

Testimony of David Luban
Before the House Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on: "From the Department of Justice to Guantanamo Bay:
Administration Lawyers and Administration Interrogation Rules, Part I"
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Mr. Chairman, and Honorable Committee members,

I'd like to thank you for inviting me to testify today. I am not here as an insider with new information to give you. I am a law professor who specializes in legal ethics. I've written textbooks and other books on the subject. As a scholar of legal ethics, I have closely studied the role that government lawyers played in approving harsh interrogations. That is what I am here to testify about.

I want to start with a story. Jack Goldsmith headed the Justice Department's Office of Legal Counsel in 2003 and 2004. Last year, he published his memoirs of that period. At one point, he describes an OLC memo on interrogation written before he joined the Office. He calls it a "golden shield" for interrogators. What he meant by "golden shield" was that interrogators relied on its assurance that the harsh tactics they were using were legal. And Goldsmith found himself in the tough position of withdrawing that Golden Shield as well as a second OLC memo on interrogation.

Goldsmith did not withdraw them because he was a political opponent of John Yoo, the lawyer who wrote them. He was on the same side. He withdrew them because, in his words, they had "no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."¹ The "golden shield" turned out to be made of hot air. Interrogators were misled, and detainees may have suffered cruel and illegal treatment because of these memos.

¹ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 149 (2007); the reference to the "golden shield" is at page 162.

The Golden Shield found that inflicting physical pain isn't illegal unless the pain reaches the level of organ failure or death; that enforcing laws against authorized interrogators is unconstitutional; and that self-defense can include cruelty to helpless detainees. It's easy to see that under these standards, practically anything goes. The trouble was that none of this is really the law. The memo ignored inconvenient Supreme Court precedents, misrepresented sources, and pulled the "organ failure or death" standard out of a Medicare statute on emergency medical conditions.

Mr. Chairman and committee members, when a trusted government lawyer writes a "golden shield," it should meet the gold standard. We should be confident that the lawyer has described the law as it really is. Not the law according to the lawyer's pet theories, and not the law as the client would like it to be, no matter who the client is. Lawyers sometimes have to say "no" to clients, and in its prouder days OLC lawyers have said no to presidents of the United States. Playing it straight is the lawyer's most basic obligation.

I would propose two rules of thumb for a government lawyer writing an opinion on what the law means. First, the opinion should say the same thing it would even if you imagine your client wants the opposite from what you know he wants. That guarantees that you are not tailoring the opinion to reach some predetermined result. Second, the opinion should be able to stand the light of day; otherwise, it's probably wrong. Obviously, before being published, some opinions will have to have sensitive intelligence information redacted out. But there is no reason that an opinion about the meaning of the Constitution or the interpretation of law should be a state secret.

There is a common misperception that lawyers are always supposed to spin the law in favor of their clients. That's simply not true. It *is* true that in a courtroom, lawyers are supposed to argue for the interpretation of law that most favors their client. The lawyer on the other side argues the opposite, and the judge who hears the strongest case from both sides can reach a better decision.

But matters are completely different when a lawyer is giving a client advice about what the law means. Now there is nobody arguing the other side, and no judge to sort it out. For that reason, legal ethics rules require the lawyer-advisor to give an independent and candid opinion of what the law really requires.² The ABA emphasizes that “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”³

This is common sense. Otherwise, clients might go to their lawyers to 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 Teflon circle: the lawyer says “I was just doing what my client instructed” and the client says “I was just doing what my lawyer approved.”

Government lawyers have an awesome responsibility. OLC opinions bind the entire executive branch. They have the force of law inside that branch. The idea that unelected lawyers are writing secret legal opinions that spin the law makes a mockery of democratic government. It means the executive branch is governed by a secret constitution – a constitution written by activist lawyers instead of the constitution written by the Framers.

² ABA Model Rules of Professional Conduct, Rule 2.1 (Advisor): “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

³ ABA Model Rules of Professional Conduct, Rule 2.1, cmt. [1].

Without getting too deeply into technicalities which, quite frankly, only a lawyer could love, let me summarize in a bit more detail just how spun the torture memos were.⁴ First of all, they argue for a near-absolute version of executive power – a version that says the Commander in Chief can override any law in the statute book.⁵ The effect of this argument is that a crime is not a crime if the Commander in Chief orders it. Mr. Yoo paints a picture of an imperial commander in chief beyond the law that would have made the Founding Fathers’ jaws drop in astonishment.⁶ In making this argument, Mr. Yoo simply ignored Supreme Court precedents reining in the commander in chief.⁷ In the same way, arguing for a necessity defense to the crime of torture, he ignored an inconvenient Supreme Court case decided just fifteen months earlier – an opinion that cast doubt on whether necessity defenses actually exist in federal law.⁸ And he ignored the Constitution itself: far from granting a “commander-in-chief override” of the laws, the Constitution requires the President to “take care that the laws are faithfully executed.”

