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**Ohio Northern University
Law Review**

Carhart Memorial Lecture Series

**"That the Laws be Faithfully Executed":
The Perils of the Government Legal Advisor**

DAVID LUBAN*

This morning I am going to speak to you about a neglected but extremely important role that government lawyers play: as confidential advisors to their agency or military clients about what the law requires of them. I am going to discuss those requirements through a case study of failure: the government lawyers whose legal opinions gave a green light to torture. This is obviously a pretty unusual case, loaded with melodrama. But I think there are lessons in it for every lawyer who takes on the advisor's role.

Suppose you practice business law. Your client comes to you and says "We have a major deal in the works. It is aggressive and cutting edge, and we need an opinion from you saying that it is legal." Obviously, you cannot promise that. First, you need to know what the deal is. So, you examine the documents and carefully analyze the law. Unfortunately, you have only bad news to report: the deal is illegal, and there is no way to fix it. But with a little creative stretching of the law and some body English you could make a case for it that might, just might, pass the laugh test—but only barely. What do you do? Should you stretch the law and write the opinion that your client dearly wants?

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If you were writing a brief, the answer would be straightforward under the ethics rules, and it would be yes. An advocate can make any argument “that is not frivolous.”¹ Therefore, you could and should throw your Hail Mary pass and hope for the best—remember that we are stipulating that it passes the laugh test, meaning that it is not frivolous. As the predecessor of the current Model Rules of Professional Conduct explains, “While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.”² It adds: “The advocate may urge any permissible construction of the law favorable to his client.”³

Almost certainly that is what you would like to be able to do for your client in your legal opinion.⁴ The client stands to make a lot of money from the deal and needs your blessing for it to go forward. Elihu Root, an eminent corporate lawyer of a century ago who later became Secretary of State, famously said, “The client never wants to be told that he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.”⁵

The trouble is that what is ethical for a courtroom advocate may not be ethical for an advisor. Model Rule 2.1 of the Model Rules of Professional Conduct governs the advisor’s role, and it requires you to “exercise independent professional judgment and render candid advice.”⁶ *Independent* does not mean only independence from outside influences. It also includes independence from your client’s pressure. And *candid* means just what it sounds like. In the words of the American Bar Association, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”⁷ That means offering “straightforward advice expressing the lawyer’s honest assessment.”⁸ In other words, your job may be to give the client bad news. You must tell it straight, without slanting or skewing. That can be a difficult thing to do if the legal answer is not the one that the client wants. No lawyer ever enjoys

1. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2009) [hereinafter MODEL RULES].

2. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (1980) [hereinafter MODEL CODE].

3. *Id.* EC 7-4.

4. I do not mean to deny that a conscientious lawyer might have moral qualms about approving the deal, if it puts innocent third parties at risk. On the contrary, I believe that lawyers ought to have moral qualms, regardless of how permissive the ethics rules are. In some cases, lawyers should turn down cases or tactics on moral grounds even if the rules permit the representation. But let us imagine that this particular hypothetical deal is very unlikely to harm anyone.

5. 1 [THE PREDECESSOR FIRMS 1819-1906] ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947*, at 667 (1946).

6. MODEL RULES, *supra* note 1, R. 2.1.

7. *Id.* R. 2.1 cmt. 1. The rule itself states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” *Id.* R. 2.1.

8. *Id.* R. 2.1 cmt. 1.

saying no to a valued client. But the ethical standard is clear: a legal advisor must use independent judgment and give candid, unvarnished advice.

A moment's thought will show us why. An advocate functions in an adversary system with a lawyer on the other side to present all the opposing arguments, and an impartial judge to decide whose case is stronger. The advisor's role is structurally different. Typically the lawyer gives her advice in a confidential and privileged communication with the client. Nobody else is in the room. It is just you and your client, sitting across a desk from each other. No adversary will argue the other side, and no impartial judge will pick the strongest argument. What you say *is* the law. If you simply tell your client whatever he or she wants to hear, you make the law into a joke.

