5

The torture lawyers of Washington

Revelations of torture and sexual humiliation at Abu Ghraib erupted into the news media at the end of April in 2004, when reporter Seymour Hersh exposed the scandal in *The New Yorker* magazine and CBS News broadcast the notorious photographs. Five weeks later, with the scandal still at the center of media attention, the *Wall Street Journal* and *Washington Post* broke the story of the Bybee Memorandum – the secret "torture memo," written by elite lawyers in the US Department of Justice's Office of Legal Counsel (OLC), which legitimized all but the most extreme techniques of torture, planned out possible criminal defenses to charges of torture, and argued that if the President orders torture it would be unconstitutional to enforce criminal prohibitions against the agents who carry out his commands. (The memo, written to then White House counsel Alberto Gonzales, went out over the signature of OLC head Jay S. Bybee, but apparently much of it was drafted by John Yoo, a law professor working in the OLC at the time. Before the Abu Ghraib revelations, Bybee left OLC to become a federal judge, and Yoo returned to the academy.)

Soon after, more documents about the treatment of War on Terror detainees were released or leaked – a stunning and suffocating cascade of paper that has not stopped, even after two years. When Cambridge University Press published *The Torture Papers* a scant six months after the exposure of the Bybee Memo, it included over 1,000 pages of documents.[1] Even so, *The Torture Papers* was already out of date when it was published. For that matter, so was a follow-up volume published a year later.[2] No doubt a

[1] The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel, eds., Cambridge University Press, 2005). Hereafter: TP.

[2] The Torture Debate in America (Karen J. Greenberg, ed., Cambridge University Press, 2006). Hereafter: The Torture Debate. The second volume contains eight additional memoranda, but does not include such crucial documents as the Schmidt Report on interrogation techniques used in Guantánamo, US Attorney General Alberto Gonzales's written responses to US senators at his confirmation hearings about the legality of cruel, inhuman, or degrading treatment that

third volume, collected now (November 2006), would also be outdated by the time it was distributed. The reason is simple: the lawyers continue to lawyer away.

In the last chapter, I offered an argument about the jurisprudential and ethical importance of lawyers giving candid, independent advice about the law. This chapter will provide a case study of moral failure. The chapter will help us address some questions left over from the last – questions such as: (1) What does candid, independent advice entail? (2) Given a contentious legal issue, how much leeway does the candid advisor have to slant the law in the client's direction? (3) What is the difference between illicitly slanted advice and advice that is merely wrong?

But in setting out these questions, I don't mean to gloss over the most basic reason for writing about the torture lawyers in a book about legal ethics and human dignity. Torture is among the most fundamental affronts to human dignity, and hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation. We would have to go back to the darkest days of World War II, when Hitler's lawyers laid the legal groundwork for the murder of Soviet POWs and the forced disappearance of political suspects, to find comparably heartless use of legal technicalities (and, as Scott Horton has demonstrated, the legal arguments turn out to be uncomfortably similar to those used by Bush Administration lawyers[3]). The most basic question, then, is whether the torture lawyers were simply doing what lawyers are supposed to do. If so, then so much for the idea that the lawyer's role has any inherent connection with human dignity.

If the law clearly and explicitly permitted or required torture, legal advisors would face a terrible crisis of conscience, forced to choose between resigning, lying to their client about the law, or candidly counseling that the law permits torture. But that was not the torture lawyers' dilemma. Faced with unequivocal legal prohibitions on torture, they had to loophole shamelessly to evade the prohibitions, and they evaded the prohibitions because that was the advice their clients wanted to receive. With only a few exceptions, the torture memos were disingenuous as legal analysis, and in places they were absurd. The fact that their authors include some of the finest intellects in the legal profession makes it worse, because their legal talent rules out any whiff of the "empty head, pure heart" defense. Possibly they believed that, confronted by terrorists, morality actually required them to evade the

falls short of torture, official correspondence surrounding these and other issues, or the responses offered by the US government to the UN's Committee Against Torture in May 2006. Nor does it contain major US legislation enacted while the book was in press, such as the Detainee Treatment Act of 2005; and the Military Commissions Act of 2006.

[3] Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to "A New Kind of Warfare,"* in The Torture Debate, supra note 2, at 136–50.

prohibitions on torture, a position frankly defended by some commentators.[4] But the torture lawyers never admitted anything of the sort. Professor Yoo, for example, continues to maintain the pretense of lawyering as usual, and flatly denies that he was offering morally motivated advice.[5] The issue, then, is not whether lawyers may deceive their clients about the law in order to manipulate the clients into doing the right thing by the lawyer's lights. Although that is an interesting and important question, the torture memoranda raise a different one: whether lawyers may spin their legal advice because they know spun advice is what their clients want.[6]

To grasp just how spun the advice was, it will be necessary to dwell on legal details to a greater extent than in other chapters in this book,

[4] See, e.g., Charles Krauthammer, *It's Time to Be Honest About Doing Terrible Things*, The Weekly Standard, December 5, 2005; David Gelernter, *When Torture Is the Only Option*, L.A. Times, November 11, 2005; Jean Bethke Elshtain, *Reflections on the Problem of "Dirty Hands,"* in Torture: A Collection (Sanford Levinson ed., 2004), at 87–88. In Elshtain's words, "Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person . . . To condemn outright . . . coercive interrogation, is to lapse into a legalistic version of pietistic rigorism in which one's own moral purity is ranked above other goods. This is also a form of moral laziness." Ibid.

[5] In an interview, Professor Yoo said: "At the Justice Department, I think it's very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don't want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They'll say, 'Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.' And actually I think at the Justice Department and this office, there's a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you're not telling them what plays to call, essentially . . . I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue." *Frontline Interview With John Yoo* (October 18, 2005), available at <www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>. "'The worst thing you could do, now that people are critical of your views, is to run and hide. I agree with the work I did. I have an obligation to explain it,' Yoo said from his Berkeley office. 'I'm one of the few people who is willing to defend decisions I made in government.'" Peter Slevin, *Scholar Stands By Earlier Writings Sanctioning Torture, Eavesdropping*, Wash. Post, December 26, 2005, A3. Discussing the torture memo, Yoo adds, "The lawyer's job is to say, 'This is what the law says, and this is what you can't do.'" Ibid. In other words, it is lawyering as usual, not unusual lawyering for moral purposes. (Oddly enough, however, when the US Supreme Court rejected Yoo's argument that the Geneva Conventions do not protect Al Qaeda captives, Professor Yoo complained that "What the court is doing is attempting to suppress creative thinking." Adam Liptak, *The Court Enters The War, Loudly*, N.Y. Times, July 2, 2006, section 4, at 1. Obviously, to call arguments "creative thinking" implies legal novelty, the antithesis of the straightforward "this is what the law says" that Yoo had previously used to describe his work.)

[6] This chapter therefore overlaps with another essay I wrote on torture and the torture lawyers: David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Virginia L. Rev. 1425 (2005). The latter essay was reprinted in expanded form in The Torture Debate, supra note 2, 35–83. In a few parts of this chapter, I draw on the earlier paper.

even though the technicalities are of no lasting interest. The devil lies in the details, and without the details we cannot study the devil. Only the details permit us to discuss the difference between a memo that "gets the law wrong," but argues within acceptable legal parameters, and one that cannot be understood as anything more than providing political cover for a client's position. And that is the most fundamental distinction this chapter considers.

The background

To understand the work of the torture lawyers, it is crucial to understand two pieces of legal background: the worldwide criminalization of torture, and the overall movement of legal thought by the United States government in the wake of September 11, 2001.

Governments have tortured people, often with unimaginable cruelty, for as long as history has been recorded. By comparison with the millennia-long "festival of cruelty" (Nietzsche), efforts to ban torture are of recent vintage. The eighteenth-century penologist Beccaria (widely read and admired by Americans in the 18th century) was among the first to denounce torture, both as a form of punishment and as a method for extracting confessions; and European states legally abolished torture in the nineteenth century.[7] Legal abolition did not necessarily mean real abolition: Germany practiced torture throughout the Third Reich, France tortured terrorists and revolutionaries in Algeria during the 1950s and 1960s, and the United Kingdom engaged in "cruel and degrading" treatment of IRA suspects until the European Court of Human Rights ordered it to stop in 1977. The phenomenon is worldwide: states abolish and criminalize torture, but scores of states, including democracies, engage in it anyway. Nevertheless, the legal abolition of torture marked a crucial step toward whatever practical abolition has followed; and it drove underground whatever torture persists in a great many states.

The post-World War II human rights revolution contributed to the legal abolition of torture. The Nuremberg trials declared torture inflicted in attacks on civilian populations to be a crime against humanity, and the 1949 Geneva Conventions not only banned the torture of captives in international armed conflicts, they declared torture to be a "grave breach" of the Conventions, which parties are required to criminalize. Alongside Geneva's anti-torture rules for international armed conflicts, Article 3 of Geneva (called "common Article 3" because it appears in all four Geneva Conventions) prohibits mistreating captives in armed conflicts "not of an international character" – paradigmatically, civil wars, which throughout history have

[7] See the opening chapters of Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977).

provoked savage repressions.[8] Common Article 3 is particularly remarkable because prohibitions on what sovereign states can do within their own territory in times of crisis are few and far between. And US law classifies the torture and cruel treatment forbidden by common Article 3, along with grave breaches of Geneva, as war crimes carrying a potential death sentence.[9] In addition, the United States, together with almost 150 other states, has ratified the International Covenant on Civil and Political Rights, which flatly prohibits torture and inhumane treatment.[10]

[8] The Nuremberg Charter did not in those terms declare torture a crime against humanity; but torture fell under the rubric of "inhumane acts" in the list of crimes against humanity found in Article 6(c); furthermore, Allied Control Council Law No. 10, the occupying powers' domestic-law version of the Nuremberg Charter used in other postwar trials, did name torture (along with rape and imprisonment) as a crime against humanity. The Third and Fourth Geneva Conventions include "torture or inhuman treatment" among the so-called "grave breaches" that must be criminalized: see Geneva Convention III (on the rights of POWs), articles 129–30, and Geneva Convention IV (on the rights of civilians), articles 146–47. Article 3 common to all four Geneva Conventions prohibits "mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment."

[9] 18 U.S.C. § 2441. Until the Military Commissions Act of 2006 (MCA), this section declared all violations of common Article 3 to be war crimes. The MCA decriminalized humiliating and degrading treatment, along with the practice of subjecting detainees to sentences and punishments resulting from unfair trials – both common Article 3 violations, but now no longer federal war crimes. Indeed, the MCA retroactively decriminalizes these violations back to 1997. The reason for decriminalizing these two Article 3 violations is, unfortunately, rather obvious. The MCA establishes military commissions to try detainees, and apparently its drafters wanted to insulate those who establish and serve on the commissions from potential criminal liability if a federal court ever finds the commissions unfair. (Decriminalizing the subjection of detainees to unfair trials is a noteworthy step, because the United States convicted and punished Japanese officers after World War II for illegitimately stripping downed US airmen of Geneva Convention status, trying them unfairly, and executing them. See *Trial of Lieutenant-General Shigeru Sawada and Three Others, United States Military Commission, Shanghai* (1946), in 5 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 1 (1948).) And, as we shall see below, US interrogators employed humiliation tactics in interrogating Guantanamo detainees. After the US Supreme Court found that common Article 3 applies to detainees in the War on Terror, the awkward result was that, without retroactive decriminalization, all those who engaged in humiliation tactics, together with officials who authorized the use of such tactics, were federal war criminals.

[10] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Article 7. The United States, however, does not believe that the ICCPR applies outside US jurisdiction, or during armed conflicts. For a careful argument defending this point of view, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation*, 99 A.J.I.L. 119 (2005). For the alternative point of view, see United Nations Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 21 April 2004*, CCPR/C/74/CRP.4/Rev.6. (General Comments).

The most decisive step in the legal prohibition of torture took place in 1987, when the international Convention Against Torture (CAT) entered into force. Today, 144 states have joined CAT, and another 74 have signed. Several features of CAT turn out to be particularly important for understanding the work of the torture lawyers. First, CAT provides a legal definition of official torture as the intentional infliction of severe physical or mental pain or suffering on someone, under official auspices or instigation (Article 1). This was the definition that the Bybee Memo had to loophole its way around. CAT requires its parties to take effective steps to prevent torture on territories within their jurisdiction (Article 2(1)), and forbids them from extraditing, expelling, or returning people to countries where they are likely to face torture (Article 3). Parties must criminalize torture (Article 4), create jurisdiction to try foreign torturers in their custody (Article 5), and create the means for torture victims to obtain compensation (Article 14). A party must also "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Article 16) – a requirement that the torture lawyers loopholed with tenacious ingenuity.

Strikingly, CAT holds 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" (Article 2(2)). What makes this article striking, of course, is its rejection of the most common excuse states offer when they torture: dire emergency. Article 2(2) commits the parties to CAT to the understanding that the prohibition on torture is not merely a fair-weather prohibition. It holds in times of storm and stress, and by ratifying the Convention, states agree to forgo torture even in "new paradigm" wars.[11] With the worldwide adoption of CAT, torture became an international crime.

