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**“WHAT WENT WRONG:
TORTURE AND THE OFFICE OF LEGAL COUNSEL
IN THE BUSH ADMINISTRATION”**

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Written Testimony of

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This statement addresses some of the most troubling legal deficiencies in three May 2005 memoranda issued by the Justice Department’s Office of Legal Counsel (OLC) in which OLC determined that the “enhanced” interrogations techniques employed by the U.S. government neither ran afoul of the Torture Statute nor constituted cruel, inhuman, or degrading treatment. The statement identifies and discusses three flaws in the memos’ legal reasoning.

First, they consistently assume legal conclusions rather than engaging in meaningful analysis. Second, they engage in selective use of precedent. And finally, they misconstrue or ignore relevant legal standards.

Introduction

In the public sphere, the debate over whether the United States government engaged in torture—and thus violated the law—has largely been resolved. Most Americans now recognize that some of the CIA’s so-called “enhanced” interrogation techniques amounted to torture. The discussion has moved on to a different set of questions: Should the architects of the interrogation policy be held accountable? Does a nation’s interest in protecting itself ever justify torture? If so, did the techniques in fact help us by providing intelligence that could not otherwise have been obtained? Or did they harm us by alienating our allies and providing recruiting tools to our enemies?

But before we can truly move on to those important and compelling questions, we first must answer this one: How did a team of Justice Department lawyers, operating in an office renowned for its integrity and legal acumen, repeatedly conclude that behavior most Americans recognize as torture is, in fact, humane treatment?

Non-lawyers might surmise that the laws prohibiting torture are full of loopholes or define “torture” in a technical manner that departs from common understanding. But that is not the case. Consistent with our obligations under the Convention Against Torture (“CAT”), Congress enacted the Torture Act. The Act criminalized as “torture” any “act committed by a [government actor or agent] specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”¹ This definition is straightforward. There are no loopholes to accommodate claims of necessity—indeed, the opposite is true: the CAT provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”²—and the concept of “severe pain or suffering,” while qualitative in nature, is readily comprehensible by lawyer and layperson alike.

This statement will address some of the ways in which the Justice Department’s Office of Legal Counsel (OLC), in three May 2005 memoranda that were released to the public on April 16, 2009,³ applied this and other legal standards in ways that are anything but straightforward. The memos—which determined that the “enhanced” interrogation

¹ 18 U.S.C. § 2340.

² Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Art. 2(2).

³ This statement does not address previously released 2002 and 2003 OLC memoranda regarding the application of the Torture Statute. In those memos, OLC lawyers attempted to evade the plain import of the Torture Statute by arguing that it contains an unwritten exception for torture authorized by the President when acting as Commander in Chief. Memorandum for Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002). In the alternative, OLC lawyers redefined torture by arguing that “severe pain or suffering” occurs only when the pain approaches the level associated with “organ failure or death.” *Id.* These arguments were so unpersuasive that OLC subsequently withdrew those memos, disclaiming any future reliance on them. The flaws in these arguments have been thoroughly catalogued and are not repeated here. *See, e.g.,* Frederick A. O. Schwarz Jr. & Aziz Huq, *Unchecked and Unbalanced, Presidential Power in a Time of Terror*, Ch. 7 (2007).

techniques employed by the U.S. government neither ran afoul of the Torture Act nor constituted cruel, inhuman, or degrading treatment—exhibit several flaws in their reasoning. First, they assume legal conclusions rather than engaging in meaningful analysis. Second, they engage in selective use of precedent. And finally, they misconstrue or ignore relevant legal standards.

I. Assuming the Conclusion

No law can be analyzed in a vacuum. Legal reasoning involves considering the relevant legal standard as applied to a specific set of facts. Under the Torture Act, the legal standard is whether the techniques in question were specifically intended to cause “severe physical or mental pain or suffering.” The relevant facts ostensibly would include a detailed description of the techniques in question and the manner and circumstances in which they are implemented.

The May 2005 memos that address the question whether the CIA’s interrogation program violated the Torture Act are structured in a manner that appears consistent with this approach of applying law to facts. First, the memos describe the techniques in question. Second, they set forth the applicable legal standard. And finally, they apply the legal standard to the facts.

