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DEBATE

SHOULD BUSH ADMINISTRATION LAWYERS BE PROSECUTED FOR AUTHORIZING TORTURE?

The February 19th, 2010 release of a memorandum by the Justice Department clearing former Bush Administration lawyers John Yoo and Jay Bybee of any professional misconduct for their roles in authoring the so-called torture memos may have closed the chapter on the case against Bush Administration lawyers for formal sanctions from the United States government. But the debate about the propriety of the lawyers' actions and the proper repercussions for them is far from over. The DOJ memorandum has renewed debate in the press and the academy about the now-hypothetical just deserts for the two men, even while Spanish authorities continue to pursue formal international criminal investigations against them.

In *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, Professors Claire Finkelstein and Michael Lewis debate whether the authors of the memoranda concerning enhanced interrogation techniques should be subject to criminal prosecution. Professor Finkelstein opens the debate by making the case that the lawyers could have—and should have—been charged as accomplices to torture. Eschewing debates over the applicability of the Geneva Conventions, Finkelstein argues that domestic law provides federal prosecutors all the tools needed to convict the men and the rule of law demands those prosecutions be pursued.

Professor Lewis counters that while a case could be made for prosecution for erroneous legal advice in some circumstances, it cannot be made here because the techniques outlined in the memoranda do not clearly constitute torture. Lewis highlights the lack of legal authority defining torture, the careful circumscription of what was authorized in fact, and the safeguards employed by U.S. interrogators. Accordingly, he concludes that Yoo and Bybee cannot be held liable as accomplices to torture even if their conclusions were later rejected.

OPENING STATEMENT

When Government Lawyers Break the Law: The Case for Prosecution

Claire Finkelstein[†]

I.

Since the American public first became aware that the Bush Administration authorized the use of torture in the interrogation of terror suspects, *see, e.g.*, Seymour H. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, the legal community has been undergoing an immense struggle of conscience. This struggle, to be sure, was not invented with the war on terror. Philosophically minded law professors, as well as professional philosophers, had debated the case of the “ticking time bomb” for many years prior. *See, e.g.*, MICHAEL MOORE, *Torture and the Balance of Evils*, in PLACING BLAME 669, 681 (1997). Despite its great interest to legal academics, the discussion of this example was never intended to settle the actual policy debates about interrogation. The point of posing the hypothetical was rather to identify theoretical commitments to opposing theories in metaethics. With the exception of a few difficult real-life dilemmas emerging from Israeli intelligence practices, *see* ISR. GOV'T PRESS OFFICE, COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), *as reprinted in* 23 ISR. L. REV. 146 (1989), the debate about the ticking time bomb has remained primarily theoretical, not practical.

Conveniently for law professors, recent events have afforded an opportunity to debate a real-world version of the old standby, but this time under radically altered assumptions. In contrast with the ticking time bomb scenario, neither the benefit nor the chance of obtaining that benefit is guaranteed in the examples we now have at our disposal. The intellectual purity of the ticking time bomb has thus been replaced by a thicket of legal, moral, and political dilemmas that stem from the moral ambiguity of using torture to further national security interests under vague and imprecise conditions. Thus, even if we were to accept the utilitarian conclusion that torture is morally justified to forestall a greater evil under conditions of relative certainty, finding a compelling justification for the use of torture under the radically dif-

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ferent conditions of uncertainty would pose a significant—indeed perhaps an insurmountable—challenge.

Of course, one cannot demonstrate the *illegality* of the torture policy by arguments designed to establish its *immorality*. Assuming, then, that the illegality of the policy can be demonstrated by other means, we must ask what would be required beyond illegality to justify prosecuting those who officially sanctioned illegal conduct. Public debate on this question has been unfocused, and the aspects most often addressed unfortunately fall short of resolving the question of prosecution. A clear discussion of the issue might naturally have emerged had the Obama Administration been more receptive to the pursuit of former Administration officials, but it most emphatically was not, despite its loud protestations against the policy itself.

In the hue and cry that erupted when the first pictures of the mistreatment of prisoners at Abu Ghraib emerged, along with the growing realization that much of the torture that took place was implemented according to a government plan, *see, e.g.*, Editorial, *The New Iraq Crisis: Donald Rumsfeld Should Go*, N.Y. TIMES, May 7, 2004, at A30 (calling for former Secretary of State Donald Rumsfeld's resignation in response to the scandal), public discourse began to coalesce around certain pivotal aspects of the governmental policy. Many of these issues, though important in their own right, were tangential to the question of whether Administration officials could be held criminally liable for a policy that *appeared to be in violation of federal law*. Indeed, in many instances, the memoranda from the Office of Legal Counsel (OLC) were themselves responsible for the focus on tangential arguments. Potential defendants were thus already laying the groundwork for their own legal defense. My thesis is that if the torture policy does represent a violation of federal law, and if the conditions of personal responsibility for that policy obtain with regard to the OLC attorneys, then restoration of the rule of law requires the imposition of criminal or administrative sanctions on those who knowingly and effectively encouraged others to break the law.

Admittedly, the question whether OLC lawyers under the Bush Administration ought to be prosecuted for authorizing torture has become another philosopher's hypothetical, almost as removed from reality as the ticking time bomb scenario. It is now clear that such a prosecution will not occur or, at any rate, is highly unlikely. In addition to the antiprosecutorial stance of the present administration, a pair of reports reinforcing that result was recently released. *See OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, REPORT (2009); available at <http://judiciary.house.gov/hearings/pdf/>*

OPRFinalReport090729.pdf; Memorandum to the Attorney General from David Margolis, Associate Deputy Att’y Gen. (Jan. 5, 2010), *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/MargolisMemo_021910.pdf. Although the report from the Office of Professional Responsibility concluded that John Yoo and Jay Bybee engaged in “professional misconduct” by authorizing enhanced interrogation techniques, OFFICE OF PROF’L RESPONSIBILITY, *supra*, at 260, Margolis restricted himself to saying that they exercised “poor judgment,” Memorandum to the Attorney General from David Margolis, *supra*, at 1. Margolis’ finding obviates the referral of the lawyers to state bar associations for disciplinary proceedings and drives the final nails in the coffin of criminal prosecution. But far be it from a legal philosopher to shy away from a purely theoretical exploration. Let us therefore consider what case *might* be made for prosecuting the OLC lawyers who endorsed torture during the Bush Administration.

II.

Among the various misconceptions about the Bush Administration’s torture policy, four are particularly prominent. These misconceptions have contributed to the demise of any effort to prosecute those responsible, as they have tended to draw the public’s focus away from issues salient to prosecution.

First, it is tempting to think that the true defect of the torture policy had to do with its lack of respect for international law. In particular, the focus has been on the Bush Administration’s decision to circumvent the Geneva Conventions by denominating members of al Qaeda and the Taliban “unlawful combatants,” thus exempting them from the Conventions’ protections. *See* Memorandum from President George W. Bush to the Vice President et al. 2 (Feb. 7, 2002), *available at* <http://nmdigital.cdmhost.com/u?/p267801coll8,463>. The strategy of the OLC memoranda ironically set the tone for the ensuing public debate: the memoranda often make it sound as though the permissibility of the enhanced interrogation techniques, and hence the culpability of those who authorized them, depends entirely on international law. Because it is difficult to convince the American public that a violation of domestic law could be justified by executive privilege, even in times of national emergency, but not difficult to convince them of this same thesis with respect to international law, the focus on international law appears to weaken the case for prosecution. But the case for prosecution would not be one iota weaker if international law did

indeed support the use of enhanced interrogation techniques. For the true case for prosecution would best be made under domestic law.