The United States signed CAT in 1988, and the Senate ratified it in 1994. However, the Senate attached declarations and reservations to CAT, including a declaration that none of its substantive articles is self-executing. That means the articles do not take effect within the United States until Congress

[11] Stunningly, however, in May 2006 the US State Department's legal advisor informed the United Nations Committee Against Torture that the United States has never understood CAT to apply during armed conflicts. *Opening Remarks by John B. Bellinger III, Legal Advisor, US Dep't. of State, Geneva, May 5, 2006*, available at <www.us-mission.ch/Press2006/0505BellingerOpenCAT.html>. He based this view on statements made by US representatives at the negotiations that created the CAT. The United States was apparently worried that CAT would displace international humanitarian law, including the Geneva Conventions. However, the Senate did not include this limitation among the reservations, declarations, and understandings it attached to CAT at ratification, so these isolated statements from the legislative history have no legal significance. This is particularly important given that US law currently maintains that international humanitarian law does not apply to the War on Terror, and so there is nothing for CAT to displace.

implements them with appropriate legislation. Congress did implement several of the articles. Most significantly, it passed a pair of criminal statutes, defining torture along the lines laid down by CAT and making torture outside the United States a serious federal felony.[12]

What about torture within the United States? Long before CAT, US domestic law outlawed torture, although not by name. The US Constitution forbids cruel and unusual punishment, and the Supreme Court held that official conduct that "shocks the conscience" violates the constitutional guarantee of due process of law.[13] Ordinary criminal prohibitions on assault and mayhem straightforwardly prohibit torture, and US military law contains parallel prohibitions. When foreign victims sued their home-state torturers in US courts, the courts found no difficulty in denouncing "the dastardly and totally inhuman act of torture."[14] If police investigators sometimes continue to give suspects the third degree in the back rooms of station houses, no one prior to the torture memos doubted that this broke the law; the 1997 torture of Abner Louima by New York City police officers led to a thirty-year sentence for the ringleader. If US agents abroad engaged in torture, nobody admitted it; and when federal agents allegedly tortured a criminal suspect while bringing him to the United States, the court held that he could not be tried if the allegations were true – a rare exception to the longstanding rule of the US courts that people brought for trial illegally can still stand trial.[15]

This is not to say that, when it comes to torture, the United States was squeaky clean. In 1996, the Pentagon admitted that the School of the Americas, in Fort Benning, Georgia – a US-run training school for Latin American military forces – had for years used instructional manuals that advocated torture; and there have been many allegations over the years of US "black ops" involving torture.[16] Nevertheless, until the torture lawyers began making the legal world safe for brutal interrogations, the United States was one of the leading campaigners in the worldwide effort to place torture beyond the pale of permissibility. Afterward, although the US government insists it has not backed down an iota in rejecting torture, the protestations ring hollow, and everyone understands that US officials can proclaim them only because the torture lawyers have twisted words like "torture," "cruel, inhuman, and degrading," and "humane" until they no longer mean what they say.[17]

[12] 18 U.S.C. §§ 2340–2340A. [13] Rochin v. California, 345 U.S. 165, 172 (1952).

[14] Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980).

[15] U.S. v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

[16] See, e.g., Dana Priest, *US Instructed Latins on Executions, Torture*, Wash. Post, September 21, 1996; Alfred W. McCoy, A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror (2006); Jennifer Harbury, Truth, Torture, and the American Way: The History and Consequences of US Involvement in Torture (2005).

[17] I discuss some of these redefinitions in David Luban, *Torture, American-Style*, Wash. Post, November 27, 2005, B1. At his confirmation hearing, Attorney General Gonzales redefined "cruel, inhuman, and degrading" treatment so that conduct outside US borders does not count. He also defined "humane" treatment as involving nothing more than providing detainees with food, clothing, shelter, and medical care; consistent with this view, the Army's Schmidt Report concluded that intensive sleep deprivation, blasting detainees with ear-splitting rock music, threatening them with dogs, and humiliating them sexually "did not rise to the level of being inhumane treatment." *Army Regulation 15–6 Final Report: Investigation of FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* [hereafter: Schmidt Report], at 1, available at <www.defenselink.mil/news/Jul2005/d20050714report.pdf>. Legal obligations were defined so narrowly that US officials could truthfully say that the United States complies with its legal obligations, simply because it hardly has any to comply with.

The result

In the War on Terror, CIA techniques for interrogating high-value captives reportedly include waterboarding, a centuries-old torture technique of near-drowning. Tactics also include "Long Time Standing" ("Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours"), and "The Cold Cell" ("The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.")[18] All these techniques surely induce the "severe suffering" that the law defines as torture. Consider Long Time Standing. In 1956, the CIA commissioned two Cornell Medical Center researchers to study Soviet interrogation techniques. They concluded: "The KGB simply made victims stand for eighteen to twenty-four hours – producing 'excruciating pain' as ankles double in size, skin becomes 'tense and intensely painful,' blisters erupt oozing 'watery serum,' heart rates soar, kidneys shut down, and delusions deepen."[19]

[18] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, November 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>. At least one Afghani captive reportedly died of hypothermia in a CIA-run detention facility after being soaked with water and shackled to a wall overnight. Bob Drogin, *Abuse Brings Deaths of Captives Into Focus*, L.A. Times, May 16, 2004. The US government has never officially acknowledged which techniques it uses. However, in a September 2006 speech, President Bush for the first time admitted that the CIA held high-value detainees in secret sites, and interrogated them using "an alternative set of procedures," which he described as "tough . . . and safe . . . and lawful . . . and necessary." Office of the Press Secretary, The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, September 6, 2006, available at <www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. Subsequently, the government argued that revelation of the techniques could cause "exceptionally grave damage" to national security – so much so, that detainees should not be permitted to tell their own civilian lawyers what was done to them. Declaration of Marilyn A. Dorn, Information Review Officer, CIA, in Majid Khan v. George W. Bush, U.S. Dist. Court, District of Columbia, Civil Action 06-CV-1690, October 26, 2006, available at <http://balkin.blogspot.com/khan.dorn.aff.pdf>; Respondents' Memorandum in Opposition to Petitioner's Motion for Emergency Access to Counsel and Entry of Amended, Protective Order, in Khan v. Bush, available at <http://balkin.blogspot.com/khan.doj.brief.pdf>.

[19] Quoted in Alfred W. McCoy, *Cruel Science: CIA Torture & US Foreign Policy*, 19 New England J. Pub. Pol. 209, 219 (2005).

More important, perhaps, than authorizations of specific tactics are open-ended, tough-sounding directives that incite abuse without explicitly approving it, such as a 2003 email from headquarters to interrogators in Iraq: "The gloves are coming off, gentlemen, regarding these detainees. Col. Boltz has made it clear we want these individuals broken."[20] In response, a military interrogator named Lewis Welshofer accidentally smothered an uncooperative Iraqi general to death in a sleeping bag – a technique that he claimed his commanding officer approved. Welshofer was convicted of negligent homicide, for which he received a slap on the wrist: a written reprimand, two months' restriction to base, and forfeiture of $6,000 in pay. The commanding officer who approved the sleeping-bag interrogation suffered no adverse consequences.[21] Similarly, Manadel Jamadi, a suspected bombmaker, whose ice-packed body was photographed at Abu Ghraib next to a grinning soldier, was seized and roughed up by Navy SEALS in Iraq, then turned over to the CIA for questioning. At some point, either the SEALS or the CIA interrogator broke Jamadi's ribs; then he was hooded and hung by his wrists twisted behind his back until he died. The CIA operative has still not been charged two years after Jamadi's death. And the SEAL leader was acquitted, exulting afterward that "what makes this country great is that there is a system in place and it works."[22] It worked as well in another notorious case of prisoner abuse, when two young Afghanis

> were found dead within days of each other, hanging by their shackled wrists in isolation cells at the [US military] prison in Bagram, north of Kabul. An Army investigation showed they were treated harshly by interrogators, deprived of sleep for days, and struck so often in the legs by guards that a coroner compared the injuries to being run over by a bus.[23]

The investigation stalled because "officers and soldiers at Bagram differed over what specific guidelines, if any, applied," an ambiguity that "confounded the Army's criminal investigation for months and ... gave the accused soldiers a defense ..."[24]

In addition to harsh interrogations by its own personnel, the United States has engaged in so-called "extraordinary renditions," where detainees are sent to other countries for interrogation by local authorities of sinister reputation.

[20] CBS News, *Death of a General*, April 9, 2006, available at <www.cbsnews.com/stories/2006/04/06/60minutes/main1476781_page2.shtml>.

[21] Ibid. See also David R. Irvine, *The Demise of Military Accountability*, Salt Lake Tribune, January 29, 2006.

[22] Jane Mayer, *A Deadly Interrogation*, The New Yorker, November 14, 2005; John McChesney, *The Death of an Iraqi Prisoner*, NPR's All Things Considered, October 27, 2005, available at <www.npr.org/templates/story/story.php?storyId=4977986>; Seth Hettena, *Navy SEAL Acquitted of Abusing Iraqi Prisoner Who Later Died*, Associated Press, May 28, 2005, available at <www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2005/05/27/state/n171730D65.DTL>.

[23] Tim Golden, *Years After 2 Afghans Died, Abuse Case Falters*, N.Y. Times, February 13, 2006.

[24] Ibid. at A11.

The practice, nicknamed "outsourcing torture," has existed since the Clinton administration, but accelerated dramatically in the War on Terror.[25] Several detainees, seized by mistake, rendered, and later released, describe torture inflicted on them.[26] In May 2006, the State Department's legal advisor made explicit what observers had long surmised: that US lawyers believe the Torture Convention's ban on returning people to states where they face torture does not cover cases where the person is rendered from a country other than the United States.[27]

Thus, "We don't torture" comes with an asterisked proviso: "It depends who you mean by 'we,' and it depends what you mean by 'torture.'" Likewise, "The United States obeys its legal obligations" comes with the unspoken qualification "... which is easy because we hardly have any." The provisos are the torture lawyers' handiwork. They allow politicians to profess great respect for law and human rights, while operating without the fetters that their noble words suggest.

How did we get there?

[25] Jane Mayer, *Outsourcing Torture*, The New Yorker, February 5, 2004. See also an interview with Michael Scheuer, an ex-CIA officer who helped develop the program: *"Die CIA hat das Recht, jedes Gesetz zu brechen": Darf der US-Geheimdienst mutmassliche Terroristen entführen? Michael Scheuer, ein Hauptverantwortlicher, gibt erstmals Antworten*, Die Zeit (Hamburg), December 28, 2005, available at <www.zeit.de/2006/01/M__Scheuer?page=5>. An English translation is available at <www.counterpunch.org/kleine01072006.html>.

An investigation has revealed, perhaps unsurprisingly, that several European countries whose governments expressed shock at revelations that their bases and airports formed part of the secret CIA rendition network actually were colluding with the United States. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, Draft report by Dick Marty, June 7, 2006, available at <http://assembly.coe.int/Main.asp?Link=/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.htm>.

[26] The best-known is Maher Arar. See Mayer, *Outsourcing Torture*, supra note 25; Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"*, 20 Georgetown Imm. L. J. 213 (2006). Another was Khaled El-Masri, a German cab driver seized while on holiday in Macedonia, turned over to US agents, and held for months in Afghanistan. See *Extraordinary Rendition*, Harper's Mag., February 2006, at 21–24 (excerpting El-Masri's statement). His was a case of mistaken identity, which created a sensation in Germany after he was released. US courts refused to hear lawsuits filed by Arar and El-Masri, on the astonishing basis that revealing "state secrets" about gross government misconduct could embarrass the United States and therefore be bad for national security. Arar v. Ashcroft, 414 F.Supp.2d 250, 281–83 (E.D.N.Y. 2006); El-Masri v. Tenet, E.D. Va., Case 1:05cv1417 (memorandum opinion of Ellis, J., May 12, 2006). Another rendition victim, Laid Saidi, claims that his US captors transported him to Afghanistan, hung him by his wrists for five days, and released him only after sixteen months. Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in US Hands*, N.Y. Times, July 7, 2006 available at <www.nytimes.com/2006/07/07world/africa/07algeria.html?_r=1&oref=slogin>.

[27] List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America 32–37 (2006), available at <www.us-mission.ch/Press2006/CAT-May5.pdf>.

The post-9/11 legal response

The torture lawyers went into overdrive in the wake of the September 11 attacks, producing a flood of documents in a remarkably short time. As an article in the *New York Times* explains,

> The administration's legal approach to terrorism began to emerge in the first turbulent days after Sept. 11, as the officials in charge of key agencies exhorted their aides to confront Al Qaeda's threat with bold imagination.
>
> "Legally, the watchword became 'forward-leaning,'" said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.'"
>
> The challenge resounded among young lawyers who were settling into important posts at the White House, the Justice Department and other agencies.[28]

As an example of "forward-leaning" legal strategy, the article cites an OLC memorandum by John Yoo on how to overcome constitutional objections to the use of military force against terrorists within the US, for example "to raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed or injured by exchanges of fire."[29] Yoo wrote the memo just ten days after September 11. The article explains that "lawyers in the administration took the same 'forward-leaning' approach to making plans for the terrorists they thought would be captured."[30]

Related to the "forward-leaning" strategy is what Ron Suskind refers to as "the Cheney Doctrine" or "the one percent doctrine," allegedly formulated by the US Vice-President in November 2001. In Suskind's words, "If there was even a one percent chance of terrorists getting a weapon of mass destruction . . . the United States must now act as if it were a certainty."[31] "It's not about our analysis, or finding a preponderance of evidence," Suskind quotes Cheney as saying. "It's about our response."[32] Suskind asserts that the Cheney Doctrine formed the guiding principle in the War on Terror. It carries far-reaching implications for the interrogation of captives: if even a minute chance of catastrophe must be treated as a certainty, every interrogation becomes a ticking time-bomb case – and

[28] Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. Times, October 24, 2004, A1, at A12. The lawyers were political conservatives, mostly veterans of the Federalist Society and clerkships with Justices Scalia and Thomas, and Judge Laurence Silberman. Some sources for the article stated that their "strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism," such as strengthening executive power and halting US submission to international law. Ibid.

[29] Ibid. This memo has not yet been released or leaked. [30] Ibid.

[31] Ron Suskind, The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11 62 (2006).

[32] Ibid.

ticking time-bomb cases are the one situation where many people who otherwise balk at torture reluctantly accept that breaking the taboo is morally justified.

