

Dear members of the University of Minnesota Law School's community:

The following is a letter we hoped never to have to write.

We regret the decision of the Co-Deans of the University of Minnesota Law School to hire Robert Delahunty to teach Constitutional Law for the Spring term of 2007, temporarily replacing Prof. Dale Carpenter for that semester. We also regret, in this context, the non-collegial vitriol apparently coming from an Associate Dean of this law school. It is because we care deeply about this law school and this university and because of what we see as our commitment not only as lawyers but also as decent human beings that we feel compelled to express publicly our opinions in this matter.

Before Robert Delahunty started teaching at St. Thomas University School of Law he spent most of his legal career "at the Office of Legal Counsel, where he was made Special Counsel and a member of the Senior Executive Service in 1992. His work and writing at the Office of Legal Counsel focused on the constitutional law of foreign relations, Presidential war powers, public international law, treaties, and immigration law. His usual clients included the Office of the Counsel to the President, the Office of the Legal Adviser to the National Security Council, . . ." (St. Thomas University Law School Website: <http://www.stthomas.edu/law/academics/faculty/fulltimefaculty/delahunty.asp>)

In connection with his government service, and entirely outside any academic function, Mr. Delahunty co-authored a secret (but later leaked) memo with John Yoo,¹ in which they concluded that the "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution."

The memo also concluded that U.S. soldiers could not be tried for violations of the laws of war in Afghanistan because such international laws had "no binding legal effect on either the President or the military."

This memo, part of the now notorious "Torture Memos," facilitated the eventual torture of detainees not only in Guantanamo but in Abu Ghraib and elsewhere. The Delahunty-Yoo memo gave the US Administration and its agents the legal blanket to conduct such acts, which are in clear violation of international law, with virtual impunity.

1 John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, "Application of Treaties and Laws to al Qaeda and Taliban Detainees" (January 9, 2002), <http://www.msnbc.msn.com/id/5025040/site/newsweek>, reprinted in *The Torture Papers: The Road to Abu Ghraib* 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

In May 2005, Amnesty International expressed its concern about the impact of the Yoo-Delahunty memo and other actions by government lawyers and officials:

“The refusal of the US government to conduct a truly independent investigation into the abuses at Abu Ghraib prison and other detention centers is tantamount to a whitewash, if not a cover-up, of these disgraceful crimes. It is a failure of leadership to prosecute only enlisted soldiers and a few officers while protecting those who designed a deliberate government policy of torture and authorized interrogation techniques that constitute torture or cruel, inhuman or degrading treatment. The government’s investigation must climb all the way to the top of the military and civilian chain of command.

If the US government continues to shirk its responsibility, Amnesty International calls on foreign governments to uphold their obligations under international law by investigating all senior US officials involved in the torture scandal. And if those investigations support prosecution, the governments should arrest any official who enters their territory and begin legal proceedings against them. . . .

Amnesty International calls upon state bar authorities to investigate the Administration lawyers alleged to be involved in the torture scandal for failing to meet professional responsibility standards. The attorneys who wrote various legal opinions that may have provided cover for subsequent crimes and who should be investigated include . . . Robert Delahunty, former Special Counsel in the Office of Homeland Security, and three attorneys in the Office of Legal Counsel—John Yoo, former Deputy Assistant Attorney General

A wall of secrecy is protecting those who masterminded and developed the US torture policy. Unless those who drew the blueprint for torture, approved it and ordered it implemented are held accountable, the United States’ once proud reputation as an exemplar of human rights will remain in tatters. Its shattered image will continue to fuel anti-American sentiment around the globe and make the world a more dangerous place.”²

Nor is Amnesty International’s position unique in this regard. Robert Delahunty is likely to be subjected to investigation in Europe and in other parts of the world, if not in the United States, for his activities which have made it more likely that the United States would engage in torture and ill-treatment of detainees. This conduct may be considered by a prosecutor and a court to be a war crime or a crime against humanity.

We also note that in *Hamdan v. Rumsfeld*,³ the U.S. Supreme Court rejected the conclusions of the Yoo-Delahunty memo and relied on the Geneva Conventions, in holding that the procedures adopted by the military commission for trying Al Qaeda and Taliban detainees did not meet the requirements of international law.