This is common sense. Otherwise, clients could go to their lawyers and say, "Give me an opinion that says I can do what I want"—and then duck responsibility by saying, "My lawyer told me it was legal." Then we would have a perfect circle of nonaccountability: the lawyer says "I was just doing what my client wanted," and the client says, "I was just doing what my lawyer approved." The damage to law, and compliance with law, would be enormous.

In my view, the standard for candid, independent advice cashes out in two important rules of thumb.⁹ Number One is that the legal opinion you give your client should be more or less the same as it would be if your client wanted the opposite from what you know she actually wants. If it is not, it means that you have allowed your advice to be slanted by the outcome you aimed to reach. Number Two is that your legal opinion—given in confidence—should be one you could live with even if Wikileaks puts it on the Internet for all to see.¹⁰ If your opinion does not obey these two rules of thumb, you should slam on the brakes, because it probably means you have failed in your ethical duty of candor and independence.

What I have said so far holds for lawyers in any form of law practice. That includes government lawyers, who are bound by the same ethics rules as their counterparts in private practice.

9. I discuss these rules of thumb further in David Luban, *Tales of terror: lessons for lawyers from the 'war on terrorism'*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 56, 61-63 (Kieran Tranter et al. eds., 2010).

10. Here I am drawing on an important idea of Immanuel Kant, who declared that "[a]ll actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public." IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 126 (H. S. Reiss ed., 2d ed. 1991). Kant calls this formula an "experiment of pure reason," that is, a thought experiment to tell right from wrong. For discussion, see David Luban, *The Publicity Principle*, in THE THEORY OF INSTITUTIONAL DESIGN 154 (Robert E. Goodin ed., 1996).

I want to illustrate what I have been saying with a case study. I choose it because it is what first got me thinking about how important the distinction is between the advocate's and advisor's roles. Additionally, it is a case that I followed closely for six years, starting when it first hit the newspapers in 2004, up to the final government report on it in 2010.

It is the case of what have come to be known as the "torture memos": legal opinions written by the Justice Department's elite Office of Legal Counsel ("OLC") on the permissibility of using very harsh tactics in interrogating so-called "high value" Al Qaeda prisoners. All told, there were six OLC torture memos, two in 2002, one in 2004, and three in 2005.¹¹ All of them confronted a host of legal issues about torture—issues about statutory interpretation, international treaties, criminal defenses, and executive power. Ultimately, they gave interrogators the green light on every one of them, no matter how unlikely the argument was.¹²

How harsh were the interrogation tactics we are talking about? The most often discussed tactic is *waterboarding*, which is a controlled partial drowning.¹³ Waterboarding causes intense physical and mental panic responses within a few seconds, and those who have experienced it describe it as unbearable.¹⁴ But waterboarding is not the only method used by CIA and other interrogators. For example, the torture memos also approved sleep deprivation, brought about by chaining detainees to the ceiling with loose chains that made it impossible to lie down and equally impossible to do anything but stand up on their own power.¹⁵ The prisoners were naked and diapered, and OLC approved up to 180 hours of sleep deprivation—

11. See THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 41, 106, 128, 152, 199, 225 (David Cole ed., 2009) [hereinafter THE TORTURE MEMOS].

12. I have analyzed the torture memos in DAVID LUBAN, *The torture lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY 162 (2007), and in my Senate testimony: *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 11-14, 47-50, 290-95 (2009) (statement of David Luban, Prof. of Law, Geo. U. L. Center) [hereinafter Senate Testimony]. See also David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SECURITY L. & POL'Y 455, 457-59 (2010).

13. See Malcolm Nance, *Waterboarding is Torture...Period*, SMALL WAR J. (Oct. 31, 2007, 2:30 PM), <http://smallwarsjournal.com/blog/waterboarding-is-torture-period-links-updated-9> (providing a description of waterboarding, by a former US Navy instructor who "personally led, witnessed, and supervised the waterboarding of hundreds of people."); see also Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency (May 10, 2005) [hereinafter Memorandum from Steven G. Bradbury to John A. Rizzo], reprinted in THE TORTURE MEMOS, *supra* note 11, at 152.