The most crucial portions of the "forward-leaning" strategy – which included not only interrogation issues but military tribunals and the applicability of the Geneva Conventions as well – were formulated in near-total secrecy by a small group of like-minded Administration lawyers, intentionally excluding anticipated dissenters in the State Department and the JAG Corps.[33] Indeed, when the chief JAG officers of the four military services learned of the Bybee Memo months after the fact, they responded with forceful criticism and barbed reminders that "OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion."[34] The chief Air Force JAG reminded the Secretary of the Air Force that "the use of the more extreme interrogation techniques simply is not how the US armed forces have operated in recent history. We have taken the legal and moral 'high road' in the conduct of our military operations regardless of how others may operate."[35] (This, by the way, is exactly the kind of moral reminder that a good lawyer ought to give clients.) Nevertheless, where in past administrations OLC weighed in only after relevant federal agencies had addressed legal questions, now the OLC "frequently had a first and final say."[36] The Bush Administration took pains to bypass legal advice it did not want to hear, and Vice President Dick Cheney's lead counsel, David Addington, was particularly suspicious that JAGs are too independent.[37] In 2006 it emerged that Defense Secretary Donald Rumsfeld had quietly signed off on a torture-permissive working group report without ever notifying officials who objected to it (and who were in the working group), including Navy general counsel Alberto Mora. Mora had argued for months against cruel or degrading interrogation techniques. He thought he had won his argument when Defense Department general counsel William Haynes wrote a US Senator that the military would not use abusive tactics. But Haynes, who had previously approved intimidation with dogs, forced

[33] Golden, *After Terror, a Secret Rewriting of Military Law*, supra note 28, at 12–13.

[34] Memorandum from Brigadier General Kevin M. Sankuhler (USMC) for the General Counsel of the Air Force, February 27, 2003, reprinted in The Torture Debate, supra note 2, at 383.

[35] Memorandum from Major General Jack L. Rives for the Secretary of the Air Force, February 5, 2003, reprinted in The Torture Debate, supra note 2, at 378.

[36] Golden, *After Terror, a Secret Rewriting of Military Law*, supra note 28, at 13.

[37] Chitra Ragavan, *Cheney's Guy*, US News & World Report, May 29, 2006, available at <www.usnews.com/usnews/news/articles/060529/29addington.htm>. According to Ragavan, Addington has been the most powerful and influential of the torture lawyers, a view confirmed by many sources in Jane Mayer's detailed article on Addington: Jane Mayer, *The Hidden Power*, The New Yorker, July 6, 2006, available at <www.newyorker.com/fact/content/articles/060703fa_fact 1>.

nudity, and sleep deprivation, outmaneuvered Mora.[38] In the words of reporter Jane Mayer, "Legal critics within the Administration had been allowed to think that they were engaged in a meaningful process; but their deliberations appeared to have been largely an academic exercise, or, worse, a charade."[39] Nor did Abu Ghraib change the Bush Administration's desire to keep politically independent JAG officers out of the advisory loop. In response to Abu Ghraib, the US Congress enacted legislation that prohibited Defense Department officials from interfering with JAG officers offering independent legal advice.[40] But although President Bush signed the legislation, his signing statement implied that the executive branch would not abide by these prohibitions.[41]

The post-9/11 OLC used the catastrophe to advance an extraordinarily militant version of executive supremacy – an agenda that, even before 9/11, had preoccupied Yoo, Cheney, and Addington.[42] Just two weeks after 9/11, a Yoo memorandum concluded "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." No statute, he added, "can 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."[43] This bold assertion prefigures the Bybee Memo, because it clearly implies that the decision whether to torture would be "for the President alone to make." The conclusion reappeared in one of the Bybee Memo's most controversial sections, which argued that the criminal laws

[38] Mora's battle is described in Jane Mayer, *Annals of the Pentagon: The Memo*, The New Yorker, February 27, 2006, available at <www.newyorker.com/fact/content/articles/060227fa_fact>. Haynes's approval is in TP, supra note 1, at 237; the list of techniques he recommended is in TP, at 227–28.

[39] Mayer, *The Memo*, supra note 38. The working group report is in TP, supra note 1, at 241–359.

[40] 10 U.S.C. §§ 3037, 5046, 5148, and 8037.

[41] Statement on signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, October 28, 2004, available at <www.highbeam.com/library/docfree.asp?DOCID=1G1:125646055&ctrlInfo=Round19%3AMode19b%3ADocG%3AResult&ao=>. On Bush's use of signing statements, see Charlie Savage, *Bush Challenges Hundreds of Laws*, Boston Globe, April 30, 2006, available at <www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/?>.

[42] In an article about Addington, Chitra Ragavan writes, "The 9/11 attacks became the crucible for the administration's commitment to restoring presidential power and prerogative." Ragavan, supra note 37. Mayer likewise emphasizes that Addington and his boss Dick Cheney both believe that the presidency had been wrongly weakened from the Nixon administration on. Mayer, *The Hidden Power*, supra note 37.

[43] Memorandum from John C. Yoo to Timothy Flanigan, Deputy Counsel to the President, September 25, 2001, reprinted in TP, supra note 1, at 24.

against torture could not be enforced against interrogators authorized by the President.[44]

One of the first steps the Administration took was to strip Geneva Convention protections from Al Qaeda and Taliban captives (a position eventually rejected by the Supreme Court in June 2006, when the Court held that common Article 3 of Geneva applies in the War on Terror and therefore protects even Al Qaeda captives).[45] In January 2002, OLC concluded that the President has unilateral authority to suspend the Geneva Conventions, and that customary international law (which incorporates Geneva protections) has no purchase on US domestic law – a deeply controversial position favored by some conservative academics but never accepted by mainstream lawyers or the Supreme Court.[46] In any event, two memos argued, the Geneva Conventions do not apply to Al Qaeda or the Taliban, because Al Qaeda is not a state and the Taliban were unlawful combatants. The President quickly adopted this position.[47] However, the President added, because "our Nation has been and will continue to be a strong supporter of Geneva and its principles . . . the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[48] Critics quickly noticed that this order applies only to the armed forces, not the CIA, and that the phrase "consistent with military necessity" creates a loophole for harsh interrogation. The carefully crafted phrasing, which makes the document superficially appear more protective of detainees than it actually is, was more handiwork of the White House torture lawyers. A few months later, Attorney General Gonzales qualified the protection even more dramatically when he stated that "humane" treatment of detainees need consist of nothing more than providing them food, clothing, shelter, and medical care.[49]

Stripping away Geneva protections from the detainees was crucial to all the further work of the torture lawyers. It was essential that as few

[44] Memorandum from Jay S. Bybee to Alberto R. Gonzales, August 1, 2002 [henceforth: Bybee Memo], reprinted in TP, supra note 1, at 204.

[45] Hamdan v. Rumsfeld, 2006 Lexis 5185 (June 29, 2006), at *124–9.

[46] Memorandum from Bybee to Gonzales, January 22, 2002, reprinted in TP, supra note 1, at 91, 93, 112–13.

[47] Ibid.; memorandum from Bybee to Gonzales, February 7, 2002, in TP, supra note 1, at 136; Memorandum from President Bush to the Vice-President and other officials, February 7, 2002, in TP, supra note 1, at 134–35.

[48] Ibid. at 135.

[49] "The President said – for example on March 31, 2003 – that he expects detainees to be treated humanely. As you know, the term 'humanely' has no precise legal definition. As a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care." Written response of Alberto R. Gonzales to questions posed by Senator Edward M. Kennedy, question #15, January 2005.

detainees as possible be classified as prisoners of war under the Third Geneva Convention, because POW status protects them not only from torture but from all forms of coercive questioning. Indeed, Article 17 provides that "prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Stripping away common Article 3 protections against torture and humiliation was equally essential if harsh interrogators were to avoid war crimes charges: as we have seen, violations of common Article 3, like grave breaches of the Geneva Conventions, were war crimes under federal law. Bybee and Yoo argued that because the global war on terror (the "GWOT") is international, common Article 3 does not apply, because Article 3 is limited to armed conflicts "not of an international character."[50] (This is the interpretation the Supreme Court eventually rejected in June 2006.) These early opinions set the stage for the torture memos that followed.

The Bybee Torture Memo

Unquestionably, the Bybee Memo is the most notorious of the memos and advisory opinions dealing with abuse of detainees. According to John Yoo, the memo was written because the CIA wanted guidance on how far it could go interrogating high-value Al Qaeda detainees; the United States had already captured Abu Zubaydah, believed by some to be a top Al Qaeda leader.[51] Apparently, the CIA wanted to go quite far. Abu Zubaydah's captors reportedly withheld pain medication from him – he was wounded when he was captured – and the CIA wanted to know whether it would be illegal to waterboard him.[52] Evidently, eager as CIA interrogators might have been to

[50] Memorandum from Jay S. Bybee to Alberto Gonzales and William Haynes II, January 22, 2002, TP, supra note 1, at 85–89.

[51] Yoo interview on Frontline, supra note 5.

[52] Don Van Natta *et al.*, *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. Times, March 9, 2003, at A1; Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. Times, January 13, 2005, A1, A16. Suskind reports that Zubaydah received first-rate medical care, but quotes a CIA official who said, "He received the finest medical attention on the planet. We got him in very good health, so we could start to torture him." Suskind, supra note 31, at 100. Suskind also describes "[CIA Director George] Tenet's months of pressure on his legal team" to permit harsh interrogation. Ibid. at 100–1. See also Dana Priest, *Covert CIA Program Withstands New Furor*, Wash. Post, December 30, 2005, at A1 (describing aggressive positions taken by CIA lawyers). The Zubaydah interrogation, however, proved disappointing: Zubaydah proved not to be a big fish – an FBI specialist on Al Qaeda described him as a meet-and-greet guy, "Joe Louis in the lobby of Caesar's Palace, shaking hands." Suskind, at 100. Furthermore, he was insane. Ibid. at 95–96, 100. Eventually, he revealed the name of dirty-bomb suspect Jose Padilla – but only after harsh interrogation had stopped and interrogators switched to a different tactic, arguing religion with Zubaydah. Ibid. at 116–17. Suskind's account contradicts President Bush's assertion that

take the gloves off, they were unwilling to do so without a legal opinion to back them up. OLC did not disappoint. But it would be a mistake to suppose that OLC was acting on its own: lawyers and other officials in the White House, the Vice-President's office, and the National Security Council also vetted the torture memo.[53]

The Bybee Memo provided maximum reassurance of impunity to nervous interrogators. It concluded that inflicting physical pain does not count as torture until the pain reaches the level associated with organ failure or death; that inflicting mental pain is lawful unless the interrogator specifically intends it to last months or years beyond the interrogation; that utilizing techniques known to be painful is not torture unless the interrogator specifically intends the pain to be equivalent to the pain accompanying organ failure or death; that enforcing criminal laws against Presidentially authorized torturers would be unconstitutional; that self-defense includes torturing helpless detainees in the name of national defense; and that torture in the name of national security may be legally justifiable as the lesser evil, through the doctrine of necessity.

These conclusions range from the doubtful to the loony. Some can be supported by conventional, if debatable, legal arguments. These include the analysis of mental torture, which has some support in the language of the statute, and the discussion of specific intent, where OLC seizes on one of two standard readings of the doctrine but, quoting authorities quite selectively, ignores the other.

Others, however, have the mad logic of the Queen of Hearts' arguments with Alice. The analysis of self-defense, for example, inverts a doctrine permitting last-resort defensive violence against assailants into a rationale for waterboarding bound and helpless prisoners. OLC cites no conventional legal authority for this inversion, for the simple reason that there is none. Although OLC claimed to base its analysis on the teachings of "leading scholarly commentators" (again: "some commentators"), in fact there is only one such commentator, and OLC flatly misrepresents what he says.[54] Although

"alternative interrogation procedures" were "necessary" to break Zubaydah. Bush speech, supra note 18.

[53] Dana Priest, *CIA Puts Harsh Tactics on Hold*, Wash. Post, June 27, 2004, A1.

[54] The commentator is Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989). Here is what OLC says: "Leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the anti-torture statute] would be justified under the doctrine of self-defense." TP, supra note 1, at 211, citing to Moore. And here is what Moore actually says on the page OLC cites: "*The literal law of self-defense is not available to justify their torture.* But the principle uncovered as the moral basis of the defense may be applicable" (emphasis added). OLC states that "the doctrine of self-defense" would justify torture, where Moore says, quite literally, the opposite. Note also the difference between OLC's assertive "would be justified" and Moore's cautious "may be applicable."

Professors Eric Posner and Adrian Vermeule quickly published a *Wall Street Journal* op-ed describing the Memo's arguments as "standard lawyerly fare, routine stuff,"[55] theirs was a distinctly minority view that seemed plainly to be an exercise in political damage control.[56] By ordinary lawyerly standards, the Bybee Memo was, in Peter Brooks's words, "textual interpretation run amok – less 'lawyering as usual' than the work of some bizarre literary deconstructionist."[57] Even the OLC – after Jack Goldsmith (a sometimes co-author of Professor Posner) took over from Jay Bybee – did not regard the Bybee Memo as standard lawyerly fare. In an unusual move, it publicly repudiated the Memo a few months after it was leaked.

This is not the place to offer a detailed analysis of the Bybee Memo (which I have done elsewhere).[58] To illustrate its eccentricity, I will pick just two examples: the organ-failure definition of "severe pain," and one curious portion of its discussion of the necessity defense.

The amazing fact about the organ-failure definition is that Yoo and his co-authors based it on a Medicare statute that has nothing whatsoever to do with torture. The statute defines an emergency medical condition as one in which someone experiences symptoms that "a prudent lay person ... could reasonably expect" might indicate "serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." The statute specifies that severe pain is one such symptom. In an exquisite exercise of legal formalism run amok, the Memo infers that pain is severe only if it is at the level indicating an emergency medical condition. The authors solemnly cite a

[55] Eric Posner & Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall St. J., July 6, 2004.

