

**THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON
TERROR TURNED INTO A WAR ON AMERICAN IDEALS¹**

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*He who does battle with monsters needs to watch out lest
he in the process becomes a monster himself. And if you
stare too long into the abyss, the abyss will stare right
back at you.*³

I. Introduction

On 11 September 2001, four commercial airliners, hijacked by Islamic terrorists, crashed into the World Trade Center in New York, the Pentagon in Washington, D.C., and a field in Pennsylvania, killing 2973 people.⁴ Vice President Dick Cheney, who had spent a good portion of his political life preparing for national disasters,⁵ sprang into action and took control of the Executive branch.⁶ Vice President Cheney took the reins of government and fought for the next seven years to steadily increase the scope of the Executive branch's powers.

The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals is the culmination of Jane Mayer's long-term investigation.⁷ It chronicles the actions and decisions by a myriad of high level politicians, lawyers, and bureaucrats in the Bush Administration that pushed the envelope of American morality and Executive power by justifying and authorizing controversial techniques for interrogation, exemptions from the protections of the Geneva Conventions, and surveillance of American citizens. Mayer also tells the story of a small group of lawyers and law enforcement agents who stood up to the administration in an attempt to prevent the use of torture and

¹ JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

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³ MAYER, *supra* note 1, at 261 (quoting Friedrich Nietzsche).

⁴ U.S. Deaths in Iraq, War on Terror Surpass 9/11 Toll, CNN.com, <http://edition.cnn.com/2006/WORLD/meast/09/03/death.toll/> (last visited Jan. 20, 2009) (number does not include terrorists).

⁵ MAYER, *supra* note 1, at 1–2.

⁶ *Id.*

⁷ *Id.* at 370. Jane Mayer wrote a series of thirteen articles for *The New Yorker* magazine since 9/11 relating to the Bush Administration's actions during the war on terror. *Id.*

the degradation of civil and human rights.

Mayer's central thesis is that members of the Bush Administration, primarily Vice President Dick Cheney and his legal counsel David Addington,⁸ used the political climate after 9/11 to radically advance their long-time agenda of expanding the powers of the Executive branch.⁹ Mayer examines the methods by which Vice President Cheney and his colleagues expanded their powers as well as the effects their actions had on suspected terrorists, members of the government that opposed them, and the reputation of America in the international arena.

Mayer presents the reader with a catalogue of shocking behind-the-scenes political machinations culled from her interviews with sources close to the administration. However, the truly gripping and morally engaging aspects of the book are the accounts of the lives affected by the administration's policies of "enhanced interrogation,"¹⁰ indefinite detention, rendition, military commissions, and political assassinations.

II. The Expansion of the Office of the Vice President

Historically, the office of the Vice President has been relatively unimportant.¹¹ While the office has evolved, there are still notable examples from modern history of the relative unimportance of the office of the Vice President.¹² From the beginning of the Bush Administration it was clear that this would change. President Bush relied heavily upon Vice President Cheney in national security matters from the beginning.¹³

⁸ Addington has been referred to as "the most powerful man you've never heard of." Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REPORT, May 21, 2006, at 32.

⁹ MAYER, *supra* note 1, at 7.

¹⁰ *Id.* at 151.

¹¹ There are only two duties of the Vice President enumerated in the U.S. Constitution. The first is to serve as the President of the Senate, casting a vote only in the case of a tie. U.S. CONST. art. I, § 3. The second is to collect the electoral ballots from the states and open them "in the Presence of the Senate and the House of Representatives." *Id.* art. II, § 1.

¹² See, e.g., This Day in History, 1945, *Truman is Briefed on Manhattan Project*, <http://www.history.com/this-day-in-history.do?action=Article&id=505> (last visited Jan. 20, 2009) (Harry S. Truman never informed of the Manhattan Project while serving as Vice President); U.S. Senate: Art and History Home, http://www.senate.gov/artandhistory/history/common/generic/VP_Dan_Quayle.htm (last visited Jan. 20, 2009) (Vice President Quayle was told by President George H. W. Bush that he should "travel a lot to get some seasoning.").

¹³ MAYER, *supra* note 1, at 63.