14. See Nance, *supra* note 13.

15. Memorandum from Steven G. Bradbury to John A. Rizzo, *supra* note 13.

seven days and seven nights—which in fact was the treatment given to one detainee.¹⁶

The legal meaning of torture is the intentional infliction of severe mental or physical pain or suffering.¹⁷ Obviously, that is a vague standard: how severe is severe? Vague or not, though, it certainly means something. Anyone who has given birth to a baby or gotten kicked in the wrong place knows what severe pain is. Personally, I have no doubt that waterboarding and prolonged sleep deprivation inflict severe suffering and count as torture. The Supreme Court has described sleep deprivation as torture, and likened a 36-hour interrogation to “the inquisition of the Middle Ages.”¹⁸ So too, the Fifth Circuit Court of Appeals described an interrogation technique identical to waterboarding as torture.¹⁹ But the OLC memos concluded the opposite.

The most often discussed of the torture memos was written by an OLC lawyer named John Yoo, an academic who eventually returned to the academy and currently teaches law at the University of California. It is usually called the “Bybee memo,” though, because it was signed by the then-head of OLC, Jay Bybee (now a judge on the Ninth Circuit Court of Appeals).

Ethically speaking, the Bybee memo was not the OLC’s finest hour.²⁰ It misrepresented what one source said, and it omitted adverse precedents, including important Supreme Court precedents and the Fifth Circuit case that had labeled waterboarding “torture.” If a lawyer did this in a brief, he would face professional discipline—and we have seen that the standard of honesty is even higher in a legal opinion than in a brief.

The most famous part of the memo is its test of how severe pain or suffering must be to count as torture. According to Yoo, pain is not torture unless it is equivalent to the pain of organ failure or death.²¹ Where did that standard come from? The answer is startling: Yoo took it from a Medicare statute that has nothing to with torture and was not trying to define severe pain. The statute was defining emergency medical conditions, and it

16. *Id.*

17. See 18 U.S.C. §§ 2340-2340A (2006). There is more to the definition than this, but I am focusing on the definitional core.

18. *Ashcraft v. Tennessee*, 322 U.S. 143, 150 n.6 (1944); *id.* at 152 n.8 (quoting *Enoch v. Commonwealth*, 141 Va. 411, 423 (1925)).

19. *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984).

20. This is for reasons I explain at length in LUBAN, *supra* note 12; Senate Testimony, *supra* note 12.

21. See Memorandum from Daniel Levin, Acting Assistance Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), *reprinted in* THE TORTURE MEMOS, *supra* note 11, at 138 n.17.

includes the common sense criterion that severe pain can be a sign of an emergency medical condition. Yoo, in effect, flipped the statute to conclude that pain is only severe if it is equivalent to that of an emergency medical condition. This reading is fundamentally absurd. In the end, the Bybee memo was not only not candid and independent, it was frivolous. Eventually, OLC itself repudiated the argument.²²

But you do not have to take my word for it. Bybee's successor as head of OLC was Jack Goldsmith, now a professor at Harvard Law School. Goldsmith read the memos and quickly wrote to the Pentagon that it must not rely on them. Goldsmith, like John Yoo, is a prominent conservative, and nobody thinks this was just a political disagreement. In his book about terrorism, Goldsmith criticizes the Bybee memo for "cursory and one-sided legal arguments" that have "no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."²³ The memo, Goldsmith added, "lacked the tenor of detachment and caution that usually characterizes OLC work."²⁴ In a blistering comment, Goldsmith charged Yoo with providing "get-out-of-jail free cards" to torturers.²⁵

Eventually the Justice Department launched an internal investigation of the memos. An initial report by Department of Justice's Office of Professional Responsibility concluded that the Bybee Memo was so flawed that Yoo and Bybee should be referred for professional discipline.²⁶ But a Justice Department official who reviewed the report downgraded the

22. *Id.* The repudiation came in a later memo:

We do not agree with those statements. Those other statutes define an 'emergency medical condition,' for purposes of providing health benefits, as 'a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)' such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.,* 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define 'severe pain' even in that very different context (rather, they use it as an indication of an 'emergency medical condition'), and they do not state that death, organ failure, or impairment of bodily function cause 'severe pain,' but rather that 'severe pain' may indicate a condition that, if untreated, could cause one of those results.

