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# The Torture Memos: The Case Against the Lawyers

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1.

On Monday, August 24, as President Obama began his vacation on Martha's Vineyard, his administration released a previously classified 2004 report by the CIA's inspector general that strongly criticized the techniques employed to interrogate "high-value" al-Qaeda suspects at the CIA's secret prisons.[1] The report revealed that CIA agents and contractors, in addition to using such "authorized" and previously reported tactics as waterboarding, wall-slamming, forced nudity, stress positions, and extended sleep deprivation, also employed a variety of "unauthorized, improvised, inhumane and undocumented" methods. These included threatening suspects with a revolver and a power drill; repeatedly applying pressure to a detainee's carotid artery until he began to pass out; staging a mock execution; threatening to sexually abuse a suspect's mother; and warning a detainee that if another attack occurred in the United States, "We're going to kill your children."

The inspector general also reported, contrary to former Vice President Dick Cheney's claims, that "it is not possible to say" that any of these abusive tactics— authorized or unauthorized—elicited valuable information that could not have been obtained through lawful, nonviolent means. While some of the CIA's detainees provided useful information, the inspector general concluded that the effectiveness of the coercive methods in particular—as opposed to more traditional and lawful tactics that were also used—"cannot be so easily measured." CIA officials, he wrote, often lacked any objective basis for concluding that detainees were withholding information and therefore should be subjected to the "enhanced" techniques. The inspector general further found no evidence that any imminent terrorist attacks had been averted by virtue of information obtained from the CIA's detainees. In other words, there were no "ticking time bombs."

The same day, Attorney General Eric Holder announced that he was asking John Durham, a federal prosecutor already investigating the CIA's suspicious destruction of its interrogation videotapes, to expand his inquiry to include a preliminary investigation into some of the CIA's most extreme interrogation tactics. Holder simultaneously announced that he would not prosecute "anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees."
The latter limitation suggests that Holder has directed the investigation to focus only on those interrogators who engaged in unauthorized conduct, but not on the lawyers and Cabinet officials who authorized the CIA to use specific techniques of brutal physical coercion in the first place. If the inquiry stops there, it will repeat the pattern we saw after the revelation of the abuses at Abu Ghraib, in which a few low-level individuals were

prosecuted but no higher-ups were held accountable.

Lost in all the attention given to the CIA inspector general report and Holder's announcement was still another packet of documents released later the same day, from the Justice Department's Office of Legal Counsel (OLC). When these memos, letters, and faxes are considered together with an earlier set disclosed in April 2009, it becomes clear that there is an inherent conflict of interest in the investigation Holder has initiated. Justice Department lawyers were inextricably involved in justifying every aspect of the CIA program. They wrote memo after memo over a five-year period, from 2002 to 2007, all maintaining that any interrogation methods the CIA was planning to use were legal. And now the Justice Department is investigating not itself, but only the CIA, for atrocities in which both were deeply implicated.

While the memos from the Office of Legal Counsel have received less attention than the details of brutal treatment recorded by the CIA inspector general, these memos are the real "smoking gun" in the torture controversy. They reveal that instead of requiring the CIA to conform its conduct to the law, the OLC lawyers contorted the law to authorize precisely what it was designed to forbid. They concluded that keeping suspects awake for eleven days straight, stripping them naked, exposing them to cold temperatures, dousing them with water, slamming them into walls, forcing them into cramped boxes and stress positions for hours at a time, and waterboarding them hundreds of times were not torture, not cruel, not inhuman, not even degrading, and therefore perfectly legal. The memos make clear that true accountability cannot stop at the CIA interrogators, but must extend up the chain of authority, to the lawyers and Cabinet officers who approved the "enhanced interrogation techniques" in the first place.
The OLC's defenders argue that it was difficult to define concretely exactly what constitutes torture or cruel, inhuman, or degrading treatment and that there was little direct precedent to go on. There is some truth to these arguments. Not all physically coercive interrogation is torture. Determining whether tactics qualify as torture under federal law requires difficult distinctions between "severe" and less-than-severe pain and suffering, and between "prolonged" and temporary mental harm. Former Attorney General Michael Mukasey has argued that the lawyers acted in good faith to render their best judgment on these issues in perilous times.

Precisely because many of the questions were so difficult, however, one would expect a good-faith analysis to reach a nuanced conclusion, perhaps approving some measures while definitely prohibiting others. Yet it is striking that on every question, no matter how much the law had to be stretched, the Bush administration lawyers reached the same result—the CIA could do whatever it had proposed to do. And long after federal officials acknowledged that the threat of terror had substantially subsided, the OLC continued to distort the law so as to facilitate brutality.

