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Understanding the OLC Torture Memos (Part I)

Marty Lederman

Following up on Jack's latest post, I highly recommend this recent column by Professor Michael Dorf of the Columbia Law School, concerning the two publicly released OLC Opinions construing the federal torture statute—its notorious August 1, 2002 Opinion and the superseding Opinion that OLC released last Thursday. Professor Dorf is correct that in issuing its new memo OLC has taken a critically important step toward restoring the Office's integrity and reputation for rigorous and impartial legal advice: I agree with Professor Dorf that the new memo's author—Acting Assistant Attorney General Daniel Levin—and other OLC attorneys who undoubtedly contributed to the careful and difficult work on the memo, deserve considerable praise (and, from those of us who revere the Office, sincere thanks for respecting many of the Office's best practices and traditions).

The discrete issue the new Opinion addresses is the meaning of "torture" under one, specific federal statute—what is known as the Federal Torture Act, 18 U.S.C. §§ 2340-2340A. As I'll discuss in a subsequent post, the most significant thing about both OLC opinions is what they *don't* discuss: each is silent on a host of other, more restrictive legal constraints that presumably would apply to government interrogations even where the extremely narrow definition of "torture" is not met.

But on the question that the memos *do* address—what the torture statute prohibits—the new OLC Opinion is in many respects a great improvement over the 2002 OLC Opinion. Former OLC Deputy Assistant Attorney General John Yoo—who helped draft the 2002 Opinion—was quoted the other day as saying that the new OLC Opinion "makes it harder to figure out how the torture statute applies to specific interrogation methods. It muddies the water. Our effort [in 2002] was to interpret the statute clearly." In an important sense, he is absolutely correct. Because the 2002 Opinion basically defined torture out of existence (and further advised that even if some techniques were "torture," they were subject to imagined "self-defense," "necessity," and "presidential approval" defenses)—it sent an unmistakable signal to the CIA that it was free to engage in extremely coercive forms of interrogation without fear of legal exposure. The new Opinion (correctly) concludes that the statute is more restrictive, and that some questions are too close or too abstract to be able to resolve categorically. This is probably not the sort of encouraging and immunizing advice that the CIA was hoping to receive.

Nevertheless, in an overlooked footnote, the new Levin Opinion reassures the agency: "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and *do not believe that any of their conclusions would be different under the standards set forth in this memorandum.*" In other words, despite its admirable and considerable repudiation of the 2002 OLC Opinion, the new OLC Opinion in many important respects does not affect what the CIA has been authorized to do. (I'll discuss this issue further in my follow-up post.)

Moreover, the definition of "torture" that the new Opinion adopts remains an extremely narrow one. This is largely not the result of the new OLC analysis, but is instead a function of the fact that the Senate (at the urging of the first President Bush) insisted upon adopting extremely restrictive readings of certain key terms of the Convention Against Torture ("CAT") as a condition of its ratification of that treaty, and the fact that Congress adopted those restrictive terms in the torture statute itself.

Even though the two Opinions therefore come out in roughly the same place, the differences between them are striking, and very important from a practical standpoint. These are among the more significant areas of contrast and repudiation:

1. Even apart from the "merits" of the conclusions in the two Opinions, there's a world of difference between the two documents in terms of process, tone, methods of analysis and emphasis.

- a. For example, from all that appears, in 2002 OLC did not consult the agencies with historical expertise in defining "torture" under federal law—in particular, the State Department. The Opinion is centrally concerned with a statute that implements a U.S. treaty obligation. Interpretations of that treaty, and of its implementing legislation, obviously can have profound effects on our international relations, on the way in which other nations construe the Convention when interrogating detainees (including American detainees) and prosecuting possible treaty violations, and on the development of international law. Therefore, traditionally OLC would solicit the views of the State Department before rendering any advice on an issue such as this, and would reject the State Department Legal Adviser's views only after extremely careful consideration. In this case, it appears that OLC did not even consult the State Department—even though the State Department actually implements the CAT in connection with extradition cases, and has regulations defining "torture." See 22 C.F.R. 95.1. The 2002 Opinion does not so much as mention such regulations, or any State Department practice with respect to the CAT. (The Opinion is also silent on INS

(now Department of Homeland Security) regulations defining "torture" in the context of asylum applications.)

