

By Allen S. Weiner

Introduction

On April 16, the Justice Department released four previously classified memos issued by its Office of Legal Counsel (OLC) that provided legal guidance on the permissibility of certain aggressive techniques used during the interrogation of high-ranking al Qaeda suspects. The memos examined these techniques in light of the prohibition against torture under the Convention Against Torture (Torture Convention),[\[1\]](#) the U.S. criminal statute that implements the Torture Convention (“the anti-torture statute”),[\[2\]](#) and the prohibition on cruel, inhuman, and degrading treatment under the Torture Convention. The release of the memos has provoked considerable discussion about possible criminal accountability for government officials who carried out interrogations or who formulated the legal guidance authorizing them. This Insight addresses questions regarding possible criminal liability for the responsible officials and some issues of state responsibility of the United States under international law.

The Memos and Obama Administration Interrogation Policy

The four memos released on April 16 addressed various legal questions raised in 2002[\[3\]](#) and again in 2005[\[4\]](#) by a series of “enhanced interrogation techniques” employed by the Central Intelligence Agency (CIA) with a number of “high value” members of al Qaeda then held outside the United States. The techniques assessed included placing detainees on liquid diets, interrogating detainees in the nude, “walling” (slamming detainees against a wall), facial and abdominal slaps, cramped confinement, the use of stress positions, dousing detainees with cold water from a hose, and sleep deprivation (for periods up to 180 hours). The “most traumatic of the enhanced interrogation techniques” was “waterboarding,”[\[5\]](#) which involves laying a detainee on a board with his feet above his head, placing a cloth over his face, and pouring cold water over it. This makes it difficult to breath and induces “a sensation of drowning” and “fear and panic.”[\[6\]](#)

The memos concluded that that none of the enhanced interrogation techniques

violated the anti-torture statute or United States obligations under Article 16 to prevent “acts of cruel, inhuman or degrading treatment or punishment.”

Although OLC recognized that waterboarding could constitute a “threat of imminent death,”^[7] it nevertheless concluded that it did not produce physical suffering of sufficient duration^[8] or sufficiently prolonged mental harm^[9] to constitute torture.

Shortly after assuming office, President Obama issued an Executive Order prohibiting the use of any interrogation technique that is not authorized by the Army Field Manual governing interrogation methods.^[10] A number of the techniques employed by the CIA – including forced nudity and waterboarding – are expressly prohibited by the Army Field Manual.^[11] The Manual more generally prohibits all “forms of physical pain,” without regard to whether or not they are severe.^[12]

When the OLC memos were released, President Obama provided an assurance that his Administration’s repudiation of the “enhanced interrogation techniques” would not result in criminal prosecution of “those who carried out their duties relying in good faith upon legal advice from the Department of Justice.”^[13] In public remarks only a few days later, however, the President indicated that this assurance did not necessarily extend to “those who formulated those legal decisions.” He indicated that the issue of criminal accountability for Bush Administration lawyers would be decided by “the Attorney General within the parameters of various laws.”^[14] Press accounts indicate that the Office of Professional Responsibility in the Justice Department has conducted a detailed review of the conduct of the OLC lawyers who wrote the interrogation memos and has reached a tentative conclusion that although the lawyers committed serious lapses of professional judgment, they should not be prosecuted.^[15]

Domestic Criminal Accountability for Bush Administration Interrogation Techniques

Although U.S. law criminalizes torture, prosecution of interrogators who employed techniques in accordance with OLC guidance may face considerable obstacles.^[16] Despite the fact that President Obama^[17] and Attorney General Eric Holder^[18] have publicly expressed their view that waterboarding constitutes torture, individuals who acted on the basis of OLC’s judgment that it was *not* torture would have a strong defense to any prosecution under the “reasonable reliance” doctrine. This common law doctrine provides that the

belief that one's conduct is lawful is a defense when the defendant "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . an official interpretation of the public officer or body charged by law with responsibility for the interpretation . . . of the law defining the offense."[\[19\]](#) Although there is some question about the application of the doctrine to government officials who claim to rely on a superior's statement of their legal duties,[\[20\]](#) as opposed to private citizens who rely on official representations, the longstanding responsibility of OLC for interpreting statutes for the Executive Branch would give interrogators a strong basis for invoking the defense. This is particularly true in light a series of Supreme Court rulings suggesting that not only common law doctrine, but also "the Due Process Clause circumscribes the ability of state and federal authorities to bring criminal prosecutions against defendants who acted in reasonable reliance on an official interpretation of law."[\[21\]](#)