Second, it is often suggested that even if the policies of the Bush Administration violated domestic law, *see* 18 U.S.C. §§ 2340–2340A (2006), responsibility for such violations should never be laid at the doorsteps of government lawyers. *See generally* Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006). Lawyers, even high-ranking officials in the Department of Justice, are not originators of policy, it is argued. They merely respond to policy that others make. The lawyers' endorsement of illegal interrogation practices did not cause their implementation because the causal effect of their actions passed through the independent voluntary acts of those who received their advice and decided to heed it. Moreover, as it is often argued, blaming lawyers who operate in an advisory role is sure to chill the willingness of lawyers to serve the government in this capacity and would inevitably result in the loss of good talent the Department of Justice needs.

The foregoing view of government lawyers seriously misses the mark. First, if OLC lawyers are responsible for fostering an illegal interrogation policy, their liability is premised on accomplice liability, which does not depend on causation. Moreover, for reasons I have already indicated, it would not be unreasonable to understand the lawyers of the OLC as *more responsible* than other central actors in the Administration. This has to do with the particular role that lawyers are expected to play in shaping domestic policy. I elaborate on this point more fully below.

The third misconception is that it is possible to isolate the position of the Bush Administration during the relevant years from what came before it and what came after. In other words, in the wake of 9/11, the Administration understandably saw itself as in the midst of a national security crisis of the utmost seriousness. It claimed that the ordinary rules regarding the scope of executive privilege and the procedures that Congress had put in place to constrain that privilege had to be suspended at such moments. *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President 31-33 (Aug. 1, 2002), *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> (describing the Commander-in-Chief power as “especially pronounced in the middle of a war”). But, the argument goes, expansive executive authority in times of emergency does not set precedent or create any erosion of the normal lines of authority in nonemergency situations, as there is no difficulty keeping the two situations separate.

This argument about emergency powers is an extremely dangerous one, as it threatens to justify a permanent expansion of executive privilege in any society in which there are threats to national security on a regular basis. The modern day state of emergency is not a passing moment; it is a permanent condition, in which nations must establish long-term legal and institutional structures to deal with terroristic threats to security. The result is the slow osmosis of the “law of emergency” into ordinary domestic law, via a grossly expanded conception of national sovereignty.

Finally, there is the common refrain that prosecuting the OLC lawyers would be pointless. *See, e.g.*, Press Release, The White House Office of the Press Sec’y, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos (“[N]othing will be gained by spending our time and energy laying blame for the past.”). At best it would smoke some individuals out and help to identify their involvement in the torture policy. But it would produce no other tangible gains, and, on the contrary, it would drag the country down into internecine warfare that might well result in extreme national dissension and disagreement. As we shall see, however, this argument ignores less tangible gains that result from the restoration of the rule of law.

In what follows, I shall first attempt to show why domestic law is more than adequate to cover any prosecution one might wish to bring against OLC lawyers in this case and why the weakness of international norms need not affect the analysis. I shall then address the special role that government lawyers play in shaping the policy decisions that they endorse as well as the responsibility for that policy that inheres in such endorsement. Finally, I shall return to my suggestion that there are particular benefits to be gained from prosecution, at least in a world in which such prosecutions are both politically palatable and ultimately compelling.

III.

That there are violations of federal law sufficient to support a charge of illegality with respect to the OLC lawyers’ analysis emerges unmistakably when one examines the federal torture statute with an unjaundiced eye, a law that codifies the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. The domestic statute provides,

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C. § 2340A(a) (2006). Additionally, the conspiracy provision requires that anyone who conspires to commit torture be subject to the same penalties (except death) as long as commission of the offense was the object of the conspiracy. *Id.* § 2340A(c).

Because the OLC lawyers did not themselves “commit torture,” this statute may appear inapplicable. But there is a straightforward theory according to which they do satisfy the statute, namely accomplice liability. Under the Model Penal Code, for example, “a person is an accomplice of another person in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it” MODEL PENAL CODE § 2.06 (1985).

The most straightforward argument for finding lawyers from the OLC guilty of violating § 2340A is that they were accomplices of those interrogators who engaged in torture. The lawyers are accomplices because they aided in the commission of the prohibited act (torture) by encouraging, soliciting, or otherwise contributing to the act by giving it legal validation. But does encouraging an illegal act by saying you believe it to be legal *really* constitute a form of aid to that other person? If you advise a client that an illegal act is legal, and you are a lawyer in a position of authority who has the power and ability to make such pronouncements, and, moreover, you do so with the purpose of promoting or facilitating the commission of the offense, there are arguably sufficient grounds for regarding you as an accomplice of those who commit the offense.

There are admittedly several wrinkles in this approach to liability, but as objections to the basic argument they are unimpressive. The first rests on the definition of torture itself and whether there is a prima facie case for guilt. In the now-infamous memorandum dated August 1, 2002, the author (John Yoo, though the memorandum was signed by James Bybee) claims that in considering whether the government’s policies violate § 2340A, one must focus on the fact that this section requires the so-called torture to consist of acts that are “specifically intended to cause severe physical or mental pain or suffering.” Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President, *supra*, at 2-3. Moreover, Yoo ar-

gues, such physical pain “must be of intensity akin to that which accompanies serious physical injury such as death or organ failure.” *Id.* at 46.

According to the memorandum, then, there are two impediments to calling the behavior of interrogators involved in “enhanced interrogation techniques” torture. First, the specific intent of the interrogators must be to inflict severe pain. Thus, Yoo argues, if instead of intending to inflict severe pain, the interrogators intended only to *collect information* with the help of enhanced interrogation methods, their individual or respective intents could not be deemed to satisfy the requirement of the statute.

Second, the memo argues that the physical pain involved must be as severe as pain that accompanies organ failure or death. Arguably, then, the kinds of harsh treatment at issue here—namely subjection to shackling positions for long periods of time, sleep deprivation, the famous waterboarding, enclosure in a small box filled with insects, prolonged periods of nudity, infliction of mental distress because of exposure to humiliation and sacrilege, and so forth—would not count as torture under the statute.

The first supposed impediment rests on a transparently specious argument. If it is your purpose to extract information from a particular detainee, and the means used to accomplish that purpose is to inflict severe pain, then you *intend* to inflict severe pain. You intend it because you want to collect information and you believe that inflicting pain will assist you in this effort. The argument that if the purpose is to collect information, then the purpose is *not* to inflict severe pain, reflects a mistake in reasoning of a very elementary sort. It is a serious misapplication of an old Catholic doctrine called the “Doctrine of Double Effect,” see G.E.M. Anscombe, *War and Murder*, in *ETHICS, RELIGION, AND POLITICS* 51, 58-59 (1981), and a rejection of the more apt insight that “he who wills the end wills the means.”

