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The Justice Department's Change of Heart Regarding Torture:

A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further

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As 2004 drew to a close, the Office of Legal Counsel of the United States Department of Justice took an important step towards restoring its own integrity: It released a memorandum essentially repudiating its earlier analysis of the circumstances under which someone could be found criminally liable for engaging in torture. That earlier memorandum of August 2002 had turned intellectual summersaults to find loopholes and excuses for the commission of what a lay observer would surely consider torture.

The new memo, in contrast, is fair-minded and reasonable. Accordingly, its author, Acting Assistant Attorney General Daniel Levin, deserves considerable praise. As I explain below, the memo definitively repudiates two of the most outrageous positions set forth in the August 2002 memo: the almost impossibly high threshold for finding an act of torture; and the contention that a torturer can escape criminal liability if he engages in torture with a noble goal in mind, such as to extract vital information from the torture victim.

In one particular, however, the new memo could have gone further. The August 2002 memo had set forth a third outrageous proposition: that Congress lacks the power to prohibit torture undertaken at the behest of the President, acting in his capacity as Commander in Chief. Although the new memo laudably declines to endorse this view, it does not formally repudiate the position either.

That is unfortunate, because the August 2002 memo's contentions regarding the wartime powers of the President are truly frightening. They deserve to be repudiated expressly and unequivocally.

The Political Background of the Torture Memos

The Office of Legal Counsel (OLC) provides legal advice to the Executive Branch of the federal government on important matters of public policy. Its August 2002 memo was signed by Jay Bybee, then the head of OLC and now a federal appeals court judge. Judge Bybee, who was confirmed by the Senate before the memo came to light, has refused to comment on it.

Much of the political heat produced by the Bybee memo has accordingly been directed elsewhere--at the Bush Administration in general and at White House Counsel Alberto Gonzales, to whom the memo is addressed, in particular. Gonzales will shortly face his own Senate confirmation hearings on his nomination to become Attorney General. When he does, he will likely be asked why he sought legal advice about the "standards of conduct" under the international treaty and the federal statute barring torture.

The August 2002 memo recites OLC's understanding that the torture issue arose "in the context of the conduct of interrogations outside of the United States." One can reasonably infer, therefore, that the Bush Administration, with the approval of Gonzales, was interested in pushing the envelope in its treatment of suspected al Qaeda terrorists and others detained in Afghanistan, at Guantanamo Bay, and elsewhere.

That inference receives further support from reports of the treatment of prisoners in Iraq. Together, the evidence suggests that U.S. military and civilian interrogators were given the green

light to engage in practices that the International Committee of the Red Cross has described as "tantamount to torture."

The Senate is thus entitled to inquire whether Gonzales knew or should have known that his request for legal advice regarding potential criminal liability for torture was part of a scheme to authorize--or at least turn a blind eye towards--torture.

In the wake of last week's release of the new memo, some commentators have suggested that the Administration is hoping to defuse the potentially explosive issue of the role Gonzales played with respect to the August 2002 memo. If that is the Administration's hope, however, it seems a vain one; the fact that OLC has now repudiated the views it expressed earlier sheds little light on Gonzales' fitness to serve as the nation's chief law enforcement officer.

If one were to conclude that Gonzales showed poor judgment and disrespect for the rule of law by asking for the August 2002 memo, then it is hard to see how OLC's more recent change of heart would alter this conclusion. A confession of error by Gonzales himself might be relevant, but why should an about-face by OLC be relevant?

The Legal Significance of the OLC Memos

These political considerations will be addressed when Gonzales goes before the Senate. For now, let us focus on the law. What is the legal significance of the August 2002 memo and the December 2004 memo repudiating it?

OLC memos do not have the force of law in quite the way that opinions of the Supreme Court do, but neither are they mere opinion pieces in the way that, say, a scholarly article or a law professor's column on FindLaw's Writ is. OLC is often asked to address constitutional issues that will never to make it to court--what lawyers call non-justiciable political questions. In these circumstances, the formal advice of OLC may be the only sort of "precedent" that exists.

Moreover, although the head of OLC and the top deputies are political appointees, the office as a whole has long had a culture of independence. The dedicated and talented lawyers who work at OLC typically see themselves not as mere servants of the Administration that happens to seek their advice, but also as keepers of an inter-generational trust. Thus, one commonly sees OLC memos taking seriously the views expressed in prior OLC memos prepared for Presidents of either political party. The OLC under Republican Administrations approvingly cites the memos of its predecessors in Democratic Administrations, and vice-versa.

Against this background, the August 2002 memo can only be described as a serious departure from longstanding OLC practice. In content and tone, the memo reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner's request for whatever arguments can be concocted to enable the firm's client to avoid criminal liability.

The December 2004 memo, however, is markedly different. Although its analysis is no less lawyerly than that contained in the August 2002 memo, it shows a sensitivity to the important role that OLC plays in shaping national policy--a sensitivity that was sorely lacking in the earlier memo.

How Severe is the Pain or Suffering that Torture Must Cause?

As its title suggests, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Acts, prohibits not only torture but also less serious forms of cruelty, inhumanity and degradation. The United States ratified the Convention and subsequently enacted federal legislation that defines torture and establishes criminal liability for Americans and others found in the United States who commit torture abroad.

Significantly, however, the federal statute does not impose criminal liability for cruel, inhuman, or degrading acts. Under a reservation adopted by the Senate when it ratified the U.N. Convention, such lesser acts are equated with treatment that would be considered unconstitutional under the Fifth, Eighth, and Fourteenth Amendments.