In contrast, the government lawyers who formulated the legal advice that justified enhanced interrogation techniques, if those techniques are later deemed to constitute torture, would not be able to invoke the reasonable reliance defense. And there is nothing about functioning in a legal capacity as such that immunizes lawyers from prosecution for their participation in crimes. Lawyers have, for example, been convicted of conspiracy to launder money for giving advice on how to structure illegal financial transactions so as to avoid governmental suspicion[\[22\]](#) and of conspiracy to obstruct justice for carrying out their representation of a grand jury witness so as to prevent the witness from giving truthful testimony.[\[23\]](#) Lawyers have even been convicted of war crimes for the way they discharged their legal functions. Herbert Klemm, an official of the Third Reich, for instance, was convicted by a U.S. military tribunal after World War II for, among other things, a legal position he took during his tenure in the Nazi Party Chancellery. Specifically, Klemm approved the Justice Minister's proposal to deny the application of the German Criminal Code of Juveniles to Poles, Jews, and gypsies, a position which contributed to the persecution of those groups.[\[24\]](#)

Nevertheless, attempting to hold OLC lawyers criminally responsible for the advice they gave in the memos could prove difficult. To convict a lawyer for conspiracy or aiding and abetting torture, it is likely that the prosecution would have to prove that the purpose of the lawyer's advice was to facilitate conduct that the lawyer knew to be criminal. Where a lawyer gives advice in good faith, or that he believes is well-founded, "he cannot be held liable for an error in judgment."[\[25\]](#) Criminal prosecutions of lawyers who play a role in advising

clients who pursue criminal activity are accordingly quite rare. The government would have to prove, in any case against lawyers involved in formulating the OLC guidance, that they gave advice that they knew to be erroneous. In the absence of evidence demonstrating that the OLC lawyers who advised the CIA that the interrogation techniques were legal did not in fact believe that there was a plausible basis for this argument, it would be difficult to establish their criminal liability. Evidence of such belief – emails, meeting minutes, other officials' testimony – may be quite difficult to adduce.

The difficulty in criminally prosecuting those connected to the CIA interrogations does not, of course, preclude other forms of accountability. Some members of Congress have called for an inquiry into the interrogation practices by either Congressional committees or an independent commission.[\[26\]](#) A *New York Times* editorial has called for the impeachment of Jay Bybee, now a federal judge, who signed the earliest of the memos recently released by the Justice Department.[\[27\]](#) The Justice Department's Office of Professional Responsibility will reportedly recommend that state bar associations consider possible disciplinary action against lawyers involved in approving the interrogation techniques.[\[28\]](#) And one former enemy combatant detainee has filed a civil suit against former OLC lawyer John Yoo alleging that Yoo was responsible for, among other things, "unconstitutional interrogations" that violated the Fifth and Eighth Amendments.[\[29\]](#)

International Responsibility of the United States

In view of President Obama's statement that that waterboarding constitutes torture, the government's decision not to prosecute CIA interrogators who used that technique is presumably based either on an assessment that the defendants would be able to invoke the "reasonable reliance" defense, or on a policy judgment to eschew prosecution. If the decision is based on policy grounds, the failure to prosecute perpetrators would appear to violate the U.S. obligation under Article 7 of the Torture Convention to try or extradite persons in territory subject to its jurisdiction alleged to have committed torture. The Torture Convention does not contain an exception allowing for non-prosecution on policy or prudential grounds.

If, on the other hand, the decision not to prosecute interrogators is based on the reasonable reliance defense, it is likely that this would relieve the United States of its obligation to prosecute acts of torture under the Convention. Although it is not clear, under of general international criminal law, whether a

domestic law defense such as the reasonable reliance doctrine could be invoked to defuse an international law obligation to prosecute, the Torture Convention provides that decisions about prosecutions shall be taken “in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”^[30] This suggests that a good faith decision not to prosecute on the basis of domestic criminal law procedures and defenses may be consistent with United States obligations under the Convention.