The second impediment rests on a philosophical confusion. The description of severe pain, according to Yoo, is a poor one in light of the fact that organ failure and death need not be painful at all. But waiving this objection and taking the point as it was presumably meant, namely that the pain must be severe, the argument is still weak. This is especially so when applied to the infamous practice of waterboarding. As is by now well-known, after World War II the Allies prosecuted Japanese interrogators for waterboarding American and British prisoners of war during the war. See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 *COLUM. J. TRANSNAT’L L.* 468, 482-94 (2007). There has never been much doubt

that the use of this interrogation technique constituted torture. This perception is confirmed by the fact that several Japanese servicemen were actually put to death following the war by the International Military Tribunal for the Far East, *see id.* at 493 n.110, and others sentenced to twenty or more years of hard labor by the United States, *see id.* at 488 n.88. Indeed, Eric Holder recently recognized as much in his confirmation hearings for Attorney General:

If you look at the history of the use of [waterboarding] used by the Khmer Rouge, used in the inquisition, used by the Japanese and prosecuted by us as war crimes. We prosecuted our own soldiers for using it in Vietnam. I agree with you, Mr. Chairman, water boarding is torture.

Transcript, *Senate Confirmation Hearings: Eric Holder, Day One*, N.Y. TIMES, Jan. 16, 2009, <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html>. Putting this history together with the position taken in the memoranda, the argument appears to be: When you waterboard Americans and British, it is torture. But when you waterboard members of al Qaeda or the Taliban, it is not because the pain inflicted upon them is “unintentional,” given that you are merely seeking information. Could it be that the Japanese were merely seeking information as well?

IV.

Government lawyers who enable illegal executive branch policies play a singular role in jeopardizing the rule of law. Although disregarding legal norms will always have a tendency to weaken the rule of law, the damage is of an entirely different order when illegal policies are wrapped in a tissue of false legal argumentation and thereby given the appearance of legal legitimacy. If legal argumentation itself becomes distorted, the law can no longer serve to constrain ideology, and the impairment of the rule of law will consequently be profound. In this case, the most dangerous aspect of the legal reasoning in the OLC memoranda is ultimately not the specious argument about intent and pain infliction. It is rather the defense of an expanded conception of executive power, conceived as stronger than *all* sources of constraint on law. *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President, *supra*, at 31-39. And the nub of the problem is that the greater the commitment to that power, the weaker the commitment to the rule of law. The story of the memoranda, then, is ironically the story of the legal profession placing the foundation of its own independence in jeopardy through the revival of the anachronistic assertion that the sovereign is above,

rather than below, the law and moreover that the sovereign must himself stand as arbiter of the scope of his own authority.

The assertion is that torture in the war on terror is permissible because the Commander-in-Chief regards its use as *necessary* to win the war on terror and, further, that conflicting sources of law are themselves without legal effect insofar as they restrict the President's ability to determine the scope of his own authority in times of war. This monarchical conception of sovereignty is not only politically dangerous, but it is illegal when put into effect.

Prosecution for abuse of power, if successful (and even sometimes if not), is a forceful way to seek vindication of the rule of law. When a legal system is able to correct its own excesses through the legal process, it reasserts the principle of legality in a way that cannot occur if the attempt to vindicate the rule of law stems from either the political process or the court of public opinion. (For a contrary view, see Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* (Austin Sarat & Nasser Hussain eds., forthcoming 2010) (manuscript at 274, on file with author)).

If the foregoing thoughts about the public nature of the rule of law are correct, there would then be a strong argument for bringing to justice those who have contributed most to the infringement of the rule of law through their attempt to replace public reason with clandestine executive rule. When we prosecute those who have misused legal argumentation to weaken the rule of law, we are pressing law into service to correct and to reassert its own supremacy. We are once more making political rule a "government of laws and not of men." It is only by the scrupulous affirmation and reaffirmation of valid legal rules that we can hope to protect the rule of law from incursions of both principle and convenience.

REBUTTAL

*Torture Memos? What the Bush Lawyers Really Authorized and Why It Does Not Clearly Constitute Torture*Michael Lewis[†]

Unlike many discussions of the enhanced interrogation techniques approved by the Bush Administration, this Debate is not merely a philosophical exchange about what might theoretically constitute torture or a political discourse on the importance of the rule of law and constitutional values in the war on terror. This Debate is about whether individuals committed a crime by giving legal advice about the exact location of the boundary line between conduct that is torture and conduct that is not torture. Although recent developments in this country indicate that prosecutions of the Bush Administration lawyers will not go forward, as this Rebuttal goes to press, Spanish Judge Baltasar Garzón is continuing his investigation of some Bush Administration lawyers for aiding, abetting, or facilitating torture at Guantanamo Bay. See Juzgado Central de Instrucción, Jan. 27, 2010, [Central Court for Preliminary Criminal Proceedings] (No. 150/09-N), available at http://www.ccrjustice.org/files/National%20Court%20Madrid%20Decision%201.27.10_Spanish.pdf (Spain). Based on his public statements, he is widely expected to subpoena the lawyers to testify before his inquiry and to issue international arrest warrants if they fail to comply, potentially subjecting them to arrest, detention, and extradition to Spain for trial on these charges if they choose to travel outside this country. See Lisa Abend, *Will a Spanish Judge Bring Bush-Era Figures to Justice?*, TIME, Mar. 31, 2009, <http://www.time.com/time/world/article/0,8599,1888572,00.html>. In this setting, the question whether the legal advice given by Bush Administration lawyers made them accomplices to torture becomes very concrete, and it is here that the vagueness and subjectivity inherent in the definition of torture becomes problematic. It is also precisely because these questions are not merely philosophical that we must consider them with a degree of legal rigor that is often not found in purely theoretical discussions.

Before discussing the reasons why I believe that the Bush lawyers should not be found criminally liable for the advice they gave regarding coercive interrogations, it is worth noting several points upon which Professor Finkelstein and I agree. She discusses common mis-

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conceptions that frequently appear in discussions of whether these lawyers should be prosecuted. I generally agree with Professor Finkelstein's views on these issues, and I want to emphasize that my underlying argument does not depend upon any of them.

First, there is the misconception that criminal liability for the Bush lawyers must rest upon international law, not domestic law. I agree with Professor Finkelstein that it is clear that the federal torture statute, 18 U.S.C. §§ 2340–2340A (2006), prohibits the intentional infliction of severe pain or suffering, just as the international Convention Against Torture does. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]. Conduct that violates the torture prohibition found in article 1 of the CAT almost assuredly violates the federal torture statute as well.

Second, Professor Finkelstein challenges the claim that lawyers should be somehow immune from prosecution for advice they give because holding them accountable for the consequences of their advice might discourage others from public service. While I think that it is perfectly reasonable to believe that prosecuting lawyers for drawing lines on controversial issues will make others less willing to take on those responsibilities in the future, I do not believe that this “chilling effect” means that those lawyers get a pass for their conduct. If, as Professor Finkelstein says, the lawyers “aided in the commission of the prohibited act (torture) by encouraging, soliciting, or otherwise contributing to the act by giving it legal validation” then they should be prosecuted for those actions, regardless of the chilling effect it may have on future government service.