Most disturbingly, the OLC lawyers secretly maintained their position even as the relevant facts changed, and even after the law developed to underscore that the CIA's tactics were illegal. There was one law for public consumption, but another quite different law operating in secret. For example, when the Justice Department's initial August 2002 memo interpreting the torture statute was leaked to the press in June 2004 and widely condemned, the department publicly issued a replacement memo, dated December 30, 2004, which rejected several interpretations advanced in its earlier memo. But the recently disclosed documents reveal that the department continued in secret to approve all the same

interrogation tactics.

In 2005 Congress threatened to restrict CIA tactics further by confirming that every person in US custody was protected against not only torture, but all cruel, inhuman, and degrading treatment. The Bush lawyers drafted yet another secret opinion, concluding that none of the CIA's tactics could even be considered cruel, inhuman, or degrading. And when the Supreme Court ruled in 2006 that the Geneva Conventions, which broadly prohibit all mistreatment of wartime detainees, applied to al-Qaeda, the OLC lawyers wrote still another secret opinion recommending that President Bush issue an executive order that would "authoritatively" establish that the CIA's tactics did not violate the laws of war—simply because the president said so. When considered as a whole, the memos reveal a sustained effort by the OLC lawyers to rationalize a predetermined and illegal result.

2.

History has shown that even officials acting with the best intentions may come to feel, especially in times of crisis, that the end justifies the means, and that the greater good of national security makes it permissible to inflict pain on a resisting suspect to make him talk. History has also shown that inflicting such pain—no matter how "well-intentioned"—dehumanizes both the suspect and his interrogator, corrodes the system of justice, renders a fair trial virtually impossible, and often exacerbates the very threat to the nation's security that was said to warrant the interrogation tactics in the first place.

Knowing that history, the world's nations adopted the Geneva Conventions and the Convention Against Torture (in 1949 and 1984), both of which prohibit torture in absolute terms. The Convention Against Torture provides that "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."

If laws such as the Geneva Conventions and the Convention against Torture are to work, however, lawyers must stand up for them. That means being willing to say no when asked whether it is permissible to subject a human being to the brutality that the CIA proposed. Yet the OLC lawyers always said yes. Where precedents were deemed helpful, they cited them even if they were inapposite; where precedents were unhelpful, they did not cite them, no matter how applicable. They treated the law against torture not as a universal moral prohibition, but as an inconvenient obstacle to be evaded by any means necessary.

Such an approach to the law is especially alarming in view of the particular role of the Office of Legal Counsel. That office is designed to serve as the "constitutional conscience" of the Justice Department. As Jack Goldsmith, one of the heads of the OLC under President Bush, has said, "OLC is, and views itself as, the frontline institution responsible for ensuring that the executive branch charged with executing the law is itself bound by law." It attracts some of the nation's best lawyers, and its alumni include former Chief Justice William Rehnquist, Justice Antonin Scalia, former Solicitors General Theodore Olson and Walter Dellinger, former Yale Law School Dean and current State Department Legal Adviser Harold Koh, Harvard Law Professor Cass Sunstein, and former Yale University President Benno Schmidt Jr.

Private lawyers are sometimes considered "hired guns," whose obligation is to interpret the law as far as possible to do their client's bidding. We rely on the adversarial system and

public airing of arguments and evidence to reach a just result. Lawyers in the Office of Legal Counsel, by contrast, work in a setting that affords no adversarial presentation or public scrutiny. In that position, the lawyer's obligation is to provide objective advice as an "honest broker," not to act as an advocate or a hired gun.

When it comes to covert activities such as the CIA interrogation program, judgments of legality are often uniquely in executive hands, since the judiciary, Congress, and the public may not even know of the activities' existence. In addition, on the question of torture the OLC lawyers were the last—and only—line of defense, since the detainees were denied all recourse to the outside world.

If OLC lawyers had exercised independent judgment and said no to the CIA's practices, as they should have, that might well have been the end of the Bush administration's experiment with torture. Vice President Dick Cheney and his chief counsel, David Addington, would undoubtedly have put tremendous pressure on the OLC to change its views; but had the OLC stood firm, it is difficult to imagine even the Bush-Cheney White House going forward with a program that the OLC said was illegal.

