

**Response to
the U.S. Department of Justice
Office of Professional Responsibility
Draft Report Dated March 4, 2009**

**Submitted on Behalf of
Professor John C. Yoo**

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INTRODUCTION

The Department of Justice's Office of Professional Responsibility (OPR) has prepared a Draft Report dated March 4, 2009 that is riddled with error and lacks even the pretense of objectivity. If the analysis and conclusions of the Draft Report are permitted to stand, they will bring discredit to OPR, do great harm to the Department of Justice, and needlessly damage former Department attorneys who performed their duties in the best of faith during trying times. In response to the Draft Report, Professor and former Deputy Assistant Attorney General for the Office of Legal Counsel John C. Yoo offers the following comments.¹

* * *

The authors of the Draft Report have spent the last four-and-a-half years preparing a document that evinces far less competence and candor than the memoranda it purports to condemn on those grounds. The Draft Report concludes that Professor Yoo and former Assistant Attorney General for the Office of Legal Counsel (and now Court of Appeals for the Ninth Circuit Judge) Jay S. Bybee should be referred for sanction by state bar authorities for alleged violations of legal ethics rules based on nothing more than OPR's subjective analysis of their work product on detainee interrogation in the aftermath of September 11, 2001 (applying OPR's terminology, the relevant documents include the August 1, 2002 "Bybee Memo," the August 1, 2002 "Classified Bybee Memo," and the March 14, 2003 "Yoo Memo").² Because such referral and sanction are entirely unprecedented, however, OPR creates legal standards out of whole cloth to support its results-driven approach. The authors of the Draft Report develop their own test for the duty of candor, for example, because "the reported decisions and professional literature provided little guidance for the application of the standard in this context." D.R. at 131. The authors apparently fail to consider that the complete absence of any precedent suggests that their application of the ethics rules is inappropriate.

If OPR's *sui generis* standards are to prevail, the authors of the Draft Report and untold numbers of other Department attorneys will be subject to bar referral based solely on subjective assessment of their legal analyses, even where those analyses are made in good faith and are not objectively wrong. No responsible official with a modicum of foresight could choose such a path for the Department. And the fact that pressure for bar referral is being applied by legislators who would use OPR's considerable authority for political gain is no reason to handicap the

1 Professor Yoo respectfully adopts and incorporates herein Judge Bybee's response, in its entirety.

2 OPR independently analyzes only the Bybee Memo and the Classified Bybee Memo (collectively the "Bybee Memoranda") based on its conclusion that "[t]he Yoo Memo incorporated virtually all of the Bybee Memo more or less verbatim." Draft Report at 55; *see also id.* at 134 n.113 ("Yoo's March 14, 2003 memorandum to Haynes incorporated the Bybee Memo in its entirety, with very few changes. Thus, our conclusions with respect to the Bybee Memo, as set forth below, apply equally to the Yoo Memo."); *id.* at 180 n.168 ("As discussed above, the analysis which follows applies equally to the March 14, 2003 Yoo Memo."). Professor Yoo therefore limits his discussion to the Bybee Memoranda.

Department for the foreseeable future by scaring away talented attorneys and casting a chilling pall over those who remain.³

DISCUSSION

I. OPR's Conclusion That Professor Yoo Committed Professional Misconduct and Should Be Referred For Bar Discipline Must Be Rejected At the Outset Because It is Based On Fundamental Legal Errors That Would Set Unwise and Dangerous Precedent.

Referring Professor Yoo to the Pennsylvania Bar would open a new chapter in OPR's history—it would mark the first time in its history that OPR referred a *former* DOJ attorney to a state body that *lacks jurisdiction* to investigate OPR's allegations. As OPR correctly notes, Professor Yoo is a member of the Pennsylvania Bar. D.R. 126 n.106. As OPR conveniently omits, the statute of limitations for investigating bar referrals in Pennsylvania is four years, a period that has long since lapsed. But even if the Pennsylvania Bar could act on OPR's referral, OPR's failure to give more than passing consideration to the difficult choice of law issue presented in these circumstances undermines entirely the Draft Report's conclusions. OPR's tidy three-sentence discussion of the issue falls well short of the extended discussion it actually warrants—for if Professor Yoo were subject to the Pennsylvania Rules of Professional Responsibility (rather than the D.C. Rules of Professional Responsibility, as the OPR asserts, *see* D.R. 125), he could not be disciplined for violating Rule 2.1 because Pennsylvania Rule 2.1 was permissive, rather than mandatory, when he worked on the memos. These procedural failings—which are discussed below—gut the Draft Report of any pretense of reliability.

