and the consequences of those acts. Yoo writes, “a vague threat that someday the prisoner might be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death” (12). Here, the gerunds “subjecting” and “playing” serve as nominalizations; again no actor is present. Elsewhere, the act violates the statute, not the actor: “only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter” (27). Verbs are often nominalized as well; in the following example, human action and agency are also absent from the sentence construction: “Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed” (13).
The passive also serves, in combination with other linguistic strategies, to dehumanize the victim and elide any perspective from his or her point of view. For example, Yoo’s formulation, “posttraumatic stress disorder is frequently found in torture victims” (Doc 22, 7), separates the consequences of the act of torture from any mention of the act itself, except as it modifies the victim, or of any actor who committed the act. It also obscures the experience of the recipient; PTSD is simply a “found” condition. The example below, on the other hand, seems to be written to include a consideration of the victim’s experience:

By requiring that the procedures and the drugs create a profound disruption, the statute requires more than that the acts “forcibly separate” or “rend” the senses or personality. Those acts must penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality. (11).

In actuality, however, Yoo is denying the victim the consequences of such treatment, except as he imagines the most extreme result possible, i.e. as a fundamental loss of identity.

Nominalizations and passive agent deletions are arguably typical of the language of both legal and military cultures. Descriptions that shift language from human action and agency to passive interrogation methods and “applications” that occur seemingly on their own are not unique to these memos; rather, the memos are representative of the widespread elision of both subject and agent in such contexts.
Doc 37, the Working Group Report Rumsfeld commissioned to circumvent opposition to legalizing harsh interrogations, and which was based on an expansion of Doc 22, contains many further examples of the obfuscation of human agency, experience, and ultimately responsibility. Only a few are listed below:

- Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees. (Doc 37, 5)

- Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique. (2)

- Implementation of approved exceptional techniques must be approved at the command authority level specified for the particular method. (56)

The third example is particularly interesting; here, there is no actual approving authority—a word that in itself elides human agency. Instead, there is merely a “command authority level” at which “exceptional techniques” must be approved. Such language serves to legitimize cruelty by cloaking acts, formulated as seemingly innocuous processes, in the official-sounding, depersonalized and depersonalizing language of bureaucracy.

Doc 29, Haynes’ Nov. 27, 2002 “action memo” on “Counter-Resistance Techniques,” requests approval from Rumsfeld for two out of three levels of increasingly aggressive methods of interrogation for Guantanamo detainees. It
recommends reserving most techniques from level 3 as “legally available” but without blanket approval “at this time” (Doc 29, 1). Famously, on Dec. 2, 2002, Rumsfeld signed his approval and then scrawled a post-script at the bottom of the page: “However, I stand for 8-10 hours a day. Why is standing limited to only 4 hours?” This remark has been interpreted as a macabre “joke,” indicative of Rumsfeld’s dark humor, or alternatively (in the left blogosphere, at least) as a shocking indication of Rumsfeld’s utter lack of empathy. “Standing” in the context of performing one of the most influential and powerful jobs on the globe is vastly different from being chained in a “stress position” for hours; the distinction needs no further explanation.

Philippe Sands, however, offers a different take on Rumsfeld’s remark. Although Haynes’ memo recommends denying blanket approval to Category III techniques, officially acknowledging that our “Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint” (Doc 29, 1), Sands was warned by Alberto Mora that Rumsfeld’s comment could be interpreted as a possible signal or “coded message, ‘a written nod-and-a-wink to interrogators . . . that they should not feel bound by the limits set in the memo, but consider themselves authorized to do what was necessary to obtain the necessary information’” (Sands 136). This corresponded with understandings of policy—i.e. that “the gloves were off” (136)—that were communicated from the highest levels of command to other interrogators with whom Sands spoke. Sands also notes that Doc 29 is not signed by anyone other than Haynes, meaning that the routine chain-
of-command consultation and approval process such memos normally undergo had been circumvented; further, the memo refers only to the Armed Forces, not to CIA interrogators. Approved techniques of Categories I and II include 20-hour interrogations, sensory deprivation, nakedness, the use of phobias such as fear of dogs, and being shackled for hours in stress positions. Perhaps the most important component of employing such techniques, however, which is heavily backgrounded in the memos or even virtually absent, is that these techniques were applied over and over, in conjunction with one another, often over a period of days, weeks, or several months.

As previously discussed, the OLC authors and the policy makers with whom they were closely associated made a key assumption: that normally prohibited interrogation methods will elicit the information sought—i.e., that torture works. Yoo writes,

such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the US and its citizens” (Doc 22, 39 emphasis added).

The implication in the above passage and in the memos as a whole is that only harsh interrogations are actually successful interrogations; this assumption also shapes the “ticking time bomb hypothetical” (Doc 22, 31 FN 17) that, although fictional, has
become a key part of the reigning narrative of the war on terror. Yoo writes, “the more certain government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be” (41). Nowhere in the documents do the authors ever provide evidence that supports their emphatic, if euphemistic, defense of torture or its supposed efficacy and superiority as a method for obtaining intelligence, conducting an effective war against terrorism, or protecting the United States.

Perhaps this is because such evidence does not exist. A 2006 study by the National Defense Intelligence College found “there was almost no scientific evidence to back up use of controversial interrogation techniques in the fight against terrorism” (Sands 148). Some experts even believe that “aggressive approaches could hinder the ability to get good information” (148). Nor, according to Sands, Mayer, and others, has there been any substantial evidence (despite numerous claims to the contrary by Bush, Cheney, and others) that information obtained during interrogations amounting to torture was in any way truly valuable, other than to confirm information that had already been obtained by other, legal means.

Certainly the U.S. has a right to protect itself. Opening the door to legalizing torture, however, and destroying longstanding protections for basic human rights, does not ultimately protect anyone. As the International Committee of the Red Cross states,
The ICRC recognizes the right of the US authorities to take measures to address legitimate security concerns, including the detention and interrogation of individuals suspected of posing a threat to national security. However, the ICRC believes that the US can achieve these objectives while respecting its obligations and historical commitment to respect international law. (“ICRC Report”)

The February 14, 2007, Report by the International Committee of the Red Cross lists the following methods of treatment of detainees in U.S. custody. Bear in mind that these are cases the ICRC has been able to investigate; many more eyewitness accounts remain uncorroborated. Despite efforts on the part of top government officials to suspend the rule of law regarding the determination of detainee status and involvement with terrorism, some of the dead have been proven innocent beyond a reasonable doubt. Further, the CIA destroyed many hours of interrogation tapes—with impunity—and treatment in black sites around the world has remained largely invisible. The ICRC has confirmed the use of the following techniques:

- suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation and use of loud music, exposure to cold temperature and cold water, prolonged use of handcuffs and shackles, threats, forced shaving, deprivation and restricted provision of solid food.” (“ICRC Report”)
Further, autopsy reports obtained by the ACLU and posted online indicate that over 100 detainees have died in U.S. custody, at least several dozen of them due to homicide. Accounts by Human Rights Watch, Human Rights First, and investigative reporter Andy Worthington, among others, contain gruesome details, which I will forego cataloguing here, of detainee treatment—often following an orchestrated “program” that includes the methods listed above over prolonged periods of time. More than once, such a program has led to death while the detainee is suspended, shackled, from the ceiling. A full accounting or even review of such cases could fill another chapter of this dissertation; suffice it to say that few of these instances have been investigated, much less led to any serious consequences for those involved. According to Glenn Greenwald, “the steepest sentence for anyone involved in a torture-related death” (“Suppressed Fact”) as of 2006 was five months in jail.

The implementation of a systematic “program” of methods of interrogation that sound relatively innocuous when taken separately and at face value is perhaps a particularly sophisticated form of torture; its effects are more easily elided and the experience of the dehumanized victim can be dismissed as “hazing pranks from some fraternity” (Rohrbacher qtd in Frick) by anyone not paying close attention—or who does not care to know. The target audience of such shifts in the common sense discourse of torture is a far broader group than the recipients of the methods themselves. As early as 2002 at Guantanamo, FBI interrogators protested such treatment and refused, officially, to take part in interrogations. During a hearing held by the House Subcommittee on International Organizations, Human Rights, and
Oversight regarding the treatment of detainees at Guantanamo Bay, as detailed in an FBI report by the Inspector General, the FBI “found the interrogations not only abusive, but also ‘in their view, ineffective’” (Frick). During that hearing, Rep. Dana Rohrbacher (R-CA) “join[ed] a long list of torture apologists who refuse to heed the words even of Gen. David Petraeus, who unequivocally rejected torture as producing information of only ‘questionable value’” (Frick). The list of practical reasons to oppose torture may be as long as the list of ethical and moral reasons to do so.

Viewed another way, however, the OLC authors and the methods they espoused were enormously successful. As Washington Post staff writers Barton Gellman and Jo Becker point out, “a more careful look at the results suggests that Cheney won far more than he lost. Many of the harsh measures he championed, and some of the broadest principles undergirding them, have survived intact but out of public view” (1). Some, arguably, are still in plain sight. This may be particularly true with regard to the co-optation of the discourse of torture, as well as of the expansion and iron-fisted reach of unlimited executive power.
"The chief problem in historical honesty is not outright lying. It is omission or de-emphasis of important data. The definition of 'important,' of course, depends on one's values.”

---Howard Zinn

David Luban puts it succinctly: “Torture used to be incompatible with American values” (35). So what happened? What has opened up this rift in American politics, creating a seemingly unbridgeable chasm between the two opposing sides of this debate and everything it says about our current polarization? Is there a middle ground when it comes to torture? What might the torture debate reveal about our national political discourse?

Any honest attempt to understand the Torture Memos and the driving forces that gave rise to their production must first include an acknowledgement of a core motivation of many key (and minor) players in the war on terror, from top-level officials to foot soldiers in the armed forces: the compelling desire to protect.
During the course of this inquiry I have come to view the need to protect as an elemental human need, an integral component of the second level in Maslow's hierarchy of needs, the need for protection and safety. Human beings need not only to be protected; equally essential is their need to protect those they love, feel responsible for, or consider worthy of defense.

Defense, therefore, is the master narrative that surrounds the memos. From the beginning, the desire to protect has been cited as the key motivation behind the writing of the memos. On numerous occasions, George W. Bush stated that the chief purpose for the actions the memos permitted and condoned—and indeed, for the war on terror itself—was to protect “our way of life,” to protect “the American people.” In an Oct. 5, 2007 speech from the Oval Office on renditions, for example, Bush explained:

“There's been a lot of talk . . . about a program that I put in motion to detain and question terrorists and extremists. I have put this program in place for a reason, and that is to better protect the American people . . . The American people expect us to find out information—actionable intelligence so we can help protect them. That's our job.”

(Bush “Remarks”).