The August 2002 memo seizes on the distinction between, on the one hand, torture, as defined in both the U.N. Convention and the U.S. implementing legislation as the infliction of "severe pain or suffering," and, on the other hand, "mere" cruel, inhuman or degrading acts. The basic strategy of the August 2002 memo on this point is to treat all but the most horrific acts as insufficiently severe to constitute torture. Thus, the August 2002 memo sets the torture threshold at "excruciating and agonizing" pain, or pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

Although the December 2004 memo recognizes that the plain text of the Convention and federal law do distinguish between torture and lesser degradations, it disavows the extremely high threshold advocated in the August 2002 memo.

To be sure, the new memo is not especially helpful in establishing exactly how much pain or suffering is necessary to count as "severe." For the most part, the memo simply describes cases in which the courts have and have not found torture to have occurred.

But this is probably the prudent course. Cruel, inhuman and degrading forms of treatment are, after all, no more lawful than torture, even if they do not give rise to criminal liability in the U.S. courts. To draw sharp distinctions between torture and these "lesser" horrors, as the August 2002 memo attempted to do, could only serve to signal to potential torturers how they can avoid imprisonment while still inflicting great pain and suffering. OLC apparently now realizes that it is inappropriate to send such signals.

When, if Ever, is Torture Justified?

Perhaps the most jarring aspect of the August 2002 memo was its argument that a defendant could escape criminal liability for committing torture by presenting a defense of necessity or self-defense.

Under either defense, the torturer could argue that he tortured his victim in order to prevent some terrible harm. To use the classic example, one could claim that he had in custody a suspect believed to have planted a time bomb that, if not defused, would kill many innocents. If the defendant reasonably believed that by torturing the suspect, he would learn the location of the bomb and thus save the innocents, the argument goes, he cannot be punished for having done so.

The notion that torture is sometimes morally justified has real appeal. If one stipulates sufficiently great certainty of a catastrophe, all but the most punctilious Kantians will be tempted to say that it is better to torture the terrorist than to allow the catastrophe to occur.

The difficulty, though, is that the real world provides probabilities rather than certainties. Categorical prohibitions against torture like the one contained in the U.N. Convention and federal law are based on the sensible assumption that if torture is condoned in the extreme case of the known terrorist who has certainly planted the ticking time bomb, security officers will come to believe that they hear bombs ticking everywhere, and will use torture against people merely suspected of posing a security threat.

Only by prohibiting torture under all circumstances, such laws assume, can we prevent an extremely limited authorization, for torture in extreme circumstances, from becoming a license for routine torture.

It is possible that this logic is wrong. Perhaps, as Alan Dershowitz and others have argued recently, careful regulation can prevent us from slipping down the slope from rare to common torture.

But if so, that is an argument for a dramatic change in the law, rather than an argument for reading nonexistent exceptions into the existing international and U.S. categorical bans on torture. The August 2002 memo, in proposing such exceptions, would have gutted the laws it purported to interpret.

Accordingly, the December 2004 memo states unequivocally that "there is no exception under the statute permitting torture to be used for a 'good reason.'"

Can Congress Limit the President's Ability to Order Torture?

The principal disappointment in the December 2004 memo is its failure to condemn the view of Presidential power expressed in the August 2002 memo. That earlier memo asserted that "the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces." It argued that Congress lacks the constitutional power to limit the President's decisions about how to treat captives.

The August 2002 memo had attempted to justify these sweeping propositions largely by presenting selective, out-of-context citations of broad language in a few Supreme Court opinions, and citing OLC's own recent post-9/11 memos.

The December 2004 memo should have unequivocally repudiated the unlimited view of Presidential power espoused in August 2002. Article I, Section 8 of the Constitution commits to Congress the authority "to make Rules concerning Captures on Land and Water." From this language, Congress's authority to limit the President's treatment of captives is clear.

If the August 2002 memo's view of Presidential power were accepted, the President could unilaterally order discipline of U.S. service members even if that discipline clearly contradicted the Uniform Code of Military Justice, enacted by Congress. He could even order that all enemy captives be shot, notwithstanding clear treaty obligations to the contrary. These extreme examples show the absurdity of any claim that the President has an entirely free hand in the treatment of captives or the conduct of war more generally.

The December 2004 memo, by its terms, "supersedes the August 2002 Memorandum in its entirety." For that reason, the August 2002 assertion of the President's virtually unlimited power as Commander in Chief can no longer be said to constitute official OLC policy.

However, the December 2004 memo does not specifically disavow the August 2002 view of Presidential authority. Deeming analysis of such power "unnecessary," the December 2004 memo simply declines to address the subject.

Why did the memo's author feel it was unnecessary to address this key point? The memo itself claims that "[c]onsideration of the bounds of any" Presidential authority to authorize torture in violation of Acts of Congress "would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."

But this explanation for the new memo's reticence as to the scope of Presidential authority does not quite wash, for none of the OLC analysis is, strictly speaking, necessary; if the new memo had been limited to necessary analysis, there would have been no memo at all.

Given that U.S. personnel are not supposed to engage in torture or cruel, inhuman or degrading treatment of prisoners, there is no necessity to clarify the line between the two categories of forbidden conduct; yet the December 2004 memo does just that. Similarly, with respect to the question of whether there is a good-reason exception to the torture prohibition, and a number of other issues, the December 2004 memo does not simply wash away the conclusions of the August 2002 memo; it affirmatively draws contrary conclusions.

Accordingly, one is left to worry that OLC declined to assert limits on Presidential authority because OLC may continue to entertain a dangerously broad view of that authority.

Nonetheless, putting aside the legitimate worry about what the December 2004 memo does not say about Presidential power, the memo is, on the whole, a most welcome development. Whatever the actual motives of the Justice Department officials who released it when they did, the memo itself should have the salutary effect of communicating to personnel overseas that the U.S. neither encourages nor tolerates torture.

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