Over the past seven years, many have come to view Cheney as “the most powerful vice president in U.S. history.”¹⁴

Much of Vice President Cheney’s power was derived from his meticulous attention to detail. One witness to many of the presidential daily briefings prior to 9/11 said that “Cheney was the detail guy. . . . He [was] the one senior guy who had his hands on the steering wheel.”¹⁵ This same witness described President Bush at the same meetings as “distracted.”¹⁶

As the Chief of Staff for President Ford, Vice President Cheney had a unique vantage point to “witness[] the marginalization of Vice President Nelson Rockefeller.”¹⁷ He concluded that the key to power was information, and he was able to manipulate decision-making by limiting the information before the President received it.¹⁸ Vice President Cheney ensured that he was the conduit for all information, and “almost invariably had the final word with the President.”¹⁹

Vice President Cheney also surrounded himself with a contingent of lawyers who shared his beliefs. Chief among them was David Addington. Addington had served as Vice President Cheney’s special assistant when he was the Secretary of Defense, and then as the Pentagon’s General Counsel during which time he became known by many as “Cheney’s gatekeeper.”²⁰ During the transition between the Clinton and Bush Administrations, Addington worked closely with Vice President Cheney in an effort to set up a strong vice presidency.²¹

III. Expansion of Executive Power

Both the Vice President and Addington had long believed that the power of the Executive branch should be expanded and that the

¹⁴ Robert Kuttner, Op-Ed., *Cheney’s Unprecedented Power*, BOSTON GLOBE, Feb. 25, 2004, at A19, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/02/25/cheneys_unprecedented_power.

¹⁵ MAYER, *supra* note 1, at 27.

¹⁶ *Id.*

¹⁷ *Id.* at 62.

¹⁸ *Id.* at 63.

¹⁹ *Id.* Similarly, David Addington generally had the last word on any paperwork that was to be presented to the President. *Id.*

²⁰ *Id.* at 61.

²¹ *Id.* at 62.

legislative branch's ability to perform checks on the Executive should be curtailed.²² The terrorist attacks of 9/11 provided the opportunity that they had been awaiting for decades, and they did not hesitate to seize it. Within hours of the attacks, the Vice President and Addington were engaged in strategy sessions to determine how far they could expand the President's power.²³ By the end of the day, they had enlisted two more like-minded attorneys: Timothy Flanigan from the White House Counsel's Office and John Yoo from the Justice Department's Office of Legal Counsel.²⁴ Yoo had been a law professor specializing in the area of presidential power during war and believed that the President's powers were like "that of British Kings."²⁵ These men, along with White House Counsel Alberto Gonzalez and Pentagon General Counsel Jim Haynes, began referring to themselves as "The War Council,"²⁶ and played an astounding role in the expansion of the powers of the President through their legal interpretations.

On 14 September 2001, Senator Trent Lott approached Senate Majority Leader Tom Daschle and, at the behest of the White House Counsel, requested an amendment to the pending congressional authorization of presidential war powers, adding "in the United States" to the proposed area of operations.²⁷ This amendment would presumably allow the President to prosecute the war on terror inside the United States, effectively denying American citizens their civil rights.²⁸ Senator Daschle refused the request and the limited authorization was passed.²⁹ Within a week, the President received a secret opinion from the Justice Department stating that the President had nearly unlimited authority to prosecute the war on terror, unfettered by Congress.³⁰ This was the first step in a slippery legal slope that would expand the President's powers while stripping individuals of their civil rights and protections from international conventions.

²² See *id.* at 7, 51, 55–56, 58–61.

²³ *Id.* at 49.

²⁴ *Id.* at 50.

²⁵ *Id.* at 50–51.

²⁶ *Id.* at 66. Interestingly, no member of the "War Council" had ever served in the military.

²⁷ *Id.* at 44–45.

²⁸ *Id.* at 45.

²⁹ *Id.* The limited authorization passed unanimously in the Senate and by a vote of 420 to 1 in the House. *Id.*

³⁰ *Id.* at 46–47. The opinion implied that the President had the authority to override the laws specifically imposed by Congress to regulate his powers. *Id.*

On 25 September 2001, the Justice Department Office of Legal Counsel issued another secret memorandum entitled “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them.”³¹ This opinion, authored by John Yoo, further expanded the powers of the President to take action—including preemptive action—against any terrorist groups regardless of any link to al Qaeda. The memorandum also concluded that Congress had, “no right at all to interfere with the President’s response to terrorist threats.”³² The practical effect of this memorandum was significant in that the government is bound by legal interpretations from the Office of Legal Counsel, and anyone who follows the opinion in good faith is virtually immune to prosecution.³³

The War Council worked in secrecy, regularly refusing to provide copies of their legal analysis to the agencies tasked with carrying out their programs.³⁴ On several occasions, the War Council excluded those with regulatory authority if they believed that their legal opinions would be challenged.³⁵ By avoiding legal opposition and controlling the information presented to the President, Vice President Cheney and his War Council steered the country headlong into confronting one of the most contentious moral questions of our time: How far can a President go to keep his people safe?

