The administration’s intention to transport al Qaeda and Taliban prisoners to Guantanamo Bay was announced on December 27, 2001, by Defense Secretary Donald Rumsfeld. The next day, the memo by John Yoo of the Office of Legal Counsel enabled the administration to create a legal fiction, to place prisoners outside the U.S. court system. The memo prevented prisoners from using habeas corpus and argued that in leasing Guantanamo Bay from Cuba, the United States had jurisdiction and control over the base. Another memo by Yoo and special counsel Robert Delahanty excluded prisoners alleged to be members of al Qaeda and the Taliban from protections of Article 5, which says that captured members of either group have the right to be identified and treated as POWs. It argued that members of these groups cannot be considered POWs because they are terrorists, exhibiting the mindset that only the administration can determine which individuals are members of terrorist organizations. It wasn’t written to enable the capture of actual terrorists; it was designed to apply to anyone in custody, regardless of the evidence.

Prisoners in Guantanamo’s Camp Delta were confined to wire mesh cell blocks, except for a short exercise period and shower. They were shackled when they left their cells and subjected to bright lights all day; guards kept a 24-hour watch, and prisoners had to be observed every 30 seconds. In March 2003, Camp Four was established to process prisoners most willing to participate in thought reform; better conditions included dormitories, and prisoners ate and exercised together. Intelligence gatherers quickly concluded that there were no major players among the hundreds of prisoners. An intelligence analyst that the CIA sent there met with interrogators and determined “that many of
the prisoners had no meaningful ties to terrorism.”

On October 17, 2001, General Tommy Franks, in command of military forces in Afghanistan, had ordered the troops to follow the Geneva Conventions, especially Article 5; military lawyers worked to apply it to Guantanamo, when the initial prisoners captured in Afghanistan were sent there. All indications were that the military would hold Article 5 hearings. Instead, on January 19, 2002, Rumsfeld countermanded Frank’s order, insisting that prisoners he considered members of al Qaeda and the Taliban not be offered Geneva Convention protections. On February 7, Assistant Attorney General Bybee finished a legal memo, providing the president with authority to suspend the application of Article 5 because the prisoners had been identified as war criminals. That day, Bush spoke of a “new paradigm” in the war on terrorism. So Geneva Convention protections determining one’s status as a POW and Article 3 did not apply. Prisoners were referred to as “enemy combatants,” a concept foreign to the Geneva Conventions.

The elimination of legal precedent motivated the administration. In seeking guidance from the Office of Legal Counsel, Alberto Gonzales’s asked if interrogation methods were limited by the 1994 federal antitorture statute. There was an interest in just how far interrogations could go before they were outside the law. At Guantanamo and elsewhere, the CIA had custody of individuals they considered high-ranking al Qaeda members; operatives wanted to know if they could employ certain interrogation techniques without risking prosecution. One step made their actions criminal: a simple redefinition of proper interrogation techniques. As a result, the extraction of intelligence surpassed what could be undertaken according to the Geneva Conventions and went toward prohibited practices that constituted torture. Gonzales’s question was answered on August 1, 2002, with the Yoo and Bybee memo, which legalized torture, redefining it by making practitioners guilty only if they acted with intentional malice. The criminal aspect of their definition appears in the section that exempts any violation of the law and provides immunity from prosecution if the actions were taken as a result of presidential directives. In Yoo’s words, “Congress cannot tie the president’s hands in regard to torture as an interrogation technique … it’s the use of the commander in chief function. They cannot prevent the president from ordering torture.” Such authority, they argue, makes the president both a lawmaker and interpreter of law. They chose to ignore Article 1 of the Constitution, granting Congress