³ As former Attorney General Michael Mukasey and Deputy Attorney General Mark Filip—both highly respected former federal judges—have eloquently observed (after noting that there is no evidence that Professor Yoo or Judge Bybee acted in anything but good faith in discharging their duties):

[It is] impossible to believe that government lawyers called on in the future to provide only their best legal judgment on sensitive and grave national security issues in the time available to them will not treat [bar referrals for Professor Yoo and Judge Bybee] as a cautionary tale—to take into account not only what they honestly conclude, but also the personal and professional consequences they might face if others, with the leisure and benefit of years of hindsight, later disagreed with their conclusions. Faced with such a prospect, we expect such lawyers to trim their actual conclusions accordingly. Nor, if the recommendation of professional discipline stands, could the Department reasonably be expected to attract, as it does now, the kinds of lawyers who could make such difficult decisions under pressure without the lingering fear that if those decisions appear incorrect when reconsidered, not only their legal conclusions but also their competence and honesty might be called into question. OLC lawyers might be willing to subject themselves to the inevitable public second-guessing of their work that occurs years later in a time of relative calm. But we fear that many might be unwilling to risk their future professional livelihoods.

January 19, 2009 Letter to H. Marshall Jarrett (“Mukasey Letter”), at 14.

A. Given That the Statute of Limitations For Disciplinary Action Expired Over Two Years Ago, Referring Professor Yoo to the Pennsylvania Bar Would Correctly Be Seen as a Transparent Political Stunt And Would Accomplish Nothing But Highlight OPR's Own Incompetence.

The most embarrassing and indefensible flaw in OPR's body of work is that OPR has blown the statute of limitations on referring Professor Yoo to the Pennsylvania Bar for potential disciplinary proceedings, and thus any report that OPR sends to the Pennsylvania Bar accusing Professor Yoo of professional misconduct will arrive stillborn.

With respect to attorneys admitted to the Pennsylvania bar, alleged violations of the rules of professional conduct are subject to a four-year statute of limitations. Pa. Disciplinary Bd. R. § 85.10(a) ("The Office of Disciplinary Counsel or the Board *shall not* entertain any complaint arising out of acts or omissions occurring more than four years prior to the date of the complaint, except as provided in subsection (b)") (emphasis added).⁴ Professor Yoo's "acts or omissions" related to his work on the Bybee Memo and the Classified Bybee Memo ended on August 1, 2002, while his work on the Yoo Memo ended on March 14, 2003. The four-year statute of limitations for any professional misconduct related to these memos thus expired on July 31, 2006, and March 13, 2007—*more than two years ago*. As a result, allegations of professional misconduct related to this work are untimely under the rules of the Pennsylvania Disciplinary Board, and may not be investigated by the Pennsylvania Bar.

Given this expiration of the statute of limitations, the Department should consider carefully the implications of sending any adverse findings to the Pennsylvania Bar, for at least two reasons. First, with no legitimate point to be served by the referral of any such findings, this exercise would, quite correctly, subject OPR and the Department to charges of political gamesmanship for the sole purpose of creating headlines. Second, it must be said that if OPR's conclusion actually were valid—which it manifestly is not—then OPR has itself exhibited extraordinary incompetence by allowing the statute of limitations to expire despite working on this investigation for approximately *two years* before that deadline came and went. Allowing a limitations period to run is, of course, a quintessential competence issue subject to bar discipline. *See, e.g., In re Outlaw*, 917 A.2d 684 (D.C. 2007).

Although the statute of limitations issue becomes irrelevant if the Department reaches the correct and just substantive result here, that is not the case if the Department goes forward with

⁴ Subsection (b) sets out two limited exceptions to the four-year limitations period, neither of which helps OPR. First, Pennsylvania does not apply the limitations period to certain kinds of alleged misconduct—"theft or misappropriation, conviction of a crime or a knowing act of concealment"—that plainly are irrelevant here. Disciplinary Bd. R. § 85.10(b)(1). Second, Pennsylvania permits tolling "during any period when there has been litigation pending that has resulted in a finding that the subject acts or omissions involved civil fraud, ineffective assistance of counsel or prosecutorial misconduct by the respondent-attorney"—again, quite irrelevant here. *Id.* § 85.10(b)(2). The Disciplinary Board Rules are found at <http://www.padisciplinaryboard.org/documents/DBoardRules.pdf>.

the erroneous conclusion in the Draft Report. The failure of OPR to complete its investigation sufficiently timely, or alternatively to seek tolling agreements, likely will cause justified criticism to rain down from all sides. The Department's decision to walk into this buzz saw in the belief that such a course is appropriate, or at least politically expedient, would be a huge further mistake that will serve only to eviscerate institutional and public confidence in OPR's and the Department's impartiality, processes, and basic competence.