In reality, though, the outcome of this critical third step is a foregone conclusion. That is because the “facts” set forth in the first step of the memo do not simply describe the techniques at issue and their implementation; they also accept—based entirely on what the CIA has told OLC’s lawyers—the premise that the techniques in question do not cause severe pain or suffering. In other words, the memos explicitly assume as a factual predicate the very legal issue that they are purporting to decide.

In the May 10, 2005, memo that analyzed individual interrogation techniques⁴ (“Techniques Memo”), for example, the description of almost every technique includes an explicit assumption that severe pain or suffering does not result (or is not intended to result) from the technique’s application:

- From description of “stress positions”: “You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. . . . [T]hey are designed to produce the physical discomfort associated with temporary muscle fatigue.”⁵
- From description of “sleep deprivation”: “We understand from discussions with [the CIA’s Office of Medical Services (OMS)] that the shackling does not result in any significant physical pain for the subject.” “OMS has advised us that this condition

⁴ Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005).

⁵ *Id.* at 9.

[i.e., swollen limbs resulting from being shackled in a standing position] is not painful.” “We understand that these alternative restraints, although uncomfortable, are not significantly painful, according to the experience and professional judgment of OMS and other personnel.”⁶

- From description of “the waterboard”: “We are informed that based on extensive experience, the process is not physically painful.”⁷
- From description of “walling”: “We understand that this technique is not designed to, and does not, cause severe pain, even when used repeatedly as you have described.”⁸
- From description of the “facial slap”: “We understand that the goal of the facial slap is not to inflict physical pain that is severe or lasting.”⁹
- From description of “abdominal slap”: “It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause any significant pain.”¹⁰

The Techniques Memo does not undertake to evaluate the CIA’s claims that its actions do not meet the “severe pain or suffering” standard; instead, it repeatedly cautions that its conclusions apply only if the CIA adheres to the conduct it has described. But the acceptance of these claims reduces the memo’s “analysis” to a meaningless tautology. At its essence, the memo’s reasoning is as follows: “The Torture Act prohibits techniques that cause severe pain or suffering. You have informed us that these techniques, as applied by you, do not cause severe pain or suffering. We therefore conclude that they do not violate the statute. We caution that our conclusion is valid only if you apply the techniques in a manner that does not inflict severe pain or suffering.” It is difficult to see the purpose of such an “analysis,” other than to attach the imprimatur of the Justice Department to the CIA’s own conclusions.

The tautological nature of the memo’s analysis alone is cause for concern. But accepting the CIA’s inherently subjective judgment¹¹ about whether its techniques cause “severe pain and suffering” is problematic for another reason as well. The CIA has an obvious institutional interest in obtaining legal approval of its programs. That interest was particularly strong in this case, where the techniques in question had already been employed, and so a conclusion that they had been applied *unlawfully* would expose the agency or its agents to legal liability. Moreover, OLC chose to rely on the CIA’s

⁶ *Id.* at 11-12.

⁷ *Id.* at 13.

⁸ *Id.* at 8.

⁹ *Id.* at 8.

¹⁰ *Id.* at 8-9.

¹¹ *Id.* at 20 n. 4 (citing a medical journal for the proposition that “[p]ain is a complex, subjective, perceptual phenomenon with a number of dimensions . . . that are uniquely experienced by each individual and, thus, can only be assessed indirectly. Pain is a subjective experience . . .”).

subjective assessment even when more objective evidence was at hand. The CIA had videotapes in its possession—which it subsequently destroyed—of the way that these techniques had actually been implemented. OLC does not rely upon such videotape evidence when analyzing the CIA’s interrogation program. Instead, it refers repeatedly to its “understandings” of the techniques, or to “assurances” provided by the CIA.