[56] The Bybee Memorandum provoked a flurry of commentary, almost entirely negative. Along with my own paper *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate, supra note 2, see, e.g., Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 Geo. J. Legal Ethics 557 (2005); Richard B. Bilder & Detlev A. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 A.J.I.L. 689 (2004); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Security L. & Pol'y 455 (2005); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in The Torture Debate, supra note 2, at 241; Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. Colo. L. Rev. 1 (2006); Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L. J. 1213 (2005); Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 Geo. J. Legal Ethics 225 (2006); Jeremy Waldron, *Torture and the Common Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681 (2005); Ruth Wedgwood & R. James Woolsey, *Law and Torture*, Wall St. J., June 28, 2004; W. Bradley Wendell, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67 (2005).

[57] Peter Brooks, *The Plain Meaning of Torture?*, Slate, February 9, 2005, available at <www.slate.com/id/2113314>.

[58] I offer a detailed analysis of the Memo in *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate, supra note 2, at 55–68.

Supreme Court decision to show that Congress's use of a phrase in one statute should be used to interpret its meaning in another. Months later, when OLC withdrew the Bybee Memo and substituted the Levin Memo, the substitute memo rejected this argument and pointed out the obvious: that the Medicare statute was a definition of an emergency medical condition, not of severe pain, and the difference in context precludes treating it as an implicit definition of severe pain.[59] The organ-failure definition, perhaps more than any other portion of the Bybee Memo, involved lawyering that cannot be taken seriously. It seems obvious that OLC lawyers simply did an electronic search of the phrase "severe pain" in the United States Code and came up with the healthcare statutes (the only ones other than torture-related statutes in the entire Code to employ the phrase). Then they decided to see how clever they could get. The result is a parody of legal analysis.

The discussion of the necessity defense is bizarre for a different reason. Looked at dispassionately, necessity offers the strongest defense of torture on normative grounds. The necessity defense justifies otherwise criminal conduct undertaken to prevent a greater evil, and in extreme cases it is at least thinkable that torture might be the lesser evil.[60]

However, the Bybee Memo's authors were not content to argue for the possibility of the necessity defense. They also threw in an argument that even though the necessity defense is available to torturers, it would not necessarily be available in cases of abortion to save a woman's life.[61] At this point, the

[59] Levin Memo, in The Torture Debate, supra note 2, at 367–68, note 17.

[60] I should also note, however, that the claim that the necessity defense is available for the crime of torture runs flatly contrary to the official opinion of the United States government in its 1999 report to the UN Committee Against Torture, a fact that the Bybee Memo chooses not to mention: "US law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a 'state of public emergency') or on orders from a superior officer or public authority." Available at <www.state.gov/www/global/human_ rights/torture_intro.html>. The Memo also ignores a Supreme Court opinion decided just three months earlier asserting that it is an "open question" whether the necessity defense is ever available for a federal crime without the statute specifically making it available (and the Court's language suggests that the answer might turn out to be no). United States v. Oakland Cannabis Buyers' Coop, 532 U.S. 483, 490 (2001). I am grateful to Marty Lederman for calling these documents to my attention.

[61] Bybee Memo, in TP, supra note 1, at 209. In addition to its blatant political pandering, the argument is also garbled to the point of incoherence. When Congress enacted the US anti-torture statutes, it broadened CAT's definition of torture. Whereas CAT defines torture as the infliction of severe pain for reasons such as interrogation, intimidation, punishment, or discrimination, the US statute drops these reasons and bans torture regardless of why it is inflicted. Congress decided that all torture is criminal, not just torture for certain reasons. In other words, Congress evidently concluded that nothing can justify torture. OLC reads the Congressional emendation of CAT's language in the opposite way, concluding that "Congress has not explicitly made a determination of values vis-à-vis torture." This sentence is opaque

partisan political nature of the document becomes too obvious to ignore. It is the moment when the clock strikes thirteen. Opposition to abortion was an article of faith in the Ashcroft Justice Department, and apparently the OLC lawyers decided to try for a "two-fer" – not only providing a necessity defense for torture, but throwing in a clever hip-check to forestall any possibility that their handiwork might be commandeered to justify life-saving abortions if a legislature ever voted to outlaw them. Even abortion opponents are likely to balk at the thought that torture might be a lesser evil than abortion to save a mother's life. But this was the conclusion that the OLC aimed to preserve.

The Levin Memo

But Bybee's is not the only torture memo that deserves similar judgments. On the eve of Alberto Gonzales's confirmation hearing as Attorney General, the Justice Department abruptly withdrew the Bybee Memo and replaced it with another OLC opinion, the Levin Memo.[62] OLC lawyer Daniel Levin vehemently denounced torture, retracted Bybee's specific intent analysis, rejected the "organ failure" definition of severe pain, and no longer argued that it would be unconstitutional to prosecute Presidentially authorized torturers. In all these respects, the Levin Memo sounded more moderate than Bybee, and perhaps restored a measure of credibility to the OLC. Furthermore, the Levin Memo does not indulge in stretched, bizarre, or sophistical arguments – with one striking exception I shall note shortly.

Read closely, however, the Levin Memo makes only minimum cosmetic changes to the bits of Bybee that drew the worst publicity. Levin does not point out the weaknesses in Bybee's criminal-defense arguments; he simply never discusses possible defenses to criminal charges of torture.[63] The memo likewise ducks the presidential-power question rather than changing Bybee's answer. And, although Levin explicitly contradicts Bybee's conclusion that pain must be excruciating to be severe, every one of the Memo's illustrations of "severe pain" is, in fact, excruciating: "severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers . . . cutting off . . . fingers, pulling out . . . fingernails" and similar atrocities.[64] These

and clumsy; it is hard to speak clearly when you are fudging. The next sentence is even worse, bordering on gibberish: "In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense."

[62] It is reproduced in The Torture Debate, supra note 2, at 361.

[63] He does say that "there is no exception under the statute permitting torture to be used for a 'good reason.'" Ibid. at 376. This might be read to suggest that the defenses of necessity and self-defense are unavailable, but the context suggests otherwise.

[64] Ibid. at 369.

barbaric illustrations are the only operational guidance Levin has to offer on how to tell when pain is "severe," and they obviously suggest that milder techniques are not torture. While Levin's legal reasoning marks a return to normalcy, the opinion provides ample cover for interrogators who "merely" waterboard detainees or deprive them of sleep for weeks. Indeed, Levin specifically states that he has "reviewed this Office's prior opinions addressing issues involving treatment of detainees and do[es] not believe that any of their conclusions would be different under the standards set forth in this memorandum."[65] This includes another, still secret, August 2002 OLC opinion on specific interrogation techniques used by the CIA, believed to include waterboarding.[66]

Indeed, at one point the Levin Memo indulges in the kind of frivolous statutory interpretation that was the hallmark of the Bybee Memo it replaced – and that is a carefully crafted paragraph that reads a nonexistent word into the torture statute which would render it inapplicable to waterboarding.[67] Recall that the torture statutes define torture to include both severe physical pain and severe physical suffering. Waterboarding, by duplicating the experiences of drowning, would presumably fall under the "suffering" prong of this definition rather than the "pain" prong. And the suffering must indeed be severe: according to CIA sources, Khalid Sheikh Mohammed, the architect of 9/11, "won the admiration of interrogators when he was able to last between two and two-and-a-half minutes before begging to confess"; CIA agents who underwent waterboarding all broke in less than fifteen seconds.[68]

Enter the Levin Memo, which concludes that "to constitute torture, '*severe* physical suffering' would have to be a condition of some extended

[65] Ibid. at 362, note 8.

[66] See *Opening Statement of Senator Carl Levin at the Personnel Subcommittee Hearing on Military Commissions, Detainees and Interrogation Procedures*, July 14, 2005, available at <www.senate.gov/~levin/newsroom/release.cfm?id=240601> (referring to a second, still secret, Bybee memorandum). Bush Administration officials also stated that Michael Chertoff, then head of the Justice Department's Criminal Division, consulted on the second Bybee memorandum, which reportedly permitted waterboarding. David Johnston, Neil Lewis & Douglas Jehl, *Security Nominee Gave Advice to the C.I.A. on Torture Laws*, N.Y. Times, January 29, 2005, available at <www.nytimes.com/2005/01/29/politics/29home.html?pagewanted=1&ei=5090&en=8b261a9df1338e4a&ex=1264741200&partner=rssuserland>.

[67] I am grateful to Marty Lederman for pointing out the connection between this portion of the Levin Memo and waterboarding. See Lederman, *Yes, It's a No-Brainer: Waterboarding Is Torture*, Balkinization, October 28, 2006, available at <http://balkin.blogspot.com/2006/10/yes-its-no-brainer-waterboarding-is.html>.

[68] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>. On the treatment of KSM, see James Risen, State of War: The Secret History of the CIA and the Bush Administration 32–33 (2006). Risen asserts that CIA agents inflicted hundreds of abuses each week on KSM, and quotes one source who said that it was the accumulation of so many abuses that made the interrogation program torture.

duration or persistence as well as intensity."[69] That would exclude any technique that breaks victims in a matter of seconds or minutes, such as waterboarding. But in fact, the torture statute contains no mention whatever of "extended duration or persistence." This is especially striking because the statute does state that *mental* pain and suffering must be "prolonged" to count as torture – but it never says that physical pain or suffering must be prolonged. The authors of the Levin Memo simply made up the duration requirement out of whole cloth.

The Beaver Memo

Next consider the memorandum written for the Defense Department by LTC Diane Beaver (a JAG legal advisor at Guantánamo), on the legality of specific interrogation techniques. Like the Bybee Memo, Beaver's was written to respond to a specific request by interrogators who were having a hard time "breaking" a high-value Al Qaeda detainee; it was then forwarded to the Pentagon. In this case, the detainee was Mohammed Al-Kahtani (or Qahtani), one of the so-called "twentieth hijackers" who tried but failed to participate in 9/11. Kahtani was detained at Guantánamo, and in 2002 a series of requests went from Guantánamo to Washington for approval of harsh interrogation techniques.[70] Eventually, Kahtani was subjected to a wide variety of sexual humiliations, intensive sleep deprivation (20-hour-a-day interrogations for 48 out of 54 days, interrupted only when Kahtani's pulse-rate plummeted), and months of isolation. He was shot up with three-and-a-half bags of intravenous fluid and forced to urinate on himself; leashed and made to do dog tricks; threatened with working dogs (a technique specifically approved by Defense Secretary Donald Rumsfeld, who closely followed the interrogation of Kahtani[71]); straddled by a female interrogator who taunted him about the deaths of other Al Qaeda members; made to wear a thong on his head and a bra; stripped naked in front of women; and bombarded with ear-splitting "futility music" (the Army's term) by Metallica and Britney Spears.[72] A subsequent US Army report concluded that none of these

[69] The Torture Debate, supra note 2, at 371. [70] TP, supra note 1, at 223–28.

[71] Michael Scherer & Mark Benjamin, *What Rumsfeld Knew*, Salon.com, April 14, 2006, available at <www.salon.com/news/feature/2006/04/14/rummy/index_np.html>. This article is based on an Army inspector-general's report Salon obtained through the Freedom of Information Act.

[72] These techniques (and the Army's judgment that they were approved) are described in the Army's own report, the so-called Schmidt Report, supra note 17. Most of this report remains classified, but a thirty-page summary has been released and is available at <www.defenselink.mil/news/Jul2005/d20050714report.pdf>. See also Adam Zagorin *et al.*, *Inside the Interrogation of Detainee 063*, and *Excerpts from an Interrogation Log*, both in Time Mag., June 20, 2005. The forced urination is described in the latter articles but not in the Schmidt Report.

techniques is "inhumane."[73] (Nor is "futility music" the most bizarre Guantánamo tactic: FBI agents have reported seeing interrogators force detainees to watch homosexual porn movies.[74])

Some of these techniques, including the dog threats, leading detainees around on a leash, placing women's underwear on detainees' heads and forced nudity, migrated to Abu Ghraib, where soldiers memorialized them in photos that soon became notorious throughout the world. In General Randall Schmidt's words, "Just for the lack of a camera, it would sure look like Abu Ghraib."[75] Compelling evidence suggests that the migration resulted when the Guantánamo commander, General Geoffrey Miller, was sent to Iraq to "Gitmoize" intelligence operations there (although Miller denies it).[76] If so, the implications are enormous: it would mean that Abu Ghraib does not represent merely the spontaneous crimes of low-level sadists, but rather the unauthorized spillover of techniques deliberately exported from Guantánamo to Iraq as a high-level policy decision.[77] That would imply a direct causal pathway connecting the advice of the torture lawyers to the Abu Ghraib abuses via General Miller. (A former State Department official traces the policy back to Cheney's then general counsel David Addington.[78])

Beaver labeled her memorandum a "legal brief" on counter-resistance strategies, and a brief rather than an impartial legal analysis is indeed what she wrote. Beaver rightly observes that interrogations must meet US constitutional standards under the Eighth Amendment. To identify these

[73] Schmidt Report, supra note 17.

[74] See documents obtained under the Freedom of Information Act by the ACLU, available at <www.aclu.org/torturefoia>.

[75] Quoted in Michael Scherer & Mark Benjamin, supra note 71.