⁴ Here I am referring to Mr. Yoo’s August 1, 2002 memorandum, which went out over Judge Bybee’s name, as well as the March 14, 2003 memorandum to Mr. Haynes, which went out over Mr. Yoo’s name. The arguments I discuss appear in both memoranda.

⁵ The Levin Memorandum did not include this argument, but it also did not withdraw it. And an earlier, published, OLC opinion – presumably still in force – also makes the commander-in-chief override argument.

⁶ My own review of the founding era debates reveals deep concern about possible presidential abuse of the standing army. David Luban, *On the Commander-in-Chief Power*, 60 S. Cal. L. Rev. (forthcoming). Recently, David J. Barron and Martin S. Lederman have exhaustively surveyed historical evidence from the founding of the republic to the present and found no trace of the commander-in-chief override idea until after the Civil War, and very little political or legal precedent for it since then (although the idea won some support within the academy). David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008); Barron & Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 Harv. L. Rev. 941 (2008). Their review of the original understanding appears in the first of these article at pages 772-800.

⁷ Thus, his opinions do not mention the leading case *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)(holding that the President’s commander-in-chief power did not permit him to seize steel mills during the Korean War); nor do they mention one of the earliest and clearest cases in which Congress constrained the president’s commander-in-chief power and the Supreme Court upheld it: *Little v. Barreme*, 6 U.S. 170 (1804)(upholding damages against a naval officer who, who during the undeclared “quasi-war” against France, had followed President Adams’s orders to seize ships sailing from French ports, contrary to Congressional restrictions).

⁸ *United States v. Oakland Cannabis Buyers’ Coop*, 532 U.S. 483, 490 (2001)(expressing doubt that a necessity defense exists in federal criminal law absent a statute providing it).

Second, as I mentioned earlier, he wrenches language from a Medicare statute to explain the legal definition of torture. The Medicare statute lists severe pain as a possible symptom of a medical emergency, and Mr. Yoo flips the statute and uses the language of medical emergency to define severe pain. This was so bizarre that the OLC itself disowned his definition a few months after it became public. It is highly unusual for one OLC opinion to disown an earlier one, and it shows just how far out of the mainstream Mr. Yoo had wandered. This goes beyond the ethical limits for a legal advisor. In fact, even in the courtroom there are limits to spinning the law: ethics rules forbid advocates from making frivolous legal arguments, or failing to disclose adverse legal authority.⁹

But it would be a mistake to focus only on Mr. Yoo. Mr. Levin's replacement memo also takes liberties with the law. In particular, when the Levin Memo discusses the term "severe physical suffering" (which is part of the statutory definition of torture), it states that the suffering must be "prolonged" to be severe – and that requirement simply isn't in the statute at all.¹⁰ Under that definition, of course, waterboarding would not be torture because people break within seconds or minutes. This is a perfect example of a legalistic definition that looks inconspicuous but in reality narrows the definition of torture dramatically. Notice that the quicker a technique breaks the interrogation subject, the less prolonged his suffering will be – so the harsher the tactic, the less likely it is to qualify as "torture." It goes without saying that if Congress had written the statute that

⁹ See ABA Model Rules of Professional Conduct, Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Rule 3.3(a)(2) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.")

¹⁰ The torture statute does require that severe *mental* suffering must be prolonged. 18 U.S.C. § 2340(2). But the very fact that Congress included no parallel requirement in the same statute's treatment of physical suffering shows, under ordinary interpretive methods, that it should not be read in.

way, OLC lawyers would be bound to respect it in their opinion. But it should also go without saying that lawyers ought not to rewrite a statute to include language that is not there.

Rather than continuing to dissect the arguments of these memos and others, I am attaching one of my publications that does so to this written testimony. It is titled “The Torture Lawyers of Washington,” and it is a chapter in my book *Legal Ethics and Human Dignity*. My main point is that the torture memos take enormous liberties with the law and reach eccentric conclusions.

The authors may believe their conclusions represent the law as it should be. But the job of a legal opinion is to advise the client on the law as it is. If that dissuades the client from doing something the client wants to do, so be it. In the words of the ABA, “Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.”¹¹ The lawyer’s job is emphatically not to enable clients to defy law by interpreting it oddly.

¹¹ ABA Model Rules of Professional Conduct, Rule 1.6, cmt. [2].