Indeed, whether or not OLC lawyers had seen—or been told about—the videotapes, they knew, at the time the 2005 memos were drafted, that the CIA had *not* always conducted its interrogations in a manner consistent with the descriptions contained in the memos. A 2004 report issued by the CIA’s Inspector General and referenced in the Techniques Memo indicates that the use of medical personnel to monitor interrogations, as well as the frequency and manner of use of the waterboard, differed significantly from the techniques described in the Techniques Memo.¹²

The use of factual assumptions and hypotheticals to obviate the need for any real analysis is also on display in the May 10, 2005, memo regarding the legality of the combined use of certain interrogation techniques (“Combined Techniques Memo”).¹³ This memo explicitly notes that it cannot answer the question whether any combination of techniques actually applied would be like the ones hypothesized in the memo. It goes on to say that “our advice does not extend to combinations of techniques unlike the ones discussed here.”¹⁴ Taken together, these statements make clear that the advice pertains to hypothetical interrogations, not real ones. Similarly, “whether other detainees would, in the relevant ways, be like the ones previously at issue would be a factual question we cannot now decide. Our advice, therefore, does not extend to the use of techniques on detainees” whose medical and psychological examinations indicate that interrogation is likely to result in severe physical or mental pain or suffering.¹⁵

¹² *Id.* at 29 n.34, 41 n.51. An independent report issued to the CIA’s General Counsel, who was the recipient of the 2005 opinions, by the International Committee of the Red Cross (“ICRC”) catalogs the treatment of fourteen detainees as described by the detainees themselves. ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (2007). In this report, the ICRC noted that the consistency of the detailed allegations made by all fourteen detainees lent weight and credibility to their accounts. ICRC Report, at 6. Like the 2004 Inspector General Report, the ICRC Report indicates that the techniques actually employed during interrogations differed in material ways from the descriptions of those techniques supplied by the CIA. For example, Abu Zubaydah reported that the box in which he was confined was not large enough for him to sit upright. ICRC Report, at 13. According to the CIA, however, the cramped confinement technique involves only spaces “large enough for the subject to sit down. Techniques Memo, at 9.

A very helpful comparison between the techniques as described by the Techniques Memo and the treatment described by the detainees themselves and reported in the ICRC report is available here: <http://www.propublica.org/special/torture-memos-vs.-red-cross-report-prisoners-recollections-differ-0424>.

¹³ Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005).

¹⁴ Combined Techniques memo, at 9.

¹⁵ *Id.* at 10.

In short, in the Combined Techniques Memo, OLC gives legal advice regarding combinations of techniques that may or may not reflect the combinations used in practice, for a subset of detainees that may or may not be the subset to which these techniques are being applied.

Further divorcing its analysis from reality, the memo states that, because there is “less certainty and definition about the use of techniques in combination, it is necessary to draw more inferences in assessing what may be expected.”¹⁶ This is a carefully worded concession that there is no evidence regarding the effects of combining these techniques (though, of course, the CIA’s subsequently destroyed videotapes presumably contained such evidence).

Having admitted that its analysis is based on hypothetical combination of techniques, the effect of which is unknown, the memo reverts to the analytical trick described in the Techniques Memo. While acknowledging that some techniques might make a detainee more susceptible to the pain and suffering imposed by another technique, it assumes—because the CIA has said so—that medical personnel will stop any interrogation before it reaches that point. The memo thus presents the same basic tautology as the Techniques Memo: “Techniques that by themselves do not amount to torture might, when combined, rise to the level of torture, but since the CIA has assured us that it will not permit that to happen, what the CIA proposes to do does not amount to torture.” By assuming the conclusion, the memo avoids the need to address and answer the two critical conceded unknowns: what the CIA is actually doing and how it impacts the detainees. It also avoids an independent assessment of whether the CIA’s actions constitute torture.

II. Selective Use of Precedent

Rather than relying solely on the CIA’s claims regarding whether its actions met the standard for torture, the OLC lawyers should have considered more carefully a resource routinely relied upon by judges and others called upon to assess the legality of a particular course of action: how that course of action has been viewed in the past, both by the courts and by the entities charged with enforcing the law.

In the Techniques Memo, however, relevant precedents that go against OLC’s conclusions are dismissed if they can be distinguished in any respect. For example, the U.S. Court of Appeals for the Ninth Circuit in 1996 held that a course of conduct that included sleep deprivation and waterboarding—both of which are techniques analyzed in the memos—amounted to torture.¹⁷ The Techniques Memo relegates discussion of this case to the footnotes, downplaying its precedential force because the court was considering “a variety of techniques taken together,” not sleep deprivation or waterboarding alone.¹⁸ In one of those same footnotes, the memo notes that the

¹⁶ *Id.* at 9.

¹⁷ *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Circuit 1996).

