They Did Authorize Torture, But...

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They Did Authorize Torture, But…

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by David Cole

Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists

a report by the Office of Professional Responsibility, Department of Justice

289 pp. (July 29, 2009; released February 19, 2010)

Memorandum for the Attorney General

by Deputy Attorney General David Margolis

69 pp. (January 5, 2010; released February 19, 2010)

Whatever else you might say about John Yoo, the former Justice Department lawyer who drafted several memos in 2002 authorizing the CIA to commit torture, you have to admit that he’s not in the least embarrassed by the condemnation of his peers. The Justice Department on February 19 released a set of previously confidential reports by its Office of Professional Responsibility (OPR) excoriating Yoo’s legal work—but stopped short of referring him for professional discipline by his state bar association. Since then Yoo has written Op-Eds for The Wall Street Journal and The Philadelphia Inquirer trumpeting his “victory.” In the Wall Street Journal piece, entitled “My Gift to the Obama Presidency,” Yoo argued that President Obama owes him a debt of gratitude for “winning a drawn-out fight to protect his powers as commander in chief to wage war and keep Americans safe.” Four days later, in The Philadelphia Inquirer, Yoo called the decision not to refer him for bar discipline “a victory for the people fighting the war on terror.”

This is a bit like a child coming home with an F on his report card and telling his parents that they should congratulate him for not getting suspended, or President Clinton proclaiming to Hillary that Congress’s failure to impeach him was a vindication of his affair with Monica Lewinsky. The one thing practically everyone interviewed by the OPR agreed about was that Yoo’s legal work on the torture memos was atrocious. Bush’s Attorney General Michael Mukasey called it “slovenly.” Jack Goldsmith, another Republican who headed the Office of Legal Counsel from 2003 to 2004, said that Yoo’s August 2002 memo justifying torture by the CIA was “riddled with error” and a “one-sided effort to eliminate any hurdles posed by the torture law.” Daniel Levin, who headed the Office of Legal Counsel after Goldsmith left and, like Yoo, was a former clerk to Justice Clarence Thomas, described his reaction upon reading Yoo’s memo as “This is insane, who wrote this?” And Steven Bradbury, who became acting head of the OLC after Levin’s departure, also under President Bush, and who wrote several memos authorizing torture himself, said of Yoo’s arguments about presidential power, “Somebody should have exercised some adult leadership” and deleted his arguments altogether. These are the assessments not of human rights advocates or left-wing critics but of Yoo’s Republican colleagues at the Justice Department.

The OPR itself, which is comprised of career civil servants charged with monitoring ethics violations by department lawyers and is not known for being eager to discipline its own, decided before President Obama took office that Yoo and Jay Bybee, Yoo’s superior, had violated their ethical duties as attorneys. After considering responses from Yoo and Bybee, the OPR reaffirmed that Yoo had “put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and...therefore committed intentional professional misconduct.” It found that Bybee, who signed the 2002 torture memos and is now a judge on the US Court of Appeals for the Ninth Circuit, had acted in “reckless disregard” of the same professional obligation. It recommended that both lawyers be referred to their respective state bar associations for discipline.

So how can Yoo portray this process as a victory? Only because a single Justice Department official, Associate Deputy Attorney General David Margolis, overruled the OPR’s considered opinion, finding that while Yoo and Bybee exercised “poor judgment,” they did not knowingly provide false advice, and therefore were not guilty of professional misconduct. But Margolis’s assessment was in no way an endorsement of Yoo’s theories or practices. He described the issue of whether Yoo engaged in misconduct as a “close question,” called the memos “an unfortunate chapter in the history of the Office of Legal Counsel,” and said he feared that “John Yoo’s loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power.” In short, no one reviewing Yoo’s work gave it a passing grade. And he narrowly escaped a referral to his bar association for disciplinary action only because of the decision of a single lawyer in the Justice Department.

Serious questions remain. A footnote in the OPR report notes that Yoo’s e-mails from the critical period when he wrote his memos on torture are missing and not recoverable, even though experience tells us that e-mails are virtually always recoverable. And the OPR was unable to obtain the testimony of many high officials, including Attorney General John Ashcroft and White House lawyers David Addington and Tim Flanigan, all of whom played a role in authorizing torture but refused to participate in the inquiry. A full-scale
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investigation, preferably by an independent commission, not part of the very department implicated in the wrongdoing, is still necessary, although the chances of such a commission being formed now seem small.

The OPR and Margolis largely agreed that Yoo’s memos contained many serious flaws. Yoo interpreted the ban on torture to require the intentional infliction of severe pain of the level associated with death and organ failure, a standard he imported from a health benefits statute having no relevance to the issue at hand. The standard is literally meaningless, as neither death nor organ failure are associated with any particular level of pain. Yoo appears to have adopted it to permit the CIA to inflict an extraordinarily high degree of pain.

Yoo wrote that an interrogator could inflict even severe pain as long as he did not “specifically intend” to do so. He advised that the president could order outright torture, and that a criminal statute to the contrary could not constrain the president as commander in chief. (Indeed, he later told the OPR that the president could not even be prohibited from ordering the extermination of an entire village of civilians.) And he reasoned that an interrogator who engages in torture could defend his behavior by claiming that it was done because of “necessity” or because it was required for self-defense—of the nation, not of the interrogator himself. In both cases Yoo employed unprecedented and virtually unrecognizable versions of these defenses. (Indeed, the OPR report discloses that even the lawyer who worked under Yoo on the memos initially found his argument about self-defense “wholly implausible,” because self-defense requires an imminent threat to the person invoking it, and interrogators faced no such threat.)