[76] Janice Karpinski, the commander of the Military Police unit implicated in the Abu Ghraib abuses, claims that General Miller told her his job was to "GTMO-ize" or "Gitmoize" Abu Ghraib; Miller denies he ever used that phrase. Mark Benjamin, *Not So Fast, General*, Salon.com, March 7, 2006, available at <www.salon.com/news/feature/2006/03/07/major_general/index_np.html>. However, the mandate Miller received from Rumsfeld was to replicate his Gitmo intelligence successes in Iraq. John Barry *et al. The Roots of Torture*, Newsweek, May 24, 2004; see also Josh White, *Army General Advocated Using Dogs at Abu Ghraib, Officer Testifies*, Wash. Post, July 28, 2005, at A18 (testimony by top MP operations officer at Abu Ghraib that Miller "was sent over by the secretary of defense to take their interrogation techniques they used at Guantánamo Bay and incorporate them into Iraq"). The Fay-Jones Report on Abu Ghraib likewise concludes that it is possible that interrogation techniques had migrated from Guantánamo to Abu Ghraib. TP, supra note 1, at 1004. And Donald Rumsfeld briefed Miller on the Department of Defense's working group report on interrogation techniques. Mayer, *The Memo*, supra note 38. According to one released detainee, inmates received the worst treatment during Miller's command at Guantánamo. Michelle Norris, *Leaving Guantánamo: Enduring a Harsh Stay*, NPR's All Things Considered, May 22, 2006.

[77] For analysis along these lines, see Mark Danner, Torture and Truth (2004).

[78] *Former Powell Aide Links Cheney's Office to Abuse Directives*, Int'l Herald-Tribune, November 3, 2005.

standards, she analyzes the 1992 Supreme Court decision *Hudson v. McMillian*.[79] *Hudson* addressed the question whether mistreatment of prisoners must cause serious injury to violate the constitutional prohibition on cruel and unusual punishment, and its answer is no: even minor injuries can violate the Eighth Amendment if guards inflict them for no good reason. (A good reason would consist of subduing a violent inmate.) Beaver's analysis of the case virtually flips it upside down, and the message she draws from *Hudson* is that mistreatment is unconstitutional only if there is no "good faith legitimate governmental interest" at stake and the interrogator acted "maliciously or sadistically for the very purpose of causing harm."[80] Obviously, any interrogation technique, no matter how brutal, passes this test if the interrogator's sole purpose is to extract intelligence. Beaver inverted a Supreme Court decision designed to broaden the protections of prisoners and read it to narrow them dramatically.

And indeed, Beaver proceeded to legitimize every proposed technique, including "the use of a wet towel to induce the misperception of suffocation" – a version of waterboarding. Oddly, Beaver adds that "The use of physical contact with the detainee ... will technically constitute an assault," but immediately goes on to "recommend that the proposed methods of interrogation be approved."[81] In other words, her memo on the legality of interrogation techniques concludes by recommending government approval of a felony.

The Draft Article 49 Opinion

After Jay Bybee's departure, Jack Goldsmith, a distinguished University of Chicago law professor (now a Harvard law professor), took over the leadership of OLC. Goldsmith took several courageous stands against Administration hard-liners, stands for which he reportedly had to withstand the fury of David Addington, Cheney's volcanic general counsel, regarded by many as the hardest of hard-liners.[82] As early as December 2003, before the Abu Ghraib scandal and the leak of the Bybee Memo, Goldsmith advised the government not to rely on a March 2003 memo by John Yoo that had directly influenced the Defense Department's working group on interrogation.[83] And it was under Goldsmith's leadership that OLC

[79] 503 U.S. 1 (1992). [80] TP, supra note 1, at 232. [81] Ibid. at 235.

[82] Daniel Kleidman, Stuart Taylor, Jr., & Evan Thomas, *Palace Revolt*, Newsweek, Feb. 6, 2006. On David Addington's role, see Ragavan, supra note 37, and Mayer, *The Hidden Power*, supra note 37.

[83] In February 2005, OLC formally retracted this latter Yoo memorandum. OLC letter from Daniel Levin to William J. Haynes II, February 5, 2005, regarding the Yoo memorandum of March 14, 2003. So far as I know, this letter is unpublished, but I have a PDF of the signed letter; and a link to the PDF may be found in Marty Lederman's blog at http://balkin.blogspot.

repudiated the Bybee Memo. Some regard Goldsmith as an unsung hero in the torture debates.

Nevertheless, Goldsmith too drafted a memorandum that exemplifies the kind of loophole legalism I object to in the other memoranda. (Let me emphasize, however, that Goldsmith's draft was never given final approval, and that could indicate that Goldsmith thought better of it.) Written in March 2004, it concerned the question of whether detainees in Iraq could be temporarily sent out of the country for interrogation, despite plain language in Article 49 of the Fourth Geneva Convention stating:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.[84]

Goldsmith divided the memo into two sections, one on whether Article 49 would prevent US authorities from deporting illegal aliens in Iraq "pursuant to local immigration law," and one on whether removing protected civilians from Iraq for interrogation violates Article 49.

In answer to the first question, Goldsmith contends that the drafters of Article 49 could not have meant to ban the removal of illegal aliens under an occupied state's immigration law. That conclusion sounds uncontroversial. But we shouldn't forget that during World War II, the removal of illegal aliens under an occupied state's immigration law included deporting stateless Jewish refugees from Vichy France to death camps in the East. The Vichy

com/2005/09/silver-linings-or-strange-but-true.html>, which also provides a useful chronology and analysis. The March 14, 2003 Yoo memorandum has not been released or leaked. Levin's letter mentions that twenty-four interrogation techniques are still approved; the implication is that the Yoo memorandum okayed techniques that OLC no longer approves.

[84] The *Washington Post* reports that Goldsmith had written an opinion five months earlier concluding that a ghost detainee named Rashul could not be removed from Iraq. By that time the CIA had already spirited Rashul away to Afghanistan, and after Goldsmith's opinion they quickly returned him to Iraq. According to an intelligence source, "That case started the CIA yammering to Justice to get a better memo." Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, Wash. Post, October 24, 2004, A1, A21. However, Professor Goldsmith has informed me that this account is seriously defective: there was no previous memo on the topic, and he did not give in to any pressure. (Private e-mail communications, August 27 and 29, 2006.) The CIA's deputy inspector general "told others she was offended that the CIA's general counsel had worked to secure a secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations without notice to the International Committee of the Red Cross – because the Geneva Conventions prohibit such practices." R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, Wash. Post, May 14, 2006. Priest's article states that even though the draft was never released, the CIA relied on it to remove a dozen Iraqis from the country. However, other sources assert that the dozen detainees were not Iraqis. Douglas Jehl, *The Conflict in Iraq: Prisoners; U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. Times, October 26, 2004.

government and the German occupation authorities made a point of beginning with stateless Jews, in order to fit the deportations under the rubrics of immigration law.[85] It's a little hard to believe that the drafters of Article 49 were oblivious to the Nazis' studied policy of using immigration law to facilitate the deportation of Jews to Auschwitz.[86] In this matter, a little historical sense would perhaps have given some moral clarity to the role of OLC in approving the removal of "illegal aliens" from Iraq. Goldsmith's argument would have legalized the deportation of Anne Frank.

For that matter, Goldsmith never questions whether forcible removal by US forces of foreign captives taken in Iraq actually *does* accord with Iraqi immigration law. It doesn't sound terribly likely, unless some conscientious American lawyer hastily rewrote Iraqi immigration law. Without the unarticulated premise that the US interest in Article 49 is nothing more than learning its implications for immigration enforcement, this portion of the memo has no point – unless, perhaps, "enforcement of immigration law" is the legal hook on which rendition of foreign insurgents hangs.

Goldsmith then turns to the question of whether Article 49 forbids sending Iraqi captives outside the country for interrogation, to which his answer is no. First he argues that "transfer" and "deportation" both imply permanent or at least long-term uprooting, not temporary removal for interrogation. To show this, he quotes authorities who indicate that uprooting and resettling people violates Article 49.[87] However, none of his sources suggests that resettlements are the *only* forcible transfers or deportations that violate Article 49, and so this argument by itself amounts to very little.

To show that Article 49 permits temporary transfers, Goldsmith argues that reading Article 49 to forbid all forcible transfers is inconsistent with Article 24, which says that occupiers must facilitate the reception of youthful war orphans in a neutral state.[88] If Article 24 permits occupiers to evacuate war orphans, he reasons, then Article 49 cannot possibly mean to forbid *all* forcible transfers, such as sending Iraqi nationals to Afghanistan for interrogation.

Unsurprisingly, no commentator before Goldsmith ever noticed an "inconsistency" between the duty to evacuate war orphans and the obligation not to deport or forcibly transfer captives. No one would reasonably describe

[85] This was the accord between Vichy and the Nazis of July 4, 1942, described in Michael R. Marrus & Robert O. Paxton, Vichy France and the Jews 249 (1981).

[86] Indeed, embedded in a footnote, Goldsmith quotes a Norwegian delegate "regarding the plight of 'ex-German Jews denationalized by the German Government who found themselves in territories subsequently occupied by the German Army'" TP, supra note 1, at 376 note 11. The trouble is that Goldsmith's sole point in including this quotation is to buttress his argument that deportation implies denationalization. He overlooks the more important point: the horrific history of using immigration law as a fig leaf for something far more sinister.

[87] TP, supra note, 1, at 376. [88] TP, at 376–77.

parents sending their child to safety as a "forcible transfer" or "deportation." Nor, therefore, is it a forcible transfer or deportation when a child is moved out of harm's way by responsible adults acting *in loco parentis*. The authorities acting *in loco parentis*, not the child, are the responsible decision-maker, so long as they are aiming at the child's well-being. Goldsmith's analogy between captives sent to be interrogated and children sent to safety boggles the mind – and that analogy is the sole basis of his argument that if Geneva doesn't forbid the latter it doesn't forbid the former. Like the Bybee Memo's organ-failure definition of "severe pain," this is legal formalism divorced from sense.

A second argument dispenses more senseless formalism. Goldsmith turns to two other Geneva articles, one protecting impressed laborers and the other protecting people detained for crimes. Among their protections, both articles prohibit such people from being sent abroad. According to Goldsmith, if Article 49 really meant to forbid any and all temporary removals out of state, these two articles would become redundant, and therefore "meaningless and inoperative."[89]

The short response is: no, they wouldn't. The two articles say, in effect, that Article 49's protection against forcible removal applies even to persons detained for a crime or lawfully impressed into labor. The articles ward off potential misreadings of Article 49 that find implied exceptions to it for impressed laborers or accused criminals. In that way, the two articles strengthen and clarify Article 49 – and unsurprisingly, that is precisely how the Red Cross's official commentary to the Geneva Conventions explains the relationship among the three articles.[90]

Goldsmith rejects the commentary's explanation because Article 49 must not be read to make the other articles superfluous.[91] Evidently, he believes that the anti-redundancy canon articulated in a 1933 US Supreme Court opinion trumps all other rules of treaty interpretation. However, the canons of treaty interpretation explicitly recognized in the international law of treaties emphasize "good faith [interpretation] in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[92] – the very form of interpretation so conspicuously absent from Goldsmith's memo. The anti-redundancy canon

[89] TP, at 378–79. According to Article 51, impressed laborers can be compelled to work "only in the occupied territory where the persons whose services have been requisitioned are," and Article 76 requires that people accused or convicted of offenses can be detained only in the occupied country.

[90] 4 Jean S. Pictet, Commentary on the Geneva Conventions of 12 August 1949 279, 298, 363 (1958).

[91] He rejects the commentary's construction in TP, supra note 1, at 379 note 13.

[92] Vienna Convention on the Law of Treaties, Articles 31 and 32. Although the United States is not a party to the Vienna Convention, it accepts its sections on treaty interpretation as

he relies on appears nowhere in the Vienna Convention, not even its article on supplementary means of interpretation.

Finally, Goldsmith observes that a separate clause of Article 49 forbids occupying powers from deporting or transferring its own civilians *into* occupied territory. Presumably (he argues), that prohibition does not prevent the occupier from bringing civilian contractors or NGOs in for the short term. Hence, in this latter clause the words "transfer" and "deport" do not encompass short-term transfers and deportations. Thus, these words do not encompass short-term transfers of persons out of the country either, because "there is a strong presumption that the same words will bear the same meaning throughout the same treaty."[93]

Perhaps so, although the only legal authority Goldsmith cites for this "strong presumption" is a US Supreme Court dictum saying something different.[94] In opinions Goldsmith does not cite, the Court recognizes that in the interpretation of federal statutes, the same-words-same-meaning "presumption ... is not rigid and readily yields" to good reasons for distinguishing meanings in different contexts.[95] But even if there were a rigid same-words-same-meaning presumption, it hardly follows that words with the same meaning coincide in every respect. If a building code specifies safety requirements for "the cellar of a house" in one paragraph, obviously in that paragraph the word "house" refers only to houses with cellars. But it would be absurd to suppose that in other clauses of the code, dealing with other issues, the word "house" likewise refers only to houses with cellars. The word's core meaning covers both houses with cellars and houses with none. In precisely the same way, the fact that in one paragraph of the Fourth Geneva Convention the word "transfer" can refer only to long-term transfers implies nothing about its referent in a very different context. The word's core meaning – moving people from one place to another – covers both long-term and short-term transfers. Tellingly, Goldsmith fails to mention the Red Cross Commentary's observation that in the paragraph prohibiting occupiers from transferring or deporting their own civilians into occupied territory "the

customary international law. Restatement (Third) of the Foreign Relations Law of the United States, §325.

[93] TP, supra note 1, at 377.

[94] Air France v. Saks, 470 U.S. 392, 398 (1985). In the passage Goldsmith cites, the Court says that different words in a treaty presumptively refer to different things. That is the logical converse of Goldsmith's principle, and neither implies the other. For good reason, then, Goldsmith cites this case with a "cf." Presumably, if better authority existed, he would have cited it.