¹⁸ Techniques Memo, at 40 n.50 & 44 n.57. Notably, this case is not mentioned at all in the Combined Techniques Memo. If the case did not establish that individual techniques were torture because it did not

Committee Against Torture (the international body charged with interpreting the Convention Against Torture, which the Torture Act implements) concluded that “sleep deprivation for prolonged periods” constitutes torture. The memo nevertheless opines that this fact “provide[s] little or no useful guidance” since “[t]he Committee provided no details on the length of the sleep deprivation or how it was implemented and no analysis to support its conclusion.”¹⁹

While declining to accord significance to precedents that actually address techniques used by the CIA, the Techniques Memo repeatedly features a case that does not even mention any of the CIA’s techniques: *Mehinovic v. Vuckovic*.²⁰ In that case, the court found that a course of conduct including “severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim’s forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of ‘Russian Roulette’” constituted torture.²¹ This case is clearly highlighted to make the CIA’s techniques look mild by comparison. Yet the fact that techniques worse than those implemented by the CIA may exist is irrelevant to whether the CIA’s techniques themselves constitute torture.

The Techniques Memo also relies heavily on the U.S. military training known as “SERE training,” in which members of U.S. forces are trained to withstand harsh interrogation methods. The memos acknowledge that the experience of individuals undergoing SERE training is fundamentally unlike that of detainees subjected to CIA interrogations:

Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.²²

Moreover, as noted in a unanimous Senate Armed Services Committee Report regarding the Committee’s inquiry into detainee treatment, “SERE school is voluntary; students are even given a special phrase they can use to immediately stop the techniques from being

analyze those techniques in isolation, it seems that the analysis of those techniques used in combination would be particularly relevant to the Combined Techniques Memo’s analysis.

¹⁹ *Id.* at 40 n.50.

²⁰ 198 F. Supp. 2d 1332 (N.D. Ga. 2002).

²¹ *Id.* at 22, 24, 26, 38; *see also* Combined Techniques Memo, at 14.

²² Techniques Memo, at 6; Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees 38 (May 30, 2005) (“Article 16 Memo”).

used against them.”²³ The differences between SERE training and actual interrogations are far more significant than the distinctions cited by OLC as the basis for dismissing the Ninth Circuit and Committee Against Torture decisions mentioned above. Indeed, to assume that the effects of SERE training, administered by fellow servicemen and women in a controlled environment, can meaningfully be compared to the effects of indefinite interrogations at the hands of hostile forces on detainees kept isolated in harsh conditions flies in the face of all common sense.

Yet, instead of relegating the SERE program to a footnote, the Techniques Memo repeatedly cites the use of techniques in SERE training as evidence that CIA detainees do not experience “severe pain or suffering” when subjected to modified versions of these techniques.²⁴

Not only does the Techniques Memo take a selective approach to emphasizing or de-emphasizing precedent; it conspicuously fails to cite the executive branch’s own history of treating waterboarding as torture. It makes no mention, for instance, of *United States v. Lee*,²⁵ in which a Texas law enforcement officer was prosecuted by the United States for subjecting prisoners to “water torture” in order to extract confessions. The court martial of Major Edwin F. Glenn for his use of “the water cure” during the Philippines war to obtain intelligence from counter-insurgents is similarly absent from the memo.²⁶ And a discussion of the prosecutions in the International Military Tribunal for the Far East of members of the Japanese armed forces who applied water torture to Allied prisoners during World War II is nowhere to be found.²⁷

Another relevant source—the U.S. State Department’s Country Reports on Human Rights Practices—is also absent from the Techniques and Combined Techniques Memos.²⁸ Each year, the reports condemn practices that resemble several of the CIA’s interrogation tactics, including food and sleep deprivation, stripping and blindfolding, and dousing with cold water. The U.S. government’s consistent condemnation of these techniques, however, does not find its way into OLC’s analysis.

²³ Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody xix (2008).

²⁴ Techniques Memo, at 6, 29, 34, 35, 42, 44. Remarkably, the memo addressing the question whether the interrogation techniques constitute cruel, inhuman, or degrading treatment also cite the existence of SERE training as evidence that “use of these techniques in some circumstances consistent with executive tradition and practice.” Article 16 Memo, at 37.

²⁵ 744 F.2d 1124 (5th Cir. 1984).

²⁶ Guenael Mettraux, *U.S. Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int’l Crim. Just. 135, 143 (2003).

