



Tortured Law: Discussion Questions

OLC's Role within an Administration

- OLC has been called the “constitutional conscience” of an administration.
 - Do you think the authors of the torture memos played that role?
 - What do you think is a lawyer’s ethical duty to say no to the proposed CIA interrogation methods?
- Covert activities, such as the CIA interrogation program, raise unique situations where the judgments of legality are left only to the executive branch, because Congress, the courts, and the public might not know that the activities exist.
 - How should this reality affect our standards and expectations of the role of OLC lawyers?
 - Does it heighten a lawyer’s responsibility to act as an “honest broker” rather than as a hired gun?

Lawyering and National Security

- What is a national security lawyer’s proper role when he or she knows admittedly little about the policy implications and the attendant dangers of the facts at hand?

Consider this quote from Jack Goldsmith in his book *The Terror Presidency*, recounting his experience as head of OLC during the Bush Administration:

I was no expert on what our enemies were up to or what it would take to stop them. The methods of interrogating high-value al Qaeda detainees known to have information of al Qaeda plans had been fully vetted at the highest levels of the executive branch by officials who had much more information about the terrorist threat than I had, and who would be personally and politically responsible if another attack occurred as a consequence of the government declining to take these aggressive steps. I had very little basis for second-guessing my superiors’ judgment that certain detainees would be questioned as aggressively as legally possible. When appropriate, I put on my counselor’s hat and added my two cents about the wisdom of counterterrorism policies. But ultimately my role as the head of OLC was not to decide whether these policies were wise. It was to make sure that the policies were implemented lawfully.

OLC Lawyers' Ethical and Legal Responsibilities

- Many legal scholars and commentators, such as Professor David Cole in his book *The Torture Memos*, contend that, as a whole, the torture memos reveal a sustained effort by OLC lawyers to rationalize a predetermined result of authorizing whatever previously unlawful interrogation tactics the CIA requested.
 - Does this violate the federal anti-torture statute? A lawyer's ethical duties to uphold the law? A government lawyer's duty to serve the public and uphold the Constitution?
- Professor David Cole has written:

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

 - Do you agree?
 - What are a lawyer's ethical or legal responsibilities in such circumstances?
 - Lawyers cannot advise their clients to break the law; so isn't it problematic when lawyers instead "interpret" the law in such a way that immunizes a client's conduct?
- Jack Goldsmith has written that it is wrong to place too much blame on John Yoo, who was only a Deputy Assistant Attorney General, a position that does not require nomination by the president or confirmation by the Senate. It is widely known that Yoo was the primary drafter of the 2002 memo twisting the meaning of the federal anti-torture statute so as to authorize any abusive conduct so long as it did not result in death or organ failure. Goldsmith asserts that the ultimate responsibility for giving Yoo so much power and influence must lie with the Assistant Attorney General in charge of OLC, the Attorney General, and the White House.
 - Do you agree?
- David Cole, on the other hand, blames the entire Bush torture regime on the OLC lawyers. Had the OLC lawyers exercised independent judgment and said no to the CIA's requested practices, Cole has written, that might have been the end of the Bush Administration's torture policies. Cole writes, "The OLC lawyers had the opportunity, and the *responsibility*, to prevent illegal conduct *before* it occurred."
 - Do you agree?

What Kind of Torture?

- Most of the public debate about the Bush torture policies centers on “waterboarding”—yet the memos authorize more than dozen other interrogation techniques, such as slamming prisoners against the wall, stripping them naked and dousing them in freezing water while shackling them in ‘stress positions,’ and confining them in small, cramped containers for up to 18 hours on end.
 - Why do you think the public outcry tends to focus on waterboarding?
 - Do you find other “enhanced interrogation techniques” less objectionable?
 - If they don’t amount to ‘torture,’ do you think they are “cruel, inhuman, or degrading?”

Does It Matter Whether Torture Worked?

- The day after Attorney General Holder announced a preliminary review of the CIA interrogators who acted outside the scope of the torture memos, Dahlia Lithwick wrote on *Slate*: “To his credit, in Holder’s statement announcing the appointment of a special prosecutor, he didn’t bother to address the question of whether torture ‘worked,’ since that is not, nor has it ever been, a legal question.”
 - Do you agree?

The Need for Accountability

- Christopher Edley, dean of the law school at University of California, Berkeley, has written:

As a board member of the Obama Presidential Transition, I argued that fidelity to the Rule of Law requires investigation of possible criminality by officials in the previous administration, despite the political cost of being attacked for conducting a "witch hunt." My belief then, and now, is that only in a court of law can we have definitive findings of fact and conclusions of law. We need both. My friend Eric Holder, Attorney General of the United States, should either pursue the matter, or tell us that he believes there was no criminality. We need to know what happened, and not just from journalists. We need to know where the boundaries of lawful conduct are in combating national security threats. We need to know when legal advice and advocacy become criminal.

 - Do you agree?
- Some legal experts and advocates are calling for criminal investigations of the Bush torture practices, including the lawyers and policymakers who authorized those practices. Others have called for an independent truth commission, modeled after the 9/11 Commission, to review and assess the Bush torture policies. Some proposals for a truth commission include immunity for any current or former government official who testifies before it.