Third, Professor Finkelstein discusses the dangers of expanding executive power in a nation that is perpetually in a state of emergency. While I believe that her concerns about untrammelled executive power are somewhat overstated given that Congress passed numerous pieces of legislation authorizing executive action, including the Authorization to Use Military Force, the Patriot Act, the Detainee Treatment Act, and the Military Commissions Act, I share her disagreement with the contention advanced in Section V of the memorandum authored by John Yoo that the scope of the Commander-in-Chief power during times of national emergency may allow the executive to authorize actions that violate U.S. law. *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President 31-38 (Aug. 1, 2002) [hereinafter Yoo Memorandum], *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. Be-

cause my argument against criminal liability for the Bush lawyers does not rely on any of these misconceptions, however, our agreement on these peripheral issues does little to resolve our disagreement on the legal question of criminal liability.

Thus, we turn to the question of the legal basis for prosecutions. Did, as Professor Finkelstein claims, the Bush Administration lawyers validate conduct that clearly violated the statute? There are three reasons why the answer to this question is “no.” First, there was very little legal authority defining the line between torture and not torture, and the Bush lawyers’ analysis examines what authority did exist and agrees with it. Additionally, the memoranda that actually authorize the application of specific techniques are very narrowly drawn, very detailed in their descriptions of the boundaries on the conduct permitted, and repeatedly insist upon medical oversight to ensure that lines are not crossed. Finally, the only attempt that Professor Finkelstein makes to show that the techniques approved by the memoranda violated the “severe pain or suffering” standard established by the CAT and the federal torture statute is to rely on the comparison between the Japanese war-crimes trials after World War II and the waterboarding that was approved by the Bush lawyers. This comparison, as I will explain below, is deeply flawed.

Turning to the actual content of the memoranda, it is important to recognize that we are dealing with four separate memoranda which outline the Bush Administration lawyers’ advice on the definition of torture as applied to the coercive interrogation of al Qaeda detainees. See Yoo Memorandum, *supra*; Memorandum from Jay S. Bybee, Assistant Att’y Gen., to John A. Rizzo, Acting Gen. Counsel, CIA 2-4 (Aug. 1, 2002) [hereinafter Bybee Memorandum], *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000780.pdf> (discussing ten proposed techniques); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Counsel, CIA 7-16 (May 10, 2005) [hereinafter Bradbury Memorandum], *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000798.pdf> (describing three additional techniques, namely dietary manipulation, nudity, and an abdominal slap); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Counsel, CIA 2-12 (May 10, 2005) [hereinafter Bradbury Combination Memorandum], *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000844.pdf> (discussing the use of these techniques in combination with one another). Professor Finkelstein focuses almost exclusively on a very small part of the Yoo memoran-

dum: the “organ failure or death” standard it uses to define “severe pain or suffering” and some of its discussion of executive power. When the Yoo Memorandum is considered in its entirety, however, and particularly when it is considered in conjunction with the other memoranda, a very different picture emerges.

The Yoo memorandum responded to the question of how the federal torture statute defines torture. It correctly stated that there had not been any criminal prosecutions under the statute to aid in its interpretation, Yoo Memorandum, *supra*, at 22, and therefore consulted the civil and international analogues, *see id.* at 14-22 (discussing the CAT); *id.* at 22-27 (discussing the Torture Victims’ Protection Act, 28 U.S.C. § 1350 (2006)).

The memorandum reviewed two leading international cases on interrogational torture. *See id.* at 28-29 (citing *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)); *id.* at 30-31 (citing HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999], *as reprinted in* 38 I.L.M. 1471 (1999) (Isr.)). The *Ireland* case establishes a line between torture and cruel, inhuman, and degrading treatment (CIDT). The European Court of Human Rights found that stress positions, mild sleep deprivation, hooding, dietary manipulation, and exposure to noise amounted to CIDT but not torture. *See Ireland*, 25 Eur. Ct. H.R. (ser. A) at 27. The Yoo memorandum similarly concluded that the *Israel* opinion forbade shaking, stress positions, hooding, and sleep deprivation on the ground that these actions constituted CIDT but did not rise to the level of torture. *See Yoo Memorandum, supra*, at 30. While the Israeli Supreme Court did not directly address the distinction, its conclusion that interrogators charged with employing such techniques would have a defense of necessity available to them is indicative of this distinction. This is because, under the CAT, the prohibition against torture is not derogable and no defenses are recognized to its employment. *See CAT, supra*, art. 2. The prohibition against CIDT, however, is derogable and some defenses may be recognized in times of national emergency. *See id.* art. 12.

Finally, after noting that both of the foreign cases held that a number of interrogation techniques constituted CIDT but not torture, the memorandum turned to the definition of torture used by U.S. courts when interpreting the TVPA. It outlined in some detail cases in which U.S. courts concluded that the defendant tortured the plaintiff. *See Yoo Memorandum, supra*, at 47-50. Yoo acknowledged the lines drawn in these cases and indicated that those cases constituted torture. *See id.* at 23-27.

If Yoo had ignored these opinions or concluded that conduct that they labeled “torture” did not in fact constitute torture, then Professor Finkelstein might be right to say that Yoo validated conduct that clearly violated the statute. But he did no such thing. He acknowledged the lines that already existed and then attempted to outline a standard for defining the hopelessly amorphous phrase “severe pain or suffering.” He concluded that “severe pain” was pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 1. Should the fact that this standard was later withdrawn as improperly describing the line between torture and not torture make Yoo’s line-drawing criminal? No.

This is particularly true when one considers that the Yoo memorandum did not authorize anyone to do anything to any detainee. On the same day that Jay Bybee signed the Yoo memorandum, he also signed another far more detailed memo discussing the use of ten specific techniques on a single detainee, Abu Zubaydah. *See* Bybee Memorandum, *supra*. This memorandum, and the other two memoranda that have been released from May 2005, illustrate the narrowness of the authorizations to use enhanced interrogation techniques and the level of detail that accompanied those authorizations.

The 2002 authorization to use enhanced interrogation techniques did not apply to all detainees—or even to a class of detainees—but was limited to a single individual, Abu Zubaydah. The authorization stated that Zubaydah was known to be a high-ranking member of al Qaeda, that interrogators were certain that he was withholding information about terrorist networks in the United States and Saudi Arabia, and that all interrogation methods short of utilizing these enhanced techniques had been exhausted. *See id.* at 1. The Bybee memorandum explained that “[i]f these facts were to change, this advice would not necessarily apply.” *Id.* In other words, if anything changes or if you capture anybody else that you want to do this to, you must come back to us to get permission again.

The 2005 authorization was somewhat broader, as it applied to “high-value detainees.” Bradbury Memorandum, *supra*, at 4. But this type of detainee was narrowly defined as a senior member of al Qaeda that either had knowledge of imminent terrorist threats against the United States or had direct involvement in planning and preparing terrorist actions against the United States. *Id.*

Thus, these detailed authorizations outlined the use of a limited set of enhanced interrogation techniques on a specific individual or upon a narrowly defined class of detainees. Any implication that the

broad “organ failure or death” language from the Yoo memorandum was handed to interrogators to authorize the use of whatever enhanced interrogation techniques they saw fit is simply false.