The OPR and Margolis were in full accord that these opinions are deeply misguided. But where the OPR viewed the errors cumulatively as evidence of an extraordinary and ultimately bad-faith effort to contort the law to a predetermined result, Margolis considered the errors one by one, and concluded that no single error “of itself” warranted a finding of professional misconduct. Margolis, in short, missed the forest for the trees.

In a more fundamental sense, however, both the OPR and Margolis failed to confront the real wrong at issue. They focused exclusively on the manner by which Yoo and Bybee arrived at their result, rather than the result itself. What is most disturbing about the torture memos is not that they employ strained reasoning or fail to cite this or that authority, but that they do so in the name of authorizing torture and cruel, inhuman, and degrading treatment of human beings. Remarkably, neither the OPR nor Margolis directly considered the illegality of the conduct that was authorized by the memos. The OPR stated that it “did not attempt to determine and did not base our findings on whether…the Memos arrived at a correct result.” Margolis also did not address whether the conduct authorized was illegal. But surely that is the central issue.

Why, then, did the OPR and Margolis fail to take up the question of the legality of the brutality itself? Almost certainly because doing so would have implicated not only John Yoo and Jay Bybee, but all of the lawyers who approved these methods over the five-year course of their application, including, within the Justice Department, Jack Goldsmith, Daniel Levin, and Steven Bradbury, Bybee’s successors as head of the Office of Legal Counsel, and the two attorneys general, John Ashcroft and Alberto Gonzales.

Notwithstanding their criticism of Yoo’s errors, all of these men concurred with the basic conclusion of the Yoo and Bybee memos that the tactics being used by the CIA were legitimate.

Goldsmith, for example, rescinded only one of Yoo and Bybee’s two August 1, 2002, memos—the one that was leaked—and left in place a still-classified memo that authorized all of the specific procedures employed by the CIA. Goldsmith did temporarily suspend authorization of waterboarding, but not because he believed that it was torture. He did so, he said, because he believed that the CIA may have used it in ways that diverged from its authorized form.

Goldsmith and Levin drafted a replacement memo for the original torture memo. But that memo, issued in December 2004 under Levin’s signature, did not alter the conclusion that the CIA’s tactics were legitimate. It used more cautious rhetoric, but it permitted the CIA to continue to subject suspects to forced nudity, extended sleep deprivation, slaps to the face and stomach, painful and extended stress positions, being slammed into walls, and waterboarding—the very activities Yoo and Bybee memos that the tactics being used by the CIA were legitimate.

Similarly, Bradbury wrote three memos in 2005 and one in 2007, all of which concluded that the CIA could continue to engage in whatever coercive tactics it requested. These memos each concluded, in secret, that the CIA did not need to change its practices, despite the fact that the law had grown increasingly restrictive with respect to interrogation tactics. When Congress took up the task of rejecting the Bush administration’s view that the ban on cruel, inhuman, and degrading treatment did not apply to foreigners held outside our borders, Bradbury wrote two memos concluding that none of the CIA’s tactics, even when inflicted in combination, were cruel, inhuman, or degrading. John Bellinger, who served as legal adviser to the National Security Council and the Department of State under President Bush, and who himself signed off on the CIA’s tactics in 2003, told the OPR that this memo’s conclusion was “so contrary to the commonly held understanding of the [anti-torture] treaty that he considered that the memorandum was ‘written backwards’ to accommodate a desired result.”

And when the Supreme Court in 2006 rejected the Bush administration’s position that the Geneva Conventions did not protect al-Qaeda and Taliban detainees, Bradbury wrote another secret memo in 2007, this time concluding that the CIA’s tactics did not violate the Geneva Conventions’ requirement that all detainees be treated humanely.

Margolis sought to excuse Yoo and Bybee in part on the basis of the extraordinary circumstances in which they wrote their initial memos, within one year after September 11. It’s not clear why this consideration would warrant approval of torture. In any case, Yoo and Bybee’s successors in the Justice Department wrote their memos not in the heat of the moment, but after the program had been in place for years, and had been the subject of substantial criticism by the CIA’s own inspector general. He found, among other things, no evidence that the practices in fact obtained useful information that lawful, noncoercive tactics would not have obtained. Yet the OLC continued to approve of the practices.

Yoo and Bybee are in some sense easy targets. Their memos were the first to be written, and they employed less polished rhetoric than those that followed years later. But surely what was wrong, at bottom, was the legal approval of conduct that, under any
reasonable understanding of the terms, amounted to torture or cruel, inhuman, and degrading treatment, all of which the United States has solemnly committed to abjure. That conclusion was apparently too dangerous for either Margolis or the OPR, since it would have implicated everyone who had approved the CIA interrogation program, not just Yoo and Bybee. But responsibility for the illegal brutality inflicted on CIA and Guantánamo detainees cannot be limited to Yoo and Bybee. It extends to all those who approved the tactics—even those so eager later to condemn Yoo’s reasoning. And unless we as citizens demand some form of accountability for the wrongs done in our name, it extends to all of us, too.

Margolis concluded his memo with an important caveat: “OPR’s findings and my decision are less important than the public’s ability to make its own judgments about these documents and to learn lessons for the future.” In this, he is exactly right. Will the Bush administration’s decision to authorize and practice torture and cruelty be viewed as a necessary adjustment in a time of severe crisis or as a morally, constitutionally, and ethically culpable descent into illegality? The failure of the OPR and Margolis to confront the illegality of the CIA’s approved techniques is unfortunate; but it does not excuse others from doing so.

We must continue to insist on accountability—whether in congressional hearings, citizens’ commissions, civil lawsuits, or the marketplace of ideas. The essential lesson must be that torture and cruel treatment are not policy options—even when a lawyer is willing to write an opinion blessing illegality.

—March 9, 2010