Id.

23. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 149 (2007).

24. *Id.*

25. *Id.* at 97.

26. Office of Prof'l Responsibility, Dep't of Justice, 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 260 (July 29, 2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

criticism to "poor judgment."²⁷ Even so, he agreed that the memo was "flawed" and "slanted toward a narrow interpretation of the torture statute at every turn."²⁸

One more set of testimonies ought to be mentioned. When the TJAGs—the heads of each service's JAG corps—learned about the torture memos, they were taken by surprise and wrote angry letters of protest.²⁹ They complained that these civilian lawyers did not take the interests of the military seriously; one of them wrote that the military prefers to take the high road.³⁰

So far, I have said nothing about why the Bybee Memo was written when it was. OLC wrote the memo in the summer of 2002, less than a year after 9/11, and at a time when the U.S. government feared an "anniversary" attack by Al Qaeda. General Richard Myers, who chaired the Joint Chiefs of Staff at the time, recalled that "[t]here was a sense of urgency that in my forty years of military experience hadn't existed in other contingencies."³¹ By the time the issue reached OLC, the harsh interrogation program had been approved at the highest levels of government, including the head of the National Security Council, the Vice-President, and the President.³² This was a classic case in which the client desperately wanted an opinion that gave the green light to the client's preferred course of action—not that Mr. Yoo, who defends the opinion to this day, had any apparent qualms about it. The watchword of the day for government lawyers was to be "forward-leaning"³³—meaning legally aggressive—and, in the words of then-Counterterrorism Director Michael Hayden, government officials should get

27. Memorandum from David Margolis, Associate Deputy Attorney Gen., U.S. Dep't of Justice, to the Attorney Gen., the Deputy Attorney Gen., U.S. Dep't of Justice 68 (Jan. 5, 2010), *available at* <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. For criticism of this report, see David Luban, *David Margolis Is Wrong*, SLATE (Feb. 22, 2010, 11:49 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html.

28. *Id.* at 64.

29. These are reproduced in THE TORTURE DEBATE IN AMERICA (Karen Greenberg ed., 2005).

30. LUBAN, *supra* note 12, at 173 (citing Memorandum from Major Gen. Jack L. Rives to the Secretary of the Air Force (Feb. 5, 2003), *reprinted in* THE TORTURE DEBATE IN AMERICA, *supra* note 29, at 378).

31. PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 88 (2008).

32. See Sen. John D. Rockefeller IV, Release of Declassified Narrative Describing The Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program 6-7 (Apr. 22, 2009) (attached to letter from Attorney Gen. Eric Holder to Sen. John D. Rockefeller IV (Apr. 17, 2009)), *available at* <http://dspace.wrlc.org/doc/bitstream/2041/71011/03104display.pdf>. This report does not mention the President, but President Bush himself has stated in his memoirs that he was aware of, and approved, the interrogation program. See GEORGE W. BUSH, DECISION POINTS 169 (2010).

33. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, <http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?pagewanted=print>.

“chalk on our spikes” pushing the law to its limits in the name of national security.³⁴ Given the threat, is there anything wrong with that? Without in the least bit diminishing the horror of 9/11 or the danger posed by Al Qaeda, I think the answer is yes.

All lawyers, I have said, have a duty to give candid and independent advice, but executive branch lawyers have an even more powerful obligation to play the law straight. Article II of the Constitution obligates the President to “take care that the laws be faithfully executed.”³⁵ Not just executed, but *faithfully* executed. That word “faithfully” is there to do some work. It is a warning that the President, above all, must not try to loophole the law—no chalk on his spikes.

The constitutional obligation to take care that the laws be faithfully executed flows down the chain of authority from the President to the Attorney General to the Office of Legal Counsel (which is delegated to provide Attorney General opinions)—and, indeed, to every lawyer in the executive branch. It places them under an even more stringent obligation of candor than a lawyer representing a private client. It is an obligation of constitutional dimension. The executive branch lawyer is responsible not just for a private client, but for the integrity of the laws themselves.