Apart from their status under the Torture Convention, the interrogation techniques likely violated U.S. obligations under Common Article 3 of the Geneva Conventions, which in the context of “conflicts not of an international character” requires humane treatment of detainees.^[31] It also prohibits, among other things, “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”^[32] OLC presumably did not, in 2005, analyze the enhanced interrogation techniques under Common Article 3 given the U.S. government’s position that the conflict between the United States and terrorist actors in Afghanistan did not fall within the scope of Common Article 3, because it was not a civil war “occurring in the territory of one of the . . . Parties” to the Geneva Conventions. In 2006, however, the Supreme Court in *Hamdan v. Rumsfeld* found Common Article 3 applicable to the conflict with al Qaeda.^[33] Under that view, there is a strong argument that at least some of the interrogation techniques – which OLC itself noted were intended to cause humiliation – violated the prohibition on humiliating and degrading treatment.^[34] There is also a good argument that the United States is responsible as a matter of international law for violating the prohibition on cruel treatment.^[35]

Finally, apart from the question of state responsibility on the part of the United States, it is possible that individual interrogators or lawyers may be subject to criminal prosecution outside the United States. Torture is an offense subject to universal jurisdiction, and under the Torture Convention, any state party may potentially prosecute acts of torture no matter where they have occurred. A decision not to prosecute in the United States – whether based on the availability of strong defenses under domestic law or on policy considerations – does not preclude other states from exercising criminal jurisdiction. We have already seen the initiation of a criminal investigation in Spain of six U.S. Government officials – including two OLC lawyers – for torture that allegedly took place at the U.S. military facility at Guantanamo Bay, Cuba.^[36] Individuals involved in either the design or execution of the enhanced interrogation program are accordingly vulnerable to arrest and prosecution if

they travel outside the United States.

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Endnotes

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[2] 18 U.S.C §§2340-2340A. Section 2340A makes it an offense to comment or attempt to commit torture “outside the United States.” The statute was enacted to give effect to the obligation under Article 4 of the Torture Convention to establish jurisdiction over the offense of torture when, among other things, “the alleged offender is a national of” a State Party to the Convention. Pertinent definitions are included in 18 U.S.C. § 2340. Conduct amounting to torture within the United States is prohibited by other criminal statutes.

[3] Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Interrogation of al Qaeda Operative* (Aug. 1, 2002) [hereinafter Zubaydah Memo].

[4] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee* (May 10, 2005) [hereinafter Techniques Memo]; Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value Al Qaeda Detainees* (May 10, 2005) [hereinafter Combined Use Memo]; Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value Al Qaeda*

Detainees (May 30, 2005). The CIA appears to have requested the 2005 memos in part because the Justice Department had withdrawn an August 2002 memo giving general guidance on the interpretation of the anti-torture statute – commonly referred to as the “Torture Memo” – that was first leaked to the press in June 2004. See [Memorandum for Alberto R. Gonzales](#), Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* (Aug. 1, 2002).

[5] Combined Use Memo, *supra* note 4, at 15.

[6] Techniques Memo, *supra* note 4, at 13.

[7] *Id.* at 43.

[8] *Id.* at 43.

[9] *Id.* at 44.

[10] Executive Order, [Ensuring Lawful Interrogations](#) §3(b) (Jan. 22, 2009).

[11] Department of the Army, Field Manual No. 2-22.3, Human Intelligence Collector Operations, at 5-21 (2006). Sleep deprivation and dousing also appear to violate restrictions in the Army Field Manual. *Id.* at M-10 (detainees must be protected from “excessive dampness” and must not be precluded from “getting four hours of continuous sleep every 24 hours”).

[12] *Id.* at 5-21.

[13] President Barack Obama, [Statement on Release of OLC Memos](#), Apr. 16, 2009, available at http://www.whitehouse.gov/the_press_office/Statement_of-President-Barack-Obama-on-Release-of-OLC-Memos.

[14] The White House, [Remarks by President Barak Obama and King Abdullah of Jordan in Joint Press Availability](#), Apr. 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-President_Obama-and-King-Abdullah-of-Jordan-in-joint-press-availability.

[15] David Johnston & Scott Shane, [Interrogation Memos: Inquiry Suggests No Charges](#), N.Y. TIMES, May 6, 2009, at A1.

[16] Those interrogators who took actions beyond the scope of the OLC guidance, or not in reasonable reliance of it, may face a different situation. See R. Jeffrey Smith, *Hill Panel Reviewing CIA Tactics*, WASH. POST, May 10, 2009.