²⁷ Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat’l L. 468, 477-82 (2007).

²⁸ Interestingly, another 2005 memo discussing the requirements of Article 16 of the Convention Against Torture, *see infra*, does mention the State Department Country Reports when discussing whether the techniques are “cruel, inhuman, and degrading.” The memos seem to acknowledge the existence of the Reports only when they can simultaneously offer an explanation—however implausible—of why they are not relevant.

This is not to say that the CIA's practices were necessarily illegal according to the omitted and discounted precedents, or that the practices were factually identical. But in analyzing the legality of the techniques at issue, these precedents were certainly relevant. Their omission thus constitutes a hole in the memos' reasoning and contributes to the impression that the memos were intended merely to rubber stamp government policies rather than evaluate them.

III. Problematic Treatment of Legal Standards

All of the 2005 memos err in applying relevant legal standards.

A. Redefining the Prohibitions of the Torture Act

While it does so on a much less conspicuous scale than did OLC's 2002 and 2003 memos—which notoriously redefined “severe pain” such that only the levels of pain associated with “organ failure or death” would qualify—the 2005 memos also redefine the plain language of key terms in the Torture Act. A notable example is the Techniques Memo's and the Combined Techniques Memo's definition of “suffering.” OLC opined that the term “suffering” has an inherent temporal component, applying only to “a state or condition . . . that persists for a significant period of time” and not to “discomfort” that is “merely transitory.” To support this reading, OLC cited a dictionary that defined “suffering” as a “state,” an “experience,” or “pain endured.” Yet none of these terms suggests a prolonged temporal component. People are commonly described as being in a “state of shock” in the immediate aftermath of an accident; such a state is transitory by nature. The term “experience” is even less susceptible to a temporal minimum; anyone would agree that a robbery at gunpoint is a traumatic “experience” even if it takes mere seconds. And the term “endure”—according to the very same dictionary OLC relied on to define “suffering” – encompasses definitions that include no temporal component (e.g., “to undergo”).

Even if one were to accept the memos' definition of “suffering,” it would be impossible to apply that definition to any technique lasting longer than a few minutes without understanding what constitutes “a significant period of time.” The memos dispense with this step, and assume that any time-limited technique is acceptable. Thus, the memos conclude that dousing detainees with cold water for 20 minutes, 40 minutes, or 60 minutes (depending on water temperature) cannot cause “severe physical suffering” because “the duration is limited by specific times.” The memos further conclude that stress positions cannot cause “severe physical suffering” because “the duration of the technique is self-limited by the individual's ability to sustain the position”—without even bothering to guess, let alone determine, what that time period would be. The definition of “suffering” is thus narrowed to exclude any technique that is finite.

B. Misreading of the Constitutional “Shocks the Conscience” Standard

A May 30, 2005, memo considering the application of Article 16 of the Convention Against Torture²⁹ to the CIA’s interrogation techniques (“Article 16 Memo”)³⁰ appropriately notes that, according to the terms of a reservation entered when the U.S. ratified the treaty, the United States is obligated to prevent any cruel, inhuman, or degrading treatment that amounts to treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.

As the Article 16 Memo recognizes, the due process clause of the Fifth Amendment prohibits federal government action that “shocks the conscience.” This standard is intended to protect against arbitrary (in the constitutional sense) government action so as to “prevent government officials from abusing their power, or employing it as an instrument of oppression.”³¹ In applying this standard, the Supreme Court has described it as prohibiting conduct that is “so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency.”³²

Admittedly, “the measure of what is conscience shocking is no calibrated yard stick.”³³ But the Article 16 Memo concedes that the use of the CIA’s interrogation techniques might shock the contemporary conscience in some contexts.³⁴ It concludes, nevertheless, that they do not shock the conscience in the context of the CIA interrogations.

In reaching this conclusion, OLC misreads the relevant case law. As an initial matter, OLC reasons that the CIA program does not involve conduct that is constitutionally arbitrary because there is no evidence of “conduct intended to injure in some way unjustifiable by any government interest.”³⁵ Instead, because the program is designed to protect the national security, it cannot be “the exercise of power without any

²⁹ Article 16 reads, in relevant part, as follows: “Each State Party shall undertake to prevent in any territory under its jurisdiction . . . acts of cruel, inhuman or degrading treatment or punishment . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

³⁰ Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005).