The OLC lawyers had the opportunity, and the *responsibility*, to prevent illegal conduct *before* it occurred. The lawyers involved in drafting the "torture memos"—Jay Bybee, John Yoo, Daniel Levin, and Steven Bradbury—failed to live up to these obligations. In their hands, law became not a constraint on power but the instrument of unconscionable abuse.

3.

The "original sin" in this narrative dates to August 1, 2002, when the OLC issued two memos that approved every tactic the CIA had proposed. From that point forward, there was no turning back. Other OLC memos had already ruled that the Geneva Conventions did not protect al-Qaeda detainees. And as we would learn later, the OLC had secretly concluded that the Convention Against Torture's prohibition on cruel, inhuman, and degrading treatment did not apply to foreigners held in CIA custody abroad. The August 2002 memos, therefore, addressed what the OLC considered the sole remaining barrier to harsh interrogation tactics—a federal statute making torture a crime.

The initial August 2002 memo, written by John Yoo and signed by Jay Bybee, was leaked in 2004, and has already been widely discussed.[2] It defined "severe pain or suffering" by reference to an obscure and inapposite health benefits statute, concluding that in order to be "severe," pain must be "equivalent in intensity to the pain accompanying organ failure, impairment of bodily function, or even death." It interpreted "prolonged mental harm" to require proof of harm lasting "months or years." It said that the president had unchecked power to authorize torture despite a federal statute making it a crime. And it argued that an interrogator who tortured could escape liability by asserting unprecedented versions of the "self-defense" and "necessity" doctrines, advancing much broader interpretations of these concepts than most criminal defense lawyers would be willing to offer.

The same day, August 1, 2002, the OLC issued a second memo, publicly released for the first time in April 2009. It concluded that all of the CIA's proposed tactics were permissible: specifically,

> (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.

None of these techniques, the OLC insisted, inflicted pain of a severity associated with organ failure or death. While being slammed into a wall repeatedly "may hurt...any pain experienced is not of the intensity associated with serious physical injury." What was the basis for these OLC conclusions? The CIA itself. With respect to waterboarding, for example, the OLC memo stated: "[the CIA has] informed us that this procedure does not inflict actual physical harm," and on that basis the memo concluded that waterboarding "inflicts no pain or actual harm whatsoever." And waterboarding cannot cause any long-term suffering, the OLC determined, because, according to the CIA, it "is simply a controlled acute episode."

The arguments of the initial August 2002 memo were so strained that the Justice Department abandoned them as soon as the memo was made public in 2004. On December 30, 2004, the department issued a replacement memo, signed by the new OLC head, Dan Levin, that pointedly departed from the August 2002 memo on several specific points. But these disagreements were purely cosmetic; behind closed doors, issuance of the ostensibly contrite replacement memo did not change *anything* with respect to the CIA's program. The memo was more an exercise in public relations than in law, since it did nothing to restrict the specific techniques that had been approved previously.

This becomes clear in three secret memos issued in May 2005, and signed by Steven Bradbury, who succeeded Levin as head of the OLC. These memos sound at first reading more reasonable than the August 2002 memos. They acknowledge more contrary arguments, and even occasionally express doubt. They were written with acute awareness of the widespread public criticism of the leaked August 2002 memo, and of the damning findings of the 2004 CIA inspector general's report. By this time, almost four years after September 11, and with substantial evidence of abuse, the OLC should have known better. Yet the May 2005 memos are in a fundamental sense the worst of the lot, and ultimately reach even more unreasonable positions than the August 2002 memos.

The May memos conclude that none of the CIA techniques, used singly or in combination, constitute either torture or cruel, inhuman, or degrading treatment. Their analysis is heavily predicated on two facts: (1) American soldiers subjected to some of these techniques in the military's counter-torture training (called Survival, Evasion, Resistance, Escape, or SERE) reportedly have not suffered severe physical pain or prolonged mental harm; and (2) doctors would be present to monitor the interrogations. Neither fact remotely supports the legality of the program.

The SERE experience is wholly inapposite. A soldier who chooses to subject himself to SERE training does so voluntarily; he knows that everything that happens to him is part of a program that he knows has clear limits. He is given a code word that he can use at any time to halt the process. By contrast, an al-Qaeda suspect finds himself an involuntary captive of his enemy in a secret prison, cut off from the outside world, unaware of any limits, and utterly powerless to make his interrogators stop.