IV. Interrogations, Torture, and Criminal Justice

When you capture a suspected Al Qaeda terrorist, what do you do with him? You can’t kill him once you have him in custody and he’s been captured. That would be a violation of international law. You can’t let him go, because he’s far too dangerous and potentially far too valuable as a source of intelligence. And . . . you can’t,

³¹ *Id.* at 64.

³² *Id.* at 64–65. One of the authorities cited by Yoo in his memorandum was Yoo himself. *Id.*

³³ *Id.* at 65. Jack Goldsmith, 2003 head of the Office of Legal Counsel, referred to these opinions as “golden shields” and “get-out-of-jail-free cards”. *Id.*

³⁴ *See, e.g., id.* at 68–69 (noting that Addington refused to show the legal justification for a National Security Agency eavesdropping program to the agency that was required to run it).

³⁵ *See, e.g., id.* at 69–70 (noting that the War Council excluded Richard Shiffrin, the Pentagon lawyer in charge of National Security Agency oversight, because he would likely have found the program to be illegal).

in many cases, try him in the ordinary civilian court system.³⁶

This is the quandary that led the Bush Administration to authorize disturbing and morally reprehensible treatment of suspected terrorists and that eventually led to the establishment of the military commissions. Following 9/11, the administration was more intent on preventing another attack than prosecuting those responsible for the attacks.³⁷ In their view, constitutional rights and criminal prosecutions were not as important as extracting information that could prevent a second attack.³⁸ It is with this mindset that the administration decided to abrogate the rights of anyone that they deemed a terror suspect. The speed, and apparent lack of deliberation,³⁹ with which they came to the decision to implement renditions, enhanced interrogation techniques, and ultimately military commissions,⁴⁰ is disturbing.

Mayer cites numerous examples of the administration's apparent preference for the most aggressive approach. Despite repeated anecdotal evidence that traditional, non-coercive interrogations yield useful information,⁴¹ the administration continually insisted that interrogators need to be free to use "enhanced" methods⁴² to obtain intelligence even though they have repeatedly produced unreliable results.⁴³ The reader is left pondering why the administration insists on such harsh tactics when

³⁶ *Id.* at 79.

³⁷ *Id.* at 34 (Attorney General John Ashcroft told the Director of the FBI that "criminal trials were beside the point. All that mattered was stopping the next attack.").

³⁸ *Id.* at 33.

³⁹ *Id.* at 34 (discussing the lack of any high-level discussions before discarding the traditional criminal justice system for those suspected of terrorism).

⁴⁰ *Id.* at 86. President Bush signed the order establishing military commissions within hours of seeing it for the first time. *Id.*

⁴¹ *See, e.g., id.* at 104–07 (non-coercive interrogation of Ibn al-Shaykh al-Libi resulting in information about an Al Qaeda plot in its final stages); *id.* at 116 (information obtained through a non-coercive approach resulting in the conviction of four Al Qaeda operatives related to the 1998 embassy bombings).

⁴² "Enhanced interrogation" is the euphemism used by the Bush administration to describe any number of physically or psychologically coercive methods for procuring information from detainees. This could include anything from sleep deprivation to waterboarding. *See generally id.* at 132–335.

⁴³ *See, e.g., id.* at 118–19 (FBI threats to Abdallah Higazy that his family would be tortured in Egypt leading to false confession); *id.* at 129–34 (Maher Arar signing several false confessions after being renditioned and subjected to torture for more than a year); *id.* at 134 (Ibn al-Shaykh al-Libi coerced into making a false confession that was used to justify war in Iraq.); *id.* at 277–78 (Khalid Sheikh Mohammed recanting confessions given after being waterboarded).

lesser means remain available. Mayer seems to subscribe to the theory that the administration's panic and hasty reaction to the terrorist threat backed them into a corner from which they could not escape. However, she offers no concrete analysis of why their reaction was to quickly authorize such extreme methods of interrogation and treatment. Nor does she address whether the use of torture would ever be acceptable. Though an extremely small minority is willing to vocalize it, some commentators posit that the torture of a potentially innocent suspect is no worse than the near certainty of killing the innocent in conventional war-time bombings.⁴⁴ This issue is left unaddressed.