In addition to being very narrowly drawn, these restricted authorizations to use enhanced interrogation techniques depended upon the presence of medical personnel monitoring the condition of the detainees. “Medical and psychological personnel are on scene throughout the interrogation, and are physically present or are otherwise observing during many of the techniques. These safeguards, which were critically important to our conclusions about individual techniques, are even more significant when techniques are combined.” Bradbury Combination Memorandum, *supra*, at 13. It has been suggested that these medical personnel may have been present for the purpose of enhancing the torture, not limiting it. *See, e.g.*, Sheri Fink, *Bush Memos Suggest Abuse Isn’t Torture If a Doctor Is There*, PROPUBLICA, Apr. 17, 2009, <http://www.propublica.org/article/memos-suggest-abuse-isnt-torture-if-a-doctor-is-there-417>. The Bush Administration lawyers, however, were aware that medical personnel had been misused this way in the past and stated that,

as you have informed us and as our own dealings with [Office of Medical Services] personnel have confirmed, that the involvement of OMS is intended to prevent harm to the detainees and not to extend or increase pain or suffering. As the *OMS Guidelines* explain, “OMS is responsible for assessing and monitoring the health of all Agency detainees subject to ‘enhanced’ interrogation techniques, and for determining that the authorized administration of these techniques would not be expected to cause serious or permanent harm.

Bradbury Memorandum, *supra*, at 30 n.35. Moreover, the lawyers did not rely merely on these theoretical medical protections but cited specific practical examples in which the use of interrogation techniques was altered or suspended by OMS for even relatively minor physical problems, such as edema of the legs. *See id.* at 11 n.15.

Not only were the authorizations to use enhanced interrogation techniques narrowly drawn and reliant upon constant medical oversight, they were also incredibly detailed in their descriptions of the techniques authorized. Because Professor Finkelstein maintains that waterboarding is clearly torture, she deals with the other authorized techniques in a rather cursory (and at times inaccurate) manner. For example, she describes “enclosure in a small box filled with insects” when in fact the technique approved called for the use of a single, nonstinging insect (a caterpillar, ferocity not specified, was suggested), *see* Bybee Memorandum, *supra*, at 3, and the 2005 memoran-

da made clear that this technique was never actually employed and was no longer authorized, *see* Bradbury Memorandum, *supra*, at 9 n.13. While Professor Finkelstein has not made an issue out of these other authorized techniques, it is illuminating to briefly look at the details that the authorizations provided.

Only a short list of techniques was approved, and the memoranda made clear that the use of any techniques beyond those specifically authorized would require separate approval. *See* Bybee Memorandum, *supra*, at 1. These approved techniques included dietary manipulation, nudity, the facial or insult slap, the attention grasp, the facial hold, walling, the abdominal slap, cramped confinement, stress positions, wall standing (i.e., the technique that the *Ireland* court held was not torture), water dousing, sleep deprivation, and waterboarding. *See* Bradbury Memorandum, *supra*, at 7-15. An examination of the authorized techniques reveals an extremely detailed description of exactly what was permitted.

Dietary manipulation placed no restriction on water intake and recommended at least 1500 Kilocalories per day with an absolute minimum of 1000 Kilocalories per day. *Id.* at 7. Despite noting that many dietary programs in the United States employ prolonged periods of caloric intake of 1000 Kilocalories per day without medical supervision, the instructions required weekly weighing and the discontinuance of dietary manipulation if the detainee were to suffer a weight loss equal to ten percent of his body weight. *Id.* at 7 n.11, 30.

Nudity could only be employed when the ambient air temperature was above sixty-eight degrees Fahrenheit and could not be accompanied by any actual or threatened sexual abuse, sexual innuendo, or acts of implicit or explicit sexual degradation. *Id.* at 7-8.

The facial slap had to be done with an open hand with fingers slightly spread. It could not land on the ear or on the jaw line but only on the fleshy part of the cheek. *Id.* at 8.

The attention grasp and facial hold were both means of directing the detainee's attention to the interrogator's face. *Id.*

Walling involved placing a detainee with his heels against a flexible wall, leaning him forward, and then rapidly pushing his shoulder blades back against the wall. The flexible wall gives upon impact but is designed to make a loud noise when the detainee impacts it to increase the psychological shock induced by the technique. The detainee's head and neck are supported by a rolled hood or towel to prevent any form of whiplash injury. *Id.*

The abdominal slap had to be done with the back of an interrogator's open hand. No rings or jewelry could be worn, the interrogator

could be no more than eighteen inches from the detainee, and he had to use his elbow as the pivot point—ruling out any extensive arm swing that might result in a harder blow. *Id.* at 8-9.

Cramped confinement could last no more than two hours in a space large enough for the detainee to sit or eight hours in a space large enough for the detainee to sit or stand. *Id.* at 9.

Stress positions and wall standing did not involve contortions (unlike the Israeli “Shabach” position that was held not to be torture, *see Public Committee*, 38 I.L.M. at 1475). Rather, they were designed to generate muscle fatigue by forcing a detainee to hold a position for a long period of time, such as sitting with the arms extended above the head. The interrogators were required to position themselves in such a way as to prevent the detainee from falling down if placed in a standing stress position. Bradbury Memorandum, *supra*, at 9.

Finally, water dousing could only be done with drinking water and the interrogators had to ensure that the water did not enter the detainee’s nose, mouth, or eyes. The ambient air temperature had to exceed sixty-four degrees Fahrenheit and the water had to be at least forty-one degrees Fahrenheit. Dousing had to be followed by drying and rewarming within twenty minutes. Longer delays before drying and rewarming were permissible when warmer water was used, but in no case could the delay exceed sixty minutes. *Id.* at 9-10. All of these techniques required OMS oversight. *Id.* at 4-5.

After reading the appendix to the Yoo memorandum, which details the domestic cases that have found instances of torture—shattered bones, broken teeth, mangled genitals, electric shocks, iron bars and baseball bats, rapes, blow torches, and mutilations with knives—it is hard to imagine that the same word might be legally applied to both sets of techniques. But then, what about waterboarding?

The memoranda make clear that the lawyers considered waterboarding to be right on the line between torture and not torture. The 2002 authorization to waterboard applied only to Zubaydah. The 2005 authorization, which was slightly broader, was cognizant of the fact that requests to use this technique were extremely rare. That authorization reaffirms that waterboarding could only be applied in the most extraordinary cases:

- (1) the CIA has credible intelligence that a terrorist attack is imminent;
- (2) there are “substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack”; and
- (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.

Id. at 14. Of the many thousands of detainees captured during the war on terror, only three have ever met these criteria. See Randall Mikkelsen, *CIA Says Used Waterboarding on Three Suspects*, REUTERS, Feb. 5, 2008, <http://www.reuters.com/article/idUSN0517815120080205>. However, if waterboarding was indeed torture, then three is still too many, regardless of the information acquired from these detainees.