In the same speech, as in others, Bush (like elsewhere Cheney) also claimed, “This government does not torture people . . . we stick to U.S. law and our international obligations.” The claim was fraudulent; at best, it rested on a particular, specious definition of torture, and certainly on a peculiar understanding of exactly who was
to be protected and how best to accomplish that, i.e. on a particular definition of “the American people,” their requirements for safety, and what actually creating conditions of safety might entail.

Hindsight makes it easy to second-guess decisions that were made, and this dissertation in no way seeks to minimize, belittle, or discount the strong protective impulses of those who had to make those decisions. Michael Hayden, former general of the U.S. Air Force, Director of the National Security Agency during 9/11, and subsequent director of the CIA, eloquently summed up his problematic position during a public debate on whether detainees should be classified as enemy combatants, or as criminals:

Let me finish, because the rubber hit the road on my car, all right?
I’m the one who has to make the decision, okay? These are not easy decisions. There are conflicting values. There are moral responsibilities galore, okay? No one should trivialize it, and no one should throw bumper stickers at the difficulty of the decision people like me, people like Leon Panetta, have to make, all right?” (qtd in Worthington “David”)

If, however, as Goldsmith suggests throughout The Terror Presidency, the Bush administration meant well but simply went too far in their zeal as they faced the complexities of the moment, this narrative of to protect remains at best a “we lost our heads” defense.

Further, as a way of understanding the memos this interpretation is
unsatisfactory. If the purpose of this dissertation, among other things, is to explore what the language of the memos reveals about the motives and the intentions of the people who produced them, both directly and indirectly, it does not seek to indict those whose protective instincts were manipulated, misused, and exploited by the men and women who conceptualized and/or authored the thirty-nine documents. A preponderance of evidence clearly supports the view that the desire to protect was not the main objective of the producers of the memos, but merely the means to a far different end: the will to power.

**Will to power**

The preceding chapters demonstrated in detail the mind-set of the authors of key memos, principally John Yoo and Jay Bybee. As previously laid out in detail, the flaws in the key memos are striking: the authors use faulty logic; misleading and fallacious arguments and argumentation structures; inaccuracies ranging from global (Level IV) omissions such as the misuse or complete omission of important (or unrelated) legal precedent, down through Level I misuses at the level of word and phrase, euphemisms, changes in context that effect radical shifts in meaning, elisions, etc., in their construction of the memos. Arguably, the extreme manipulations of language, both textually and intertextually, point to alternative motivations underneath the surface narrative of *to protect*. Although any number of attorneys and legal scholars, among them Jose Alvarez, Scott Horton, Jack Balkin, Marty Lederman, Cass Sunstein, Kathleen Clark, Jack Goldsmith, Benjamin Davis,
Jack Comey, Katherine Darmer, Lawrence Rosenthal, Philippe Sands, David Luban, Karen Greenberg, Joshua Dratel, and many, many others, have condemned Yoo for his “sloppy legal work,” I argue that the evidence points to crass manipulation of language to pervert meaning that goes beyond simply carelessness, incompetence, or differences of legal opinion and interpretation. As Dratel says, “Government is not some academic political science competition, in which the prize goes to the student who can muster coherent doctrinal support, however flimsy, for the most outlandish proposition” (xxiii). The meanings the authors constructed, and the realities they called into being, had real-life consequences for real people across the globe.

Other evidence supports this assessment—as do, arguably, the events themselves. Joshua Dratel points out that “any claim of good faith . . . is belied by the policy makers’ more than tacit acknowledgement of their unlawful purpose” (xxi), and asks why else they would seek a location “purportedly outside the jurisdiction of the U.S. (or any other courts)” (xxi). Dratel’s answer, one with which I concur, is damning:

The message that these memoranda convey . . . is unmistakable: these policy makers do not like our system of justice, with its checks and balances, the rights and limits, that they have been sworn to uphold.

That antipathy for and distrust of our civilian and military justice systems is positively un-American. (xxi)

It is also resoundingly authoritarian.
The will to power, framed as defense, permeates the memos. Doc 4, which suspends the Posse Comitatus Act, allows military actions on U.S. soil because “whatever force is requisite for the defense of the community or of individuals is also lawful” (Doc 4, 30). When Yoo argues in Doc 2 that “depriving the President of the power to decide when to use military force would disrupt the basic constitutional framework of foreign relations” (Doc 2, 5), not only is his word choice (“depriving”) revealing, but his argument is fallacious. Laws designed to prevent abuses of power are cast as stripping the president of power; further, the issue is framed, falsely, as an either-or choice—either the president has absolute power over the military, or he is powerless. Even Goldsmith wrote that Yoo’s “interrogation opinions” contained an “unusual lack of care and sobriety in their legal analysis” and that “[n]owhere was this more evident than in the opinions discussion of the President’s commander-in-chief powers” (148). Despite his attempts to cast the torture authors as well-meaning, Goldsmith himself is fully cognizant of the flaws in their reasoning.

The authoritarian impulses driving the analyses in the memos are readily apparent in the manipulations of language the authors use to legitimize their objective of unlimited presidential power. As Cass Sunstein put it, “If our tradition is properly understood, this view gives the president a power that is not properly his: while he can repel sudden attacks, he cannot attack whenever he sees a threat” (Sunstein). The perception of threat is as crucial to this discussion as actual threat, as is the potential for abuse of power. In the narrative that frames the memos,
perceived threat is consciously conflated with actual threat, but nowhere in the
documents is the possibility of the abuse of power, whether in response to
perceived or actual threat, ever addressed, discussed, or even acknowledged. Yoo
writes in Doc 4, “The laws of war exist in part to ensure that the brutality inherent in
war is confined within some limits. It is essential for the conduct of a war, therefore,
that an army have the ability to enforce the laws of war by punishing transgressions
by the enemy” (7). The assumption, of course, is that we must punish them,
completely ignoring the possibility of our own brutality. This illustrates an extreme
form of van Dijk’s ideological square, in which the negative characteristic, brutality,
is vested solely in the out-group, completely denying our own capability for similar
behavior and casting us instead as the avenging, authoritative in-group.

Striking, too, is the utter failure of the authors John Yoo, Jay Bybee, Robert
Delahunty, and Patrick Philbin, and their chief overseers Jim Haynes, Tim Flanigan,
Alberto Gonzales, David Addington, and Dick Cheney, to acknowledge legal
precedent that clearly limits presidential power. A number of legal analysts have
pointed to the authors’ failure to incorporate into any of the memos that expand
presidential power an adequate discussion of the most important precedent limiting
presidential powers during wartime: the Supreme Court case known as Youngstown
Sheet and Tube Co. v. Sawyer. In that case,

the Supreme Court rejected President Harry S. Truman's unilateral
attempt to take over steel mills during the Korean War. While the
president has significant latitude in the conduct of foreign affairs, such
latitude has been constrained by congressional legislation and judicial decisions. The Justice Department memo [Doc 22] ignores this history. (Clark and Mertus B03)

From a legal standpoint, that omission may be one of the most crucial omissions in the memos. Although in 2006, in response to heavy criticism, Yoo “rather lamely” defended his failure to consider the Youngstown decision as “off point” (Horton qtd in Leopold), framing it as a labor dispute rather than as a dispute about presidential power, constitutional expert Scott Horton disagrees: “The Youngstown case is considered the lodestar precedent addressing the President’s invocation of Commander-in-Chief powers away from a battlefield” (Horton qtd in Leopold). The OPR report agreed that Yoo was remiss in ignoring both “legal precedent and existing case law” (Leopold). In her analysis of Doc 22, legal ethicist Kathleen Clark identifies “three stunning legal contortions” she sees the memo performing—redefinitions of torture and of constitutional and international law—which she dubs, simply, “distortions of the law” (Clark and Mertus B03). Importantly, these distortions rest, first and foremost, on distortions of the language.

The preceding chapters have sought to illuminate some of the strategies used to create those distortions, essentially bringing about a new common sense of torture. For Fairclough, “ideology . . . [is] essentially tied to power relations . . . ideological common sense [is] common sense in the service of sustaining unequal relations of power” (Language 70 italics in original). The common sense that underpins the torture memos arguably serves an authoritarian ideology, i.e. it
“textualize(s) the world in a particular way” (71) based on distinct hierarchies of power, authority, and legitimations of violence. If, as Fairclough maintains, “ideology is most effective when its workings are least visible” (71), close examinations of those workings in language become crucial. Lazar and Lazar, referring to Chomsky’s recognition that the fall of the Soviet Union has enabled the United States to more freely employ force, see a shifting of “problems to the arena of forceful confrontation, in which America maintains near monopoly of military might. It is important to recognize, therefore, the linkage between discursive and military acts of power” (“Enforcing” 47). This dissertation has attempted to draw some of those links.

The table below provides a summary of the most common discursive, rhetorical, and lexico-grammatical features I have identified in the Torture Memos, followed by a passage from Doc 22 that illustrates a number of the strategies employed. Such linguistic and rhetorical devices serve to create a new common sense of torture, defuse political resistance to war, violence, and ever greater seizures of power, and to maintain and increase existing power structures. In essence, they represent the hegemonic discourse of torture and its larger context, the war on terror.

Table 10.1
Discursive, Rhetorical, and Lexico-Grammatical Features Of the Torture Memos

<table>
<thead>
<tr>
<th>Representations / suspensions of:</th>
<th>▪ Outcasting (criminalization, (e)vilification, orientalization, enemy construction)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Time/space</td>
<td>▪ Naturalization (&quot;common sense,&quot; justification, legitimation)</td>
</tr>
<tr>
<td>• Specific acts and events, both potential and actual</td>
<td>▪ Argumentation strategies (misleading structures, fallacies)</td>
</tr>
<tr>
<td>• Identity</td>
<td>▪ Metaphor/Extended metaphor (ticking time bomb hypothetical, war as metaphor)</td>
</tr>
<tr>
<td></td>
<td>▪ Framing (e.g. self-defense, necessity, good vs. evil)</td>
</tr>
<tr>
<td></td>
<td>▪ Markers of Intertextuality</td>
</tr>
<tr>
<td></td>
<td>▪ Topicalization (Foregrounding/backgrounding)</td>
</tr>
<tr>
<td></td>
<td>▪ Nominalization</td>
</tr>
<tr>
<td></td>
<td>▪ Transivity (agent/patient relations)</td>
</tr>
<tr>
<td></td>
<td>▪ Deletions (agentless passive)</td>
</tr>
<tr>
<td></td>
<td>▪ Semantic shifts and reversals</td>
</tr>
<tr>
<td></td>
<td>▪ Substitutions / Euphemisms / Elisions / Conflations</td>
</tr>
<tr>
<td></td>
<td>▪ Hyperlexicalization</td>
</tr>
<tr>
<td></td>
<td>▪ Overlexicalization</td>
</tr>
<tr>
<td></td>
<td>▪ Recontextualization</td>
</tr>
<tr>
<td></td>
<td>▪ Omissions</td>
</tr>
</tbody>
</table>

The following passage from Doc 22, the Torture Memo, serves as a final, if by no means comprehensive, illustration of key assumptions underlying the memos as well as many of the strategies and discursive features listed in the table above.