- What do you think is the best way to discover the truth of the secret torture regime?
- What is the best way to hold people accountable for unlawful acts?
- What is the best transparency and accountability mechanism in terms of restoring our reputation abroad, safeguarding our troops, and promoting our national security?

The Hon. Jay Bybee (9th Circuit Court of Appeals)

- What do you think about the fact that Jay Bybee, who signed the 2002 torture memos while he was Assistant Attorney General and head of OLC, is now serving a lifetime appointment on the Ninth Circuit Court of Appeals?
 - Should he be impeached?
 - Can he administer justice now that he has lost the public's trust?
 - Has he lost the public's trust?
- There was no public knowledge of the torture memos he wrote and authorized at the time of his confirmation hearing: does that affect your answer?
- It has been reported that Bybee took the job at OLC while awaiting a possible nomination to the Ninth Circuit. Does that affect your answer?

The Role of the Media

- Public knowledge of the secret torture memos has developed over time largely thanks to the reporting by journalists at *Talking Points Memo*, the *Washington Post*, and the *New York Times*, online commentary written by legal bloggers like Glenn Greenwald, Scott Horton, and the law professors on Balkinization, and books written by Philippe Sands and Jane Mayer.
 - What pressures do you think exist on mainstream media reporters to avoid these topic areas?
 - Glenn Greenwald often criticizes media outlets like *National Public Radio* and the *Washington Post* for calling abuse “torture” when it occurs in places like Iran but for refusing to use the word “torture” in connection with the CIA’s “enhanced interrogation techniques.” What editorial decisions do you think are appropriate in this situation?

The Role of Litigation and Discovery

- Some of the secret torture memos were publicly released by the Obama Administration, but most have been made public through the discovery process or via court order in litigation brought by nonprofits like the ACLU pursuant to the Freedom of Information Act.
 - What does this make you think about the role of litigation in discovering the truth?

Civil Lawsuits Against OLC Lawyers

- Jose Padilla is an American citizen who was arrested at a Chicago airport for allegedly plotting to detonate a “dirty bomb” and who was detained for almost four years as an “illegal enemy combatant” before being transferred to jail and facing criminal charges. A federal jury found him guilty of charges of conspiracy to kill people in an overseas jihad and to fund and support overseas terrorism, and he is currently serving a 17-year sentence. He has filed a civil lawsuit against John Yoo in U.S. District Court, Northern District of California, alleging that he was tortured while detained as a result of Yoo’s torture memos, seeking a declaration that his detention was unconstitutional, \$1 in damages, and attorney’s fees.
 - What do you think about this lawsuit?
 - Is the civil court system an appropriate way to hold government officials accountable?

Government Lawyering and Academic Freedom

- John Yoo remains a tenured professor at the University of California, Berkeley law school, where he has taught, among other things, constitutional law. Some have called for his dismissal, but Boalt Hall Dean Christopher Edley recently wrote an open letter to the law school community defending Yoo’s faculty position as a matter of academic freedom. Dean Edley wrote:

There are important questions about the content of the Yoo memoranda—about tortured definitions of “torture,” about how he and his colleagues conceived their role as lawyers, and about whether and when the Commander in Chief is subject to domestic statutes and international law that he finds bothersome or interfering. We press our students to grapple with these matters, and in the legal literature Professor Yoo and his critics do battle. One can oppose and even condemn a challenging or even abhorrent idea, but I do not believe that in a university we can fearfully refuse to look at it. That would not be the best way to educate, or a promising way to seek deeper understanding in a world of continual, strange revolutions.... I believe the crucial questions in view of our university mission are these: Was there clear professional misconduct—that is, some breach of the professional ethics applicable to a government attorney—material to Professor Yoo's academic performance now? Did writing the memoranda, and any related acts, violate a criminal or comparable statute? Absent very substantial evidence on these questions, no university worthy of distinction should even contemplate dismissing a faculty member. That standard has not been met.

- Do you agree?
- As a professor at a public university, Yoo has protected Due Process and First Amendment Rights vis a vis the administration. His salary is also funded by tax dollars. How does this affect your answer?

Restoring the OLC

- President Obama nominated Dawn Johnsen, a law professor who was a Deputy Assistant Attorney General from 1993 until 1996 and Acting Assistant Attorney General heading the OLC from 1997 until 1998, to be the new head of OLC.

She testified before the Senate Judiciary Committee in February 2009, but Senate Republicans have so far blocked her from receiving an up and down vote to get confirmed.

During the Bush Administration, Johnsen was a vocal critic of the OLC torture memos, calling their broad reading of presidential authority “outlandish,” and their constitutional arguments “shockingly flawed.” Those opposing her confirmation more frequently cite her work as a reproductive rights advocate as reason she is unfit to head the OLC.

- Do you think nominating a vocal critic of the Bush torture regime will restore integrity and independence to the OLC?
- What about charges that putting someone who wrote liberal blogs in charge of the office is just as partisan as the Bush Administration was?