B. OPR's Finding of Professional Misconduct Depends Entirely Upon OPR's Dubious Premise That Professor Yoo Was Subject to the D.C. Rules of Professional Conduct While Employed at OLC.

Even if the Pennsylvania Bar could act on OPR's referral, which it cannot, OPR's conclusion is fundamentally flawed because it rests on an erroneous assumption: that Professor Yoo's work at OLC was subject to and governed by the District of Columbia Rules of Professional Responsibility ("D.C. Rules"). If this premise is incorrect, OPR's entire analysis, and its ultimate conclusion that "[i]n violating D.C. Rules 1.1 and 2.1, . . . Yoo committed professional misconduct," D.R. at 9 and 199, does not even ask the right question, much less reach the correct result. As we demonstrate below, OPR's premise is wrong because Professor Yoo's professional duties at OLC were governed not by the D.C. Rules, but only by the Pennsylvania Rules of Professional Responsibility ("Pennsylvania Rules" or "Pa. Rules"). As we also demonstrate, "fixing" OPR's error *leads to a different conclusion under OPR's own analysis*, because the Pennsylvania Rules in effect at the time Professor Yoo worked at OLC were different in a key respect from the D.C. Rules upon which OPR's conclusion is based.

The fact that OPR has completely booted the basic question of which bar rules apply speaks volumes about the stunningly poor quality of OPR's overall analysis. And as embarrassing for the Department as it may be, this error means that OPR's conclusion that Professor Yoo engaged in professional misconduct blows up, should it even get out of the starting gate.

1. OPR Fails To Adequately Consider Whether Professor Yoo's Legal Work at OLC Was Governed By The Pennsylvania Rules of Professional Conduct.

Professor Yoo has never been a member of the D.C. Bar. And as a federal government attorney, his conduct at issue did not involve litigation pending in the District of Columbia. OPR ignores these two facts and embarks on its rush to condemn Professor Yoo with this cursory, three-sentence treatment of the critical question of which bar rules would apply to Professor Yoo's conduct:

Pursuant to Department of Justice Regulations set forth at 28 C.F.R. Part 77, *Ethical Standards for Attorneys for the Government*, Department attorneys must conform to the rules of ethical conduct for *the court* before which a particular case is pending. In this case, the legal advice in question was rendered in the District of Columbia. *Therefore*, the District of Columbia Rules of Professional Conduct (D.C. Rules) are applicable.

D.R. 125 (emphases added).

The flaw in this reasoning should be obvious. OPR's conclusion that the D.C. Rules are applicable to the drafting of opinions at OLC solely because "the legal advice was rendered in the District of Columbia" does not follow from a regulation that, by its terms, addresses only a situation where Department attorneys are handling a "particular case" pending in a "court." Yet this is the sole basis upon which OPR concludes that Professor Yoo is subject to the D.C. Rules. *Id.* at 125-126 & n.106.

The standard OPR articulates is drawn from 28 C.F.R. § 77.4(a), "Rules of the court before which a case is pending." Directly below this provision, however, one finds § 77.4(c), "Choice of rules where there is no pending case"—the situation in fact presented here. That provision states a different rule:

Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

28 C.F.R. § 77.4(c)(1) (emphasis added). Since this matter did not involve Professor Yoo working on a pending case, § 77.4(c) applies, not § 77.4(a). Section 77.4(c) requires a choice of law analysis that OPR did not even pretend to undertake.

The default under Section 77.4(c) is the "ethical rules of the attorney's state of licensure"—in this case, Pennsylvania. That default, however, is subject to change when "application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction." *Id.* Pennsylvania's choice-of-law provision, in turn, contemplates that, for non-litigation conduct such as Professor Yoo's work, the lawyer is subject to either "the rules of the jurisdiction in which the lawyer's conduct occurred, *or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.*" Pa. Rule 8.5(b)(2) (emphases added).

This choice of law provision obviously presents difficult questions. Because Professor Yoo addressed "[a] question [that] has arisen in the context of the conduct of interrogations *outside the United States,*" Bybee Memo at 1, the "predominant effect" of Professor Yoo's legal work might not have even been a jurisdiction in this country, much less in the District of Columbia. This question is made more difficult by the D.C. Rules themselves. D.C. Rule 8.5(a), "Disciplinary Authority," states that "the disciplinary authority of this jurisdiction" applies to lawyers "admitted to practice in this jurisdiction," while conspicuously *omitting* the additional statement found in the ABA Model Rules that "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." *Compare* ABA Model Rules of Professional Conduct ("ABA Model Rules") 8.5(a) *with* D.C. Rule 8.5(a).