(Note that identical passages can be found on pages 78-79 in Doc 36 and also on page 29 in Doc 37, the Working Group Report commissioned by Rumsfeld.) Yoo writes,

Under the current circumstances [exceptionalism], we believe that a defendant [legitimation, justification] accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim [naturalization] that defense of another [protection, necessity]. The threat of an impending terrorist attack threatens the
lives of hundreds if not thousands of American citizens [threat,
hyperlexicalization]. Whether such a defense [justification] will be
upheld depends on the specific context within which the interrogation
decision is made [passive agent deletion, conflation of
interrogation and torture]. If an attack appears increasingly likely,
but our intelligence services and armed forces cannot prevent it
without the information from the interrogation of a specific individual
[necessity, either-or fallacy, ticking time bomb hypothetical], then
the more likely it will appear that the conduct in question
[euphemism] will be seen as necessary [conflation, ticking time
bomb hypothetical, necessity, passive agent deletion,
naturalization]. If intelligence and other information support the
conclusion that an attack is increasingly certain, then the necessity
[necessity] for the interrogation will be reasonable [see previous
sentence]. The increasing certainty of an attack will also satisfy the
imminence requirement [temporal urgency, threat]. Finally, the fact
that previous al Qaeda attacks have had as their aim the deaths of
American citizens, and that evidence of other plots have had a similar
goal in mind [enemy construction], would justify proportionality of
interrogation methods designed to elicit information to prevent such
deaths [conflation, threat, protection, necessity]. (Doc 22, 43-44)

As always, one core assumption is that torture not only provides valid intelligence
but is the best and only means to obtain the information necessary to protect lives
deemed worthy of protection. Another core assumption is that the only motivation
for torture is to protect. Again, here Yoo glaringly ignores precedent; as both
Kathleen Clark and Georgetown law professor David Luban have noted,
the memorandum never mentions the fact that the Convention
Against Torture itself seems to proscribe such a defense when it
declares that ‘[n]o exceptional circumstances whatsoever, whether a
state of war or . . . any other public emergency, may be invoked as a
justification of torture’” (Clark, “Ethical Issues” 461).
Yet Yoo writes, falsely, as though “an interrogator charged with torture might well
be able to gain an acquittal using the necessity defense” (461)—another interesting
avenue for future exploration that cannot be covered here. Lastly, although Yoo is
clearly imagining scenarios in Docs 22, 36, and 37 in which a legal defense for
torture may be necessary, he fails to fully incorporate alternative considerations, i.e.
possible future questions, about motive and intent. Although the U.S. Army Field
Manual on Interrogation itself defines torture as “the infliction of intense pain to
body or mind to extract a confession or information, or for sadistic pleasure”
(Torturing Democracy transcript 23), all motivations other than a desire to protect
are omitted from the discussion.

Rhetoric and the law
As I have previously stated, a complete or even partial analysis of the legal questions and issues surrounding the memos is far beyond the scope of this dissertation. Among the many issues that I have been unable to thoroughly explore are the distinctions—not merely legal, but rhetorical and discursive distinctions—between military interrogators and the actions of the CIA, who were subtly excluded from the language of several of the documents, such as Doc 9, that set official limits on the treatment of prisoners; the issue of military commissions and tribunals to try detainees; construction of “citizens” versus “non-citizens”; the treatment of child soldiers in U.S. custody versus the treatment of child soldiers in other countries and by the U.N.; grave breaches of conventions and treaties; issues surrounding the legal concepts of necessity and self-defense; a more thorough treatment of the ticking time bomb hypothetical; definitions of “reasonableness,” including legal understandings; and numerous questions of intent, including the legal distinctions between specific versus general intent—a key concept in various memos. Even a partial treatment of the above would fill several more chapters.

Two compelling reasons speak for the attempt, however, to at least delineate some of the most important legal issues that arise during any earnest consideration of the memos. One is the relationship of rhetoric and law. Not only do the two fields share the same origins, and indeed the art of rhetoric arose out of considerations of law and vice versa, but Aristotle’s _Rhetoric_ “was the major legal treatise of its time” (Anapol 13). Some legal realists and scholars, among them Chaim Perelman, have called for greater attention to the ways in which the fields of rhetoric and...
jurisprudence may serve to mutually benefit the other. Not only can rhetorical considerations provide a greater understanding of particular, more effective strategies of communication, but a rhetorical perspective contributes what Anapol calls the "broader view" (19)—a view that must not be lost in the minutiae, for example, of possibly sophistic legal parsings. Providing a broader rhetorical view that supports the close textual readings of the four-level critical discourse analysis has crystallized as one of the main objectives of this dissertation. This section attempts to outline, if not thoroughly explore, crucial legal concerns that have arisen from this study and that point to areas for further study and exploration, especially regarding the juxtaposition of CDA, rhetoric, and law.

One great irony that underpins the narrative surrounding the memos is that their framers use the law to circumvent the law while lamenting the overreach of the law, creating in the process a greater overreach of executive power than had previously been imagined (except, perhaps, by those who enacted it). As Michael Barone, of *U.S. News & World Report*, writes in the opening pages of Jack Goldsmith's *The Terror Presidency*, “Goldsmith . . . makes a strong case that our national security apparatus is overlawyered” (qtd in Goldsmith n.p.). Yet the meticulous legal dissections conducted throughout the memos, the at times arguably overexact examination, definition and re-definition, recontextualization, and (mis)use of particular words and phrases, i.e. the “semantic tap dance” (Giroux) the authors engage in to arrive at particular, arguably predetermined, conclusions, are the legal tools the authors use, not to best interpret the law, but to serve their own ends. As
Horton puts it, Yoo repeatedly ignored (or manipulated, as I hope this study has shown) precedent, not because it was irrelevant—by all accounts it was not—but because “it strongly contradicted the premise he was articulating” (qtd in Leopold). This manipulation raises unavoidable questions about the motives of key members of the Bush administration. I believe the documents provide evidence that contradicts the narrative that the authors were misguided but sincere in their desire to protect the country; rather, they were attempting to legally cement an authoritarian worldview that stands in direct opposition to core democratic principles—that, in essence, threatens the very democracy and liberty they claim they wish to preserve.

Much evidence exists for this, both in the language of the memos and in their larger social and historical context. In the memos, Yoo and the others undertake seemingly endless minute argumentative steps that make it all the more difficult for readers who are attempting to fully understand both the authors’ linguistic and semantic machinations, and their underlying objectives, to stay focused on the larger rhetorical concerns of purpose, situation, and audience. Clark identifies one egregious example in which Doc 22 “zeroes in on a single constitutional phrase – ‘The President shall be Commander in Chief of the Army and Navy’ — and boldly asserts that the president is all-powerful in things military” (Clark and Mertus B03). Other examples demonstrate more subtlety, such as the minor additions and subtractions of word and phrase Yoo uses to fully distort the medical precedent he has chosen in order to “essentially define the term [torture] out of existence” (“Key
Documents”). Importantly, a wealth of evidence at all four levels of analysis points to linguistic and semantic shifts and reversals that distort, manipulate, and change signification and meaning. Not only are meanings elided, obfuscated, transformed, recontextualized, but words are employed in ways that ultimately shift their connotations to the opposite of their original, agreed-upon meanings. As I hope I have amply demonstrated, these manipulations are not merely differences of opinion in interpretations of the law; rather, they are a deliberate, meticulous obfuscation of the meaning and intent of crucial particulars of the Constitution and the law, for purposes other than the objectives provided by the reigning narrative of the war on terror.

In situating the documents within their “relevant social and historical conditions of production” (Dunmire. “9/11” 196), as this dissertation has attempted to do, among the most noteworthy of those conditions is the evidence, too ample to thoroughly document here, that many of the actions the memos sought to both normalize and legitimate actually preceded their production. In other words, the documents were “hastily drafted” (Leopold) after the fact, and they were intended to provide retroactive cover to interrogators who had already crossed the line. Other evidence, including an April 21, 2009, McClatchy report by Jonathan Landay, suggests that other motivations were at play as well, including “relentless pressure [put] on interrogators to use harsh methods on detainees in part to find evidence of cooperation between al Qaida and the late Iraqi dictator Saddam Hussein's regime” (Landay). According to Landay, at least two former intelligence and military
officials claimed that “Cheney and former Defense Secretary Donald H. Rumsfeld demanded that the interrogators find evidence of al Qaida-Iraq collaboration” (Landay). Notably, despite the application of “harsh interrogation techniques,” no credible evidence was produced.

Although officially the green light for harsh techniques was not given in Guantanamo until the fall of 2002, Abu Zubaydah had been captured in March of that year. Interrogation tapes from that earlier period were later destroyed. Moreover, in a Feb. 2010 interview with ABC reporter Jonathan Karl, Cheney admitted, unrepentantly and “with a sense of impunity,” that, in essence, “the [OLC] lawyers had colluded with the policymakers to create legal excuses for criminal acts” (Parry)—negating the Bush-Cheney defense, for example the claim that the push toward harsher techniques came from below, not above. Reporter Robert Parry maintains that although “Bush administration defenders have long denied that the legal opinions were cooked, the evidence has long supported the conspiratorial interpretation” (Parry). Although the final, watered-down draft of the OPR report cast Yoo’s ignoring of legal precedent and other flaws in the Torture Memos merely as “misinterpretations” of the law, the evidence the memos themselves provide arguably points to a different, more nefarious set of motivations behind the memos’ production.

Finally, the evidence provided in previous chapters might serve as a counterpoint to defenses of Yoo, Bybee, Delahunty, and Philbin based on a last legal issue that pertains to the purpose of the Office of Legal Counsel itself. Legal scholars
differ as to whether OLC attorneys are intended to function more in an advisory role, or as advocates for the executive branch. In other words, should they outline all pertinent legal aspects of a certain issue and then advise the executive branch on the legal limits and boundaries set by precedent, or should they advocate, i.e. find legal precedents and defenses wherever possible, for actions the executive wishes to take? In a more benevolent interpretation of events, OLC attorneys—certainly those under Bush, who heavily shifted their role toward advocacy—perhaps attempted to do both, functioning as defender in addition to advisor, admittedly creating an “awkward” (Posner A.22) and perhaps contradictory duality of roles.