Nor does the presence of a doctor make coercive interrogation legal. The memos stressed that medical experts with SERE experience would stop the interrogations "if deemed medically necessary to prevent severe mental or physical harm." But how is a medical

expert supposed to assess whether a given technique is imposing severe rather than less-than-severe pain, or might give rise to prolonged rather than temporary psychological harm? No doctor could assess these things on the spot. Indeed, at one point the December 2004 memo seems to admit this, quoting a medical journal to the effect that "pain is a subjective experience and there is no way to objectively quantify it." And if anything, experience with SERE simulations is likely to have desensitized doctors to the potential harms presented by real coercive interrogations.

A separate memo, dated May 30, 2005, the most disingenuous of all, concluded that the CIA's techniques did not even constitute cruel, inhuman, or degrading treatment, a much lower threshold than torture. The Bush OLC had previously sidestepped the prohibition against "cruel, inhuman, or degrading treatment" altogether by maintaining, again in secret, that it did not apply to foreign nationals held outside US borders. But when that interpretation was publicly disclosed, Congress vowed to overrule it. The Bush administration vigorously resisted, but in the Detainee Treatment Act, enacted in December 2005, Congress expressly prohibited cruel, inhuman, or degrading treatment of any person in US custody.

Recognizing that this change was coming, the May 30 memo stated, once again in secret, that none of the CIA's techniques were cruel, inhuman, or degrading anyway, because they would not "shock the conscience," a test imposed by the Senate when it ratified the 1984 treaty banning torture and cruel treatment. The OLC concluded that the CIA tactics did not shock the conscience because they inflicted pain not arbitrarily but for a good end, and because the government sought to "minimize the risk of injury or any suffering that does not further the Government's interest in obtaining actionable intelligence."
The case law is clear, however, that *any* intentional infliction of pain for interrogation purposes "shocks the conscience." And the Supreme Court has recognized no exception that would permit the infliction of pain if the government's reason is good enough. The Court has repeatedly held that any use or threat of force to coerce a confession shocks the conscience—even where employed to solve a murder.[3]

The OLC argued in its May 30 memo that this standard ought not to apply where interrogation is used only to gather intelligence, not to convict. But in *Chavez* v. *Martinez*, the Supreme Court in 2003 reaffirmed that any intentional infliction of pain for interrogation would shock the conscience, even where the statements were not used in a prosecution. In the *Chavez* case, officers interrogated a man while he was suffering from gunshot wounds in a hospital, but they did not inflict any pain themselves for the purpose of questioning. While the justices disagreed about the specific conclusions to be drawn from the facts alleged, and ultimately returned the case to the lower court for resolution, all of the justices who addressed the issue agreed that the *deliberate* infliction of pain on an individual to compel him to talk *would* shock the conscience.

Justice Kennedy, writing for three justices, reasoned that police "may not prolong or increase a suspect's suffering against the suspect's will," or even give him "the impression that severe pain will be alleviated only if [he] cooperates." Justice Thomas, writing for another three justices, concluded that the interrogation was permissible, but only because he found "no evidence that Chavez acted with a purpose to harm Martinez," or that "Chavez's conduct exacerbated Martinez's injuries." Under either approach, then, a purpose to harm is illegal. The court of appeals on remand in the *Chavez* case unanimously held that the alleged conduct indeed shocked the conscience, a fact not even acknowledged by the

OLC memo.

The OLC memo maintained that "the CIA program is considerably less invasive or extreme than much of the conduct at issue in [*Chavez*]." In fact, the opposite is true. The officers in *Chavez* inflicted no pain for purposes of interrogation. The CIA's entire program, by contrast, was based on the deliberate infliction of pain and humiliation to compel recalcitrant suspects to talk against their will.

Tellingly, at the very end of this memo, the OLC lawyers admitted that "we cannot predict with confidence that a court would agree with our conclusion." But they then went on to reassure the CIA that the question "is unlikely to be subject to judicial inquiry." Even if the treaty prohibiting torture and cruel treatment were violated, the memo continued, "the courts have nothing to do and can give no redress." In other words, the CIA for all practical purposes was operating in a "law-free zone," or at least a zone where the law was whatever the executive said it was—in secret. And no court would ever have the opportunity to disagree.

The latest OLC memo on the CIA interrogation program to be disclosed is dated July 2007, and was publicly released on August 24, 2009.[4] By the time this memo was written, the Supreme Court had rejected the Bush administration's contention that al-Qaeda detainees were not covered by Common Article 3 of the Geneva Conventions. Common Article 3 comprehensively prohibits torture, cruelty, violence to person, and any humiliating, degrading, or inhumane treatment of wartime detainees. By 2007, the CIA had limited their interrogation tactics but were still using extended sleep deprivation, dietary manipulation, attention grasps, and slapping detainees repeatedly in the face and stomach—all of which would ordinarily violate Common Article 3.