Thus, the District of Columbia makes no attempt to create an exception to the general rule set forth in 28 C.F.R. § 77.4(c)(1)—and indeed has expressly disavowed OPR's ill-informed suggestion that Professor Yoo is subject to the D.C. rules because "the legal advice was rendered in the District of Columbia." D.R. at 125-126. OPR's bald assertion does little to resolve this

difficult issue—an error that could have drastically undermined OPR’s ultimate conclusion if the Pennsylvania rules applied to Professor Yoo, as discussed below.

2. If The Pennsylvania Rules Applied, OPR’s Own Analysis Leads to An Entirely Different Conclusion.

OPR thus begins its analysis by merely asserting that it was applying the correct rules of professional conduct in assessing whether Professor Yoo violated Rules 1.1 and 2.1. This unsupported assertion by OPR is not merely evidence of OPR’s incompetence, but has far greater significance than might first be supposed. As we explain, if OPR erred—and it nowhere explains why it has not—“fixing” OPR’s error leads inexorably to the destruction of OPR’s ultimate conclusion that Professor Yoo committed professional misconduct.

OPR does, of course, know that Professor Yoo is admitted in Pennsylvania, and is not a D.C. Bar member. Exhibiting perhaps a small glimmer of understanding that this *might* be relevant, OPR makes a single, passing reference to the Pennsylvania Rules in a footnote—but then dismisses any thought that those rules are of significance with the assertion that both D.C. and Pennsylvania “adopted the American Bar Association’s (ABA) Model Rules of Professional Conduct, with no significant changes, and [thus] the rules applicable to this matter are identical in substance.” D.R. at 126 n.106. This assertion, however, is flat wrong, as OPR would have realized had it competently researched the issue. At the time Professor Yoo worked at OLC, the pertinent provisions of the two jurisdictions’ respective rules were not “identical in substance,” but rather had a highly material difference that changes the outcome under OPR’s analysis.

The two ethics rules Professor Yoo is charged with violating are D.C. Rule 1.1 and D.C. Rule 2.1. The first sentence of the latter rule states that “[i]n representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice” (emphasis added), just as does ABA Model Rule 2.1. Rules cast with the term “shall” are “imperatives,” and such rules “define proper conduct for purposes of professional discipline.” D.C. Rules, “Scope”; *accord*, Pa. Rules, “Scope.” At the time in question, however, Pennsylvania had *not* adopted ABA Model Rule 2.1 as written. Instead, Pennsylvania altered the Model Rule to state that “[i]n representing a client, a lawyer *should* exercise independent professional judgment and render candid advice.” Pa. Rule 2.1 (emphasis added).⁵

This difference is of enormous significance for determining whether rules of professional responsibility have been violated. In Pennsylvania, as elsewhere, rules “cast in the term ‘may’ or ‘should’, are *permissive* and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*” Pa. Rules, “Scope” (emphasis added); *accord*, D.C. Rules, “Scope.” OPR itself recognizes this fact in discussing the second sentence of D.C. Rule 2.1, which states that “[i]n rendering advice, a lawyer *may* refer not only to law but

⁵ By order dated August 23, 2004, Pennsylvania adopted the mandatory “shall” language for Rule 2.1, but that revised standard is not relevant here given that the conduct in issue occurred in 2002 and 2003.

to other [extralegal] considerations. . . .” As OPR correctly notes, “[b]ecause the rule’s language is . . . permissive . . . a lawyer’s decision not to provide such advice should not be subject to disciplinary review.” D.R. 130 n.112. Because the language in *both* sentences of Pennsylvania Rule 2.1 was “permissive” at the time Professor Yoo served at OLC, as a matter of law an alleged failure to follow that rule *cannot* provide a basis for disciplinary review. OPR is foreclosed from arguing that any “violation” of the “Rule 2.1” actually applicable to Professor Yoo can be cited to support a finding of professional misconduct.

This critical fact is not understood by OPR. Instead, applying D.C. Rule 2.1, with its imperative “shall,” OPR places great weight in reaching its ultimate finding of professional misconduct on the conclusion that Professor Yoo allegedly “failed to fulfill [his] duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1.” D.R. 199. Although its conclusions are erroneous, as we discuss in Section III, *infra*, much of OPR’s ultimate conclusion is built on the assertions that Professor Yoo violated D.C. Rule 2.1 because he and others were “aware of the result desired by the client” and, among other alleged sins, “tailored their research and analysis to achieve the result desired by the client” supposedly through “exaggeration,” failure to consider adverse authority, and engaging in arguments that “were convoluted, counterintuitive, or frivolous.” D.R. at 180-184.