I am assuming a point that may seem obvious, but deserves discussion: that faithful execution of the laws requires faithful interpretation of them. That means that faithful interpretation of the laws is the President’s constitutional obligation, because it belongs to the obligation of faithful execution. The attorney general, who provides legal advice to the President, and the OLC, which writes the attorney general opinions, inherits that constitutional obligation. Might one not reply that faithful execution refers solely and by its terms to executing the laws, however interpreted, rather than interpreting them faithfully? The answer, I believe, is no. A legal text that is unfaithfully interpreted is not the law, so that whatever it is that the President faithfully executes, he cannot be said to faithfully execute *the law* unless it is, first of all, faithfully interpreted.

During the Bush administration, one frequently heard a different argument: that the President’s most sacred obligation, as set forth in the Constitution’s Oath Clause of Article II, Section 1, is to “preserve, protect, and defend the Constitution of the United States.”³⁶ Great Presidents,

34. See GOLDSMITH, *supra* note 23, at 78 (“Michael Hayden, former NSA Director General and now the Director of the CIA, would often say that he was ‘troubled if [he was] not using the full authority allowed by law’ after 9/11, and that he was going to ‘live on the edge,’ where his ‘spikes will have chalk on them.’”).

35. U.S. CONST. art. II, § 3.

36. U.S. CONST. art. II, § 1, cl. 8.

including Jackson and Lincoln, invoked the Oath Clause to justify actions that might otherwise be regarded as illegal: in Jackson's case, not enforcing a statute, and in Lincoln's, suspending habeas corpus.³⁷ Normally, of course, the Oath Clause and Faithful Execution Clause reinforce each other harmoniously: preserving, protecting, and defending the Constitution is consistent with faithfully executing the laws. Normally—but not always. What if a national security emergency requires the President to break the law? Lincoln famously asked the rhetorical question, "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?"³⁸ He was responding to the criticism "that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them."³⁹ In a national security emergency, perhaps the duty to defend takes precedence over faithful execution of law—or so the "Lincolnian" argument goes.

Although this is not the occasion for a full analysis of these constitutional clauses, I want to at least indicate why I disagree with the Lincolnian argument. I have two fundamental reasons. First, defending the Constitution is not the same thing as defending national security. Only if the United States faced a truly existential threat to the continued existence of its political system—a threat that Lincoln faced, but that Al Qaeda has plainly never come near posing—might one argue otherwise. In other cases, defending the Constitution means defending a legal structure, and that cannot be done by interpreting the laws unfaithfully. Second, the Oath Clause does not actually state a constitutional obligation of government—it sets out a personal obligation of the president to protect and defend the Constitution, but it is an obligation that does not enhance his other constitutional powers or negate his obligation to faithfully execute the laws. If the Framers had meant to give the President the constitutional authority to take extralegal steps to "preserve, protect, and defend the Constitution," they could have directly included that authority in the other Article II powers enumerated in sections two and three, rather than creating it in a roundabout way by building it into the President's oath of office.

At this point let us resume the story of the torture memos. What came next was an ethical train wreck. Quite apart from the high value Al Qaeda prisoners held in secret CIA prisons, there were also prisoners at Guantanamo who the government wanted to interrogate harshly. Two

37. 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576 (James D. Richardson ed., 1897); 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 25.

38. President Abraham Lincoln, July 4th Message to Congress (July 4, 1861), *available at* <http://millercenter.org/president/speeches/detail/3508>.

39. *Id.*

months after the Bybee Memo was written, a group of intelligence officers and lawyers held a secret meeting at Guantanamo. One of the lawyers was the staff judge advocate to the task force commander at Gitmo; the other was chief counsel to the CIA's counter-terrorism center.

For obvious reasons, we hardly ever find out what happens in secret meetings between lawyers and their clients. This one is an exception, because in 2008, a United States Senator released the minutes of the meeting.⁴⁰ I am going to quote some excerpts from those minutes. But first I want to issue a caution: the CIA counsel claims that he did not say what the minutes report him as saying.⁴¹ I nevertheless am going to treat the minutes as accurate, for two reasons. The first is that nobody else has ever come forward to say that the minutes were wrong, including the JAG at the meeting, who spoke at length with an author of a book on U.S. torture policy.⁴² The second is more basic: the CIA counsel's objection came six years after the meeting in question. In my opinion, nobody, with the most honest intentions in the world, can possibly remember what they *did not* say at a meeting that took place six years earlier—especially not someone who participated in hundreds if not thousands of meetings during his tenure at the CIA.