[95] General Dynamics Land Systems v. Cline, 540 U.S. 581, 595–98 (2004). For an even stronger statement to the same effect, see the unanimous opinion in Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1997).

meaning of the words 'transfer' and 'deport' is rather different from that in which they are used in the other paragraphs of Article 49."[96]

I describe these admittedly arcane details of Goldsmith's memo because I have heard scholars who despise the Bybee Memo hold up Goldsmith's as the gold standard of what a pro-Administration OLC memo ought to look like. It is no such thing. Like the Bybee Memo, it reaches a preordained conclusion by kabbalistic textual manipulations. The basic recipe in both memos is the same: lean heavily on "structural" canons of construction, take unrelated bits of law having to do with very different problems, read them side by side as though a legislator had intended to link them, and spin out "consequences," "interpretations," and "contradictions." Where Bybee and Yoo interpret "severe" in the torture statute by looking at a Medicare statute, Goldsmith combines a treaty clause dealing with forcible transfer and a different clause dealing with war orphans to generate an imaginary contradiction. Neither memo writer asks the most basic interpretive question: *What is the point of this law?* To ask that question would have been fatal, because the object of both documents is to protect individuals in the clutches of their enemies, and here the captors – OLC's "client" – wanted to unprotect them. Unmooring a law from its point leaves only the formal techniques of textual manipulation to interpret it.

At one point, however, Goldsmith pushes back against detainee abuse. In a final footnote at the end of his draft, Goldsmith warns that some removals of prisoners might indeed violate Article 49 and constitute war crimes.[97] He also includes a reminder that a prisoner transferred out of Iraq for interrogation does not lose "protected person" benefits. These are important warnings, and they buttress reports of Goldsmith's admirably anodyne role in resisting "the program" (as executive branch officials chillingly refer to their detention, interrogation, and rendition policies).

But then why not say specifically that those benefits include those of Article 31: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties"? Is it because a memo that explicitly said, "On the contrary, we believe he would ordinarily retain his Article 31 right against any form of coercive interrogation" would defeat the purpose of removing prisoners from Iraq? Why bury his vague warning in a footnote at the end of the memorandum? Why not quote Article 31 *in the text*, and point out that no form of coercive interrogation is permitted under Geneva IV?

[96] 4 Pictet, supra note 90, at 283. Pictet is pointing to the difference between transferring people into a country and transferring people out, but that does not matter, because the point is that the meaning of words (especially nontechnical terms like "transfer") can shift from context to context.

[97] TP, supra note 1, at 379–80, note 14.

It seems to me that the most charitable interpretation is that Goldsmith was working among hard-liners, and could subvert abusive interrogation only in a subtle and inconspicuous way. That may be the best an OLC lawyer could hope for. (Indeed, perhaps OLC never adopted his draft memo because even subtle and inconspicuous subversion was more than OLC's clients could stomach.) But a huge potential for self-deception exists in this strategy. To bury a warning risks its dismissal. And to say, in effect, "You can forcibly remove detainees from Iraq for interrogation, but it's up to you to make sure that the interrogation does not include coercion," comes awfully close to Tom Lehrer's Wernher von Braun ("'Once the rockets are up, who cares where they come down? That's not my department,' says Wernher von Braun").

Cruel, inhuman, or degrading treament

Interrogation techniques such as sexual humiliation don't fall under the legal definition of torture, or under most people's informal understanding of what torture is. They do, however, constitute degrading treatment, one of the three subcategories of the "cruel, inhuman or degrading treatment" banned by CAT. (Jurists abbreviate the treaty phrase "cruel, inhuman or degrading treatment or punishment which does not amount to torture" by the acronym "CID.") So do many other forms of "torture lite." Arguably, the legality of CID matters more for US interrogation practices than the torture statutes do.

As we have seen, the torture convention obligates parties to "undertake to prevent" CID, but it does not require criminalizing CID, and the United States has never made CID a crime. To be sure, CID violates common Article 3 of the Geneva Conventions, and that made it a US war crime. But, in 2006 the US Congress decriminalized humiliating and degrading treatment of detainees.

The requirement to "undertake to prevent" CID nevertheless remains an international legal obligation of the United States; and, while the duties it entails are vague, the obligation surely rules out deliberately engaging in CID. However, at his confirmation hearing for Attorney General, Alberto Gonzales offered a startling legal theory about why that obligation does not apply. When the US Senate ratified the torture convention, Gonzales explained, it added the reservation that CID means the cruel, inhuman, or degrading treatment forbidden by the Constitution's Eighth Amendment ban on cruel and unusual punishments and Fifth Amendment ban on conduct that shocks the conscience. But the Eighth Amendment applies only to punishment, and the Supreme Court has held, in other unrelated contexts, that the Fifth Amendment does not protect aliens outside US territory. Therefore, in Gonzales's words, "the Department of Justice has concluded that . . . there is no legal prohibition under the CAT of cruel, inhuman or degrading treatment with respect to aliens overseas." He reiterated the argument in written responses to senatorial questions.[98]

The argument is startling because it seems obvious that the Senate's reservation intended nothing of the sort. Before Gonzales's argument muddied the waters, it was perfectly clear that the Senate's reservation aimed to define CAT's concept of CID by using the substantive standards embodied in the constitutional rights, not to tie CAT to their jurisdictional reach. After Gonzales's testimony, three Democratic senators wrote an incredulous letter to the Justice Department requesting all legal opinions on the subject within three days. Justice ignored the request until two months later, after Gonzales was safely confirmed as Attorney General. Eventually the Department responded in a three-page letter, which refused to release OLC opinions but cited legal authority to back up Gonzales, most prominently some 1990 comments to the Senate by Abraham Sofaer, the State Department's legal advisor during debate over the ratification of CAT.[99] Like Gonzales, Sofaer had emphasized that "we would limit our obligations under this Convention to the proscriptions already covered in our own Constitution." If constitutional rights against CID do not apply to aliens abroad, then CAT's ban on CID cannot apply abroad.

But this was not at all what he or the Senate meant, according to Sofaer. In a letter to Senator Patrick Leahy disavowing the Gonzales interpretation, Sofaer explained that the purpose of the reservation was to ensure that the same standards for CID would apply outside the United States as apply inside – just the opposite of Gonzales's conclusion.[100] The point was to define CID, not to create a gaping geographical loophole.[101] Apparently, however, the Administration desperately wanted the geographical loophole. When Senator John McCain (a Vietnam torture victim) introduced legislation to close the loophole, the administration lobbied against it fiercely, threatening to veto major legislation rather than accede to banning CID by US forces abroad. When McCain's law nevertheless swept the Congress with veto-proof majorities, the Administration extracted a concession: federal

[98] Gonzales's oral response, quoted in a letter to John Ashcroft from Senators Patrick Leahy, Russell Feingold, and Dianne Feinstein, January 25, 2005. Written response to Senator Richard J. Durbin, question 1. PDF of both documents in my possession.

[99] Letter from William Moschella to Patrick Leahy, April 4, 2005, at 3. PDF in my possession.

[100] Letter from Abraham D. Sofaer to Patrick Leahy, January 21, 2005. PDF in my possession. Sofaer reiterated his views in an op-ed a few months later: Sofaer, *No Exceptions*, Wall St. J., November 26, 2005, at A11.

[101] It appears that the reservation was partly a response to the fact that some states declare corporal punishment to be CID, while the United States does not. It may also have been a response to a controversial European Court of Human Rights decision that had declared prolonged imprisonment in a US death row to be cruel and degrading. David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States*, 15 Nova L. Rev. 449, 461–62 (1991).

courts could no longer hear Guantánamo cases. CID might be illegal, but its Guantánamo victims would no longer have any recourse against it. And, as the final touch, President Bush attached a signing statement to McCain's CID ban implying a constitutional right to ignore it.

What's wrong with the torture memos?

Frivolity and indeterminacy

Kingman Brewster, asked what his years as a Harvard law professor had taught him, replied, "That every proposition is arguable."[102]

But not every proposition is arguable well, and not every argument is a good one. Law recognizes a category of frivolous arguments and positions, and it should. My claim is that arguments like the "organ-failure" definition of torture, Beaver's reading of *Hudson v. McMillian*, and Goldsmith's "contradiction" between Geneva's articles about war orphans and deportation are not just wrong but frivolous.

What makes an argument frivolous? Let me approach this question through what is, I hope, a straightforward example (unrelated to the torture memos), drawn from a 1989 case. Sue Vaccaro, a slightly built woman, attempted to use the first-class lavatory while traveling coach class with her husband on a cross-country flight. John Wellington Stephens, a large male first-class passenger, assaulted her. Stephens called her a "chink slut and a whore," told her she was too dirty to use the first-class washroom, and shoved her against a bulkhead. Vaccaro sued Stephens, and he counterclaimed, asserting that his ticket gave him a license to the first-class lavatory, and Vaccaro had trespassed on it. This harmed him, his counsel argued, because the donnybrook spoiled Stephens's flight. The judge punished his law firm for frivolous argument, and it may be hard to find a lawyer outside the firm who would disagree. The court of appeals wrote:

> To engage in a temper tantrum is not to suffer actual damage at the hands of a trespasser ... The federal district court is a very hospitable court but it is not yet hospitable to entertaining law suits against people who have the misfortune to engage in argument with irascible first class passengers ... The idea that if you sat in the wrong seat at a symphony, a play, a baseball game or a football game and did not get out instantly when the proper ticket holder appeared you could be sued in a federal court is not an attractive notion. It is not merely unattractive. It takes no account of the state of the law ... Rule 11 is not meant to discourage creative lawyering. It is meant to discourage pettifoggery. The state of the law, whether it is evolving or fixed in well-nigh permanent form, is important in making the distinction between the plausible and the silly.[103]

[102] Alex Beam, *Greed on Trial*, in Legal Ethics: Law Stories 291 (Deborah L. Rhode & David Luban eds., 2005).

[103] Vaccaro v. Stephens, 1989 U.S. App. LEXIS 5864; 14 Fed. R. Serv. 3d (Callaghan) 60, *9–12 (9th Cir. 1989).

No formula or algorithm exists for sorting out the plausible-but-wrong arguments from the silly, any more than an algorithm can distinguish jokes that are almost funny from jokes that aren't funny at all. But a theory of frivolity is unnecessary. As the philosopher Sidney Morgenbesser once wrote, to explain why a man slipped on a banana peel you do not need a general theory of slipping.[104] Legal plausibility is a matter for case-by-case judgment by the interpretive community, and the judgment will be grounded in specific arguments like those the court of appeals offered in *Vaccaro v. Stephens* and – more to the point – those I have offered here about the "analyses" contained in the torture memos.

Picture a bell curve representing the number of trained lawyers who find any given legal argument plausible. Some arguments are so recognizably mainstream that virtually all lawyers would agree that they are plausible. Those arguments lie under the fat part of the bell curve. Calling an argument plausible doesn't mean accepting it: readers of judicial opinions often find both the majority and the dissenting arguments plausible, and situate both within the fat part of the bell curve.

Moving further out on the bell curve, we find the kind of arguments that lawyers euphemistically call "creative" (or where one might say, "Nice try!"). Litigators resort to creative arguments when unfavorable law leaves them no better option than the brief-writer's equivalent of a Hail Mary pass. The argument is too much of a stretch to be genuinely credible, but it offers a novel way to think about the law, and someday the interpretive community might get there. At the moment, though, it lies outside the fat part of the bell curve, although not far out on the arms.

Frivolous arguments, on the other hand, *are* far out. Superficially, they make lawyer-like "moves," but they take such broad liberties with legal text, policy, and sense that only someone far removed from the mainstream would take them seriously. In the definition of federal judge Frank Easterbrook, "99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable."[105] Easterbrook's numbers may be too high, and in any case the numerical imagery is only a figure of speech, because nobody is actually out there surveying lawyers.[106]

[104] Sidney Morgenbesser, *Scientific Explanation*, 14 Int'l. Encyclopedia Soc. Sci. 122 (David Sills ed., 1968).

[105] Quoted in Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?* 24 Osgoode Hall L. Rev. 353, 375 (1987).

[106] Tax lawyers have long familiarity with numerical imagery to determine when a tax preparer can take an aggressive position without disclosing it. According to federal regulations, the preparer cannot do so unless "the position has approximately a one in three, or greater, likelihood of being sustained on its merits." 10 C.F.R. §10.34(d)(1). This regulation derives from a 1985 ABA ethics opinion replacing an earlier opinion according to which tax lawyers could take any position for which a reasonable basis could be found. "Doubtless there were some tax

But the idea should be clear: the legal mainstream defines the concept of plausibility.

It might be objected that legal arguments should be judged on their merits, not on how mainstream lawyers might vote about their merits. Judging arguments by their popularity seems like a category mistake.

That may be true in fields where truths are obscure and only the deep thinkers can discern them. But law is different. Law is not written for geniuses, and it is not written by geniuses. Legal texts are instruments of governance, and as such they must be as obvious and demotic as possible, capable of daily use by millions of people with no time or taste for riddles. Even when great judges with subtle, Promethean minds write opinions, their opinions had better contain no secret teachings, no buried allusions, no symbolism, no allegory, no thematic subtleties that need Harold Bloom or Leo Strauss to tease them out. Richard Posner once described legal texts as "essentially mediocre."[107] Both words are precisely right; but Posner forgot to add that when it comes to law, "essentially mediocre" is a compliment. Within a rule-of-law regime, rules must offer clear-cut guidance to average intelligences, and that makes essential mediocrity virtually a defining characteristic of law. Law does its job properly when it is all surface and no depth and what you see is exactly what you get.[108] That is why it makes no

practitioners who intended 'reasonable basis' to set a relatively high standard of tax reporting. Some have continued to apply such a standard. To more, however, if not most tax practitioners, the ethical standard set by 'reasonable basis' had become a low one. To many it had come to permit any colorable claim to be put forth; to permit almost any words that could be strung together to be used to support a tax return position. Such a standard has now been rejected by the ABA Committee . . . A position having only a 5% or 10% likelihood of success, if litigated, should not meet the new standard. A position having a likelihood of success closely approaching one-third should meet the standard." *Report of the Special Task Force on Formal Opinion 85-352*, 39 Tax Law. 635 (1986). Because of the infrequency of tax audits, tax preparation is perhaps the paradigm case where the system depends on the honor of lawyers to give advice based on legal positions that are not frivolous. There are significant parallels between the tax advisor's role and the role of the equally unaccountable OLC.