The OLC argued that Common Article 3 permitted abuse of al-Qaeda detainees that it would not permit of any other wartime detainees, even though Common Article 3 draws no distinctions among detainees. Other courts had ruled that any deliberate infliction of pain to coerce statements from suspects is inherently degrading. The OLC rejected that view, insisting that degrading treatment was permissible as long as it was not an "outrage upon personal dignity"—but never explained why using physical pain to override a suspect's will is not inherently an outrage upon personal dignity.

Most astoundingly, the memo argued —in a footnote—that the president could avoid all of Common Article 3's requirements simply by declaring that they do not apply—even though the Supreme Court had ruled exactly the opposite one year earlier. In the OLC's view, the Military Commissions Act of 2006 gave the president the power to overrule the Supreme Court on this matter. Congress never said anything of the kind. The memo concluded with the advice that the president act somewhat less dramatically, and simply issue a regulation that "defined" Common Article 3 in a way that would allow the CIA to do what it wanted. President Bush subsequently did just that.

4.

At its best, law is about seeking justice, regulating state power, respecting human dignity, and protecting the vulnerable. Law at its worst treats legal doctrine as infinitely manipulable, capable of being twisted cynically in whatever direction serves the client's desires. Had the OLC lawyers adhered to the former standard, they could have stopped the CIA abuses in their tracks. Instead, they used law not as a check on power but to facilitate

brutality, deployed against captive human beings who had absolutely no other legal recourse.

In light of these actions, it is not enough to order a cessation of such tactics, and a limited investigation of CIA agents who may have gone beyond the OLC guidelines. Official recognition that the OLC guidelines were themselves illegal is essential if we are to uphold a decent standard of law. Official repudiation is also critical if we are to regain respect around the world for the United States as a law-abiding nation, and if we hope to build meaningful safeguards against this kind of descent into cruelty happening again.

Moreover, this is not just a matter of what's right from the standpoint of morality, history, or foreign relations. The United States is *legally bound* by the Convention Against Torture to submit any case alleging torture by a person within its jurisdiction "to its competent authorities for the purpose of prosecution." President Obama and Attorney General Holder have both stated that waterboarding is torture. Accordingly, the United States is legally obligated to investigate not merely those CIA interrogators who went beyond waterboarding, but the lawyers and Cabinet officers who authorized waterboarding and other torture tactics in the first place.

The fact that such an investigation would be divisive, or might divert attention from President Obama's other priorities, is not an excuse for failing to fulfill this legal obligation, and not a justification for not prosecuting. The fact that a defendant has powerful allies does not warrant treating him more leniently. At the same time, prosecutors do have discretion not to bring charges for many reasons, and it would not be illegitimate to decline prosecution if a prosecutor concluded that it was not clear beyond a reasonable doubt that the lawyers and officials intended to violate the law.

But surely it is premature to make such judgments. All the facts are still not known. And even if prosecution were not warranted, it is still critical that there be some form of official acknowledgment of wrongdoing. The least President Obama should do, therefore, is to appoint an independent, nonpartisan commission of distinguished citizens, along the lines of the 9/11 Commission, to investigate and assess responsibility for the United States' adoption of coercive interrogation policies.

Only such a commission has the possibility of rising above the partisan wrangling that any attempt to hold accountable high-level officials of the prior administration is certain to set off. The facts that emerge should point to the appropriate response—whether a congressional resolution, disbarment proceedings against the lawyers, civil actions for money damages, or criminal prosecutions. Absent a reckoning for those responsible for making torture and cruel, inhuman, and degrading treatment official US policy, the United States' commitment to the rule of law will remain a hollow shell—a commitment to be honored only when it is not inconvenient or impolitic to do so.
*— September 10, 2009*

Notes

[1]Office of Inspector General, "Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)," May 7, 2004, available at www.aclu.org/oigreport/.
[2]All of the OLC memos discussed here are reproduced in *The Torture Memos: Rationalizing*

*the Unthinkable*, edited by David Cole and with a foreword by Philippe Sands, just published by the New Press, with the exception of a July 2007 memo that was released only on August 24, 2009.

[3]See, for example, *Rogers* v. *Richmond*, 365 US 534 (1961); *Ashcraft* v. *Tennessee*, 322 US 143 (1944).

[4]"Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees," July 20, 2007, available at www.usdoj.gov/olc/docs/memo-warcrimesact.pdf.

URL http://www.nybooks.com/articles/23114



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