The conclusion that Professor Yoo violated D.C. Rule 2.1 is plainly critical to OPR’s overall outcome; the Draft Report squarely states that its ultimate conclusion that “Yoo committed professional misconduct” is built upon the finding that Yoo violated “*these rules*,” that is, *both* D.C. Rule 1.1 and D.C. Rule 2.1. D.R. 188 (emphasis added). For reasons discussed below, OPR indeed goes to great pains to make clear that its conclusion Professor Yoo committed professional misconduct is reached only by aggregating all of the supposed misdeeds OPR claims occurred. “We emphasize again that we do not believe any one of the shortcomings we have identified, considered in isolation, would compel a finding of misconduct.” *Id.*

The failure by OPR to definitively prove that it was applying the correct jurisdiction’s professional responsibility rules to Professor Yoo, and its central reliance on a D.C. ethics rule whose Pennsylvania counterpart is merely “permissive” and cannot form the basis of any finding of misconduct, is thus not merely a “gotcha” point. Rather, it means that OPR’s ultimate professional misconduct conclusion hinges on a completely unsupported premise. OPR can still be critical of Professor Yoo (although unfairly), but it cannot accord its criticisms the weight that OPR intends them to bear. Professor Yoo, however, will respond to OPR’s allegations as if the D.C. Rules applied, but OPR and the Department should carefully consider the propriety of basing a conclusion on this house of cards.

C. OPR’s Conclusion That Professor Yoo Committed Professional Misconduct Depends Upon the Adoption of an Utterly Indefensible and Dangerous Perversion of the Standards That Should Have Governed OPR’s Inquiry.

OPR’s ultimate conclusion of professional misconduct must also be rejected as a result of another fundamental, insurmountable flaw: it is built upon supposed legal “standards” for judging Professor Yoo’s conduct that are erroneous in the extreme. Indeed, OPR’s conclusion

sits atop a teetering tower of impermissible, unsupportable and dangerous propositions that, as we explain below, should cause any thoughtful Department attorney to recoil in horror.

1. OPR’s Conclusion Is Reached in Direct Contravention of the Formal Requirement That *Scienter* Must Exist in Order for OPR to Find Professional Misconduct.

To begin, the conclusion in the Draft Report that Professor Yoo “committed professional misconduct” is reached in direct and outrageous violation of OPR’s own formal Policies and Procedures setting forth the standards for reaching such a determination. Those Policies and Procedures are explicit in stating that a violation of bar rules is not enough to reach this conclusion; there must also exist *scienter* on the part of the attorneys involved. Yet OPR has reached its conclusions without any regard *at all* to this requirement, not even lip service.

The *scienter* requirement is squarely laid out in OPR’s formal Policies and Procedures, which state that:

At the conclusion of the investigation, OPR makes findings of fact and reaches conclusions as to whether professional misconduct has occurred. OPR may find professional misconduct in two types of circumstances: (1) where an attorney *intentionally* violated an obligation or standard imposed by law, applicable rule of professional misconduct, or Department regulation or policy, or (2) where an attorney acted in *reckless disregard* of his or her obligation to comply with that obligation or standard. OPR may also find that the attorney used poor judgment or made a mistake; such findings do not constitute findings of professional misconduct.

OPR Policies and Procedures at 4 (emphasis in original). “The elements essential to a conclusion that an attorney committed professional misconduct, then, are that the attorney (1) violated or disregarded an applicable obligation or standard (2) with the requisite *scienter*.” OPR Analytical Framework at 1-2. *See also* OPR 2005 Annual Report at 7-8 n.3-6 (articulating standards).⁶

Under its own Policies and Procedures OPR thus *cannot* properly find professional misconduct absent evidence establishing *scienter*, in particular that a Department attorney has “intentionally” violated his or her obligations or has acted in “reckless disregard” of those obligations. Yet this impermissible result is exactly the one OPR reaches here, since OPR completely ignores this “essential” element of *scienter* in reaching its conclusions. The Draft Report in fact is entirely devoid of any mention of the *scienter* requirement, and likewise entirely devoid of any discussion of whether Professor Yoo “intentionally violated” or acted in “reckless

⁶ OPR’s Policies and Procedures, Analytical Framework, and Annual Reports are available at http://www.usdoj.gov/opr/other_opr_docs.htm.

disregard” of the cited rules of professional conduct.⁷ Without even the pretense of considering the scienter requirement, OPR has concluded that violations of D.C. Rules 1.1 and 2.1 occurred and then gone directly to the further conclusion that “[i]n violating [those rules], Bybee and Yoo committed professional misconduct.” D.R. 199.