The Dark Side contains a great amount of graphic detail regarding the treatment of suspected terrorists. Mayer delves deeply into the controversial practices authorized as "enhanced interrogation methods."⁴⁵ What is even more disturbing than the descriptions of torture is that several of the individuals who were renditioned and exposed to enhanced interrogation techniques were innocent.⁴⁶ Mayer presents the stories of individuals that lived through renditions in their own words. One such personal account is that of Khaled el-Masri, a German national held by the CIA in a secret prison in Afghanistan for 149 days during which time he was stripped, placed in a cold cell with no blanket, and subjected to physical interrogation, enemas, and segregation.⁴⁷ Reading these accounts makes it almost impossible to understand how the administration can claim that "enhanced interrogation methods" are not torture.⁴⁸

Mayer makes it clear that not everyone in the Bush Administration was in favor of expanding the President's power at the cost of civil and

⁴⁴ Sam Harris, *In Defense of Torture*, Oct. 17, 2005, http://www.huffingtonpost.com/sam-harris/in-defense-of-torture_b_8993.html (arguing that the harm of torturing one innocent suspect is far less egregious than the inevitable suffering and deaths of multiple innocent women and children caused by the methods of modern warfare, specifically aerial bombing).

⁴⁵ See generally MAYER, *supra* note 1, at 142–335 (discussing the expanded interrogation techniques approved by the administration).

⁴⁶ See, e.g., *id.* at 129–34 (regarding the rendition of Maher Arar, an innocent man imprisoned and interrogated for more than a year based on the forced confessions of individuals tortured in Syria); *id.* at 282–87 (regarding Khaled el-Masri, a German national imprisoned and subjected to harsh interrogation by the CIA, even after high level CIA officials had reason to believe he was mistakenly imprisoned).

⁴⁷ *Id.* at 282–87.

⁴⁸ See *id.* at 287 (quoting el-Masri: "Whoever says that is not torture should just have it done to them.").

human rights. Several individuals attempted to prevent the administration from violating the basic American principles prohibiting torture.⁴⁹ Many of these individuals did so at severe risk to their careers,⁵⁰ but they did so because they believed in civil rights and the prohibition of torture.

Mayer further acknowledges that members of the administration were put in a difficult position following 9/11,⁵¹ and does not attempt to depict them as monsters. However, she is clearly critical of their willingness to strip away human rights protection so easily in secret⁵² while denying their actions in public.⁵³ Additionally, she does not paint an altogether pleasant picture of President Bush's leadership. In general, she portrays the President as an individual who follows the lead of those around him.⁵⁴ Mayer clearly believes that the real power in the White House was consolidated among Cheney and his War Council.

V. Conclusion

While *The Dark Side* is an extremely well-researched and engaging read, the writing lacks a certain coherence. This is most likely due to the fact that it is essentially an expanded compilation of the investigative reports that the author has written for *The New Yorker* over the past six years.⁵⁵ However, the breadth of the subject matter, the shocking descriptions of the hardships endured by often innocent people, and the intriguing insight into the inner workings of the Bush Administration make this book an exceptional resource for those interested in

⁴⁹ *Id.* at 88 (discussing the vocal opposition offered by the service Judge Advocate Generals, including U.S. Army Major General Romig).

⁵⁰ *See, e.g., id.* at 95–97 (discussing Jesselyn Radack, an attorney at the Professional Responsibility Advisory Office at the Department of Justice who was driven out of her job after she opposed the custodial interrogation of John Walker Lindh without an attorney present). Ms. Radack further claims that her new firm was told by the DoJ that she was the target of a criminal leak investigation and that she was placed on a “no-fly” list. *Id.*

⁵¹ *Id.* at 9.

⁵² *See, e.g., id.* at 151–57, 229–30 (discussing Yoo's justification of the use of enhanced interrogation methods).

⁵³ *See, e.g., id.* at 151–57 (discussing the Bush Administration's redefinition of torture and denial of torture in public).

⁵⁴ *See, e.g., id.* at 324 (discussing an incident where Condoleezza Rice was able to get a private audience and convince the President to back down on the War Council's effort to reverse the Supreme Court's ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

⁵⁵ *See supra* note 7.

international law and human rights, as well as the inner workings of the Executive branch.