Like all of the other techniques discussed above, the lawyers' authorization of the waterboard was carefully circumscribed. Waterboarding, as authorized by the Bush Administration lawyers, explicitly required constant medical and psychological monitoring. See Bradbury Memorandum, *supra*, at 14. It involved placing a cloth over the detainee's face and pouring cold water over that cloth from a height of six to eighteen inches. *Id.* at 13. The saturated cloth created a barrier through which it became difficult or impossible to breathe, creating the sensation of drowning. Once the cloth was removed, a minimum of three or four full breaths had to be allowed which instantly relieved the drowning sensation. See Bybee Memorandum, *supra*, at 4. No detainee could be subjected to more than two "sessions" of waterboarding in a single day. Each "session" could last no more than two hours, measured from the time that the detainee was strapped to the board until the time he was released from the board. During a "session," no more than six applications of water could last for more than ten seconds, and no application of water could last more than forty seconds. Finally, the total time for water applications in a single day could never exceed twelve minutes, and in the single calendar month during which waterboarding was authorized, it could only be utilized on five separate days. See Bradbury Memorandum, *supra*, at 14.

Although it was not intended for the detainee to ingest or aspirate the water, concerns that ingestion might cause an electrolyte imbalance (hyponatremia) or that aspiration might cause pneumonia resulted in the use of a potable saline solution instead of water. *Id.* at 13. Moreover, the authorization was also "based on our understanding that there will be careful adherence to all of these guidelines, restrictions, and safeguards, and that there will be ongoing monitoring and reporting by the team, including OMS medical and psychological personnel." *Id.* at 15. Lastly, the lawyers noted that the technique they were approving had been used on thousands of U.S. servicemen in SERE school without any instances of serious physical pain or lasting psychological harm. *Id.*

Even with all of these limitations and safeguards, why is waterboarding not uncontroversially torture if we prosecuted the Japanese for doing the same thing to our troops during World War II? Profes-

sor Finkelstein relies on an article by Evan Wallach. See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 *COLUM. J. TRANSNAT'L L.* 468, 482-94 (2007). This article reviews the prosecutions of Japanese war criminals that involved waterboarding following World War II, for the purpose of demonstrating the hypocrisy of the Bush Administration for sanctioning conduct that the United States once prosecuted. Wallach concludes that "water torture, the repetitive artificial drowning and revival of another human being" must be torture. *Id.* at 506. "Can there be any doubt that it causes severe physical and lasting psychological harm? Can there be any doubt that it is torture?" *Id.* This sound bite, that we prosecuted Japanese for waterboarding U.S. troops after World War II, was seized upon by numerous Senators and other political commentators, see, e.g., Walter Pincus, *Waterboarding Historically Controversial*, *WASH. POST*, Oct. 5, 2006, at A17, and is now repeated by my opponent.

There is only one problem with this. The waterboarding authorized by the Bush Administration lawyers looked nothing like the waterboarding conducted by the Japanese. The Japanese did not have time limits. Their limitation was the capacity of the victims' stomachs and lungs, which they filled with water until the victims passed out. See Wallach, *supra*, at 482-90. The Japanese did not have medical concerns about electrolytes or pneumonia and sometimes used sea water. See *id.* at 489. The Japanese did not have rules about allowing victims to breathe; they revived them by beating them, jumping on their distended stomachs, or standing on their chests to expel the water, only to refill their stomachs and lungs again once they finished vomiting the water from the first application. See *id.* If this were the conduct authorized by the Bush Administration lawyers, I would not hesitate to label it torture and label them criminals.

The mere fact that both techniques are labeled waterboarding does not mean that they are both torture. A facial slap and a blow to the head with a baseball bat are both batteries, but one is clearly torture and the other is clearly not. "Can there be any doubt that [waterboarding] causes severe physical and lasting psychological harm?" Based on the experience of thousands of American servicemen, who were waterboarded without suffering *any* physical or lasting psychological harm, the answer to that question must be yes. "Can there be any doubt that it is torture?" Absolutely.

CLOSING STATEMENT

What is Torture?

Claire Finkelstein

In his Rebuttal, Professor Lewis was generous to list a number of points on which he and I agree. There are additional points in Professor Lewis's Rebuttal that will allow me to return the compliment. Yet despite our agreement on several key issues, Professor Lewis and I reach opposite conclusions in the starkest possible terms: I think criminal prosecution of the OLC attorneys is both legally warranted and politically appropriate; he thinks there is not even a *prima facie* case for prosecution. It will be useful to identify the source of our disagreement with precision, especially given that debate on this topic has too often substituted angry denunciation for rational argumentation.

I shall begin by noting those points of agreement that are most crucial to understanding the nature of the debate between us. First, Professor Lewis says that the federal torture statute, 18 U.S.C. §§ 2340–2340A (2006), “prohibits the intentional infliction of severe pain or suffering,” and that the statute would therefore be a more than adequate vehicle through which to prosecute Yoo and Bybee as accomplices to torture, under circumstances in which this was warranted. Unlike other outspoken opponents of prosecution, *see, e.g.*, ERIC A. POSNER AND ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* 273 (2007), Professor Lewis appears to have no *per se* objection to using the criminal law to call government lawyers to account for encouraging and soliciting illegal conduct. As he says, if the lawyers did give legal validation to torture, “then they should be prosecuted for those actions.” In principle, then, we seem to be on the same page with respect to the prosecution of government attorneys. His argument against prosecution relates only to the details of this particular case.

Second, Professor Lewis shares my concern that the 2002 memorandum authored by John Yoo, Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Yoo Memorandum], *available at* <http://news.findlaw.com/newyorktimes/docs/doj/bybee80102mem.pdf>, advances such a broad conception of the Commander-in-Chief powers during times of national emergency that it would “allow the executive to authorize actions that violate U.S. law.” Professor Lewis apparently agrees with me that executive authority, even during war, is not unlimited under the U.S. Constitution, contrary to the position that the

memorandum expresses, *see* Yoo Memorandum, *supra*, at 31, and that Yoo has defended over the years in his many articles and books on the subject. *See, e.g.*, JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 417-20 (2009). Lewis, however, regards this feature of Yoo's memorandum, and the vindication of extreme interrogation techniques that this view supports, as irrelevant to the debate about prosecution. As Lewis says, his argument against criminal liability "does not rely on . . . th[is] misconception[]."