Many argue that the OLC under the Bush administration went far beyond whatever role the office was intended to fulfill; others, however, do not. A 2004 editorial in the Wall Street Journal by Eric Posner and Adrian Vermeule, defends the Bush OLC according to what I maintain are authoritarian terms—by now familiar, I hope:

> There is an important intellectual context behind the academic critics' complaints. An older generation of legal academics developed something like a consensus in favor of enhanced congressional power over foreign affairs; support for the War Powers Act; and a favorable attitude towards Youngstown and other decisions that restrict presidential power. That conventional view has been challenged in recent years by a dynamic generation of younger scholars who emphasize constitutional text, structure and history rather than
precedent, and who argue for an expansive conception of presidential power over foreign affairs, relative to Congress. (A.22)

Posner and Vermeule’s framing pits “academic critics”—connoting out-of-touch, complaining, ivory-tower elites—against a young, dynamic, new generation of scholars, Yoo explicitly among them, who favor expanded presidential power. Posner’s “rising generation” of scholars seemingly exemplifies the implicit “you’re not the boss of me (or my president)” stance apparent throughout the memos, and essentially accuses the elites of political bias: “the academic critics’ complaints have a distinct methodological valence, one with intellectually partisan overtones” (A.22). Note that, contrary to Yoo, Posner at least acknowledges the reigning interpretation of Youngstown as it relates to executive power.

Further, Posner and Vermeule separate the giving of legal advice from any moral imperative. It is not immoral, in other words, to legally justify torture:

Although it is true that they did not, in their memorandum, tell their political superiors that torture was immoral or foolish or politically unwise, they were not asked for moral or political advice; they were asked about the legal limits on interrogation. They provided reasonable legal advice and no more, trusting that their political superiors would make the right call. Legal ethics classes will debate for years to come whether Justice’s lawyers had a moral duty to provide moral advice (which would surely have been ignored) or to resign in protest. (A.22)
The authors make several questionable assumptions here. First, like the authors of the memos, they conflate interrogation with torture, using the two concepts interchangeably in this passage and throughout the piece. Secondly, Posner and Vermeule argue here as though legal advice was given simply and in good faith, although elsewhere in the article they argue the opposite, i.e. that the role of the OLC lawyers was to advocate rather than simply provide the “reasonable legal advice” that they assert the memos contained. This contradicts the client-attorney relationship, based in giving sound advice and then trusting the outcome, that the authors describe above: “former officials who claim that the OLC’s function is solely to supply ‘disinterested’ advice, or that it serves as a ‘conscience’ for the government, are providing a sentimental, distorted and self-serving picture of a complex reality” (A.22). Specifically regarding torture, it is difficult to see how the OLC authors can embody both roles, advisory and advocacy, at the same time; ample evidence elsewhere suggests they did not even make the attempt, that they “present[ed] highly questionable legal claims as settled law” without presenting “either the counter arguments to these claims or an assessment of the risk that other legal actors – including courts – would reject them (Clark, “Ethical Issues” 462)—neglecting a crucial duty of both advisors and advocates. Further, the evidence strongly suggests that the OLC’s purpose was to provide the administration with legal cover for virtually anything the administration desired.

Most disturbing, however, is the claim that legal issues are necessarily not moral issues. Such arguments illustrate clearly the divorce of law from its larger
rhetorical concerns, as discussed above; they also create an accountability vacuum that the Nuremburg judgments, for example, specifically intended to eradicate. A comprehensive discussion of the moral and legal obligations of lawyers is impossible here, but a delineation of at least some of the ethical issues pertaining to the memos has been key to better understanding them. The Posner-Vermeule argument nonetheless attempts to separate legal questions from moral questions, (and further speciously excuses the avoidance of all moral discussion on the grounds that such advice would in any case be ignored):

For our part, we find it hard to understand why people think that the legal technicians in the Justice Department are likely to have more insight into the morality of torture than their political superiors or even the man on the street. But whatever one's views on the use of torture on the battlefield, the memorandum is not "incompetent" or "abominable" or any more "one-sided" than anything else that the Justice Department has produced for its political masters. (A.22)

This framing casts the attorneys as “legal technicians,” mere mechanics tinkering with the grinding wheels of justice, subject to their political superiors—i.e., just following orders, making the machine run as required. The language here also assumes a “morality of torture,” creating a space for debate and equally legitimate differences of opinion that is contradictory to domestic and international law; it also extends the “battlefield” into limitless global territory, far beyond actual sites of combat. Lastly, it ignores the particular obligation of the OLC, an obligation held by
many (as outlined in previous chapters) to be central to their purpose, to maintain a
higher legal, ethical, and moral standard on two-fold grounds: first, because they
advise the president of the United States, above all “on the limits of [his]
constitutional authority” (Leopold); and secondly, because unlike other legal
advisors, their judgments have the weight of law. As to the assertion that the OLC
Torture Memos are neither incompetent nor abominable, I defer to the opinion of
the many legal scholars who vehemently disagree on both counts.

**Failure to protect**

Other than from the lone voices of several military personnel, among them
William Taft, Colin Powell, and the unknown officer who called upon the "long
tradition of staying on the high ground" in Doc 39, nowhere in the documents is
there any acknowledgment that declaring the Geneva Conventions inapplicable to
certain groups sets a dangerous precedent. Urgent warnings from Powell and Taft
that suspending Geneva Convention protections for certain groups inevitably leads
to the suspension of protections for other groups—including our own troops—went
ignored. I have already examined details of this exchange in a previous chapter; in
this section I will consider the implications of Bush administration officials'
seemingly complete obliviousness (or indifference) to the manifold unintended
consequences of “working the dark side.” This includes the adverse effects of
torturing on the torturers themselves, and other ramifications no one in the
administration appeared to consider.
Mayer, Sands, Gibney, etc., along with the OPR and various other reports, demonstrate that the legitimation of torture had a profound impact, reverberating throughout the military and beyond. Further exploration of that impact is another topic for future study, as is a more thorough accounting of just what acts—many of them horrific—were committed under the umbrella term “harsh interrogation,” detailed in reports by the International Committee of the Red Cross, in autopsy reports posted online by the ACLU and Amnesty International, in Glenn Greenwald’s blog on salon.com, and many other sources too numerous to list here. John Sifton of Human Rights Watch suggests that, based on autopsy reports, roughly 100 detainees have died of homicide in U.S. custody. Many more have died of other causes. This, of course, pertains only to those sites known to the public; buried in that statistic is the far greater sum of human misery caused by the abandonment of or lack of adherence to humanitarian values.

A number of officers and interrogators Philippe Sands interviewed also referred to a phenomenon called “force drift”—the mistaken and insidious assumption that if a little force is good, a lot of force is better. Further, many believe in the danger of “migration,” i.e. once the barriers to what career interrogator and former NCIS psychologist Mike Gelles calls “abusive interrogation” (Sands 152) are lifted in one place, they are more easily lifted elsewhere. The military is a close-knit community; even if, as Helen MacDonald suggests, specific military personnel were unaware of the memos at particular points in time, the hypermasculine mind-set they represented was undoubtedly filtering through the ranks. At the same time, as
methods of interrogation shifted from complex relationship- and rapport-building to the post-9/11 “easy fix” of raw power and brute force, for many complex reasons, scores of untried and untrained troops were possibly coming into contact with detainees about whom they may well have known virtually nothing except that they were the enemy. Although John Yoo himself rejected the migration theory as “an exercise in hyperbole and partisan smear” (qtd in Sands 152), Sands details how three “deeply damning” (152) internal reports in three years document the spread of harsh techniques from Guantanamo to Iraq and elsewhere—including, eventually, Abu Ghraib. As Mayer described it, “the lawlessness and cruelty on the ground in Iraq clearly stemmed from the policies of the Bush Administration” (Dark Side 245), and as another official told Sands, “If you let the dogs slip, they will run” (Sands 153). Early on, FBI agents and various military personnel themselves, disturbed by the events occurring in Guantanamo Bay, sent protests up the chain of command; the process that led to officials at least temporarily rescinding torture policies, is far too involved to do justice to here.

At the same time, a trivialization of such acts was underway. Gellman and Becker describe how, in essence, “Cheney and his allies, according to more than two dozen current and former officials, pioneered a novel distinction between forbidden ‘torture’ and permitted use of ‘cruel, inhuman [sic] or degrading’ methods of questioning” (“Pushing the Envelope”), uncoupling the two concepts as collocates and more easily allowing apologists such as Rush Limbaugh or Representative Dana Rohrbacher to dismiss harsh treatment as “fraternity boy pranks and hazing
pranks” (qtd in Frick). This bipolarization helped shift common sense discourse toward a trivialization of the effects both of torture and of cruel, inhuman, or degrading acts. As Yoo writes in Doc 22,

> these [European court] decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture. These decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter.

(Doc 22, 27)

Essentially, the authors have created a whole class, legally, of treatment that constitutes “cruel, inhuman or degrading treatment or punishment” (Doc 22, 15) that does not, however, rise to the level of torture—and is therefore, presumably, acceptable, especially in the exceptional post-9/11 world. This view allows many to blame what had happened, once the Abu Ghraib photos become public, on a few low-level “bad apples.” Among them, Manhattan Institute fellow Heather MacDonald, who denies any link between Doc 22 and what happened at Abu Ghraib, derides what she dubs “the torture narrative” altogether:

> So what were these cruel and degrading practices? For one, providing a detainee an incentive for cooperation—such as a cigarette or, especially favored in Cuba, a McDonald’s Filet-O-Fish sandwich or a Twinkie unless specifically approved by the secretary of defense. (91)
For MacDonald, abuses came from the bottom up and were due largely to the Pentagon’s failure to enforce military discipline. Arguably, the evidence provided here does not support that interpretation of events.

In this study, I have deliberately avoided engaging in the debate about whether the treatment detainees received can, indeed, be classified as torture; as far I have been able to discover, numerous credible sources have determined that it can. Even fewer sources dispute that the treatment detainees received meets the criteria for cruel, inhuman, and degrading treatment. Yoo himself (as a stand-in here for all of the authors of the Torture Memo) trivializes the treatment he is legitimizing by comparing it to extreme cases of torture, listing in detail, in an Appendix to Doc 22, an appalling litany of brutality as a way of minimizing the actions of U.S. interrogators and military personnel. Brutality, however, can be more subtle, and psychological terror—or sophisticated physical brutality—may not leave much physical evidence. Yoo’s argument fails to consider that skilled torturers are generally particularly adept at inflicting excruciating pain without causing serious physical injury or lasting marks. Dr. Abigail Seltzer, a London-based psychiatrist who specializes in helping victims of torture, characterized 54 days of extant interrogation logs for Detainee 063, Mohammed Al-Qatani, as “‘a sophisticated jigsaw.’ It didn’t include crude beatings, but ‘in many ways the totality may be worse that any individual sensational aspects’” (qtd in Sands 169). In some cases, interrogators cycled through the authorized techniques, including sleep deprivation, isolation, temperature changes, constant bright light, and barrages of sound, for
weeks or even months.