Many commentators have observed that attorneys providing advice to a client regarding how to circumvent the law may be held complicit in the resulting criminal conduct. Moreover, such attorneys may be violating their professional obligations to make a good faith effort to determine the scope of the law, and to refer to relevant moral and ethical considerations when giving advice.² This position is even more relevant when government lawyers are involved. An editorial comment in the *American Journal of International Law* took note of the heightened responsibilities of government attorneys in providing legal guidance on matters relating to foreign relations and particularly relating to the torture memos:

“Government attorneys also have responsibilities and obligations of loyalty that go beyond those of private attorneys. Thus, the government lawyer’s ‘client’ is not simply his or her administrative superior, but also the government agency . . . for which he or she works, the U.S. government as a whole, and indeed the American public and its collective interests and values. Moreover, government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions. For their opinions on such matters may often not be subject to definitive judicial or other impartial review; and even if government legal views are in theory subject to review, it is well known that national courts, other government agencies, and the Congress have traditionally been especially deferential to such opinions. Consequently, in practice there may be no ‘safety net’ other than these attorneys’ own competence, care, integrity, and good faith; it is only these professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order.”⁴

The University of Minnesota Law School has a worldwide reputation for its international law and human rights law teaching and scholarship. Hiring an individual like Robert Delahunty, whose credentials are tainted, places at risk not only the reputation of the Law School but also that of the law faculty

3 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)

4 Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 692, 694 (2004); see also W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70–71 (2005) (arguing that the “glaringly deficient legal analysis” in the memoranda resulted from the lawyers being “so fixated on working around legal restrictions on the administration’s actions”).

and student body.

It is standard practice at the Law School for the Dean(s) to hire such temporary replacements teacher without seeking the approval of the remainder of the faculty. We do not wish to challenge this authority. But persons outside the law faculty may not be aware of that practice and may think that members of the faculty are responsible for the extremely ill-advised and not well considered decision to retain Robert Delahunty even as a temporary podium-fill professor. Accordingly, we believe that is necessary for us to disassociate ourselves from the decision of the Co-Deans of the University of Minnesota Law School to hire Robert Delahunty to teach Constitutional Law for the Spring term of 2007.

We believe that in making the decision in this particular case the Co-Deans had been unaware of the grave institutional implications of hiring Mr. Delahunty and we call on them to rectify the situation. We can only assume that the Law School would not have hired Enron officials to teach accounting to our students. Nor should we hire, even if on a temporary basis, a lawyer so directly implicated in what many in the international community regard as war crimes.

We cannot end this letter without commenting, in brief, on yet another disturbing development. In an article published by the Minnesota Daily on November 28, 2006, an Associate Dean in the Law School, Prof. Michael Paulsen, is quoted as follows:

“Paulsen also said protests are coming from a few extreme individuals in the Law School. ‘That’s a gross violation of academic ethics and academic freedom’, he said. Paulsen attributes the uproar to one professor in particular he said has an ideological problem with those who disagree with his legal point of view. Paulsen declined to name the professor. ‘It sometimes happens that even professors are not respecters of academic freedom and get their facts wrong, too,’ he said.”

We find these statements by one of our colleagues, and especially one who currently occupies the position of Associate Dean, deplorable. First, Prof. Paulsen does not show the minimal courage of “exposing” the one professor he refers to. We are unsure whether Prof. Paulsen decided to focus on a single professor without raising those issues with the individual concerned. Indeed, it is evident from the signatories to this letter that the ethical and human rights concerns about the temporary hiring of Mr. Delahunty are far more widespread than Prof. Paulsen indicated. Second, Prof. Paulsen castigates several of his colleagues as “extreme.” We suppose that it is *his* way of expressing his very own “ideological problem with those who disagree with his legal point of view.” Third, we are deeply concerned that a colleague at this Law School would bring this Law School and members of its faculty into question as to our commitment to academic freedom and responsibility. Our opposition to the hiring of Mr.

Delahunty has got absolutely nothing to do with academic freedom but all to do with legal ethics. Mr. Delahunty's role in the Torture Memos was not academic and we object to hiring someone of his credentials rather than to anything that he may say in class should he be so hired or concerns about his scholarly research or academic work.

We thus call on our Co-Deans to reconsider their decision to hire Mr. Delahunty as a temporary hire to teach constitutional law at the University of Minnesota Law School and to accommodate students who may have concerns about taking a mandatory course from such an individual.

Respectfully and Sincerely yours,

Prof. Stephen F. Befort

Gray, Plant, Mooty, Mooty, &
Bennett Professor of Law

Prof. Carol L. Chomsky

Prof. Laura J. Cooper

J. Stewart and Mario Thomas
McClendon Professor in Law
and Alternative Dispute
Resolution

Prof. Barry Feld

Centennial Professor of Law

Prof. Richard S. Frase

Benjamin N. Berger Professor
of Criminal Law

Prof. Oren Gross

Irving Younger Professor of
Law

**Prof. Fionnuala Ní
Aoláin**

Dorsey & Whitney Professor of
Law

**Prof. David S.
Weissbrodt**

Fredrikson and Byron
Professor of Law

Prof. Susan M. Wolf

McKnight Presidential
Professor of Law, Medicine &
Public Policy
Faegre & Benson Professor of
Law
Professor of Medicine

The faculty members who joined this provisional letter happened to be around the Law School when it was drafted. Other faculty members are welcome to join.