³¹ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). *County of Sacramento v. Lewis*, which concerned the actions of Sacramento County law enforcement officers, considered the requirements of the Fourteenth Amendment, which applies due process standards to state and local government. The same standards apply in the evaluation of federal government action under the Due Process Clause of the Fifth Amendment.

³² *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

³³ *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

³⁴ Article 16 memo, at 32.

³⁵ Article 16 memo, at 28 (quoting *County of Sacramento*, 523 U.S. at 849).

reasonable justification in the service of a legitimate government objective” that can be said to shock the conscience.³⁶

But the Supreme Court has found that the existence of a legitimate government objective alone cannot render otherwise conscience-shocking conduct constitutionally sound. In the landmark case of *Rochin v. California*, the Supreme Court found the forced pumping of a suspect’s stomach sufficient to offend due process.³⁷ In that case, the purpose of the official conduct was not unjustifiable by any government interest. Instead, it was carried out in order to preserve evidence of a narcotics crime. Nevertheless, the conduct was found to shock the conscience and was therefore impermissible.

The articulation of a legitimate government interest is therefore not sufficient to excuse an otherwise impermissible course of conduct. To be sure, *County of Sacramento v. Lewis* does contemplate the possibility that something may shock the conscience in some contexts but not in others. In that case, the Supreme Court considered whether due process is offended when a government official causes death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. In answering in the negative, the Court reasoned that prohibitions on deliberate indifference are reasonable “when actual deliberation is practical,” such as in the context of dispensing medical care to prisoners in the custodial setting of a prison.³⁸ In contrast, “when unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose” to shock the conscience.³⁹

Thus the context in which a decision regarding official action is made—whether an official can afford the luxury of deliberation or whether the circumstances demand the exercise of instant judgment—can affect the mental state required for conduct to be considered conscience-shocking. As the conduct moves on a continuum from indifference to recklessness to intent, it becomes more and more likely to offend the due process clause. And the less time there is for deliberation, the closer the mental state must move to the intentional side of the continuum.

In the case of the CIA interrogations, there is ample evidence of time for deliberation. The very existence of the memos indicates that there was time to devise and propose a course of action and to seek advice regarding its legality. Any application of these interrogation techniques was thus nothing less than highly intentional, under conditions of significant deliberation. This is especially true in the context of the 2005 memos, which were written three years after the initial request for a legal opinion had been conveyed. Moreover, the high value detainees had been in custody for some time and the interrogation program had been discontinued, so no subsequently captured high value detainees would be subjected to it. The urgency to government efforts to discover

³⁶ *Id.* (quoting *County of Sacramento*, 523 U.S. at 846).

³⁷ 342 U.S. 165 (1952).

³⁸ *County of Sacramento*, 523 U.S. at 851.

³⁹ *Id.* at 853.

what intelligence was in their possession had receded as that intelligence grew more and more outdated.

Mischaracterizing the significance of *County of Sacramento*'s discussion of the shocks-the-conscience analysis, OLC essentially argues that, in the context of interrogating high value al Qaeda suspects in the name of protecting the national security, government conduct can never shock the conscience.⁴⁰ The memo notes that the techniques at issue might shock the conscience in the law enforcement context, that they likely violate the rules contained in the Army Field Manual and the Geneva Conventions, and that they resemble techniques regularly condemned by the State Department. Nonetheless, because "the CIA program is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks,"⁴¹ the standard applicable in those contexts should not be applied to the CIA interrogation program.

Thus under OLC's analysis, certain conduct is impermissible, unless the government determines that the goals the conduct furthers are sufficiently important to render the conduct permissible, in which case the conduct is permissible. But it simply cannot be the case that concerns over national security render otherwise conscience-shocking behavior constitutionally acceptable. If this is so, the CAT's Article 16 is gutted of its meaning whenever the government makes a self-interested determination that the government interests at issue are sufficiently crucial to render what it is doing to pursue those interests acceptable. It cannot have been the intention of President Reagan in signing the CAT nor the Congress's intention in ratifying it to commit the U.S. to such an empty promise.