It is not my purpose here to launch accusations at individuals, and for that reason I am not going to use the lawyers' names. The CIA counsel will just be the "CIA counsel," and the staff judge advocate will just be "the JAG."

Soon after the meeting starts, the JAG says to the group, "We may need to curb the harsher operations while the [International Red Cross] is around. It is better not to expose them to any controversial techniques."⁴³ The CIA counsel chimes in that "In the past when the [Red Cross] has made a big deal about certain detainees, the [Defense Department] has 'moved' them away."⁴⁴ This is already starting to look more than a little improper. But then the real discussion gets going. The CIA counsel briefs the group on the law of torture, and he gives what seems to me a fairly accurate summary:

40. E-mail from Blaine Thomas to Sam McCahon et al., tbl. 7, at 2 (Oct. 24, 2002, 7:57 PM) [hereinafter Counter Resistance Strategy Meeting Minutes], available at <http://www1.umn.edu/humanrts/OathBetrayed/SASC-08.pdf>.

41. See Letter from Kathleen Turner, Dir. of Legislative Affairs, to Senator Carl Levin, Chair of the Senate Armed Forces Comm., and Senator John McCain, Ranking Member of the Senate Armed Forces Comm. (Nov. 17, 2008), available at http://s3.amazonaws.com/propublica/assets/docs/05aFredman_Statement.pdf (containing a statement from Jonathan Fredman).

42. The book is SANDS, *supra* note 31.

43. Counter Resistance Strategy Meeting Minutes, *supra* note 40, at 3.

44. *Id.*

[T]orture has been prohibited under international law, but the language of the statutes is written vaguely. Severe mental and physical pain is prohibited. The mental part is explained as poorly as the physical.⁴⁵

It is fair enough to say that the torture statutes do not define the term "severe." He then continues the briefing in terms that make it obvious that he has read the Bybee Memo:

Severe physical pain [is] described as anything causing permanent physical damage to major organs or body parts. Mental torture [is] described as anything leading to permanent, profound damage to the senses or personality.⁴⁶

Neither of these descriptions is in the torture statute, but both are in the Bybee Memo.

And then comes his stunning summary: "It is basically subject to perception. If the detainee dies you're doing it wrong."⁴⁷

As I mentioned, the CIA counsel indignantly denies that he said anything of the sort. He points out that the whole purpose of CIA obtaining the Bybee Memo was to make sure that how far you could go in interrogating a prisoner was *not* left to a matter of subjective perception.⁴⁸

But consider what the Bybee Memo actually says, which the CIA counsel summarized accurately: the legal standard for "severe pain," that is, for torture, is pain equivalent to that of organ failure or death.⁴⁹ Any interrogator trying to use that standard would have to guess how much pain he was inflicting, then guess what organ failure might feel like, and then compare the two. This is totally a matter of subjective perception. What else could it possibly be? More importantly, if everything is legal up to the point of pain equivalent to that of organ failure or death—and we assume that these are sometimes truly terrible pains—then you do not know you have crossed the line unless organs fail or the detainee dies. In this context, once you get chalk on your spikes, it is too late.

Later in the meeting, the CIA counsel discusses the physical effects of waterboarding in antiseptically clinical terms, and then he recommends exploiting a prisoner's phobias—snakes, insects, and claustrophobia.⁵⁰ At

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Counter Resistance Strategy Meeting Minutes, *supra* note 40, at 3.

49. *See id.*

50. *Id.* at 4.

this point, he has clearly crossed the line from providing legal advice to providing interrogation advice—just as earlier he and the JAG had both crossed the line from legal advice to what sounds like a conspiracy to hide detainee abuse from the Red Cross.