What, then, *is* Professor Lewis's argument against prosecution? Though variously expressed, his main claim is that the actus reus for torture under 18 U.S.C. §§ 2340–2340A is not met by the conduct of the principals in this case. His first argument is as follows: The term "torture" in the federal statute is never properly defined, and, as he puts it, "the vagueness and subjectivity inherent in the definition of torture becomes problematic." The most that the statute gives us is that to qualify as torture the act must be "specifically intended to inflict severe physical or mental pain and suffering." Lewis describes this phrase as "hopelessly amorphous," and points out that we have little legal guidance on how to disambiguate the phrase given that there have been no prosecutions under the statute. Indeed, one might argue, if the statute leaves vague the definition of torture, there is *eo ipso* reasonable doubt about whether the acts condoned in the 2002 memorandum constitute torture. In further support of Lewis's point, one might argue, the defendants would not have been given adequate notice that they could be prosecuted for torture if there were no basis in either statutes or prior cases for determining what counts as torture. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

By Lewis's own admission, however, this argument cannot be correct. He allows that techniques somewhat harsher than those authorized by the memoranda, such as the Japanese version of waterboarding, would satisfy the actus reus requirement under the statute. As he says, "If this were the conduct authorized by the Bush lawyers, I would not hesitate to label it torture and label them criminals." Though it may be difficult to draw a sharp boundary between conduct that constitutes torture and conduct that does not, Lewis and I agree that some conduct can be classified as torture. Even in the absence of clear legal standards that might allow for the identification of finer distinctions, shared moral commitments help to impart legal meanings to terms. The point, then, is that if "torture" has sufficient meaning to allow for prosecution in a more severe case, there can be no

impediment based on vagueness in the less severe case.

A second argument Lewis makes against the suggestion that the OLC memoranda authorized torture is that the vast majority of the techniques identified are narrowly drawn and not particularly offensive, and that there is international precedent that these lesser techniques do not constitute torture. Furthermore, he suggests that all techniques were to be implemented according to strict guidelines and careful medical monitoring, so that “the authorized administration of these techniques would not be expected to cause serious or permanent harm.” Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Counsel, CIA 30 n.35 (May 10, 2005) (quoting the CIA’s Office of Medical Services guidelines). Finally, Lewis claims, though there is little evidence by way of support, that the Bybee memorandum, Memorandum from Jay S. Bybee, Assistant Att’y Gen., to John A. Rizzo, Acting Gen. Counsel, CIA 2-4 (Aug. 1, 2002), *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000780.pdf>, authorized the enhanced interrogation techniques (EITs) only for use against a particular defendant—namely, Abu Zubaydah.

Insofar as we are debating the eligibility of the lawyers for prosecution, the fact that some of the techniques they authorized fall on the nontorture side of the line does not serve to establish that others—in particular, waterboarding—do not fall on the torture side of the line. Moreover, even if “the waterboarding authorized by the Bush lawyers looked nothing like the waterboarding conducted by the Japanese,” the difference does not demonstrate that waterboarding as the United States practiced it under the guidance of the OLC memoranda was *not* torture. Admittedly, this weakens the precedential value of the American prosecution of the Japanese as war criminals for using that technique, but only somewhat. Given the resemblance between the Japanese and American techniques, it in no way undercuts the argument.

Similarly, that the techniques were to be strictly supervised by medical personnel only weakens Lewis’s contention that they do not constitute torture. If the infliction of a particular EIT is not torture because it does not inflict severe pain, why would it be necessary to engage in medical monitoring of its use? Nor would the fact that the techniques were authorized for use only against one defendant improve the case for the OLC lawyers. Just as one needs only a single illegal act to establish a *prima facie* case of torture under the statute, so one needs only a single victim of the relevant act. This and other factors that Lewis cites may make the actions of the attorneys look moral-

ly better, but they do not improve the lawyers' legal standing with regard to the possibility of criminal penalties.

The foregoing underscores a point I made in my Opening Statement: it makes little sense to tie the definition of torture to the pain associated with various interrogation techniques, and still less sense to require that this pain be akin to the pain suffered with "organ failure" or "death." This is not the occasion to seek to develop an account of torture. Presumably, however, a more enlightened approach would articulate the concept in accordance with respect for human dignity, and with the idea of a minimum level of humanitarian respect that no person should be allowed to fall below.

Let us now turn to what for me is the most crucial aspect of this debate: Yoo's remarks in the August 1, 2002 memorandum about the scope of executive privilege. Lewis might not have made the suggestion that these remarks are irrelevant had he correctly perceived the way in which this appeal to executive privilege is used in the structure of Yoo's argument. Yoo appeals to executive privilege as an argument in the alternative: The techniques authorized do not constitute torture under the statute, *see* Yoo Memorandum, *supra*, at 2-31, but even if they do, the law would be unconstitutional to the extent that it limited the Commander-in-Chief's powers during a time of war, *see id.* at 31. This conclusion alone would encourage an interrogator to commit torture, even if she firmly believed that federal law prohibited it. The situation is akin to receiving a letter from a lawyer working for the Internal Revenue Service stating that the law criminally prohibiting the "structuring" of transactions to avoid tax liability is unconstitutional and should be ignored. If the receipt of such a letter lent legal credence to a taxpayer's scheme to "structure transactions," and hence encouraged her to violate the law, it would be difficult to avoid the conclusion that the lawyer was an accomplice to the taxpayer's illegal scheme.

This same point, however, would not hold of a non-government attorney, or of a government attorney opining outside his area of authority. What, then, is the difference between the government attorney issuing a legal memorandum on matters that fall within his area of competence and the private lawyer hired by a specific client to render comparable advice? The answer is that the government attorney has shifted the locus of responsibility from the principal to himself. A sign that this is so lies in the fact that the principal is not free to disregard the governmental legal opinion in the way that a private client usually is. In combination with a set of direct orders from additional governmental authorities, the principal must adhere to the lawyer's opi-

nion. The reason Yoo's defense of unlimited executive privilege in wartime is so pernicious, then, is that without it, *the words of the federal torture statute itself would provide a constraint against illegal conduct*, for it remains an option for each citizen to evaluate the language of the statute herself and conclude that the proffered legal analysis would violate it. But under Yoo's analysis, this would no longer be an option, for the federal torture statute itself would be wholly deprived of effect.

CLOSING STATEMENT

*Accomplice Liability for Lawyers Giving Incorrect Legal
Advice Is Subject to a Good Faith Defense*

Michael Lewis

I would like to begin by thanking Professor Finkelstein for engaging in a civil debate on a very controversial and emotionally charged subject. While civility should not be a remarkable feature of academic discussions, when the subject matter includes the Bush Administration and allegations of torture, it is disappointing how often such discussions devolve into less-than-admirable discourse.

After briefly responding to Professor Finkelstein's discussion of waterboarding, my Closing Statement will address Professor Finkelstein's discussion of Part V of the Yoo memorandum and why, on the facts available to us, it does not provide the basis for accomplice liability. It will then turn to the much broader question of whether the conception of accomplice liability that Professor Finkelstein advocates is consistent with our legal tradition.

Professor Finkelstein is correct in pointing out that the differences I identified between the Japanese method of waterboarding and the method authorized by the Bush Administration's lawyers are not dispositive of the question whether waterboarding is torture. I pointed out these distinctions *not* to prove that waterboarding is not torture but rather to challenge Professor Finkelstein's claim that waterboarding was clearly established as torture under U.S. law based upon our prosecution of the Japanese. Despite Professor Finkelstein's claims of a "family resemblance" between the procedures, they are appreciably different in terms of violence, duration, and the captors' indifference to the victims' health. A review of the Torture Victim Protection Act of 1991 (TVPA) jurisprudence, which I discussed in my Rebuttal clearly places within the definition of torture established by the U.S. Courts the beatings, stompings, and forcible ingestion and aspiration of water until unconsciousness that characterized the Japanese version of waterboarding. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President 14-22 (Aug. 1, 2002) [hereinafter *Yoo Memorandum*], *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> (discussing the TVPA); *see also* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006). A similar comparison of the waterboard-

ing authorized by the Bush Administration lawyers and the TVPA jurisprudence would not lead to the same conclusion that the American practice clearly constituted torture. The importance of this difference will be discussed more fully in Part II.