By contrast, the Wall Street Journal has reported that OLC sought input from various agencies, including the State Department, before it issued the new Levin Opinion. And the Opinion itself (page 2) reassures the reader that the Criminal Division of DOJ reviewed the document and concurs in its analysis (something that seems hard to imagine with respect to at least some portions of the 2002 Opinion, such as those recognizing defenses of necessity and self-defense).

b. The 2002 Opinion also failed to discuss many of the numerous court cases that have analyzed the meaning of "torture" under the CAT in the immigration context. That 2002 Opinion discussed only a single district court case—and then chose to accept only the aspects of the decision in that case that comported with the conclusions that OLC had already reached earlier in its opinion. An appendix to the Opinion listed several other cases discussing the meaning of "torture"—but, remarkably, the Opinion did not discuss those cases, let alone explain why it was departing from the conclusions reached in several of them.

By contrast, the new Opinion includes a much more careful, thorough and fair reading of the relevant case law defining "torture." The new Opinion also actually addresses, carefully and respectfully, serious arguments on both sides of the various statutory questions. Where the statute is ambiguous, or where it is impossible in the abstract to resolve a difficult question—such as the meaning of the "specific intent" requirement of the statute—the new Opinion concedes as much, instead of construing the statute (as the 2002 Opinion did) in the most anti-prosecution light possible.

c. The 2002 Opinion was not made public until long after its existence was leaked and became a public scandal—even though the Opinion presumably served as the basis for the United States's most far-reaching and troubling conduct in the treatment of detainees.

The new Opinion was published the evening it was issued.

2. Turning to the "merits," the new Opinion offers a much more persuasive interpretation of the torture statute, and goes so far as to expressly *repudiate* numerous central conclusions of the 2002 Opinion—something that is extremely unusual for OLC to do, especially absent a change in Administrations. For example:

a. The 2002 Opinion concluded (p.3)—without citing any authority—that in order for a defendant to be culpable of torture, he or she would have to actually *inflict* severe physical or mental pain or suffering. The new Opinion (page 17 n.28)

correctly notes that under the plain language of the statute, all that is required is that the defendant have specifically *intended* to inflict such pain or suffering.

b. The 2002 Opinion—relying upon the definition of “emergency condition” in a health-benefits statutes that have nothing to do with the torture statute—construed the phrase “severe physical . . . pain or suffering” in the torture statute to include only the pain associated with “permanent and serious physical damage” that “must rise to the level of death, organ failure, or the permanent impairment of a significant body function” (pp. 5-6), and suggested (p.19) that the pain must be “excruciating and agonizing.” The new Opinion repudiates these conclusions (pp. 2, 8 n.17), and rightly explains that the statutes upon which the 2002 Opinion relied appear in a “very different context,” define a different statutory term, and do not provide a “proper guide” for interpreting the torture statute.

c. The 2002 Opinion concluded (p.6 n.3) that “severe physical suffering” could under no circumstances be distinct from “severe physical pain,” even though the statute refers to both. The new Opinion expressly rejects this conclusion (p.10), and contains a much more rigorous and nuanced discussion of the possible distinction (pp. 10-12).

d. The 2002 Opinion indicated (pp. 1, 7) that “prolonged mental harm” requires harm that lasts months or years, and that the mental strain suffered during a “lengthy and intense interrogation” would not suffice—a conclusion that is difficult to reconcile with the dictionary definitions the Opinion itself cites, which suggest that to “prolong” means simply to “extend the duration of, to draw out.” The new Opinion (p. 14 & n.24) repudiates the 2002 Opinion’s analysis regarding the meaning of “prolonged,” acknowledges that there is “little guidance to draw upon in interpreting this phrase,” and simply concludes that the mental damage “must extend for some period of time.” The new Opinion also acknowledges (p. 15) that suffering, years after the fact, from flashbacks, nightmares, anxiety and disruptions of sleep, can constitute prolonged mental harm.

e. The 2002 Opinion concluded (pp. 3-4) that the statutory requirement that the torturer “specifically intend” to inflict severe pain or suffering requires that the defendant have had the “precise objective” of inflicting severe pain, i.e., that it is *not* sufficient that the defendant *knew* his conduct would result in such severe pain, and that the defendant cannot be guilty of torture unless he acted “with the *express* purpose of inflicting severe pain or suffering.” The new Opinion declines to adopt these conclusions (pp. 16-17 n.27), and concludes instead (p. 16) that it is not useful for OLC to try to define the precise meaning of the term—i.e., to resolve the very difficult cases between the two extremes—in the absence of any judicial guidance on the question.