The larger point here is the insidious legitimation of cruelty, and that creating cultures of cruelty perpetuates and increases those types of cultures. As Alberto Mora told Mayer, “Cruelty disfigures our national character. It is incompatible with our constitutional order, with our laws, and with our most prized values . . . Where cruelty exists, law does not” (qtd in *Dark Side* 236). In-group and out-group formation, and the strategies of out-casting Lazar and Lazar detail in various studies, are crucial to the formation of such cultures. Once it is has even been considered as acceptable, torture and/or cruel, inhuman, and degrading treatment has a legitimacy in the discourse that cannot be done. Perhaps the worst effect of the legitimation of torture, however, is that it not only dehumanizes the subjects—it also dehumanizes the perpetrators. This, too, would be a fruitful area for further study, for example in relation to empathy—arguably a highly underrated human power.

Space does not allow for an in-depth discussion of the effectiveness, or the lack thereof, of torture. The presumption that “torture works” permeates the memos and the culture surrounding it, but this assumption is highly questionable. As Mayer has pointed out, torture can occasionally yield useful information; far more often, however, it leads to a wealth of false or misleading information, and valuable time and resources are wasted determining the accuracy of information given. Torture is far more effective for producing statements the interrogators wish to hear, as the subject will say anything to end the torment. Retired Army Colonel
Ann Wright explains:

Neither the US military nor the CIA has a good track record of being able to efficiently and professionally interrogate detainees. Language barriers, lack of understanding of cultural traditions and an environment of no-accountability for lengthy unwarranted detentions (over one year for most detainees) has ensured that US detention and imprisonment policies will increase daily the numbers of individuals and families who despise the United States, its policies and those in the military and other government agencies who implement those policies. ("More Bounties")

Mayer, Sands, and others have reported that no interrogations yielded much valuable intelligence, other than intelligence that was already known; Mayer also documents one case in which intelligence supposedly gathered from the "harsh interrogation of a high value detainee" was known to Bush administration officials up to a year before the interrogations took place, and that other sources contributed to the capture of a terrorist whose whereabouts the detainee purportedly disclosed under harsh treatment. By contrast, administration officials and numerous supporters, MacDonald among them, claim that much valuable information has been gathered (and in any case dispute that their treatment was torture). A full investigation into the accuracy of statements from detainees in US custody obtained through torture or harsh interrogations is also well beyond the scope of this study.

To summarize, then, a short list of the reasons why torture (or cruel,
inhumane, or degrading treatment) is a poor choice: it opens our soldiers to the same treatment; it “costs us our soul”; it compromises our moral authority as a nation; it dehumanizes our own military and medical personnel; it helps create a “Playstation mentality to killing” (cage prisoners.com); it is highly inefficient; it creates more terrorism through blowback; it does not bring about the mythological results claimed; it feeds the worst human impulses; it creates unchecked power and more possibility of abuse, which feeds the negative downward spiral and opens the doors to egregious abuse, such as extracting false confessions to legitimate the march to war; it creates false declarations of “actionable intelligence” until “action” can be taken on any intelligence; it feeds the myth of the Ticking Time Bomb Scenario and aids the construction of American imperialism, the true consequences of which are largely hidden from the American people.

The dehumanization described in detail in this dissertation, evident in such discursive, rhetorical, and lexico-grammatical strategies such as outcasting, clearly demonstrate the absence of empathy—a condition that enables a culture of cruelty that denies or ignores the humanity of others and the self, enabling the concrete denial of basic human rights. Yoo is right in his claim that context is crucial to understanding and defining torture, yet he fails to acknowledge that a prisoner in custody without recourse, access to legal counsel, or the recognition of his basic human rights such as habeas corpus, is essentially at the whim of his captors in the most fundamental ways. Thus when Yoo claims, for example, that threatening a detainee with death does not violate U.S. Code because the threat may not be
imminent, he utterly ignores context. According to Yoo, “common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming . . . By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement” (Doc 22, 12). The threat of being killed while in the custody of a powerful enemy force, however, is not merely an idle one; the irony here, as Scott Horton has pointed out, is that “death, organ failure, or the permanent impairment of a significant body function” is always a possibility—and occasionally a reality, as autopsy reports demonstrate. Knowing that you are completely at the mercy of people whose intentions are not benevolent, however justified and righteous they may feel themselves to be, creates a unique context of horror. This aspect has also largely been missing from the discourse that trivializes waterboarding.

Trivialization occurs in part, perhaps, because many, if not most, people do not care whether someone who has been deemed to be a terrorist suffers, and indeed might find the idea emotionally gratifying. Psychologist Martha Stout describes imagining a horrific tragedy in the midst of a cheerful neighborhood bonfire shortly after 9/11, and then fantasizes that the victim of her imagined tragedy is Osama bin Laden. The crowd as she describes it is “not a heartless amoral mob, and we would by no means have rallied around a murder, let alone the staging of a torture” (57). Yet, Stout continues,

standing there among all those good people, I suddenly realized that the reaction might have been something less than horror, simply
because Osama bin Laden is not a human being in our view. He is Osama, and . . . he has been completely “excluded from our moral universe.” The interventions of conscience no longer apply to him. He is not human. He is an it. And unfortunately, this transformation of a man into an it makes him scarier as well. (57)

She goes on to contemplate certain out-groups, or “its,” who “appear to deserve our moral exclusion” (57)—terrorists, child abductors, war criminals, serial killers. Many would argue that such people have forfeited their rights to humane and compassionate treatment. Stout argues, however, that in most cases, our tendency to reduce people to non-beings is neither considered nor conscious, and throughout history our proclivity to dehumanize has too often been turned against the essentially innocent. The list of out groups that some portion of humankind has at one time or another demoted to the status of hardly even human is extremely long and, ironically, includes categories for nearly every one of us” (58).

The fundamental question, as I understand it, is one of equality versus hierarchy or, put another way, a conflict of the value of life versus the value of guilt or innocence. Are rights based on the fact of human existence, because one is alive? Or does a determination of guilt along a spectrum of harmful, even horrific, actions pre-empt certain basic human rights, pre-empt the right to live with some measure of dignity?

Stout is clearly cognizant of the danger of demonization and creation of the
other. She writes,

> once the other group has become populated by *its*, anything goes, especially if someone in authority gives the order. Conscience is no longer necessary, because conscience binds us to other beings and not to *its*. Conscience still exists, may even be very exacting, but it applies only to my countrymen, my friends, and my children, not yours. You are excluded from my moral universe, and with impunity—and maybe even praise from the others in my group—I can now drive you from your home, or shoot your family, or burn you alive. (58)

Crucial in the above description, particularly to this discussion, is Stout’s recognition of the role of authority in the treatment of the other.

I would argue, however, that this discussion is not primarily about terrorists. It is about us—Americans and interested parties, defenders of democracy, citizens of empire, however we define ourselves. It is about who we are constructing ourselves to be, both discursively and in our life-worlds.

**Findings and Implications for Further Research**

We now turn back to the original three research questions of this dissertation. See the table below for the list of questions:
Table 10.1 The three research questions

<table>
<thead>
<tr>
<th>The Three Research Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. What conflicting assumptions and values underlie the “Great Divide” in our current political discourse?</td>
</tr>
<tr>
<td>2. What textual evidence exists for the above and for how power/power struggles are enacted in political discourse?</td>
</tr>
<tr>
<td>3. Can I use that textual evidence to create a method that reveals and illuminates core elements of opposing worldviews across various expressions of political speech? (i.e. can I build a set of analytical methods that I can then apply individually or collectively to a broad range of discursive samples?)</td>
</tr>
</tbody>
</table>

In other words, how does everything that preceded this final section relate to the larger question of what criteria, assumptions, frames, conceptual metaphors, etc., serve to form people’s political thinking? How does the preceding four-level analysis of the Torture Memos help us better understand or at least describe some of the fault lines and undercurrents of the national conversation in the United States? Further, will this set of methods enable me to better understand and analyze, through the creation and application of similar analytical processes, other, varying levels and genres of political discourse?

In order to help discuss the implications of the findings, the four tables below provide an overview of the most prominent features, and their codings, that analysis at each of the four levels of granularity revealed:
Table 10.2 Codes/descriptors with examples for level of granularity IV

<table>
<thead>
<tr>
<th>Level of Granularity IV: Higher Level Concepts</th>
<th>Codes/Descriptors</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>▪ Naturalization</td>
<td>▪ “Commonsense” assumptions:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o torture works</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o interrogation = torture</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o innocent victimhood (good vs. evil binaries)</td>
</tr>
<tr>
<td></td>
<td>▪ Markers of hegemonic discourse</td>
<td>▪ Exceptionalism</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o The U.S.</td>
</tr>
<tr>
<td></td>
<td>▪ Purpose: to defuse political resistance, maintain/increase existing power structures</td>
<td>o The situation</td>
</tr>
<tr>
<td></td>
<td>▪ Ideology</td>
<td>▪ War on terror</td>
</tr>
<tr>
<td></td>
<td>▪ Argumentation</td>
<td>o Rhetoric of crisis</td>
</tr>
<tr>
<td></td>
<td>▪ Metaphor</td>
<td>o Threat as existential</td>
</tr>
<tr>
<td></td>
<td>▪ Framing</td>
<td>▪ Protect and defend</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o “Whatever it takes”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Presumption of common values</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Punish, punishment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o Innocence versus evil</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Demonization</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o Dehumanization of the enemy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Distribution (creation, preservation) of power</td>
</tr>
</tbody>
</table>

Table 10.3 Codes/descriptors with examples for level of granularity III

<table>
<thead>
<tr>
<th>Level of Granularity III: Text</th>
<th>Codes/Descriptors</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>▪ Genre, recognizability of text</td>
<td>▪ Distribution (creation, preservation) of power</td>
</tr>
<tr>
<td></td>
<td>o Legalese (markers of register)</td>
<td>o The president, executive</td>
</tr>
<tr>
<td></td>
<td>▪ Heteroglossia – intertextual phrases and sentences</td>
<td>o Not Congress or the judiciary</td>
</tr>
<tr>
<td></td>
<td>▪ Coherence</td>
<td>▪ Punish, punishment</td>
</tr>
<tr>
<td></td>
<td>▪ Framing</td>
<td>o Justice</td>
</tr>
<tr>
<td></td>
<td>▪ Extended metaphor</td>
<td>▪ Positive self / negative other</td>
</tr>
<tr>
<td></td>
<td>▪ Foregrounding/backgrounding</td>
<td>o van Dijk’s ideological square:</td>
</tr>
<tr>
<td></td>
<td>▪ Opening of discursive spaces that then become physical spaces; creation of discursive acts that then become material enactments</td>
<td>o Maximize + in-group, - out-group</td>
</tr>
<tr>
<td></td>
<td></td>
<td>o Minimize – in-group, + out-group</td>
</tr>
<tr>
<td></td>
<td>▪ Exceptionalism / ticking time bomb</td>
<td></td>
</tr>
</tbody>
</table>
OMISSIONS

