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Responses to the Ten Questions

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RESPONSES TO THE TEN QUESTIONS

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3. DID THE MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE[1] IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN?

4. DID THE MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

I. BACKGROUND

To provide my response to these questions, I believe it is necessary to provide background as to what the Office of Legal Counsel (OLC) does and remind the reader about the historical

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1. I will analyze malpractice by employing the simplest definition: "[a] lawyer's failure to render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances." BLACK'S LAW DICTIONARY 978 (8th ed. 2004).

background of these two legal opinions.

OLC is part of the Department of Justice and employs some of the finest lawyers in the United States. In the words of then Principal Deputy Assistant Attorney General Stephen Bradbury, OLC has only one purpose which is "to advise the President and executive agencies on questions of law."[2] In the same memorandum previously cited, Mr. Bradbury also wrote that "[t]he value of an OLC opinion depends upon the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of the policymakers."

I chose this passage because I believe it best describes that OLC does not have a traditional client as would an attorney in private practice. Candid, principled, and independent advice means that the OLC lawyer is obligated to analyze the law and the law alone without reference to the goals of the President or others employed in the executive branch. While an attorney in private practice would be obligated to zealously represent his or her client and might thereby argue strained interpretations of the law, OLC attorneys only represent the law. OLC lawyers are tasked to provide advice to persons who have sworn to defend the Constitution and uphold the law. The President, as a person, is therefore not OLC's client, and OLC has no obligation to zealously support the political goals of the President.

In 2002, as the Twin Towers smoldered and the Pentagon was being rebuilt after the September 11 attacks, the U.S. Government was facing what it viewed as a mortal threat at home. At the same time, it was at war against the Taliban and al Qaeda in Afghanistan and other places around the world. The policymakers surely wanted to do all that they could to prevent another attack and learn everything they could from the terrorists and Taliban members that they began to capture. In this regard, these two memoranda served the interests of the policymakers by giving them the green light to detain and interrogate suspects without risk of prosecution under U.S. law. At the same time, these memoranda also address complicated issues of federal and international law about which lawyers could disagree. The point is that there is

2. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Attorneys of the Office, Best Practices for OLC Opinions (May 16, 2005), *available at* http://www.justice.gov/olc/best-practices-memo.pdf.

always a tension that arises when the law is interpreted during a time of war.

It bears reminding that these attorneys were not the first lawyers to be asked to "interpret" the law and the Constitution in a time of war.[3] President Roosevelt's attorneys allowed the *Ex parte Quirin* defendants to be executed before the Supreme Court even issued an opinion affirming the sentences.[4] Presidents Nixon, Wilson, Lincoln, and others relied upon attorneys to advance their interests. Here, though, it is clear that these lawyers did commit malpractice in issuing the Interrogation Memorandum. On the other hand, I do not find that the lawyers who issued the memorandum regarding the Geneva Conventions committed malpractice. This paper presents the rationale for these decisions.

II. THE GENEVA CONVENTIONS MEMORANDUM

The specific question posed to OLC in the January 9, 2002, memorandum was whether the "laws of armed conflict apply to the conditions of detention and the procedures for trial of members of Al Qaeda and the Taliban militia." The answer provided was, in short, that international treaties did not provide protections to these people as they were either not lawful combatants wearing a uniform or fighting for an organized armed force of a nation that was a party to the Geneva Conventions.[5] These opinions are certainly reasoned and arguably justified under applicable law. It is important to recognize that the Supreme Court disagreed with much of these opinions as can be seen in the *Hamdi* and *Hamdan* decisions. However, it is obvious that an attorney that loses at the Supreme Court does not automatically commit malpractice.

There are, for sure, certain parts of the opinion that are very difficult to support as a reasonable interpretation of the law. Most significantly, the opinion draws the conclusion that Common Article 3 of the Geneva Convention is not applicable to captured

3. *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (Chief Justice Rehnquist's interpretations of civil liberties during wartime).

4. PIERCE O'DONNELL, IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA 244–53 (2005).

5. Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002), *available at* http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf.

members of al Qaeda and the Taliban militia. This is significant because 18 U.S.C. § 2441 (c)(3) of the War Crimes Act defines as a war crime conduct that "constitutes a violation of common article 3" of the Geneva Convention. That statute, if applicable, would have made it a violation of federal law to commit any "outrages upon personal dignity, in particular humiliating and degrading treatment" upon an al Qaeda detainee. Such a legal finding would have crippled the "enhanced" interrogation techniques that followed and were plainly contemplated at that time. Similarly, had Common Article 3 been deemed to have applied, the military commissions then contemplated would have plainly failed the test in section (d) which prohibits the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized by civilized peoples." Of course, we know that the Supreme Court in *Hamdan* did later hold that the commissions as then constituted did fail this test.

While I believe that most legal analysts would have decided that Common Article 3 did apply to al Qaeda and the Taliban militia, I do not believe that malpractice was committed by finding to the contrary. That is because it was arguable that Afghanistan was not, during the time at issue, part of the territory of one of the High Contracting Parties. While this analysis is sloppy, citing, for example, to newspaper articles, I believe that the writers of this opinion made it clear that the President retained the option to determine whether, as a matter of policy, the standards of the applicable treaties applied to the U.S. Armed Forces. As I do not see this as a "roadmap" to violate the law or in derogation of the standard of care, I do not believe that malpractice was committed in this regard.