OPR may, of course, now seek to cobble together an after-the-fact finding of the requisite scienter in an effort to “fix” this gaping hole in its analysis. Any attempt to do so, however, will face two insurmountable barriers.

First, such a repair job will only highlight the fact that OPR reached its conclusion without worrying much about whether that conclusion was justified by proper process and analysis. This reality is underscored by the fact that OPR was apparently intent in January of this year on publicly releasing an earlier draft of the report without even awaiting proper review. *See* Mukasey Letter at 3. OPR goes to great lengths to criticize what it asserts was ends-driven legal reasoning in the Bybee Memoranda, but dressing up OPR’s Draft Report with newly concocted postmortem “findings” will but prove that OPR has itself engaged in exactly this alleged sin.

Second, and more fundamentally, OPR cannot in good faith actually find either intent or reckless disregard here. The evidence to support any such finding simply does not exist—which undoubtedly is why OPR ignored the requirement in the first place.

For appropriate reasons, the scienter test is a very tough one for OPR to meet. OPR’s own Analytical Framework makes this clear:

An attorney intentionally violates an obligation or standard when he or she (1) engages in conduct with the *purpose* of obtaining a result that the obligation or standard *unambiguously* prohibits, or (2) engages in conduct *knowing* its natural or probable consequence and that consequence is a result that the obligation or standard *unambiguously* prohibits. . . .

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney *knows, or should know* based on his or her experience and the *unambiguous* nature of the obligation or standard, of an obligation or standard, (2) the attorney *knows, or should know* based on his or her experience and the *unambiguous applicability* of the obligation or standard, that the attorney’s conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or standard, and (3) the attorney nonetheless engages in the conduct, which is *objectively unreasonable under all the circumstances*. Thus, an attorney’s disregard of an obligation or standard is reckless when, considering the nature and purpose of the attorney’s conduct and the facts known

⁷ Ironically, the one reference in the Draft Report even arguably on point (albeit not offered for the purpose), a quotation on page 2 from an academic critic nominated for service in the Obama Administration, cuts *against* any finding of scienter by asserting that the work on the Bybee Memo was “*just short of reckless*.” D.R. 2 (emphasis added).

to the attorney, it represents a *gross deviation* from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR Analytical Framework at 3 (emphases added). OPR’s own guidance thus indicates that to find scienter in this context the evidence must show *not only* the normal attributes of conduct going beyond negligence and into recklessness or intent (*i.e.*, purpose, knowledge, “knew or should have known,” “gross deviation from the standard of conduct”, etc.), but also that the obligation alleged to have been violated “*unambiguously prohibit[ed]*” the conduct at issue. For this to be true, *both* the “unambiguous nature of the obligation and standard” *and* the “unambiguous applicability of the obligation or standard” must be obvious, *i.e.*, something that the attorney “knew, or should have known.” As we address further below, it is not possible in good faith to conclude that Professor Yoo acted with any such intent or reckless disregard, and OPR has not even bothered to try.

The decision by OPR to ignore one of the two “essential” elements that must exist for professional misconduct to have occurred under OPR’s own standard is not merely poor scholarship. It is compelling proof that OPR’s ultimate conclusion is the product of bias, is without foundation, and is itself a violation of “a standard imposed by . . . Department regulation or policy.” The Department cannot appropriately permit such an obviously and fundamentally flawed conclusion to stand.

2. OPR’s Conclusion Is Reached Without Any Regard for the Fact That a Violation of the Rules of Professional Responsibility Must Be Established by “Clear and Convincing Evidence.”

Under D.C. law, violations of the D.C. Rules of Professional Conduct must be established by “clear and convincing evidence.” *In re Romansky*, 938 A.2d 733, 739 (D.C. 2007); *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). *OPR completely misses this requirement.* Instead, OPR just *presumes* that its inquiry into whether a violation of the ethics rules occurred is to be governed by a preponderance of the evidence standard. D.R. 132 (“We then considered whether the evidence, taken as a whole, established by a preponderance of the evidence that the attorney violated his duty . . .”). OPR has booted another central legal rule that was supposed to govern its inquiry.