- *revenge, vengeance
- *fear (e.g. being under complete control of the violent arm of the most powerful state apparatus in the world
- *debate on the efficacy of torture
- *empathy (Rumsfeld’s note)
- *questions that arguably would be present if the intent were primarily to protect

Table 10.4 Codes/descriptors with examples for level of granularity II

<table>
<thead>
<tr>
<th>Level of Granularity II: Sentence</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codes/Descriptors</td>
<td></td>
</tr>
<tr>
<td>Nominalization</td>
<td></td>
</tr>
<tr>
<td>o Verbs become nouns</td>
<td></td>
</tr>
<tr>
<td>Transivity</td>
<td></td>
</tr>
<tr>
<td>o agent/patient relations; semantic agent [actor/status]</td>
<td></td>
</tr>
<tr>
<td>Deletions</td>
<td></td>
</tr>
<tr>
<td>o deliberate omissions; agentless passive</td>
<td></td>
</tr>
<tr>
<td>Topicalizations</td>
<td></td>
</tr>
<tr>
<td>o foregrounding, backgrounding</td>
<td></td>
</tr>
<tr>
<td>Presuppositions (assumptions)</td>
<td></td>
</tr>
<tr>
<td>Substitutions</td>
<td></td>
</tr>
<tr>
<td>o generalize and objectivate, protecting individ/power</td>
<td></td>
</tr>
<tr>
<td>o trivialize</td>
<td></td>
</tr>
<tr>
<td>Recontextualization</td>
<td></td>
</tr>
<tr>
<td>Punish, punishment</td>
<td></td>
</tr>
<tr>
<td>o Justice</td>
<td></td>
</tr>
<tr>
<td>Distribution (creation, preservation) of power</td>
<td></td>
</tr>
<tr>
<td>o The president, the executive</td>
<td></td>
</tr>
<tr>
<td>o Not Congress or the judiciary</td>
<td></td>
</tr>
<tr>
<td>Dismissive, distancing language</td>
<td></td>
</tr>
<tr>
<td>Lazar &amp; Lazar: outcasting</td>
<td></td>
</tr>
<tr>
<td>o Enemy construction</td>
<td></td>
</tr>
<tr>
<td>o Criminalization</td>
<td></td>
</tr>
<tr>
<td>o Orientalization</td>
<td></td>
</tr>
<tr>
<td>o (E)vilification</td>
<td></td>
</tr>
<tr>
<td>Intentions of the framers (Hamilton)</td>
<td></td>
</tr>
</tbody>
</table>

Table 10.5 Codes/descriptors with examples for level of granularity I

<table>
<thead>
<tr>
<th>Level of Granularity I: Word/Phrase</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codes/Descriptors</td>
<td></td>
</tr>
<tr>
<td>Classification (Huckin)</td>
<td></td>
</tr>
<tr>
<td>Representational choices (Dunmire)</td>
<td></td>
</tr>
<tr>
<td>Connotation / code words</td>
<td></td>
</tr>
<tr>
<td>Metaphor</td>
<td></td>
</tr>
<tr>
<td>Conflations</td>
<td></td>
</tr>
<tr>
<td>Status of detainees</td>
<td></td>
</tr>
<tr>
<td>o Human beings as legitimate / illegitimate</td>
<td></td>
</tr>
<tr>
<td>o Events as inevitable, inextricably linked, automatic</td>
<td></td>
</tr>
<tr>
<td>o The future as certain, the potential</td>
<td></td>
</tr>
</tbody>
</table>
While I will not claim at this stage that the *content* of the findings of these beginnings studies, so far, can be universally applied to help better explain and understand the divide in our national discourse, I do believe they contribute to a more nuanced interpretation of the some of the conflicting assumptions and values that undergird that divide. I further claim that this study has without doubt provided me with a number of strategies in the rhetorical, analytical, and process domains that will help shape and inform future research. In particular, the application of grounded theory at four levels of granularity—first examining the discourse/reading the text, identifying patterns, and then coding those patterns in four descending stages using a mix of methods that seems most appropriate or revealing—will certainly form my approach for the next several studies I conduct, and likely beyond. My intention is to conduct a similar study on a smaller sample of texts to refine and hone the process, and also to experiment with other specific methods of analysis from various linguistic, discursive, and other domains that could prove at least as fruitful as this set of methods has.
A Final Comment on Authoritarianism

Throughout this study I have alluded to my growing awareness of the authoritarian assumptions that underpin the construction of the memos. This does not by any means imply that authoritarianism will form the main focus of any further studies I conduct; as I hope I have by now made sufficiently clear, each study will presumably demand an individualized set of analytical methods that will arise from the rhetorical and discursive needs and characteristics of whatever texts I am analyzing, rather than beginning with assumptions about specifics I might find. All of the information I am gathering, however, will remain in the “toolbox” as a possible match to whatever textual evidence I might find. I intend to add the various content domains that have emerged from this particular study, however, to the content domains of previous studies; they will take their place in the collection of interpretive tools that may well help inform further analysis and research.

In particular, the content domain of authoritarianism has emerged as a crucial area for further study and will remain, I suspect, an important frame for the possible analysis of future findings. In the worldview of those whom Altemeyer calls right-wing authoritarians, obeying and sustaining the power of recognized authorities is the highest value, a finding that corresponds to and compliments, for example, some of Lakoff’s findings. Thus, although the text of Doc 2, for example, centered around its stated purpose of enabling the President to respond to the horrific terrorist attacks in a manner that he saw fit, in order to best protect the United States from future attacks, its deeper purpose—like that of subsequent
memos—was arguably to enshrine presidential power beyond the reach of any legal constraints. I hope I have provided ample textual evidence for this interpretation.

Hetherington and Weiler have also identified authoritarianism as a crucial piece in understanding key strains in our current political discourse. Through a series of statistical studies, in which they used surveys to connect beliefs about proper ways to discipline children to voting patterns, they concluded that “American public opinion is increasingly divided along a cleavage that things like parenting styles and ‘manliness’ map onto” (3)—a cleavage they call authoritarianism. The correlation is not a causal one, but various values, choices, and beliefs emanate from particular worldviews that have “a range of ramifications, including political ones” (3). The table below shows key characteristics that Hetherington and Weiler have identified as belonging to (non-African-American) high-scoring authoritarians:

Table 10.6 Low- versus high-scoring authoritarians, from Hetherington and Weiler

<table>
<thead>
<tr>
<th>High scorerers in authoritarianism</th>
</tr>
</thead>
<tbody>
<tr>
<td>- view the world in more concrete, black and white terms than low-scorers, who are more comfortable with ambiguity</td>
</tr>
<tr>
<td>- have a greater than average need for order</td>
</tr>
<tr>
<td>- a lower than average tolerance for difference</td>
</tr>
<tr>
<td>- make stronger than average distinctions between in and out-groups (which imposes order and reduces ambiguity)</td>
</tr>
<tr>
<td>- embrace and work to protect existing social norms</td>
</tr>
<tr>
<td>- view the social order as fragile and under attack</td>
</tr>
<tr>
<td>- research suggest they prefer military conflict over diplomacy and protecting security over preserving civil liberties</td>
</tr>
<tr>
<td>- prefer corporal punishment to time outs</td>
</tr>
<tr>
<td>- higher than average resistance to empirical evidence or actual situations, non-respondiveness or fixed responsiveness to the world</td>
</tr>
</tbody>
</table>
Hetherington and Weiler’s research suggests that the divide on many current issues falls along authoritarian lines, and that this is the single greatest indicator of voting patterns, beyond party affiliation, income, education, religion, or age. In fact, in their 2006 study the impact of authoritarianism on voting patterns had doubled over their 2004 study: “although the standard errors are too large to make too much of it, authoritarianism actually has a larger estimated effect than any other variable in the model including preferences for government spending and moral traditionalism” (148). The divide is not so much greater, they suggest, as that people are sorting more clearly along authoritarian versus non-authoritarian lines. Their research suggests that “authoritarianism has become an important new ingredient in party identification in early twenty-first century America, suggesting that people have internalized party differences on issues that are structured in part by authoritarianism” (154). Their claim is not so much that authoritarianism is on the rise, as it is that the contrast between low and high scorers has been thrown into ever-sharper relief.

For Hetherington and Weiler, moreover, low-scoring authoritarians are the group to watch. They believe that low scorers, animated by a new political landscape after years of feeling starkly alienated during two terms of the Bush presidency, turned out in masses in 2008 to sweep Barack Obama into office. They also claim that, among Democrats, Obama appealed to lower-scorers while Hillary appealed to higher scorers; this, they claim, made the final difference in Obama’s rise to power. Differences between low and high scorers, in their view, go far
beyond disagreements over policy or ideology to conflicts “about core self-understandings of what it means to be a good person” (11) and what forms the basis of a good society.

Importantly, in contrast to Altemeyer, Hetherington and Weiler “do not focus on the supposed pathologies of the ‘authoritarian personality’ or, to use a more up-to-date term, authoritarian disposition” (7 italics in original). Their research indicates that authoritarian reactions are triggered by perceived threat, i.e. that threats “activate” an authoritarian stance—and that this occurs across the spectrum. Non- or low-scoring authoritarians, when faced with stimulus they perceive as threatening (often overlooked in various studies, as I mention in my analysis of the language both Altemeyer and Haidt use in their surveys), will demonstrate similarly authoritarian responses such as less tolerance and higher aggression. Note that the nature of perceived threat might be quite different across the spectrum of low to high scorers; the interesting question is whether there are, indeed differences in behavior or attitude when the perception of threat is similarly high. Hetherington and Weiler challenge the assumption that “threat supposedly causes non-authoritarians to become more tolerant and principled” (11); possibly, however, there is discrepancy in the literature because non-authoritarians might be more able to assess a given situation, generating a fight-or-flight response as seems appropriate, where authoritarians might fall back on a more rigid, standardly aggressive response. This is pure speculation, although it does seem to correspond with Sharon Crowley’s observations, for example, about the greater density (i.e.
lower flexibility of response) in fundamentalist belief systems. Clearly, further research needs to be done in this area, but it provides a fruitful avenue of study to pursue in the discourse.