[17] The White House, [News Conference by the President](#), Apr. 29, 2009 (“What I’ve said . . . is that waterboarding violates our ideals and our values. I do believe that it is torture.”).

[18] Josh Meyer, *Holder calls waterboarding torture; Obama’s nominee for Attorney General promises big changes at a ‘badly shaken’ Justice Department*, L.A. TIMES, Jan. 16, 2009, at A10 (quoting Attorney General-designate Eric Holder as stating during his confirmation hearing, “Waterboarding is torture”).

[19] Model Penal Code §2.04(3)(b) (rev. ed. 1985).

[20] Model Penal Code §2.04 cmt. at 278 & n.32 (discussing application of the doctrine in *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976), involving the reversal of the convictions of two “foot-soldiers” in the break-in of Daniel Ellsberg’s office who claimed that Howard Hunt, a White House employee, told them that the burglary was designed to obtain information about a “traitor” who was passing information to the Soviet Embassy).

[21] John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 3 (1997).

[22] *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992).

[23] *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987).

[24] *United States v. Alstoetter*, (“Justice Case”), in 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 954, 1090, 1094-95 (1951).

[25] *United States v. Cintolo*, *supra* note 22, 818 F.2d at 994 (quoting *In re Watts*, 190 U.S. 1, 29 (1903)).

[26] David M. Herszenhorn, *Lawmakers Push Interrogation Inquiries*, N.Y. TIMES, Apr. 25, 2009, at A11.

[27] Editorial, *The Torturers’ Manifesto*, N.Y. TIMES, Apr. 18, 2009, § WK, at 9.

Bybee signed the Zubaydah Memo, *supra* note 3. He also signed the 2002 “Torture Memo” referred to in note 4, *supra*.

[28] Johnston & Shane, *supra* note 15, at A1.

[29] Complaint at 21, *Padilla v. Yoo*, (N.D. Cal. 2008) (CIV 08 No. 0035), available at <http://jurist.law.pitt.edu/pdf/YooComplaint.pdf>.

[30] Torture Convention, *supra* note 1, art. 7(2).

[31] All four of the 1949 Geneva Conventions contain an identical, or “common,” Article 3. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T 3114, 3116–18, 75 U.N.T.S. 31, 32-34.

[32] *Id.*

[33] 548 U.S. 557, 629 (2006).

[34] Techniques Memo, *supra* note 4, at 32 (noting that some detainees might be humiliated by forced nudity), 33 (noting that one purpose of the facial slap is to cause humiliation), and 40 (noting potential humiliation of requiring a detainee to wear an adult diaper during periods of sleep deprivation).

[35] A “grave breach” of Common Article 3 could at least in theory also provide an independent basis for domestic prosecution under the War Crimes Act of 1996, as amended. See 18 U.S.C. § 2441. In the Military Commissions Act of 1996, certain violations of Common Article 3 were defined as “war crimes” prosecutable under that statute. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, §6(b) (revising subsection c(3) and adding a new subsection d to 18 U.S. § 2441). However, not all acts prohibited by Common Article 3 were included in the definition of “grave breaches” for purposes of the War Crimes Act. Outrages upon personal dignity and humiliating and degrading treatment, for instance, were not defined as grave breaches prosecutable under domestic law. In addition, some of the provisions that were included as grave breaches were defined very narrowly. “Cruel or inhuman treatment,” for example, is defined as “an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse.” Cruel or inhuman treatment, in other words, was effectively limited to conduct that would otherwise constitute “torture.” (“Torture” is included in the list of prosecutable

grave breaches of Common Article 3, and it is defined in the War Crimes Act in substantively identical terms to those in the anti-torture statute.) Finally, the Military Commissions Act stipulated that the incorporation of the “grave breach of Common Article 3” provisions into the War Crimes Act fully satisfied United States obligations under the Geneva Conventions to provide “effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character.” Under the circumstances, it is unlikely that the War Crimes Act would provide a basis for domestic prosecution of any conduct that would not otherwise be prosecutable under the anti-torture statute.

[36] Associated Press, *Spanish judge opens Guantanamo investigation* (Apr. 29, 2009), available at <http://www-cdn.npr.org/templates/story/story.php?storyId=102474382>.