[107] Richard A. Posner, Overcoming Law 91 (1995).

[108] Legal theorists might balk at this claim, pointing to the phenomenon of "acoustic separation" between the rules of conduct known by the hoi polloi and the more intricate rules of decision employed by officials. Meir Dan-Cohen, who introduced the concept of acoustic separation, pointed out that broad knowledge of available criminal defenses (for example, duress or necessity) would create perverse incentives for people to abuse those defenses. Hence it is better to keep decision rules and conduct rules acoustically separated, meaning that primary actors should not necessarily become aware of the more lenient decision rules officials actually use. Acoustic separation, with selective transmission of the law to different audiences, might actually be a useful strategy for lawmakers to adopt. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984). The concept of acoustic separation is an interesting and useful one. In my opinion, however, legal theorists invoke the concept of acoustic separation more often than it warrants. Descriptively, the phenomenon of law intentionally tailored for acoustic separation seems like a marginal part

sense to suppose that the plausibility of legal arguments could deviate systematically from what the interpretive community thinks about their plausibility. What could it deviate to? In law, by design, there is no hidden there there.[109]

Although the interpretive community defines the bounds of the reasonable, there remains plenty of room for interpretive disagreement within those bounds.[110] Law, we must remember, emerges from political processes, and it

of the legal enterprise. Normatively, there is real danger behind the idea that some law is too dangerous for ordinary mortals to know and should be left to the experts. It presupposes the superior rectitude of experts, and therefore it underrates the perverse incentives for experts to shield their own abuses from accountability. Dan-Cohen, I should add, does not make this mistake: for him, "the option of selective transmission is not an attractive one, and the sight of law tainted by duplicity and concealment is not pretty." Ibid. at 673. Furthermore: by suggesting that society might be better off if people don't know the law too well, the doctrine of acoustic separation rationalizes a system where legal services are unaffordable by tens of millions of people, and only the wealthy can buy their way around acoustic separation.

[109] The thesis I am defending is that there are no truths about what law means or requires outside the range of views that the interpretive community finds plausible. This is a weak thesis, grounded in the specific functions of law, not a general metaphysical claim that interpretive communities constitute the meaning of the objects they concern themselves with. The latter is the view of relativists like Stanley Fish, *Anti-Professionalism*, 7 Cardozo L. Rev. 645 (1986). I've criticized his view in *Fish v. Fish or, Some Realism About Idealism*, 7 Cardozo L. Rev. 693 (1986), on two grounds: first, that interpretive communities could play the role Fish ascribes to them only if they meet internal political conditions of reciprocity and freedom; and second, that the vaporous concept of "constituting" meaning buys into a metaphysical contrast between idealism and realism that we would do well to abandon.

In the present chapter, I am fishing in shallower waters. Regardless of who is right about realist, idealist, and pragmatist conceptions of inquiry and truth *in general*, it seems to me we should all agree that law contains no truths hidden from the citizens it governs and the lawyers who help them understand it.

[110] To be sure, Ronald Dworkin has argued that legal questions have a single, unique right answer, namely that answer that displays the sources of law in the morally best light. Determining which answer that is may be something that only Judge Hercules (Dworkin's hypothetical über-jurist) can do. Ronald Dworkin, Law's Empire 52–53 (1986); Dworkin, *"Natural" Law Revisited*, 34 U. Fla. L. Rev. 165, 169–70 (1982); Ronald Dworkin, *Hard Cases*, in Taking Rights Seriously 81, 105–23 (1978); Dworkin, *No Right Answer?* in Law, Morality and Society: Essays in Honour of H. L. A. Hart 58 (P. M. S. Hacker & J. Raz eds., 1977). However, given the lack of a decision procedure or verification procedure about which people with conflicting good-faith moral views can agree (to say nothing of the unreality of Judge Hercules), it is hard to see why a Dworkinian "right answer" is anything more than a *Ding an sich*, an "as-if," that anchors a theory of objectivity without serving the basic function of law, namely governing a community. I discuss some of the perplexities raised by the possibility of a right answer that lacks a verification procedure in Luban, *The Coiled Serpent of Authority: Reason, Authority, and Law in a Talmudic Tale*, 79 Chi.-Kent L. Rev. 1253 (2004).

Lacking a decision procedure does not doom us to radical indeterminacy in which anything goes. Even if we cannot settle which of several competing answers is right, we can rule out answers that are obviously wrong. To illustrate with Fred Schauer's example, "That I am

typically represents the compromise, or vector sum, of competing social forces. Compromise whittles down sharp edges, and legal standards without sharp edges are bound to generate interpretive disagreements. It is worth taking a moment to see why.

Some ambiguity in law results because drafters finessed a ticklish political issue with strategic, diplomatic doublespeak. To take a famous and blatant example, the UN Security Council helped end the Six Days War with a resolution issued in two official languages, English and French. The French version requires the Israelis to withdraw from all the occupied territory, while the English requires them to withdraw only from some.[111] The reason for splitting the difference is obvious: it stopped the shooting and postponed the hardest question to another day. (Unsurprisingly, for forty years Israelis have cited the English version and Arabs the French.) Likewise, US Congressional staffers admit that ambiguity in statutes often results because "we know that if we answer a certain question, we will lose one side or the other."[112]

Although strategic ambiguity is the most obvious way that politics creates legal indeterminacy, it is not the only way. Other ambiguities enter through legislative log-rolling and mutual concessions. Political give-and-take generates statutes that qualify or soften requirements, attach escape clauses to bright-line rules, or balance clauses favoring one contending interest group with clauses favoring others. None of these provisions need be unclear in itself, but taken together they generate multiple interpretive possibilities. That is because jurists interpret statutory language in the light of its purpose, and when the statute itself reflects cross-purposes, its requirements can be viewed differently depending on which purpose the interpreter deems most vital. An interpreter who views the escape clauses and qualifications as important expressions of legislative purpose will stretch them to borderline or doubtful cases; another, who views the unqualified rules as the key, will interpret those rules strictly and find very few exceptions. Needless to say, judges' moral and political outlooks influence their understanding of legislative purpose: it's easier to grasp purposes you agree with than purposes you don't. Every

unsure whether rafts and floating motorized automobiles are 'boats' does not dispel my confidence that rowboats and dories most clearly are boats, and that steam locomotives, hamburgers, and elephants equally clearly are not." Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 422 (1985).

[111] UN Security Council Resolution 242 (1967). The English version calls for "withdrawal of Israeli forces from territories occupied in the recent conflict" ("territories," not "the territories," where "the" was dropped as the result of a US amendment to the British-proposed text), while the French version calls for "retrait des forces armées israéliennes des territoires occupés lors du récent conflit."

[112] Quoted in Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. Rev. 575, 596 (2002). On the deliberate use of ambiguity, see ibid. at 594–97, 614–19.

political fault line in a legal text automatically becomes an interpretive fault line as well.

Even judicially created doctrines reflect the push and pull of many outlooks. A court creates a legal doctrine that neatly resolves the case before it. Later, another court faces a case in which applying that doctrine would yield an obviously wrong outcome; so the court carves out an exception and identifies a counter-principle governing the exception. Subsequent courts decide whether the principle or counter-principle applies to a new case by judging whether the facts of the new case more closely resemble those of the original case or the exception – and typically, some facts in the new case will resemble each. Which analogy seems most compelling will depend on judges' varying senses of fairness. Over the course of centuries, lines of judicial authority elaborate both the principles and counter-principles into the architecture of the common law. As a result, legal doctrine resembles a multi-generational compromise, with principles and counter-principles that roughly track the political fault lines of different stages of evolving society.

The result is indeterminacy in legal doctrine, a familiar theme in the writings of the legal realists and critical legal studies. But it is indeterminacy of a special and limited sort – moderate, not global, indeterminacy. Indeterminacy attains its maximum along fault lines where the law most strongly reflects a political compromise. Where political conflict was unimportant to the shape a legal text assumed, indeterminacy may be minimal or non-existent. Brewster was wrong: *not* every proposition is arguable. Lawyers desperate for an argument will try to conjure up an indeterminacy where little or none exists, but they will have a hard time doing so honestly. The torture memos testify to that.

The ethics of legal opinions

Let me summarize. I have been suggesting that crucial arguments in the torture memos are frivolous. However, I have also insisted that no bright-line test of frivolity exists beyond whether an interpretive community accepts specific objections showing that the arguments are baseless or absurd. You know it when you see it.

In that case, why can't the torture lawyers simply reply that their interpretive community sees it differently from the interpretive community of liberal cosmopolitan lawyers? One answer, perhaps the strongest, is the moral certainty that they would have reached the opposite conclusion if the Administration wanted the opposite conclusion. The evidence shows that all these memos were written under pressure from officials determined to use harsh tactics – officials who consciously bypassed ordinary channels and looked to lawyers sharing their aims. An interpretive community that contours its interpretations to the party line is not engaged in good-faith interpretation.

In the case of the torture memos, the giveaway is the violation of craft values common to all legal interpretive communities. This is clearest in the Bybee Memo, but the preceding discussion reveals similar problems in the other documents. What makes the Bybee Memo frivolous by conventional legal standards is that in its most controversial sections, it barely goes through the motions of standard legal argument. Instead of addressing the obvious counter-arguments, it ignores them; its citation of conventional legal authority is, for obvious reasons, sparse; it fails to mention directly adverse authority; and when it does cite conventional sources of law, it employs them in unconventional ways, and not always honestly.

The other memos are less transparent about it, but they too discard the project of providing an analysis of the law as mainstream lawyers and judges understand it. Instead, they provide aggressive advocacy briefs to give those who order or engage in brutal interrogation legal cover.

One might ask what is wrong with writing advocacy briefs. Aren't lawyers supposed to spin the law to their clients' advantage? The traditional answer for courtroom advocates is yes. The aim is to persuade the judge or jury, not to write a treatise. To be sure, even courtroom advocates should not indulge in frivolous or dishonest argument. But, as Judge Easterbrook's formula indicated, the standards of frivolity leave plenty of room for pro-client spin.

But the torture memos are not briefs. They are legal advice, and in traditional legal ethics they answer to a different standard: not persuasiveness on the client's behalf but candor and independence.[113] As I suggested in the last chapter, perhaps the most fundamental rule of thumb for legal advice is that the lawyer's analysis of the law should be more or less the same as it would be if the client wanted the opposite result from the one the lawyer knows he wants.

Other rules of thumb follow from this. First, a legal opinion ought to lay out in terms intelligible to the client the chief legal arguments bearing on the issue, those contrary to the client's preferred outcome as well as those favoring it. Unlike a brief, which aims to minimize the opposing arguments and exaggerate the strength of its own, the opinion should evaluate the arguments as objectively as possible. Second, opinions must treat legal authority honestly. (Briefs should as well.) No funny stuff: if the lawyer cites a source, the reader should not have to double-check whether it really says what the lawyer says it says, or whether the lawyer has wrenched a quotation out of context to flip its meaning. And adverse sources may not simply be ignored. Just as litigation rules require lawyers to divulge directly adverse law to courts, an honest legal opinion does not simply sweep it under the rug and hope nobody notices.

[113] See ABA Model Rules of Professional Conduct 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

Finally, an honest opinion explains where its conclusion fits on the bell curve. While it is entirely proper for an opinion writer to favor a nonstandard view of the law, she must make clear that it *is* a nonstandard view of the law. She cannot write an opinion advancing a marginal view of the law with a brief-writer's swaggering self-confidence that the law will sustain no view other than hers.

An example might help. It is only fair to use an argument in one of John Yoo's OLC memos that fulfills these requirements. A memo of January 22, 2002 (which went out over Bybee's signature) argues, among other things, that common Article 3 of the Geneva Conventions does not apply to the US conflict with Al Qaeda. That is because Article 3 applies only to "armed conflicts not of an international character." By this phrase, Yoo argues, the framers of Geneva had in mind only civil wars, like the Spanish and Chinese civil wars.[114] That would plainly exclude the conflict with Al Qaeda.

There is nothing frivolous about this argument; indeed, it is quite forceful. But there is also a powerful reply to it. In legal terminology, "international" means "among nation-states," as in the phrase "international law." An international armed conflict is a conflict among nation-states, and therefore an armed conflict "not of an international character" would be *any* armed conflict not among nation-states, not only civil wars. (This, eventually, was the interpretation adopted by the US Supreme Court in its June 2006 *Hamdan* opinion.) In that case, the conflict with Al Qaeda would be classified as an armed conflict not of an international (i.e., state-against-state) character – and therefore common Article 3 would apply to it and protect even Al Qaeda captives. That conclusion would harmonize with the most obvious purpose of Article 3: protecting at least the most basic human rights of all captives, whether or not they qualify for the more extended protections Geneva offers to POWs and protected civilians in wars among nation-states. If, as a matter of policy, Article 3 aims to protect basic human rights in nonstandard wars, it would be irrational to protect human rights only in civil wars rather than all armed conflicts. Most international lawyers believe that human rights instruments should be interpreted in a broad, gap-filling way, precisely because of the importance of human rights.

The virtue of Yoo's opinion is that he explicitly discusses all this. He sketches the evolution of the law of armed conflict in the twentieth century, acknowledging that in recent years international law "gives central place to individual human rights" and "blurs the distinction between international and internal armed conflicts."[115] He cites one of the principal cases illustrating this view, the Yugoslav Tribunal's *Tadic* decision; and in a footnote he refers to other authorities taking the same view. In response, he emphasizes that the

[114] TP, supra note 1, at 86–87.
[115] Ibid. at 88.