3. The unpersuasive interpretation of the meaning of "torture" was not the most egregious aspect of the 2002 Opinion. Having construed the definition down to almost nothing, that Opinion then went a huge extra step and spent nine pages arguing in favor of two implausible statutory defenses to culpability—"necessity" and self-defense—and that the statute should also be construed to permit torture when the President authorizes it. The notion that the statute implicitly includes such defenses (and that it can be construed to recognize an approval-of-the-Commander-in-Chief exception) is extremely implausible, especially in light of the fact that recognizing such defenses would put the U.S. in flat violation of its treaty obligations. Nor did the 2002 Opinion attempt to reconcile its analysis with DOJ's traditional views on the availability and scope of the relevant criminal-law defenses. The theory of "self-defense" in the Opinion actually had little to do with defense of "self"—which is understandable, because a torturer is rarely in imminent danger of being grievously injured by his detainee. Instead, OLC imagined a newfangled theory permitting torture in the name of *the nation's* defense, regardless of whether the threat derives from the person being tortured or whether the threat is imminent. And as to "necessity," the Opinion failed even to cite the leading authority, the Supreme Court's decision (issued just two-and-a-half months earlier) in *United States v. Oakland Cannabis Buyers' Co-op*, in which the Court (in accord with the views of the Department of Justice) unanimously rejected a "necessity" defense in connection with the Controlled Substances Act, and in which six Justices suggested that necessity can never be a defense when the federal statute does not expressly provide for it. Most importantly, the 2002 Opinion entirely ignored the official position of the United States, articulated in the U.S.'s Report to the UN Committee Against Torture in 1999: **"No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. 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."** The 2002 Opinion flatly contradicts this official U.S. position—something the Department, and the White House Counsel, would have known had they bothered to consult the State Department.

The contrasting perspective of the 2004 Levin Opinion is striking. The new Opinion simply states (p.17) unequivocally, and without adornment, that "[t]here is no exception under the statute permitting torture to be used for a 'good reason.'"

4. Finally, and most notoriously, the 2002 Opinion also concluded that it would be unconstitutional for Congress to prohibit the President from authorizing

torture—or, indeed, to interfere in any way with “the President’s conduct of the interrogation of enemy combatants” (p.39) (a proposition that would appear to suggest that the President could ignore the Uniform Code of Military Justice restrictions on detainee treatment, and the Geneva Conventions where they concededly apply). The 2002 Opinion did not even mention the seminal Supreme Court case speaking to the question of statutory limits on the Commander-in-Chief power (*Youngstown Steel & Tube v. Sawyer*); nor did the Opinion acknowledge that the Constitution gives Congress the powers to define and punish Offenses against the Law of Nations; to make Rules concerning Captures on Land and Water; and to make Rules for the Government and Regulation of the land and naval forces.

The new Levin Opinion eliminates the 2002 Commander-in-Chief analysis, but it does not repudiate it—an important fact that I will touch upon in my next post.

In light of the Levin Opinion’s extraordinary and thorough rebuke of the 2002 Opinion, it is probably fair to ask why the Attorney General and the White House Counsel (the official who requested and received the 2002 Opinion) did not in 2002 immediately send the OLC Opinion back to OLC in light of what OLC itself now identifies as its manifest and numerous flaws—and why the White House Counsel did not attempt to remedy OLC’s apparent failure to consult with other agencies with expertise on the question, particularly the State Department. (Far from questioning the Opinion or asking for it to be withdrawn, the White House apparently forwarded it to the Defense Department, where it was largely incorporated in the DoD Working Group Report in April 2003.)

[Full disclosure: I worked as an Attorney-Advisor at OLC from 1994-2002, and I was still at the Office when it issued the 2002 Torture Opinion. I did not know anything about that Opinion, however—not even of its existence—until it became the subject of public debate last summer, long after I had left OLC. Nothing in this post reflects any information, confidential or otherwise, to which I was privy while at OLC. I am also one of the 19 former OLC attorneys who has signed a recent memo setting forth proposed “Principles to Guide the Office of Legal Counsel.”]

Understanding the OLC Torture Memos (Part II)

Marty Lederman

Despite the notable and significant improvements of the new Levin OLC Opinion on the federal torture statute that I discuss in the post immediately below, Professor Dorf is also right to focus upon lingering, serious concerns about two things that are conspicuously absent from the new OLC memo.

First, the new memo does *not* repudiate one of the most disturbing features of the (now withdrawn) 2002 OLC Opinion—namely, its conclusion that it would be unconstitutional for Congress to prohibit torture undertaken at the behest of the President, and that indeed Congress is entirely powerless to restrict the President's decisions concerning "what methods to use to best prevail against the enemy." There is no indication that the Administration has stepped back from this constitutional understanding—notwithstanding the fact that all nine Justices of the Supreme Court in effect repudiated OLC's Commander-in-Chief theory in the Court's Hamdi decision last summer. (I elaborate on this reading of Hamdi here.)

