

INTERROGATIONS OF DETAINEES

● OLC issued three opinions in August 2002 and another in March 2003 that discussed the legal standards for interrogations of detainees. One other opinion, issued in March 2002, considered a related topic. (TS [REDACTED])

○ In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture ("CAT") nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. (U)

○ In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute – threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party – and only if it lasted for a significant duration (months or years). The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. (U)

○ In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). (TS [REDACTED])

○ On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees.

It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. In addition to repeating much of the analysis from earlier opinions, this opinion concluded that the Fifth Amendment does not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context of punishment; that the torture statute would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States; and that the obligations of the United States under the CAT, with regard to the prohibition against cruel, inhuman, or degrading treatment, extend only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. (S)

○ In addition, on March 13, 2002, OLC issued an opinion to the Department of Defense, concluding that the President has plenary authority, as Commander in Chief, to transfer to other countries any members of the Taliban militia, al Qaeda, or other terrorist organizations that the United States armed forces have captured and are holding outside the United States. (U)

● The lengthy opinion of August 1, 2002, about the scope of the criminal statute is now posted on the *Washington Post's* web site. A draft memorandum that a Department of Defense working group prepared in March 2003 and that, we believe, reflects familiarity with a draft of the OLC opinion of March 2003, is available on the web site of National Public Radio. In addition, a draft memorandum of OLC from January 2002, dealing with the application of the Geneva Conventions to failed states, appears to have been provided to *Newsweek*, as has a December 28, 2001 opinion about the availability of habeas corpus to detainees at Guantanamo. (U)

● The Inspector General of the CIA has written a report about the CIA's program using "enhanced interrogation techniques." We have two basic disagreements with the report. First, we disagree with the IG – and with the CIA's Office of General Counsel ("OGC") – about whether OLC endorsed a set of bullet points that OGC produced in the spring of 2003, summarizing legal principles that were said to apply to interrogations of detained terrorists outside the United States. OLC attorneys reviewed and commented upon drafts of these bullet points. The General Counsel believes that this procedure amounted to OLC's concurrence. As was made clear to OGC at a meeting on June 17, 2003, OLC does not view these unsigned, undated bullet points as an opinion of OLC or a statement of its views. Second, the IG's report states that, at a meeting of the NSC principals on July 29, 2003, the Attorney General approved "expanded use of the techniques." The Attorney General did approve the use of approved techniques on detainees other than Abu Zubaydah, but the techniques were not otherwise "expanded" in any way. (TS [REDACTED])

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● We expect demands for the release of the OLC opinions that have not become public. The Department believes that these opinions should remain confidential. Judge Gonzales and Andrew Card have stated that they would support an assertion of executive privilege to protect the documents, if issuance of a subpoena makes such an assertion necessary. (U)

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Addendum: Summary of Advice

Advice to the Counsel to the President

In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. The opinion set out the elements of the criminal statute as follows: "(1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) . . . the act inflicted severe physical or mental pain or suffering." The opinion then concluded that, in view of the understandings about the Convention that attended its ratification by the United States, the international law obligations under the Convention could not exceed those under the criminal statute. It further concluded that the United States is not bound by the ICC Treaty, which it has not ratified, and that, in any event, the interrogation of al Qaeda operatives and Taliban soldiers could not be a crime that would come within the ICC's jurisdiction, because the interrogation would not be part of a systematic attack against a civilian population and because neither al Qaeda operatives nor Taliban soldiers are prisoners of war under the Geneva Convention. The opinion did not examine specific interrogation techniques.

In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute – threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party – and only if it lasted for a significant duration (months or years). A defendant would violate the statute only if he specifically intended to inflict such suffering. The Convention on Torture, the opinion stated, similarly designates as torture only such extreme measures. The opinion did not review and approve specific techniques. Instead, it observed that, in other contexts, courts have tended to examine the totality of the circumstances and to find torture where the acts in question are shocking. The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. It argued, finally, that an interrogator might be able to assert defenses of necessity and self-defense if charged with violating the torture statute.

Advice to CIA

In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). These techniques (except for the use of the insect) have been employed on United States military personnel as part of training and have been found not to cause prolonged mental or physical harm. Furthermore, an assessment of Abu Zubaydah by the CIA showed that he had no conditions that would make it likely for him to suffer prolonged mental harm as a result of the interrogation. With this background, the opinion concluded that none of the techniques would cause him the severe physical pain that would amount to torture under the statute, particularly because medical personnel would be monitoring the interrogation. Nor would the techniques cause the severe mental harm that might amount to torture – a prolonged mental harm resulting from one of the predicate acts in the statute. The only technique that might involve such an act was the use of the waterboard, which could convey a threat of severe pain or suffering, but research indicated that the technique would not cause prolonged mental harm and so would not come within the statute. In any event, the statute would be violated only if the defendant had a specific intent to cause severe pain or suffering. No such intent could be found here, in part because of the careful restrictions under which the interrogation would take place.

Advice to Department of Defense

On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees. It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. The opinion concluded that the Fifth Amendment does not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context of punishment. It then turned to several criminal laws. It determined that interrogation methods not involving physical contact would not constitute assault, and techniques involving minimal physical contact (poking, slapping, or shoving) are unlikely to produce the injury necessary to establish assault. 18 U.S.C. § 113. It also found it unlikely that statutes on maiming, 18 U.S.C. § 114, or interstate stalking, 18 U.S.C. § 2261A, could apply. It found that the War Crimes Act, 18 U.S.C. § 2441, could not reach the interrogation of al Qaeda and Taliban detainees because, as illegal belligerents, they do not

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qualify for protection under the Geneva or Hague Conventions. The torture statute, the opinion concluded, would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States. It nonetheless repeated the analysis of the statutory elements as laid out in the earlier opinions, as well as the analysis of the Convention Against Torture. The opinion went beyond the earlier ones, however, by discussing the Convention's prohibition against cruel, inhuman, or degrading treatment. It found that the United States' obligations in this regard extended only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. As to the Eighth Amendment, it observed that the analysis turns on whether the official acts in good faith or, instead, maliciously or sadistically. Whether any pain inflicted during an interrogation is proportional to the necessity for its use, for example, would inform that analysis. Cases on conditions of confinement also provide analogues. There, a violation can be shown only if there is deprivation of a basic human need, combined with a deliberate indifference to the prisoner's health and safety. The opinion specifically stated that a brief stay in solitary confinement would not amount to a violation, nor would insults or ridicule. The "shock the conscience" test, the opinion stated, is an evolving one, but it noted that rape or beating during an interrogation could constitute behavior so disproportionate to a legitimate need so inspired by malice or sadism as to meet the standard. Methods chosen solely to produce mental suffering might also shock the conscience. But some physical contact – a shove or slap – would not be sufficient. The detainee would have to suffer some physical injury or severe mental distress resulting from the interrogator's conscious disregard of a known risk to the detainee. Finally, the opinion discussed the defenses of necessity and self-defense that an interrogator might assert if charged with a crime and found that these defenses might be available under some circumstances.

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