Geneva framers were thinking principally about protecting rights in civil wars, and argues that to interpret Article 3 more broadly "is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements."[116] In other words, where most international lawyers treat human rights instruments like a "living" constitution, Yoo treats them like contracts. I think this gives him the weaker side of the argument – and, obviously, the Supreme Court rejected his position – but that is not the point. The point is that he does a respectable job of sketching out the legal landscape, making it clear that his own analysis runs contrary to that of most international lawyers, and representing their positions honestly.[117] That is the kind of candid advice a lawyer can legitimately provide the client, even if it deviates from mainstream views.[118]

The lawyer as absolver

But what happens when the client wants cover, not candid advice? – when the client comes to the lawyer and says, in effect, "Give me an opinion that lets me do what I want to do"?

Lawyers have a word for a legal opinion that does this. It is called a CYA memorandum – Cover Your Ass. Without the memorandum, the client who wants to push the legal envelope is on his own. But with a CYA memo in hand, he can insist that he cleared it with the lawyers first, and that way he can duck responsibility. That appears to be the project of the torture memos.

Notice that this diagnosis differs from Anthony Lewis's judgment that the Bybee Memo "read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."[119] The torture memos are not advice about how to stay out of prison; instead, they reassure their clients that they

[116] Ibid.

[117] Not entirely: he neglects to mention that the drafters of the Geneva Conventions explicitly *rejected* an Australian motion to limit Article 3 to civil wars. Special Committee Seventh Report at Vol. II B, p. 121. They also rejected other, similar efforts that would have had the same effect. See *Hamdan*, 2006 US Lexis 5185, *128.

[118] This portion of Yoo's opinion contrasts sharply with another section of the same opinion, arguing that the Geneva Conventions don't protect Taliban fighters because under the Taliban Afghanistan was a failed state. Here, Yoo was back in Bybee Memo form. His draft opinion drew an outraged response from the State Department's legal advisor, who pointed out that "failed state" is not a legal concept; that so many states are failed states that Yoo's no-treaties-with-failed-states argument would greatly complicate US foreign relations; that if the Taliban have no rights under Geneva they have no obligations either, and therefore don't have to apply Geneva to any Americans they capture; and that Yoo's argument would annul every treaty with Afghanistan on every subject. Memo from William Howard Taft IV to John Yoo, January 11, 2002, available at <www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf>. The "failed-state" argument quietly disappeared.

[119] Anthony Lewis, *Making Torture Legal*, N.Y. Review of Books, July 15, 2004.

are not going to prison. They are opinion letters blessing or koshering conduct for the twin purposes of all CYA memos: reassuring cautious lower-level employees that they can follow orders without getting into trouble, and allowing wrongdoers to duck responsibility. The fact that they emerge from the Justice Department – the prosecutor of federal crime – makes the reassurance nearly perfect.

When they write CYA memos, lawyers cross the fatal line from legal advisor to moral or legal accomplice. Obviously, it happens all the time. Journalist Martin Mayer, writing about the 1980s savings-and-loan collapse, quoted a source who said that for half a million dollars you could buy a legal opinion saying anything you wanted from any big law firm in Manhattan.[120] In the Enron case, we saw lawyers writing opinion letters that approved the creation of illegal Special Purpose Entities, even though they knew that they were skating on thin ice. I am arguing that this is unethical. In white-collar criminal cases, some courts in some contexts will accept a defense of good-faith reliance on the advice of counsel, and presumably that defense is the prize the client seeks from the lawyer. But when the client tells the lawyer what advice he wants, the good faith vanishes, and under the criminal law of accomplice liability, both lawyer and client should go down.[121]

Giving the client skewed advice because the client wants it is a different role from either advocate or advisor. I call it the Lawyer As Absolver, or, less nicely, the Lawyer As Indulgence Seller. Luther began the Reformation in part because the popes were selling papal dispensations to violate law, along with indulgences sparing sinners the flames of hell or a few years of purgatory. Rodrigo Borgia once brokered a papal dispensation for a French count to sleep with his own sister. It was a good career move: Rodrigo later became Pope Alexander VI.[122] Jay Bybee had to settle for the Ninth Circuit Court of Appeals.

It is important to see why the role of Absolver, unlike the roles of Advocate and Advisor, is illegitimate. The courtroom advocate's biased presentation will be countered by the adversary in a public hearing. The advisor's presentation will not. In the courtroom, the adversary is supposed to check the advocate's excesses. In the lawyer's office, advising the client, the lawyer is supposed to check the client's excesses. Conflating the two roles moves the lawyer out of the limited role-based immunity that advocates enjoy into the world of the indulgence seller.

[120] Martin Mayer, The Greatest-Ever Bank Robbery: The Collapse of the Savings and Loan Industry 20 (Collier Books 1992).

[121] The lawyer who okays unlawful conduct by the client has also harmed the client, and therefore been a bad fiduciary of the client. But, both as a matter of law and morality, that is a distinct ethical violation from becoming the client's accomplice.

[122] Ivan Cloulas, The Borgias 38 (Gilda Roberts trans., 1989).

In short: if you are writing a brief, call it a brief, not an opinion. If it is an opinion, it must not be a brief. If you write a brief but call it an opinion, you have done wrong.

Government lawyers

Some might reply that in the real world outside the academy, legal opinions by government offices *are* briefs. When the State Department issues an opinion vindicating a military action by the US government, everyone understands that this is a public statement of the government's position, not an independent legal assessment. To suppose otherwise is naive.

In that case, however, why keep up the charade? Consider, for example, a pair of documents authored by the British Attorney General, Lord Peter Goldsmith. The first was a confidential legal memorandum to Tony Blair on the legality of the Iraq war, dated March 7, 2003, less than two weeks before the war began. The memo consisted of thirteen densely packed pages, and in my view it is a model of what such an opinion should be. It carefully and judiciously dissects all the pro and con arguments, which were closely balanced, consisting largely of interpretive debates over the meaning of characteristically soapy UN Security Council resolutions. Goldsmith concluded that, while in his opinion obtaining a second Security Council resolution authorizing the use of force "is the safest legal course," a reasonable argument can be made that existing resolutions would suffice to justify the war.[123] It was a cautious go-ahead to Blair, larded with substantial misgivings and caveats. If Blair's request to Goldsmith was to give him the strongest argument available for the legality of the war, Goldsmith replied in the best way he could: he articulated the argument Blair wanted, advised him that it was reasonable, but also made it clear that the argument did not represent his own view of how the law should best be read. This represents the limit to which an honest legal advisor can tailor his opinion to the wishes of his client. Goldsmith's office wrote a sophisticated, honest document.

Ten days later – three days before the bombing began – Lord Goldsmith presented the same issue to Parliament, and now all the misgivings were gone. In place of thirty-one subtle paragraphs of analysis, the "opinion" to Parliament consists of nine terse, conclusory paragraphs with no nuance and no hint of doubt.[124] In place of the confidential memorandum's conclusion that the meaning of a Security Council resolution was "unclear," Goldsmith's public statement expressed no doubts whatever. It was pure vindication of the course of action to which Blair was irrevocably committed.

[123] Goldsmith memo, paragraphs 27–28. Available at <www.comw.org/warreport/fulltext/0303goldsmith.html>.

[124] Hansard, 17 March 2003, column 515W.

Two years later, Goldsmith told the House of Lords that his public statement was "my own genuinely held, independent view," and that allegations "that I was leant on to give that view . . . are wholly unfounded."[125] Unfortunately for Lord Goldsmith, the confidential memorandum leaked a few weeks later, and readers could see for themselves what his genuinely held, independent view actually had been. The kerfluffle that followed fanned public suspicion about the decision to go to war, and weakened Blair in the next election.

It is obvious why Lord Goldsmith gave Parliament the unqualified opinion he did. The war was about to begin, the government was committed to it, and it was deeply controversial. An opinion laden with doubts would have had devastating repercussions for the government's policy and its relationship with the United States. Knowing this, Goldsmith wrote a brief, just as the realists think he should. But realists should notice that when he had to defend it two years later, Goldsmith continued to pretend that it was something else – a backhanded acknowledgment of the principle I am proposing: *If you write a brief but call it an opinion, you have done wrong.* In his second, brief-like opinion, he did wrong.

This is doubly true for the OLC, because in modern practice its opinions bind the executive branch.[126] That makes them quasi-judicial in character. In the preceding chapter, I argued that legal advice from lawyers to clients is always "jurisgenerative" and quasi-judicial, but obviously, written opinions binding entire departments of the government are judicial in a more direct way. As such, the obligation of impartiality built into the legal advisor's ethical role is reinforced by the obligation of impartiality incumbent on a judge. Two additional factors make the obligation more weighty still. First, some of the opinions were secret. Insulated from outside criticism and alternative points of view, written under pressure from powerful officials and, perhaps, from hair-raising intelligence about Al Qaeda's intentions, they were memos from the bunker. Recognizing a professional obligation to provide impartial analysis represented an essential tether to reality. Finally, the OLC is charged by statute with helping the executive discharge its constitutional obligation to "take care that the laws be faithfully executed." Fidelity to the law, not to the Administration, requires impartiality.

[125] Hansard, 1 March 2005, column 112, available at <www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds05/text/50301-03.htm>.

[126] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318–20 (2000). I am grateful to Dawn Johnsen, Marty Lederman, and Nina Pillard for illuminating email discussions of OLC's role and ethics. For Lederman's view, see *Chalk on the Spikes: What is the Proper Role of Executive Branch Lawyers, Anyway?*, available at <http://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html>.

In December, 2004, nineteen former lawyers in the OLC drafted a set of principles for the office reaffirming its commitment to this standard conception of the independent legal advisor. Apparently, this is not how the Bush Adminstration's OLC conceives of its job, for none of its lawyers was willing to sign.[127]

Conclusion

I drafted this chapter before the United States Supreme Court rebuffed the Bush administration's detainee policies in *Hamdan v. Rumsfeld*. Among other significant holdings, *Hamdan* found that common Article 3 of the Geneva Conventions applies to detainees in the war on terror. Article 3 forbids torture and humiliating or degrading treatment – an awkward holding, because, as we have seen, high-level officials, including the Secretary of Defense and possibly the Vice-President or even the President, had authorized such treatment for high-value detainees. Worse, federal law declared violations of common Article 3 to be war crimes. *Hamdan* pushed administration lawyers into overdrive, and they produced a bill, the Military Commissions Act of 2006, to respond to the Court. After intense negotiations with moderate Republican Senators, the final bill was approved by Congress and signed into law in October 2006.

The bill responded to *Hamdan*'s challenge in a drastic way. It stripped federal courts of habeas corpus jurisdiction over Guantánamo, defined "unlawful enemy combatants" broadly, prohibited detainees from arguing for Geneva Convention rights, retroactively decriminalized humiliating and degrading treatment, declared that federal courts could not use international law to interpret war crimes provisions, vested interpretive authority over Geneva in the President, allowed coerced evidence to be admitted, gave the government the power to shut down revelation of exactly what techniques were used to obtain such coerced evidence, and defined criminally cruel treatment in a deeply convoluted way. For example, the bill distinguishes between "severe pain," the hallmark of torture, and merely "serious" pain, the hallmark of cruel treatment short of torture – but it then defines "serious" pain as "extreme" pain. Such bizarre legalisms call the Bybee Memo to mind, of course, and they should. This bill (the worst piece of legislation I can recall from my own lifetime) was clearly inspired by the style of legal thinking perfected by the torture lawyers. In effect, the torture lawyers helped to define a "new normal," without which the Military Commissions Act would not exist.

[127] The statement of principles was published as *Guidelines for the President's Legal Advisors*, 81 Ind. L.J. 1345 (2006).

This chapter chronicles a legal train wreck. The lawyers did not cause it, but they facilitated it. As a consequence, enmity toward the United States has undoubtedly increased in much of the world. Sadly and ironically, the net effect on US intelligence gathering may be just the opposite of what the lawyers hoped, as potential sources who might have come willingly to the Americans turn away out of anger or fear that they might find themselves in Guantánamo or Bagram facing pitiless interrogators.

This is also a chapter on the legal ethics of opinion-writing. I have focused on what Fuller might have called the procedural side of the subject: the requirements of honesty, objectivity, and non-frivolous argument, regardless of the subject-matter on which lawyers tender their advice. But that does not mean the subject-matter is irrelevant. It is one thing for boy-wonder lawyers to loophole tax laws and write opinions legitimizing financial shenanigans. It is another thing entirely to loophole laws against torture and cruelty. Lawyers should approach laws defending basic human dignity with fear and trembling.[128]

To be sure, honest opinion-writing will only get you so far. Law can be cruel, and then an honest legal opinion will reflect its cruelty. In the centuries when the evidence law required torture, no lawyer could honestly have advised that the law prohibited it. Honest opinion-writing by no means guarantees that lawyers will be on the side of human dignity.

The fact remains, however, that rule-of-law societies generally prohibit torture and CID, practices that fit more comfortably with despotism and absolutism. For that reason, lawyers in rule-of-law societies will seldom find it easy to craft an honest legal argument for cruelty. Like the torture lawyers of Washington, they will find themselves compelled to betray their craft. Of course, they may think of it as creative lawyering or cleverness, not betrayal. I have little doubt that only intelligent, well-educated lawyers could write these memos, larded as they are with sophisticated-looking tricks of statutory interpretation. But there is such a thing as being too clever for your own good.[129]

[128] I thank Christopher Kutz for emphasizing this point to me. Jeremy Waldron makes the same point in *Torture and the Common Law*, supra note 56.

[129] I owe special thanks to Lynne Henderson and Marty Lederman for comments and suggestions on this chapter. I do not wish to attribute any of my views or errors to them, however. (In particular, I know that Lederman disagrees with my discussion of the OLC draft memo on Article 49 of the Fourth Geneva Convention.) In addition, Jack Goldsmith raised important objections to my analysis of his Article 49 draft memo – fewer than he would have wished to raise, because his confidentiality obligations made it impossible for him to go into details. I have made some revisions based on these objections. I am grateful to him for his generosity, fairness, and objectivity in responding to my polemical comments. Obviously, remaining mistakes in my analysis are mine alone, not his – nor those of Sandy Levinson, who also offered helpful comments on an earlier draft.