When pressed on this Commander-in-Chief question at his nomination hearing yesterday, Judge Gonzales repeatedly refused to distance himself from OLC's 2002 legal analysis. To his credit, however, at the end of his testimony Judge Gonzales stated that he "reject[s]" the statement in the 2002 Opinion that "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."

Going forward, the bold assertions of presidential power in the 2002 OLC Opinion will undoubtedly be one of its most controversial, and most important, legacies, for good or ill. Whether and to what extent the President may invoke his Commander-in-Chief authority to override congressional restrictions concerning the extraordinarily broad subject matter of "what methods to use to best prevail against the enemy" is an incredibly important and fundamental constitutional question, but one on which there has been surprisingly little serious, sustained analysis—in OLC opinions, in the case law, or in the academic literature. (Anyone interested in this question—and every incoming OLC and White House Counsel attorney—should view this video of a recent extremely valuable panel at a recent Duke Law School Conference, in which the question is discussed by, inter alia, Professors Bill Marshall, Jeff Powell, David Barron, Vicki Jackson, Michael Gerhardt and Walter Dellinger.)

But I'd like to put the Commander-in-Chief question aside in this post in order to focus on the second "missing piece" that Professor Dorf identifies, which has much more immediate practical implications: The new OLC Opinion, in common with the 2002 memo it supersedes, does not at any point reveal *why* OLC is even bothering to engage in the very sensitive and difficult task of identifying the elusive "tipping point" at which severely coercive interrogation crosses the line to

become "torture" under the specific, restrictive definition of the federal torture statute.

According to the Administration and its allies (see, e.g., Senator Cornyn's recent Op-Ed, a recent White House press briefing, and Pentagon General Counsel Haynes's letter to Senator Leahy), the President has required that all detainees be treated "humanely," and that U.S. interrogators must refrain from using not only torture, but also what some have called "torture-light," i.e., what the Geneva and Torture Conventions refer to as "cruel, inhuman and degrading treatment." Well, if that is the case, then Professor Dorf's confusion is entirely understandable: If "U.S. personnel are not supposed to engage in torture or cruel, inhuman or degrading treatment of prisoners," he writes, then "there is no necessity to clarify the line between the two categories of forbidden conduct; yet the December 2004 memo does just that."

So why do both OLC Opinions go to such great trouble, and great length, to determine exactly how one can distinguish between "cruel" treatment on the one hand, and what the new memo refers to as "extreme forms" of cruel treatment, on the other? This fine parsing is a very odd thing for OLC to be doing if both forms of treatment are unlawful. OLC's proper role is not to distinguish, for Executive Branch officials, among different forms of unlawful conduct, so as to identify those that are subject to the highest criminal sanctions, on the one hand, and those that are "merely" prohibited, but without severe sanction, on the other. (Perhaps that is the function of a defense lawyer—but not of OLC.) OLC's proper role, instead, is to inform the Executive Branch as to what conduct is *lawful*. Thus, if *both* extreme *and* nonextreme levels of inhumane treatment were, in fact, categorically off-limits to interrogators—as the Administration would have us believe—then the very existence of the OLC memos would be inexplicable.

I suspect, however, that there is a very specific, operational reason that OLC has expended such time and effort (twice, now) to "clarify the line" between torture and "merely" inhumane treatment, and it is this: In this Administration's view, the CIA is **not** bound by any standard of "humane treatment," and **may** lawfully engage in cruel, inhuman and degrading treatment, when it interrogates suspected Al Qaeda operatives outside U.S. jurisdiction, as long as the Agency's conduct does not technically constitute "torture." If I am right about this, then **the function of the OLC Opinions has been to identify the legal limits, if any, that apply to interrogation techniques used by the CIA on suspected Al Qaeda operatives at foreign locations outside U.S. jurisdiction**—a context in which the Administration apparently has concluded that the CIA is bound only by the quite narrow proscription of the torture statute, and is not required to treat detainees "humanely," or to refrain from "cruel, inhuman or degrading treatment" (i.e., conduct that "shocks the conscience")

that falls just short of the category of "torture."

Thus, for example, the President's February 7, 2002 "humane treatment" directive was carefully worded to apply *only* to the Armed Forces—*not* to the CIA. Similarly, in recent months the Senate has twice voted to prohibit the CIA, and all U.S. personnel, from engaging in cruel, inhuman and degrading treatment—but on each occasion, the Administration has resisted, and that language has been stripped from the bills in conference (even after the 9/11 Commission recommended it). Note, as well, that in yesterday's hearing Judge Gonzales was very careful to qualify his statement that "[i]t has always been the case that everyone should be treated—that *the military* would treat detainees humanely, consistent with the president's February order."