While Hanlon’s Razor counsels that OPR likely has made an “innocent” mistake, there may well be a reason that OPR granted itself a preponderance of the evidence standard: OPR may realize that nothing in the “evidence” it has articulated in the Draft Report remotely could be viewed as sufficient to meet a “clear and convincing” test. At a minimum, the fact that OPR has not only ignored its longstanding rule that a bar referral is appropriate solely for “intentional” or “reckless” violations, but has also failed even to *consider* the level of proof required by the jurisdiction it believes most relevant, is further telling proof of the dismayingly low level of care that the drafters of the report have brought to their result-driven task—and is another independent reason why OPR’s finding of professional misconduct is clearly without basis.

3. OPR Finds A Violation of the Ethics Rules Only By Creating From Whole Cloth an Indefensible “Highest Degree of Competence, Thoroughness and Objectivity” Standard of Conduct.

OPR’s failure even to address the scienter requirement set forth in its Policies and Procedures, and its failure to apply the required clear and convincing standard in analyzing whether violations of bar rules took place, are each standing alone yet further errors fatal to the professional misconduct conclusion reached by OPR. These are not the only respects, however, in which OPR contravenes the legal standards it is to apply. OPR takes the egregious further step of inventing, apparently just for this matter, an amorphous, mythical heightened “super standard of care” to justify finding professional misconduct where, in OPR’s eyes, attorneys have exhibited something less than “the highest degree of competence, thoroughness and objectivity” in working on what OPR deems to be particularly “important” issues. This “highest degree” standard exists nowhere in the law, and the fact that OPR’s conclusions are based on this obviously improper test is yet another irreparable flaw in OPR’s reasoning and outcome.

In purporting to interpret D.C. Rule 1.1 (the duty of competence), OPR begins by identifying what it describes as “minimum standards of competence [that] apply to Department attorneys who provide written legal advice to executive branch clients.” D.R. 127. OPR’s “minimum competence standards” are comprised of eight requirements that rather obviously were drafted specifically to fit the criticisms that OPR advances against the Bybee Memoranda. Incredibly, these eight “standards” are not drawn from any prior OPR or DOJ ethics rules or rulings, nor from any bar or court decisions addressing such standards in the context of providing “written legal advice,” nor even from the various treatises available on legal ethics and professional responsibility. Instead, OPR’s eight “standards” are drawn almost entirely from (1) an OLC “Best Practices Memorandum”—not “*Minimum Standards* Memorandum”—that did not yet exist when Professor Yoo was at OLC; (2) five books on legal research and writing, none of which is aimed at identifying “minimum standards”; and (3) a handful of court decisions discussing solely in a *litigation* context what an attorney must do in writing a *brief*, focusing on how properly to persuade a court on behalf of a client. D.R. at 127-129. None of these authorities even purports to address what “minimum standards” apply in writing an opinion letter, much less in a context such as that presented here.

Ironically, one of OPR’s articulated “minimum standards” is that “[s]econdary authority should be relied upon only when relevant primary authority is not available.” The fact that OPR’s eight “standards” are concocted from “authority” that is not merely secondary, but tertiary, quaternary, and just flat inapplicable, illuminates rather clearly that these supposed standards, at best, fall short of establishing the kind of obvious, *unambiguous* legal obligations that must exist as a starting point in order for it even to be possible to show an ethical violation. See OPR Analytical Framework at 3.

Further, it is readily apparent that in the course of this exercise OPR has shamelessly conflated *aspirational* goals into supposed minimum standards. The best example of this is the “standard” requiring that “[i]n legal memoranda or opinion letters that seek to predict a legal outcome, a thorough discussion of the law should include the strengths and weaknesses of the

client's position and should identify any counter arguments." This standard supposedly comes from two legal writing textbooks, plus a statement in the OLC Best Practices Memorandum that "[i]n general, we *strive* in our opinions for . . . a balanced presentation of arguments on each side of an issue . . . taking in account all reasonable counter arguments," D.R. at 129, *quoting* OLC Best Practices Memo at 3 (emphasis added). To "in general, . . . "strive" for this result is a fine goal—but such a "best practices" pronouncement certainly does not establish a "minimum standard" for determining whether a Department attorney has violated his ethical duties under D.C. Rule 1.1. OPR deliberately sets the bar too high.

OPR's eight tailor-made "minimum standards," as ill-supported as they are, serve as but a prelude to OPR's real whopper of a "standards" invention: what OPR boldly describes as the "*self-evident*" conclusion that—at least in matters implicating "the right to be free from official torture"—D.C. Rule 1.1 requires that Department attorneys meet not just "minimum standards," but the "*highest standards*" of conduct. D.R. at 130. Citing *absolutely nothing* but a general statement in Comment 5 to D.C. Rule 1.1 that major matters "ordinarily require more elaborate treatment than matters of lesser consequence," OPR ratchets its test to the sky:

It is universally recognized that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." . . . *It therefore seems self-evident* that Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture *must be held to the highest standards of thoroughness and attention*.