In *The Authoritarians*, Robert Altemeyer reveals what he calls the “Great Discovery” of social psychology: how powerfully we are “affected by the social circumstances encasing us” (230), i.e., that essentially, human identity and behavior is formed in context—and that is crucial to create contexts that enable the “best” of human development, however we define “best” in the ongoingly contested space of prevailing worldviews. Further, obedience to authority is “one of the ‘strong forces’ in life, but so also is conformity to one’s peers” (230). What the group around us is doing—whether we are functioning in a culture of benevolence or cruelty, for example—likely has a more powerful influence on us than we fully recognize. Thus the authorities we elect, pay attention to, follow, obey, or challenge become all the more important in shaping the quality of our characters and our lives:

Milgram\textsuperscript{23} has shown us how hard it is to say no to malevolent authority, how easy it is to follow the crowd, and how very difficult it is to resist when the crowd is doing the biding [sic] of malevolent authority. It’s not that there’s some part of “No” we don’t understand. It’s that situational pressures, often quite unnoticed, temporarily

\textsuperscript{23} Stanley Milgram’s 1960’s experiments on obedience to authority demonstrated that a majority of subjects would obey authorities who ordered them to administer electric shocks to punish unsuccessful learners, even when the subjects believed they were severely hurting the learners or placing their health in danger. Milgram’s study demonstrated that “at least six out of ten people will tend to obey to the bitter end an official-looking authority who is physically present” (Stout 69). That means, as Stout interprets it, that 62.5% of the population will obey authority over their own consciences.
strike the word from our vocabulary. (230)

According to Altemeyer, it takes more pressure to get a low scorer (or as he calls them, low RWAs) “to behave shamefully in situations like the Milgram experiment than it takes for highs” (231), which is often a combination of direct pressure from above and more subtle pressure from those around us. (Or, as Kenneth Burke puts it, “Those to whom religion means mainly hate are not very exacting as regards the provocations to which they will respond” [299]). Importantly, however, if “some of us are especially inclined to submit to such authority and attack in its name” (235), the difference between low- and high-scoring authoritarians is one of degree, not kind. Common sense narratives, therefore, and notions of normality—what is normalized in the discourse and enacted in the life-world—become crucial to shaping individual and social identity and behavior.

Moreover, as Altemeyer points out, most of us are ill-prepared to confront authority, even when we suspect that authority is not legitimate. The perceived legitimacy of authority is crucial to attitudes of obedience, compliance, or resistance—certainly another key factor in the political divide. Psychologist Martha Stout agrees. She states,

Where the disabling of conscience by authority is concerned, there is something even more effective, something more elemental than objectifying the ‘others,’ more cloying and miserable than a sense of helplessness, and evidently more difficult to conquer than fear itself. Very simply, we are programmed to obey authority even against our
own consciences (60 emphasis in original).

Authority, in fact, according to Stout, who also uses Milgram’s study as an example, can disable conscience. Altermeyer calls this a “stunning and destructive obedience” (229). A person who has chosen to submit to authority, Stout claims,

is no longer a person who must act in a morally accountable way, but the agent of an external authority to whom he attributes all responsibility and all initiative. This ‘adjustment of thought’ makes it much easier for benign leadership to establish order and control, but by the same psychological mechanism, it has countless times rolled out the red carpet for self-serving, malevolent, and sociopathic ‘authorities.’ (64)

Conscience is not enough; one must also have the strength to defy authority and follow one’s conscience—an act that can, upon occasion, be life-threatening. But arguably, even greater danger lies in ignoring the dictates of conscience. In addition, Stout maps the danger that “obedience to authority as knee-jerk reaction” (101) poses to our children. It makes them hypervulnerable to any aggressive or sociopathic ‘authority’ who may come along later in their lives. To everyone’s detriment, obedience and the higher values of patriotism and duty can become indistinguishable motivations. Enhanced in this way, reflexive obedience can consume the individual before he even has a chance to wonder whether he himself might be the best authority when it comes
to his own life and his own country, and long before he can ask questions such as ‘Do I and my countrymen really want to fight and perhaps die for this external ‘authority’s’ self-interest?’” (101).

The exercise of authority, in other words, is a highly effective avenue for such manipulation. Engendering fear in the populace is another. A politics of fear, such as arguably characterizes the war on terror and the discourse of torture, is ultimately destructive to the healthy exercise of conscience. War, Stout maintains, is “the ultimate contest between conscience and authority” (67)—a contest that all too often becomes a source of the common ailment, post-traumatic stress disorder, as well as many other ills such as depression, divorce, addiction, heart disease, that many returning soldiers face. War must be sold as an epic, even sacred, struggle between good and evil, “which is exactly the message authorities—on all sides of the conflict—have tried to convey during every major war in history” (67). Certainly, the discourse of the war on terror examined in this dissertation serves as a stellar example.

Certainly much more remains to explore in the discussion of authoritarianism, including a consideration the religious aspects; this is merely a brief exploration and only the beginning. I am keenly aware of the danger I see here, that I am possibly myself creating yet another out-group: high scoring RWAs. Certainly authoritarian followers need not be constructed as a threat; further, focusing on choices and behaviors, rather than identity, might help avoid further demonizing one group or another. Listening more carefully to, and seeking common
ground with, those with whom we disagree might prove highly effective in addressing the divisions that separate us. In any case, this exploration has made me more aware of my own impulses toward what I consider “righteous” anger, of my occasional fervent desire for that avenging angel who rides in on a white horse, rights all wrongs, and vigorously smites all enemies (as it were). Or, as Altemeyer describes it,

if we are tempted by all the earlier findings in this book to think that right-wing authoritarians and social dominators are the guys in the black hats while we fight on the side of the angels, we are not only falling into the ethnocentric trap, we are not only buttering ourselves up one side and down the other with self-righteousness, we are probably deluding ourselves as well. (230)

It is, as Altemeyer warns, a matter of degree, not kind; it is all too tempting to think, “Those people are the problem; if only they would go away, things would be fine”—and thus myself perform the same process of outcasting I have spent this dissertation detailing in others.

Whether or not Altemeyer is correct in his claims that authoritarianism currently poses a real threat to democracy in the United States, it seems valuable to continue to vigorously challenge the authoritarian assumption that force is always the best solution, as well as to challenge the justifications for and glorification of force. It is also crucial, as Altemeyer, Haidt, and others have stated, to attempt to identify common ground with those with whom we disagree. Equally crucial,
however, is paying keen attention to what is happening in, around, and underneath the discourse, to the assumptions, particularly the unarticulated ones, that shape our current political climate. Altemeyer’s warning does not offer comfort:

The social dominators want you to be disgusted with politics, they want you to feel hopeless, they want you out of their way. They want democracy to fail, they want your freedoms stricken, they want equality destroyed as a value, they want to control everything and everybody, they want it all. And they have an army of authoritarian followers marching with the militancy of “that old-time religion” on a crusade that will make it happen, *if you let them*. (246)

Certainly it is not easy, at least for me, to dismiss his warnings out of hand.

The key, at least as far as this dissertation is concerned, lies in the language. If non-authoritarians, as Hetherington and Weiler believe, are an essential group to watch, they are a group that needs better representation and articulation than has heretofore occurred. One way to accomplish this is to intentionally, purposefully, and far more clearly articulate and also legitimize wherever possible non-authoritarian principles such as diplomacy, negotiation, non-violence, tolerance, and ambiguity, and above all, equality, and also, wherever possible without the usual adversarial overtones, to continue to challenge characterizations that cast those values as weak, soft, or illegitimate. Under the Bush administration new spaces, identities, and realities were created outside of the commonly accepted interpretations of domestic and international law; this power, the power to call new
realities into being, can be turned equally toward benefit instead of harm. It is possible to build a new rhetoric, articulate a new discourse—one that is not merely a linguistic reaction to an already extant paradigm or that assumes legitimacy and righteousness in the use of violence on the side of whomever we favor, nor one that uses the same-old hegemonic terms and received assumptions. Rather, we need radically different, more balanced constructions of power. We need a greater recognition and acknowledgement of those systems, such as gift economies, that are already at work, every day, operating on different, if unarticulated, principles than the reigning paradigms—enemy construction and outcasting, narratives of threat, destruction, violence, and fear, and the tyranny of profit as our only guiding value. We need to clearly articulate, and then reify, a path toward global empathy such as Jeremy Rifkin outlines in *The Empathic Civilization*. This is not utopian. It is, quite possibly, a road map for survival.

If, as Fairclough maintains, language indeed creates new realities, we need to articulate a worldview that defines itself not merely as not authoritarian, but that more clearly articulates and reifies the world outside of cycles and compulsions of violence, one that seeks common ground even with the Other. We can, through language, bring into being a world of equity and abundance rather than one based on the current model of scarcity. More broadly, we can articulate a different vision, create a new and better standard in our discourse and in our enactments of that discourse, of how human beings are capable of treating each other—with dignity, compassion, and respect.
Works Cited


http://www.fff.org/freedom/1001e.asp.


http://members.shaw.ca/jeanaltemeyer/drbob/TheAuthoritarians.pdf.


ERICExtSearch_SearchValue_0=ED071105&ERICExtSearch_SearchType_0=n
o&accno=ED071105.

Anthony, Laurence. *AntConc* (Version 3.2.0) [Computer Software]. Tokyo, Japan:


http://www.ratical.org/ratville/CAH/Ferencz.html


Finn, Peter. "Detainee Who Gave False Iraq Data Dies In Prison in Libya."


http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051103412.html


http://www.cis.org/plenarypower


http://thinkprogress.org/2008/06/04/rohrabacher-torture/.


Gellman, Barton, and Jo Becker. "Pushing the Envelope on Presidential Power."


http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_pres/.

http://www.henryagiroux.com/online_articles/giroux.pdf


http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm


http://www.globalsecurity.org/military/systems/munitions/blu-82.htm


http://www.salon.com/news/opinion/glenn_greenwald/2010/02/05/lynch_mobs


---."The Suppressed Fact: Deaths by U.S. Torture."  

Grieve, Tim. “For Bush’s Spying Program, a bad poll, a new name and some false facts.”  


---.“Jonathan Haidt’s Homepage.”  
http://people.virginia.edu/~jdh6n/________________________

---.“What Makes People Vote Republican?”  
http://www.edge.org/3rd_culture/haidt08/haidt08_index.html.

---.“The Righteous Mind: Why Good People are Divided about Politics and Religion.”  


House Committee on the Judiciary Staff Report to Chairman John C. Conyers, Jr.


--- "The United States' 'Disappeared': The CIA’s Long-Term 'Ghost Detainees.'"


"Iraq Body Count." Iraqbodycount.org.


http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/.


Meeker, Catherine. Personal Interview. 10 Mar. 2010. Email.


“Office of Professional Responsibility Report: Investigation Into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence

http://www.george-orwell.org/Politics_and_the_English_Language/0.html


http://www.alternet.org/news/145671/dick_cheney_admits_to_torture_conspiracy

http://dictionary.oed.com.proxy.bsu.edu/cgi/entry/50181425?single=1&query_type=word&queryword=plenary&first=1&max_to_show=10

http://www.ericposner.com/torturememo.html


United Nations. “Convention Against Torture and Other Cruel, Inhuman or Degrading


[http://www.law.cornell.edu/uscode/usc_sec_18_00002340-000.html](http://www.law.cornell.edu/uscode/usc_sec_18_00002340-000.html).


Watts, Philip. "Bush Advisor Says President Has Legal Power to Torture Children." 