All of this is fairly strong evidence that the Administration has gone to significant lengths to preserve a significant CIA loophole. Judge Gonzales now claims that he has no "specific recollection" whether it was the CIA that asked for legal advice on the meaning of the torture statute. It is difficult to credit this assertion, however, because according to numerous accounts such as this one, the original impetus for the OLC Opinion was an inquiry from the CIA, which, according to those accounts, is detaining and interrogating high-level Al Qaeda detainees at undisclosed foreign locations.

Especially notable are the specific questions to which the CIA was seeking answers—such as **whether it may lawfully use extreme methods such as waterboarding, the threat of live burial, and threatening rendition to sadistic interrogators in other nations**. *Perhaps* such techniques are not necessarily "torture" under the narrow statutory definition. Perhaps they are. But one thing would appear fairly clear: Whatever else they are, or are not, these techniques are *not* under any perspective (short of an Orwellian nightmare) what one would call "humane." Likewise, if our treaty obligations to refrain from "cruel, inhuman and degrading treatment" *do* apply to the CIA outside U.S. jurisdiction, then such techniques *would* be unlawful wholly apart from the torture statute, because they would clearly "shock the conscience" and thus violate the Due Process Clause if performed within the U.S. (which is the U.S.-approved standard for what the "cruel, inhuman and degrading" prohibition forbids).

But it appears increasingly clear that the Administration has concluded that the CIA is *not* required to act "humanely" in this context, and is *not* required to refrain from conduct that shocks the conscience. So, for example, when Senator Durbin asked him point-blank yesterday "whether or not it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture," Judge Gonzales did not answer with a simple "no"; instead, he provided a very cautious and ambiguous answer, the gist

of which was "that all authorized techniques were presented to the Department of Justice, to the lawyers, to verify that they met all legal obligations, and I have been told that that is the case."

If this is correct, then the reason the OLC Opinions are focused on the torture statute—to the exclusion of the numerous other legal norms that might be thought to impose much more stringent constraints on interrogation—is that the Administration has determined that none of the stricter standards that govern the interrogation of U.S. armed forces regulates what the CIA can do at the locations outside U.S. jurisdiction.

How could the Administration have reached such a legal conclusion? I'll address that question in my next post.

Posted 1:50 PM by Marty Lederman [link] (0) comments

Understanding the OLC Torture Memos (Part III)

Marty Lederman

For those who are interested in the legal details, here's a brief look at the numerous other possible sources of law that, some might argue, may restrain the conduct of CIA interrogations of suspected Al Qaeda operatives outside U.S. jurisdiction, with an explanation of why the Administration has (or has likely) concluded that each source of law is inapposite in the context of the CIA interrogations in question. (Readers uninterested in the legal details can skip ahead to the final couple of paragraphs, below.)

1. The Eighth Amendment. Prohibits cruel and unusual punishment.

Not applicable here because: (i) The Administration contends that the Constitution does not protect aliens overseas; and (ii) these interrogations do not involve *punishment*, as such.

2. The Due Process Clause of the Fifth Amendment. Prohibits conduct that "shocks the conscience." At least three, and probably as many as five or six, Supreme Court Justices likely share the view Justice Kennedy expressed in 2003 in *Chavez v. Martinez* that "a constitutional right is traduced the moment torture or its close equivalents are brought to bear. . . . [I]t seems . . . a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person."

Not applicable here because: In the Administration's view, the Due Process Clause of the Fifth Amendment does not of its own accord provide any constitutional rights to aliens overseas—including the right not to be treated in a manner that shocks the conscience. (This is a very hotly contested legal question right now because of footnote 15 of the Supreme Court's recent decision in Rasul; and it is currently being litigated in the Guantanamo habeas cases being considered in the U.S. District Court for the District of Columbia in the wake of *Rasul*.)

3. The Uniform Code of Military Justice. Prohibits U.S. armed forces from, among other things, engaging in cruelty, oppression or maltreatment of prisoners (art. 93), assaulting prisoners (art. 128) (a prohibition that includes a demonstration of violence that results in reasonable apprehension of immediate bodily harm), and communicating a threat to wrongfully injure a detainee (art. 134). Senator Graham focused on this yesterday—he questioned why OLC was bothering to construe the torture statute so narrowly when the UCMJ obviously imposes much more stringent limitations.

Not applicable here because: The UCMJ does not apply to the CIA.