C. Ignoring the Constitutional Requirements for Conditions of Confinement

One area of law entirely absent from the discussion in the Article 16 Memo is the due process doctrine governing permissible conditions of confinement for individuals not convicted of any crime. There are many categories of individuals outside the criminal justice system who may nonetheless be confined under certain circumstances. The mentally ill, sexual offenders, pretrial detainees, and immigrants awaiting deportation are a few examples.

The Supreme Court has discussed the how to determine the due process requirements concerning the conditions of confinement in several of these circumstances. For pretrial detainees, the evaluation of the constitutionality of the conditions or restrictions of their detention turns on "whether those conditions amount to punishment."⁴² The civilly committed retain their due process rights to liberty from bodily restraint and personal security.⁴³ And when it comes to individuals confined as

⁴⁰ Article 16 memo, at 34-37.

⁴¹ Article 16 memo, at 37.

⁴² *Bell v. Wolfish*, 441 U.S. 520, 536 (1979).

⁴³ *Youngberg v. Romeo*, 457 U.S. 305, 316 (1982).

sexual predators, “due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed.”⁴⁴ While no court has yet considered what conditions due process demands for detainees such as the ones subjected to the CIA’s interrogation practices, existing case law makes plain that individuals not convicted of any crime cannot be held in detention conditions that amount to punishment.⁴⁵

To determine whether particular confinement conditions are punitive, the operative question is whether “the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”⁴⁶ Such a determination “generally will turn on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’”⁴⁷

To be sure, any attorney evaluating the CIA program could argue that the conditions imposed on high value detainees by the CIA’s interrogation techniques are “but an incident of [the] legitimate governmental purpose” of protecting the national security, or of gleaning important intelligence information. Nonetheless, as the Supreme Court has pointed out,

loading a detainee with chains and shackles and throwing him in a dungeon may [further the legitimate purpose of ensuring] his presence at trial. . . . But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.⁴⁸

As this example illustrates, even actions taken for a legitimate reason may be so “excessive in relation to the . . . purpose assigned to it” as to constitute an impermissible, punitive condition of confinement.

The Supreme Court has made clear that “captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”⁴⁹ Thus, though the United States has deprived many detainees of their liberty for years in its battle against al Qaeda and the Taliban, those subjected to the CIA interrogation program have not been convicted of

⁴⁴ *Seling v. Young*, 531 U.S. 264, 265 (2001).

⁴⁵ *E.g.*, *Bell*, 441 U.S. at 535-39.

⁴⁶ *Id.* at 538.

⁴⁷ *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 168-69 (1963) (alterations in the original)).

⁴⁸ *Id.* at 539 n.20.

⁴⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.) (internal quotation marks and citation omitted).

any offense. Instead, they are being held to incapacitate them from engaging in hostilities against the United States. They are accordingly entitled to non-punitive conditions of confinement under the due process clause.

These remarks take no position with respect to whether the conditions imposed by the interrogation tactics discussed in the Techniques Memo and the Combined Techniques Memo amount to punishment, though there is certainly a strong argument that they do. It is sufficient simply to point out the conspicuous absence of any analysis of this question in OLC's 2005 memos.

Conclusion

While the release of the 2005 OLC memos provides significant and important insight into the U.S. interrogation program and how it was justified, the memos raise as many questions as they answer. Did interrogators adhere to the limits imposed by OLC? Were the CIA tapes destroyed because they showed instances of non-compliance? Was OLC aware of the existence of these tapes when engaged in its legal analysis? If not, why not? Were any agents identified in the 2004 Inspector General's report subject to discipline for their use of techniques beyond what was authorized?

But the questions about the CIA program that the memos describe should not obscure the equally important questions about OLC's approval of that program: How did such a highly respected legal office produce such deeply flawed legal analyses? What happened to the proud tradition of independence and integrity that has characterized the office throughout its history? And what can be done to restore that tradition?

The Brennan Center has advocated the creation of an independent commission of inquiry to examine not only the details of the counter-terrorism policies (like the CIA's enhanced interrogation program) that strayed from the rule of law, but also the systemic failures that enabled these policies to be created and sustained. Without doubt, the role that the Office of Legal Counsel played in endorsing the policies is one of those systemic failures. That role must continue to be probed. We commend Senator Whitehouse for beginning this process, and we urge that the process be continued, whether through additional hearings or—ideally—in the context of an independent commission.