III. THE INTERROGATION MEMORANDUM

The stated purpose of the August 1, 2002, memorandum was to solicit the OLC's opinion as to the applicability of the Convention Against Torture, 18 U.S.C. §§ 2340–2340A, to certain "interrogations taking place outside of the United States." This memorandum approved as legal acts which "may be cruel, inhuman or degrading but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture." It was this memorandum that approved waterboarding and many other practices that I believe are plainly

torture as defined under the law. As such, I do assert that it was malpractice for OLC to have issued this opinion. I say this for two distinct reasons.

Many legal analysts have written that the legal work set forth in the opinion was sloppy and indefensible.[6] We know that Jack Goldsmith, when he became head of OLC in 2004, reversed this opinion as flawed. OLC was obligated to provide an independent and principled opinion on the applicability of the Convention Against Torture to the interrogation program that was planned. The sloppiness and flawed nature of the analysis constitutes malpractice in and of itself. More importantly, this flawed analysis was in my judgment done intentionally so as to allow the interrogation program to proceed in a manner cloaked with legality regardless of the correct application of the law. This was, thus, the most dangerous and invidious form of malpractice because of its intentional nature.

It is submitted that the real purpose of this memorandum was to provide legal cover for those who were about to or had approved actions which all of us would consider torture and thus a violation of federal criminal law had such treatment been inflicted on a member of the U.S. Armed Forces. Attorneys who have given legal advice designed to assist someone planning to violate federal law have been prosecuted for aiding and abetting such violations. This opinion deserves no greater respect.

There are two parts of this opinion that are plainly designed to provide a legal defense, in advance, to any government actor who might later face prosecution for torturing a captured member of al Qaeda or the Taliban militia. First, the interpretation of specific intent is quite strained and "defendant friendly," and the opinion of December 30, 2004, which abrogated the subject memorandum, properly eliminated it as unnecessary. It was written that specific intent means that the actor must have expressly "intend[ed] to achieve the forbidden act... knowledge alone that a particular result is certain to occur does not constitute specific intent."[7] From

6. Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 350–51 (2007).

7. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 3–4 (Aug. 1, 2002), *available at* http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf [hereinafter Bybee Torture Memo].

personal knowledge, many federal prisoners I have represented would have preferred that instruction to the ones they received on this subject. Suffice it to say that such a definition would allow anyone to argue essentially that though the detainee eventually died while being interrogated, it was not his intent to injure him at all when it started. This interpretation provides tremendous leeway to the interrogators, and I believe that was the purpose.

OLC's obligation is not to provide "get out of jail free" cards to those intending to violate the law. Yet, this memorandum does exactly that. Indeed, much of the opinion is dedicated to an examination of "possible defenses that would negate any claim that certain interrogation methods violate the statute." The question posed was to interpret the law. Instead, OLC provides potential defenses to a violation of the law. When you look at the reasoning provided in support of these defenses, you can quickly see why this opinion has been described as sloppy and flawed.

The authors write that "[e]ven if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached upon the President's constitutional power to conduct a military campaign. . . . Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."[8]

It is frankly difficult to fathom, given the fact that we live in a constitutional democracy, that OLC lawyers could argue that the President was above the law and could violate the law as he sees fit just because a state of war existed. Certainly the President could argue that political position in a speech or to the Congress. Yet as to OLC, one would have thought that the holding in *United States v. Nixon* would have resolved the argument once and for all. And, in support of this specious claim, the writers cite only to cases involving the enforcement of congressional subpoenas. There is no legal question that the President has the constitutional authority to wage war. But in doing so, he must rely upon the Congress to declare war and to fund the troops. There is no question that the President, when conducting a war, may issue orders to interrogate and detain the enemy. But in doing so, he must abide by the law and applicable international treaties. To argue otherwise is simply

8. *Id.* at 31.

malpractice intended solely to assist the policymaker seeking to advance a political argument.

Finally, the memorandum lists the defenses of necessity and self defense as available to one who violates the torture statute. As was true above, to answer the question presented, OLC was not called upon to provide legal defenses to the interrogators and their bosses. Worse yet, the advice provided is stunning. In a sweeping statement, the writers argue that literally any action required to obtain information from a detainee would be justified under the concept of self-defense. "[W]e believe that a claim by an individual of the defense of another would be further supported by the fact that, in this case, the nation itself is under attack and has the right to self-defense."[9] As if that was not broad enough, the writers conclude that "a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack."[10] To expand the principal of self-defense to include any criminal act, even an intentional killing, undertaken by anyone working for the federal government involved in the interrogation program is plainly malpractice.[11]

Any doubt that this opinion was written with an eye towards providing immunity in advance to those involved in the interrogation program is resolved in the penultimate sentence in the memorandum. There, the writers show their cards and provide substantial evidence of malpractice. "[E]ven if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate criminal liability."[12]

Thus we have come full circle. OLC opinions are to be independent and candid. They are to be true to the law and not drafted to please policymakers. Here, we have an opinion that was not only drafted to please policymakers but to provide a shield against prosecution for violations of the law. That, I believe, meets the definition of malpractice.

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9. *Id.* at 44.

10. *Id.* at 45.

11. This argument was also rejected on December 30, 2004. "There is no exception under the statute permitting torture to be used for a 'good reason.'" Memorandum Opinion from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Att'y Gen., Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), *available at* http://www.justice.gov/olc/18usc23402340a2.htm.

12. Bybee Torture Memo, *supra* note 7, at 46.

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