4. President's February 7, 2002 "Humane Treatment" Directive. Requires that the Armed Forces must "treat detainees humanely."

Not applicable here because: The directive is carefully worded so as to apply only to the Armed Forces, and not to the CIA.

5. Third (POW) Geneva Convention, Article 17. Prohibits *all* coercive, unpleasant and *disadvantageous* treatment of POWs: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

Not applicable here because: The Administration has concluded that Al Qaeda is not a contracting party and thus that Al Qaeda detainees are not POWs protected by article 17.

6. Fourth (Civilian) Geneva Convention, Article 27. Requires that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

Not applicable here because: The Administration has concluded that the Civilian Convention applies only to "civilian non-combatants" and that alleged Al Qaeda detainees do not qualify because they are "unlawful combatants."

7. Common Article 3 of the Geneva Conventions. Provides that "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including

members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, [and] the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment.”

Not applicable here because: The President has determined that common Article 3 does not apply to the war against Al Qaeda because the conflict is “international in scope.”

8. Protocol I to the Geneva Conventions, Article 75. Provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances,” that “[e]ach Party shall respect the person, honour, convictions and religious practices of all such persons,” and that “[t]he following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; . . . and (e) threats to commit any of the foregoing acts.”

Not applicable here because: The U.S. has refused to ratify Protocol I.

9. Convention Against Torture, Articles 1, 2 and 4. Requiring signatory parties, such as the U.S., to ensure that all acts of torture (and attempts to commit torture and complicity or participation in torture) are offenses under its criminal law, and to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, without permitting any “exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency,” or superior orders, to be invoked as a justification of torture.

Not independently applicable here because: The Senate ratified the CAT subject to certain restrictive understandings and reservations of the definition of “torture” in these articles, which were incorporated in the narrower definition of “torture” in the federal criminal statute. These articles therefore establish a binding norm only with respect to “torture” as it is narrowly defined in 18 U.S.C. §§ 2340-2340A (see No. 17, below).

10. Convention Against Torture, Article 16. This is the provision on which Prof. Dorf focuses. It requires each state party, such as the U.S., to “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 as defined in article 1*, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The U.S. ratified article 16 subject to the understanding that this article refers only to conduct that would violate the Fifth, Eighth and Fourteenth Amendments—for present purposes, conduct that would “shock

the conscience” under Due Process Clause standards.

Not applicable here because: The CIA is not acting “in any territory under [U.S] jurisdiction,” but is instead interrogating detainees in foreign jurisdictions. In other words, when the CIA takes detainees into foreign jurisdictions and engages in coercive interrogations there—even interrogations that would be unconstitutional here in the United States—it need not worry about whether article 16 applies. [The Bush Administration might also argue that the conduct in question does *not* shock the conscience in light of importance of the asserted government objective—viz., obtaining valuable intelligence in the war on terror. This would be a highly contested, and risky, proposition. In his hearing, Judge Gonzales also hinted at another rationale: that because the Constitution itself does not (in the Administration’s view) provide aliens outside the U.S. with any substantive constitutional rights, then article 16 (which is construed in accord with the Constitution) likewise does not provide any substantive protections outside the U.S. (a theory that, if correct, would appear to render article 16 inoperative at Guantanamo, too).]

11. International Covenant on Political and Civil Rights, Article 7. Provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The U.S. also ratified this subject to a limiting reservation that, for present purposes, limits the Article to cover only conduct that “shocks the conscience.”

Not applicable here because: According to the DoD Working Group Report (at page 6), the U.S. “has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict”—even though such limitations do not appear in the provision itself (in contrast to article 16 of the CAT), and even though there is some international law precedent to the contrary. Presumably the U.S. position that the Covenant does not apply extraterritorially is based upon Covenant article 2.1, which states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

12. Customary International Law. Some contend that CIL prohibits all cruel, inhumane and degrading treatment.

Not applicable here because: The U.S. has long asserted that CIL does not bind the Executive Branch, even where the Executive Branch has historically opted to act in accord with CIL standards.

13. Common Law of the “Law of Nations” Enforced Via the Alien Tort Statute, 28 U.S.C. § 1350. The Supreme Court recently held in Sosa v. Alvarez-Machain that Congress intended to permit the Alien Tort Statute to be used to enforce a “modest number” of common-law claims based upon “norms of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms” of violation of safe conducts, infringement of the rights of

ambassadors, and piracy.”