At any rate, that is what it sounded like to a criminal investigator in the Pentagon, who read the minutes three weeks later and fired off a blistering E-mail saying, rather prophetically: “This looks like the kind of stuff Congressional hearings are made of.”⁵¹ He called the discussion about how to hide detainee abuse from the Red Cross “beyond the bounds of legal propriety,” and added that the chillingly clinical discussion of waterboarding “would in my opinion; shock the conscience of any legal body.”⁵² He concluded: “Someone needs to be considering how history will look back at this.”⁵³

Indeed, someone should have been considering precisely that. Regrettably, it was not the two lawyers at the meeting. The problem, it seems to me, was that both of them allowed the boundaries between themselves and their clients to dissolve. They were no longer exercising independent legal judgment. They had turned into enablers.

This is a standing temptation to government lawyers in settings where national security might be at stake. They are part of the team and they want to be part of the team, and the stakes are high. Maybe they also feel the need to prove they are part of the band of brothers and not simply pencil pushers or nay-sayers. Recently Laura Dickinson published an important study based on interviews she conducted with JAG officers. The officers she interviewed harshly criticized a fellow JAG who failed to report war crimes by members of his unit. In their opinion, he “went native”—“[H]is loyalty to the command trumped his ethical duty [in his own mind], . . . because he was in combat with them.”⁵⁴ Going native is exactly what a lawyer-advisor is never supposed to do.

The same thing could be said of the CIA counsel and the Guantanamo JAG: they “went native.” In surprisingly bitter language, the JAG later recalled brainstorming meetings she chaired to devise methods to torment the detainees; she used vulgar language to describe her sense that the men around the table were becoming glassy-eyed and even sexually excited as they got new inspirations about neat things to do to make the prisoners

51. E-mail from Mark Fallon to Sam McCahon, tbl. 7, at 1 (Oct. 28, 2002, 4:52 PM), available at <http://www1.umn.edu/humanrts/OathBetrayed/SASC-08.pdf>.

52. *Id.*

53. *Id.*

54. Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 A.J.I.L. 1, 26 (2010).

suffer.⁵⁵ She nevertheless went along, and ultimately wrote her own "torture memo" to justify what was about to be done.⁵⁶

The result was incredibly harsh treatment inflicted on a detainee named Mohammed al-Qahtani. Al-Qahtani was interrogated twenty hours a day for forty-eight days out of fifty-four, with time off only when his heartbeat fell dramatically and he had to be treated.⁵⁷ He was subjected to sexual humiliations, led around on a leash, stripped naked in front of women, and threatened with a military working dog.⁵⁸ Significantly, all of these techniques ended up being used at Abu Ghraib, and they are immortalized in the obscene photographs that shamed the United States in the eyes of the world. Al-Qahtani was heated up and chilled down and bombarded with ear-splitting music and pumped full of liquid from an I.V. to make him urinate on himself.⁵⁹ Eventually, President Bush's head of the Guantanamo military commissions announced that al-Qahtani's treatment legally amounted to torture and therefore he could not be tried.⁶⁰ It was the only time that a government official ever said on the record that what U.S. interrogators did was torture. But that conclusion came far too late. The lawyers had fallen into the moral whirlpool with their clients, and instead of standing on shore to pull the clients out, they all went down together.

I want to close by quoting once again from Elihu Root, the famous lawyer who said that the client never wants to be told no. What is often forgotten is another statement of Root: "About half the practice of a decent lawyer consists in telling . . . clients that they are damned fools and should stop."⁶¹ That includes government clients, up to and including Presidents of the United States.

55. The JAG stated, "Who has the glassy eyes? . . . You could almost see their dicks getting hard as they got new ideas." SANDS, *supra* note 31, at 63.

56. See LUBAN, *supra* note 12, at 182. Her memo is reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 229 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

57. See Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility 17-18 (2005), available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>.

58. See *id.*

59. See SANDS, *supra* note 31, at 112-62 (details al-Qahtani's torture).

60. Bob Woodward, *Guantanamo Detainee was Tortured, Says Official Overseeing Military Trials*, WASH. POST, Jan. 14, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/01/13/AR2009011303372.html>.

61. 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938).