Wilkerson, Lawrence. In "Farewell to All That: An Oral History of the Bush White 


Schiffren, D. Tannen & H. E. Hamilton. Malden, MA: Blackwell Publishing, 

Wisler, Dominique, and Marco Tackenberg. "Ideology and Public Order: A Narrative 
Analysis of the Press in Switzerland." n.d. 


http://www.afterdowningstreet.org/node/27314.
Appendix I.

Table 4.1. An Overview of the First Forty Documents Identified by torturingdemocracy.org as the Key Documents

<table>
<thead>
<tr>
<th>#</th>
<th>Date</th>
<th>Author / Recipient</th>
<th>Subject</th>
<th>Description*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>9/14/2001</td>
<td>George W. Bush</td>
<td></td>
<td>President Bush’s military order declaring a national emergency.</td>
</tr>
<tr>
<td>2</td>
<td>9/25/2001</td>
<td>From: John Yoo, Deputy Assistant Attorney General, OLC** To: Tim Flanigan, Deputy Counsel to the President</td>
<td>“The President's Constitutional Authority to Conduct Military Operations Against Terrorist and Nations Supporting Them”</td>
<td>Lays out in detail Yoo’s view that the President’s power to respond to threats with military force cannot be limited in any way; authorizes the doctrine of pre-emption.</td>
</tr>
<tr>
<td>3</td>
<td>9/25/2001</td>
<td>From: John Yoo</td>
<td>To: David Kris, Assoc. Deputy Attorney General</td>
<td>Discusses possible changes to laws governing wiretaps for intelligence gathering and opens the possibility of legalizing warrantless searches in the interest of national security</td>
</tr>
<tr>
<td>4</td>
<td>10/23/2001</td>
<td>From: John Yoo and Robert Delahunty, Special Counsel, OLC To: Alberto Gonzales, White House Counsel, and William J. (Jim) Haynes, General Counsel to the DoD (Rumsfeld)</td>
<td>“Authority for Use of Military Force to Combat Terrorist Activities within the United States”</td>
<td>Suspends the Fourth Amendment prohibition on illegal searches and possibly the First Amendment re free speech in the interest of national security and “the overriding need to wage war successfully”</td>
</tr>
<tr>
<td>5</td>
<td>11/6/2001</td>
<td>From: Patrick Philbin, Deputy Assistant Attorney General, OLC To: Alberto Gonzales</td>
<td>Authorizes military commissions to try prisoners deemed enemy combatants (later overturned by the Supreme Court)</td>
<td></td>
</tr>
<tr>
<td>#</td>
<td>Date</td>
<td>From/To</td>
<td>Event Description</td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>------------</td>
<td>-------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>11/13/2001</td>
<td>George W. Bush</td>
<td>Military order declaring the President's unilateral authority to hold prisoners in the war on terror indefinitely.</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>12/28/2001</td>
<td>From: John Yoo and Patrick Philbin To: Jim Haynes</td>
<td>Concludes that federal district courts lack jurisdiction to accept habeas petitions from prisoners held at Guantanamo.</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>1/7/2002</td>
<td>Irene Khan, Secretary General of Amnesty International, to Donald Rumsfeld, Secretary of Defense</td>
<td>Urgent letter concerning the treatment of detainees in U.S. custody</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Warns against &quot;cruel, inhuman or degrading treatment or punishment&quot; such as hooding and blindfolding as a violation of the Convention Against Torture.</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>1/9/2002</td>
<td>From: John Yoo To: Jim Haynes</td>
<td>Concludes that Geneva Conventions do not apply to al Qaeda or the Taliban</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>1/11/2002</td>
<td>From: William Taft, Legal Advisor to the State Department To: John Yoo</td>
<td>Warns that Yoo’s legal analysis is “seriously flawed” and opens U.S. personnel to future prosecutions</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>1/19/2002</td>
<td>From: Donald Rumsfeld To: Joint Chiefs of Staff</td>
<td>Concludes that al Qaeda and Taliban detainees are not entitled to prisoner-of-war protections under the Geneva Conventions</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>1/22/2002</td>
<td>From: Jay Bybee, To: Jim Haynes</td>
<td>Signs off on Yoo’s 1/9/02 draft suspending the Geneva Conventions, using the justification of self-defense</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Correspondence</td>
<td>Description</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1/25/2002</td>
<td>Alberto Gonzales to President Bush (acc. to Mayer, actually written by David Addington, Legal Counsel to Vice President Dick Cheney)</td>
<td>&quot;Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban&quot; Outlines the benefits of not complying with the Geneva Conventions and argues that doing so would provide a &quot;solid&quot; legal defense against any future prosecution.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1/26/2002</td>
<td>Colin Powell to Alberto Gonzales</td>
<td>&quot;Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan&quot; Warns that opting out of the Geneva Conventions reverses over a century of U.S. policy, undermines the war, and opens the door to foreign prosecutions of official and troops.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/1/2002</td>
<td>John Ashcroft to George W. Bush</td>
<td>Concludes that opting out of Geneva protects American officials from future prosecutions for violations.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/7/2002</td>
<td>From: Jay Bybee, Assistant Attorney General, OLC</td>
<td>Defines detainees as “unlawful combatants” and concludes that the President can ignore Geneva’s requirement for hearings to determine their status as POW’s.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/7/2002</td>
<td>George W. Bush</td>
<td>Presidential declaration that the U.S. need not follow the Geneva Conventions protecting POWs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2/26/2002</td>
<td>Jay Bybee to Jim Haynes</td>
<td>Suspends the rights of American citizens captured in the war on terror (re John Walker Lindh) and declares evidence admissible in court even if obtained without benefit of counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3/13/2002</td>
<td>Jay Bybee to Jim Haynes</td>
<td>Underpins extraordinary rendition; suspends domestic and international law to argue that the U.S. can transfer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Page</td>
<td>Date</td>
<td>Event/Note</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td>------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>4/8/2002</td>
<td>Patrick Philbin to Daniel J. Bryant</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Swift Justice Authorization Act”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Declares unlimited authority of the President to regulate military operations, including military commissions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>6/8/2002</td>
<td>From: Jay Bybee</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To: John Ashcroft, Attorney General</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Determination of Enemy Belligerency and Military Detention”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Suspends the Posse Comitatus Act, which limits the government’s ability to use the military for law enforcement, and confers legal authority on the military to detain Jose Padilla, a U.S. citizen arrested on U.S. soil, as a prisoner of “international armed conflict.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>8/1/2002</td>
<td>Author: John Yoo (with Addington, Gonzales, and Flanigan)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Signatory: Jay Bybee</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>&quot;Standards for Conduct for Interrogation under 18 U.S.C. 2340 - 2340A&quot;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“The Torture Memo”: Dismisses numerous domestic and international laws prohibiting torture; “essentially def[in]es the term out of existence” (TD).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>8/1/2002</td>
<td>John Yoo to Alberto Gonzales</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Discusses potential threats of international prosecution</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Claims interrogations of al Qaeda cannot constitute a war crime because the President has determined the Geneva Conventions do not apply.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>8/1/2002</td>
<td>Jay Bybee to the CIA</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Re interrogation of al Qaeda operative (Abu Zubaydah)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Declares that CIA interrogation methods do not violate the statute against torture because the “specific intent” of procedures is to gather intelligence, not inflict pain or suffering.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>9/27/2002</td>
<td>Office of the Staff Judge Advocate</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Trip Report, DOD General Counsel Visit to GTMO</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Summary of Jim Haynes’ and David Addington’s trip to Guantanamo on 9/25/2002 for briefings on intelligence gathering.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>10/2/2002</td>
<td>N/A</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>“Counter Resistance Strategy Meeting Minutes”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Email exchange detailing disagreements among CIA and military officials about interrogation techniques being employed at Guantanamo and the possible ramifications.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>From/To</td>
<td>Event Description</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------</td>
<td>-----------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10/25/2002</td>
<td>Gen. James T. Hill “Counter-Resistance Strategies”</td>
<td>Forwards request to Chairman of the Joint Chiefs, but expresses worry in particular about death threats to detainees and their families (prohibited by domestic and international law).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11/27/2002</td>
<td>Jim Haynes to Donald Rumsfeld “Counter-Resistance Techniques”</td>
<td>“Action memo” to be signed off by Rumsfeld approving a list of harsh interrogation techniques. Rumsfeld signs off on all Category I &amp; II techniques, allows for the possibility of but reserves blanket approval for Category III techniques such as waterboarding.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11/27/2002</td>
<td>Unnamed FBI agent Legal Analysis</td>
<td>Agent warns superiors that some coercive techniques being considered are prohibited by the Constitution and U.S. law [18 U.S.C. § 2340 (Torture Statute)].</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1/15/2003</td>
<td>John F. Rankin, SERE Training Specialist and Christopher Ross, SERE Coordinator “After Action Report Joint Task Force Guantanamo Bay (JTF-GTMO) Training Evolution”</td>
<td>Per a “high level directive,” two SERE instructors train 24 GTMO interrogators in SERE techniques based on “Biderman’s Principles” and including death threats, degradation, and “induced debilitation.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1/15/2003</td>
<td>Donald Rumsfeld “Counter-Resistance Techniques”</td>
<td>Rumsfeld rescinds his authorization of Category I &amp; II techniques.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1/15/2003</td>
<td>Donald Rumsfeld</td>
<td>Order for a Working Group of senior military lawyers to study the legality of</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td>35</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Working Group Report”</td>
<td>various techniques.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Military Judge Advocates General</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>“The JAG memos”</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>3/14/2003</td>
<td>Expands on Yoo’s 8/1/2002 memo and authorizes even more expansive techniques. Haynes presents the memo to the Working Group as its “controlling authority” re proposed techniques.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>John Yoo to Jim Haynes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Military Interrogation of Alien Unlawful Combatants Held Outside the United States”</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>37</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4/4/2003</td>
<td>85-page Working Group Report authorizing 35 techniques of harsh interrogation, signed in the name of the group members, who were not informed of the final contents.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unknown</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>&quot;Working Group Report on Detainee Interrogations in the Global War on Terrorism&quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>38</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4/16/2003</td>
<td>Authorizes 24 of the 35 techniques for use at GTMO.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Donald Rumsfeld to Commander of US Southern Command</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>&quot;Counter-Resistance Techniques in the War on Terrorism&quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8/14/2003</td>
<td>U.S. Army military intelligence requests from interrogators a wish list of techniques to break detainees, as “the gloves need to come off.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Interrogation Wish List</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>9/14/2003</td>
<td>Guidelines authorizing techniques for Iraqi detainees, an almost verbatim copy of those issued by Rumsfeld for GTMO.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Gen. Ricardo Sanchez</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>&quot;CJTF-7 Interrogation and Counter Resistance Policy&quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Descriptions from the Website Torturing Democracy: “The Key Documents”

** All positions given refer to position held at the time the documents were written