Not applicable here because: Before the decision in *Sosa*, the Administration argued that the ATS cannot be used to enforce *any* common-law CIL claims. After *Sosa*, presumably the Administration would argue that cruel, inhuman and degrading treatment against aliens overseas that *falls short* of what U.S. criminal law defines as “torture” is *not* “defined with a specificity comparable” to the three 18th-century torts identified in *Sosa*, and thus does not constitute a legal norm that Congress has recognized as binding and enforceable through the ATS. Obviously, this is a highly contestable proposition—but one that almost certainly will not be seriously challenged until such an ATS claim is litigated by a detainee.

14. Durbin Amendment to the 2005 DoD Authorization Act. Would have categorically provided that “[n]o person in the custody or under the physical control of the United States shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”

Not applicable here because: Although the Senate voted unanimously in favor of the bill that included this prohibition, it was stripped out in Conference and replaced with boilerplate “sense of the Congress” and “U.S. Policy” provisions, which appear as subsections 1091(a)(8) and (b)(1) of the final bill as enacted.

15. 2005 DoD Authorization Act, Section 1091(b)(1). Provides that “[i]t is the policy of the United States to—ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” (Similarly, at his hearing, Judge Gonzales stated that “it is not the *policy* of the administration to tolerate torture or inhumane conduct toward any person that the United States is detaining.”)

Not *binding* here because: The Executive Branch has traditionally construed such “policy of the U.S.” provisions (and “sens of the Congress’ provisions) as hortatory and as thus not establishing supreme law of the land binding the Executive.

16. Durbin Amendment to the Intelligence Reform Act of 2004. The 9/11 Commission recommended that the U.S. develop policies to ensure that all captured terrorists be treated humanely. The Intelligence Reform bill that the Senate approved would have done so: It included a Durbin Amendment that would have expressly applied the prohibition on cruel, inhuman and degrading treatment *to the intelligence community*.

Not applicable here because: The House Conferees (presumably with the support of DoD), insisted on deleting that prohibition in the final bill that the President signed last month.

17. The Federal Torture Statute: 18 U.S.C. §§ 2340-2340A. Finally, we come to the singular subject of the OLC Opinions. This criminal statute provides that it shall be unlawful for anyone *outside the United States* to commit, attempt to commit, or conspire

to commit, torture. (There is jurisdiction if the alleged offender is a national of the U.S.) Torture is defined as an act “committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”; and “severe mental pain or suffering” in turn is defined to mean “the prolonged mental harm caused by or resulting from - (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

This criminal statute *is* applicable to CIA interrogations of aliens outside U.S. jurisdiction. Accordingly, the function of the OLC Opinions is to address *this* statute—a prohibition that is, in the Administration's view, the only legal constraint on CIA interrogations committed against aliens in foreign lands not under U.S. jurisdiction.

* * * *

I don't mean to suggest that the Administration is necessarily wrong about the inapplicability of any of the other legal norms against inhumane and coercive treatment that I've listed. Indeed, the Administration is almost certainly correct that the *majority* of the legal constraints noted above do not apply to CIA interrogation of suspected Al Qaeda operatives outside U.S. jurisdiction. And although there are very serious debates about some of the Administration legal positions described above, I think it would be hard to say conclusively that the Administration is obviously wrong on any of them.

The point I'm trying to establish here is simply that—contrary to the impression it is trying to convey to Congress and the public—the Administration has likely concluded that the CIA is not bound by any of these restrictions on cruel, inhuman and degrading treatment. Thus, on this view, as to CIA interrogation of Al Qaeda suspects outside U.S. jurisdiction, **the torture statute is the whole ballgame**, and inhumane conduct that falls short of “torture”—i.e., conduct that is, in the words of the Levin Opinion (p.6 and n.14), a “lesser form,” rather than an “extreme form,” of cruel, inhuman and degrading treatment—*is legally permissible*.

With this in mind, it becomes clear that perhaps the most important part of the new Levin Opinion is footnote 8, which reads: “While we have identified various disagreements with the August 2002 Memorandum, **we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.**” In other words, despite its admirable and considerable repudiation of the 2002 OLC Opinion, the new OLC Opinion does not in any significant way affect what the CIA has already been specifically authorized to do. And the Administration has

concealed from the public (and perhaps from the Congress, too?) the extreme forms of interrogation—just short of the strict statutory standard of “torture”—that the CIA presumably is authorized to use upon detainees overseas.

Final post to follow.