I.

Professor Finkelstein takes me to task for considering Part V of the Yoo memorandum irrelevant to the question at hand. Part V argues in the alternative that even if the techniques authorized do constitute torture, the federal torture statute, 18 U.S.C. §§ 2340–2340A (2006), would represent an unconstitutional infringement upon the President’s Commander-in-Chief powers during wartime, thereby allowing the President to immunize interrogators from any charges brought under the statute. Yoo Memorandum, *supra*, at 31. Professor Finkelstein contends that “[t]his conclusion alone would encourage an interrogator to commit torture.” This certainly could be true if the interrogators knew about the “Commander-in-Chief powers” argument. The only problem for Professor Finkelstein is that there is no evidence that the Yoo memorandum, with its discussion of executive power, ever reached interrogators. Indeed the record before us shows that this is unlikely.

In my Rebuttal, I alluded to the fact that multiple memoranda were produced by the Office of Legal Counsel concerning the use of enhanced interrogation techniques (EITs) and that the Yoo memorandum did not authorize anyone to do anything to any detainee. The Yoo memorandum was signed by Jay Bybee and was addressed to Alberto Gonzales, Counsel to the President. Yoo Memorandum, *supra*, at 1. On the same day that the Yoo memorandum was signed, August 1, 2002, Jay Bybee signed another memorandum addressed to John Rizzo, the General Counsel of the CIA. Memorandum from Jay S. Bybee, Assistant Att’y Gen., to John A. Rizzo, Acting Gen. Counsel, CIA 1 (Aug. 1, 2002) [hereinafter Bybee Memorandum], *available at* <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000780.pdf>. This memorandum specifically authorized the CIA’s interrogators to employ ten EITs and based that authorization on the conclusion that the EITs did not constitute “severe pain and suffering.” Bybee Memorandum, *supra*, at 9. Unlike the Yoo memorandum, the Bybee memorandum to the CIA does not opine that the President could immunize interrogators from the federal torture statute. It would seem likely that the memorandum directed to the CIA authorizing the use of specific EITs (the Bybee memorandum) was the memorandum that Bybee in-

tended the CIA interrogators to rely upon when they employed those EITs.

This argument is admittedly fact specific and vulnerable to a showing that the Yoo memorandum was in fact forwarded to the CIA interrogators. It could also be contended that Part V of the Yoo memorandum represented part of a causal chain that could have encouraged Gonzales to encourage others (e.g., the President, the Secretary of Defense, the intelligence directors, the National Security Advisor, and so forth) who in turn might encourage the interrogators to employ EITs that were subsequently found to be torture. For this causal chain to support a prosecution of Yoo for employing his “Commander-in-Chief powers” argument, there would have to be a showing that each link in the chain encouraged the approval of EITs based upon that argument. When one considers that none of the subsequent memoranda reference this argument—relying instead on the Bybee memorandum—such a showing seems unlikely. *See, e.g.*, Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., to John A. Rizzo, Senior Deputy Gen. Counsel, CIA 6 n.9 (May 10, 2005), available at <http://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000798.pdf> (detailing prior reliance on the Bybee memorandum, not the Yoo memorandum).

II.

In my Rebuttal, I made the case that the treatment authorized by the Bush Administration lawyers did not constitute torture chiefly because there were significant safeguards protecting the health and safety of the detainees and because even the harshest techniques employed had been used on thousands of American servicemen without causing them any physical or mental harm. At a minimum, I believe that these facts give rise to a reasonable doubt about whether the authorized conduct violated the federal torture statute, meaning that the Bush Administration lawyers cannot be held criminally liable for the advice they gave regarding EITs. However, just as the ambiguity about the definition of torture makes it difficult to prosecute torture violations, this same ambiguity also makes it difficult to definitively deny torture violations. Indeed, there is an alternative and more fundamental reason why these lawyers are not liable and should not be prosecuted.

The fundamental reason accomplice liability does not exist here is that its application to lawyers for giving legal advice is different from its general application in criminal law. I do not question Professor Finkelstein’s general description of criminal accomplice law, which

distinguishes between mistakes of fact—which can exonerate a defendant—and mistakes of law—which cannot. Where the case for accomplice liability breaks down is in how this standard is applied to lawyers who give incorrect legal advice. By definition, any mistake that a lawyer makes in describing the law to a client will be a mistake of *law* rather than a mistake of *fact*. According to Professor Finkelstein, if a client acts on mistaken advice from a government lawyer acting within her area of competence, then the lawyer is criminally liable as an accomplice.

Professor Finkelstein's IRS hypothetical illustrates why such a standard is problematic. Are IRS lawyers criminally liable for giving incorrect legal advice on the meaning of the tax code? It appears that Professor Finkelstein's answer to that question is "yes." This essentially creates a *criminal* strict liability standard for government lawyers dispensing advice on the law; every time a lawyer is wrong, she could go to jail if her client acts on her advice and commits a crime.

My answer to the same IRS lawyer question is that accomplice liability depends upon whether the lawyer acted in good faith. Did she investigate the law to determine what precedent existed? Did she adhere to that precedent? Did she place reasonable limits on the conduct she was approving as legal? If so, then the lawyer should not be held criminally liable. The idea that a lawyer acting in good faith cannot be held criminally liable for offering legal advice is found in the code of legal ethics and in recent case law. Rule 1.2(d) of the American Bar Association's Model Rules of Professional Conduct provides that

[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a *good faith effort* to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983) (emphasis added). It would be strange indeed if a lawyer could defend against an ethics complaint by raising a defense of good faith but could not raise such a defense in the criminal context. A recent case from New York indicates that the good faith provision of legal advice, even if incorrect, cannot be criminal:

We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice.

Vinluan v. Doyle, 873 N.Y.S.2d 72, 83 (App. Div. 2009).

The Bush Administration lawyers consulted and followed existing precedent. They provided painstaking detail about how to administer the EITs that they authorized and insisted on a variety of safeguards to ensure that the techniques would not cause severe pain or suffering. They also refused to authorize the CIA's request to conduct mock burials, which demonstrates that the lawyers were selective in the techniques that they allowed.. See *Bush's Torture Psychologists Wanted to Use 'Mock Burials': Report*, RAW STORY, Feb. 25, 2010, <http://rawstory.com/2010/02/bushs-torture-wanted-mock-burials> (explaining that Department of Justice officials denied requests to "pretend to bury terror suspects during interrogations"). These were not the reckless or deliberately criminal actions of lawyers simply writing a "blank check" to approve criminal activity. Rather, these were the actions of lawyers who were trying to draw legal lines around an intensely controversial topic, and they were doing so under the additional stress of knowing that people's lives may depend upon where they drew those lines.

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