Posted 3:16 PM by Marty Lederman [link] (0) comments

Understanding the OLC Torture Memos (Coda)

Marty Lederman

Of course, even if CIA conduct outside U.S. jurisdiction is the not-so-secret subtext of the OLC Opinions, the current scandal concerning torture and inhumane treatment is hardly limited to the CIA. For, even in contexts where the President’s directive of “humane” treatment, and the prohibition on cruel, inhuman and degrading treatment, indisputably *do* apply, the Department of Defense appears to have a fairly unorthodox understanding of what it means to act “humanely” and to refrain from conduct that shocks the conscience.

The Armed Forces at GTMO, and in Iraq and Afghanistan—unlike the CIA—unquestionably *are* subject to the President’s directive of “humane treatment,” certainly *are* required to abide by the article 16 prohibition on cruel, inhuman and degrading treatment (because they are acting within U.S. jurisdiction), and indisputably *are* subject to the prohibitions of the UCMJ against cruelty, oppression or maltreatment of prisoners, assaulting prisoners, and communicating a threat to wrongfully injure a detainee. The Pentagon, in its Working Group Report, agrees that these restrictions apply.

And yet, according to several accounts, such as Neil Lewis’s story in the New York Times this past weekend, techniques that apparently have been approved at GTMO include:

- prolonged sleep deprivation;
- shackling prisoners in uncomfortable positions for many hours (to the point where one detainee who had been shackled overnight in a hot cell soiled himself and pulled out tufts of hair in misery);
- tormenting prisoners by chaining them to a low chair for hours with bright flashing lights in their eyes and audio tapes of Lil’ Kim, Rage Against the Machine and Eminem played loudly next to their ears (or in some cases a tape mix of

babies crying and the television commercial for Meow Mix in which the jingle consists of repetition of the word "meow");

and, in at least one case,

-- tranquilizing a detainee, placing him in sensory deprivation garb with blackened goggles, hustling him aboard a plane that was supposedly taking him to the Middle East, and bringing him (unknowingly) back to GTMO, where he was put in an isolation cell and there subjected to harsh interrogation procedures that he was encouraged to believe were being conducted by Egyptian national security operatives.

Similarly, in its Report the DOD Working Group apparently concluded that the following techniques were "humane" and consistent with the UCMJ, the "shocks the conscience" standard, and other legal norms: Placing a hood over detainees during questioning; 20-hour interrogations; forcing a detainee to shave his hair or beard; four days of sleep deprivation; forced nudity to create a "feeling of helplessness and dependence"; increasing "anxiety" through the use of dogs; quick, glancing slaps to the face or stomach; and the threat of transfer to another nation that might subject the detainee to torture or death. (It is not clear whether the Pentagon has ever formally approved these techniques, nor how often, if at all, military interrogators have used them.)

There are extremely strong arguments that if they approved or used these techniques, military officials and other personnel have violated the law—including the UCMJ, article 16 of the CAT, the Geneva Conventions (as to detainees protected by those treaties), and the President's directive that detainees be treated "humanely"—wholly apart from the torture statute that the OLC Opinions discuss. (Indeed, from the time of the 2001 enactment of the USA PATRIOT ACT until the enactment of the 2005 Defense Authorization Act this past October 28th, the torture statute itself did not even apply to GTMO because of a technical jurisdictional provision.)

And, in any event, if those recent accounts are correct about what the Pentagon has actually approved and implemented at Guantanamo, then the President's assurance that all Armed Forces detainees be treated "humanely," and that we do not engage in cruel, inhuman and degrading treatment, ring hollow.

It is a very salutary development that OLC has finally construed the torture statute with the care and judgment that typically characterizes OLC's best work, and that the Administration has reiterated the Nation's commitment that torture is never legal, not even for "a good reason." But that is only half the story. The other half remains untold. We have yet to have an *informed* public debate about what forms of conduct OLC has sanctioned as lawful, what forms of interrogation

and coercion this nation *does* permit, and about what is, in fact, being done in our name. If we are to have such a debate, the Administration would have to be much more forthcoming with explanations of which ostensibly "humane" treatments have been approved for military interrogators at Guantanamo and elsewhere, and would have to provide with some sense of the forms of inhumane treatment the CIA has been authorized to use (subject, of course, to redaction where there are legitimate and compelling needs for classification).

If we begin such a debate, here's one modest question to consider: Would it be too much to ask that Congress approve—and the President sign—a statute that would unambiguously prohibit all U.S. personnel, everywhere in the world, from engaging in cruel, inhuman, and degrading treatment—including, at a minimum, conduct that would shock the conscience, and thus violate the Due Process Clause, if it occurred within the U.S.?

P.S. In this series of posts, I may very well have misread the law in certain respects, or failed to properly understand some of the minutiae of the complex legal framework. I would very much welcome any corrections, additions or other editorial suggestions -- thanks.