D.R. at 129-130 (emphasis added).

There is nothing remotely "self-evident" about the "highest standards" test that OPR pronounces, unless one adopts the Ambrose Bierce definition of "self-evident."⁸ The only thing self-evident is that OPR offers nothing but its own *ipse dixit* statement because there is simply *no authority* for its "highest standards" test.

Perhaps recognizing that its "self-evident" standard is, to put it charitably, both aberrational and frightening, OPR goes to considerable lengths to try and provide reassurance that its test, and the conclusions that follow, are not of general application but instead are meant just for Judge Bybee and Professor Yoo:

Our misconduct findings are limited to the particular circumstances of this case, which, as discussed below, involved issues of the highest importance that demanded the highest degree of competence, thoroughness and objectivity from the lawyers involved. Accordingly, similar facts in a more routine matter would not necessarily result in the same findings. . . .

⁸ "self-evident", *adj.*, "evident to one's self and to nobody else." *See* http://quote.robertgenn.com/auth_search.php?name=Ambrose%20Bierce.

We emphasize again that we do not believe any one of the shortcomings we have identified, considered in isolation, would compel a finding of misconduct. Moreover, the same failures of scholarship, analysis and objectivity in a more routine, less important, matter would not necessarily rise to the level of misconduct.

Id. at 8-9, 188.

The notion that only two attorneys will be held to OPR's "self-evident, highest standards" requirement cannot save OPR's conclusion. Nothing in the OPR Policies and Procedures, the OPR Analytical Framework, or any ethical rules supports the startling conclusion that whether "shortcomings" by a Department attorney "rise to the level of misconduct" turns on whether the matter in question is determined by some unknown test to be important or "less important." OPR has gone entirely off the deep end—setting aside completely the standard it is *supposed* to apply in favor of an undefined, unsupported sliding scale "standard" completely at odds with any known law. Application of this "super standard of care" may be something that "seems self-evident" to OPR, but it is not to be found elsewhere.

Finally, the Department cannot help but recognize that the approach and conclusion reached by OPR here are not merely indefensible, they are affirmatively dangerous. The Department should not *want* to publish or sanction a conclusion that tells its clients that the "degree of competence, thoroughness and objectivity" Department attorneys must bring to bear on the client's legal problems depends on whether the Department considers those problems "important." And the Department should be aghast at the thought of telling its own attorneys that they can be deemed not simply to have "made a mistake, or used poor judgment" by failing to exhibit the "highest degree" of competence, thoroughness, and objectivity, but can be found to have engaged in professional misconduct subjecting them to bar sanctions. These are untenable, even embarrassing positions for the Department to take. That, however, is precisely what OPR would have the Department do here. That position, and the OPR's findings, should be soundly rejected by wiser heads at the Department.

II. OPR's Failure to Consider the Facts and Circumstances Faced by Professor Yoo, and Its Failure Even to Recognize that the Bottom-Line Advice Provided Was Reaffirmed By Other OLC Attorneys In Subsequent Opinions, Demonstrates That OPR's Conclusions Are Biased and Unsound.

In Section I, above, we have identified the most significant overarching errors of law that infect OPR's entire analysis and render its conclusions insupportable and incorrect. In Section III, below, we address the numerous and in some instances inexcusable errors in OPR's specific critiques of the Memoranda at issue here. Before turning to this topic, however, we address in the present Section two critical points that help to illustrate the biased approach that OPR has brought to its task, and how that approach has contributed to OPR reaching its faulty conclusions.

A. OPR Does Not Assess Professor Yoo's Conduct in the Factual Context in Which It Occurred, as the Rules of Professional Conduct Require.

The D.C. Rules of Professional Conduct, on which OPR relies, “presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.” D.C. Rule, “Scope,” cmt. [3]; *see also Atty. Grievance Comm’n of Md. v. Kemp*, 641 A.2d 510, 514 (Md. 1994) (assessing ethical violations based on “the facts and circumstances of the particular case”). OPR does not even try to assess Professor Yoo’s conduct through that prism. Among other shortcomings, it omits all discussion of the wartime mindset thrust upon the United States by the 9/11 terrorist attacks and of the accompanying fear of a follow-on attack still prevalent throughout the country in August 2002, and omits even to mention the chilling facts upon which OLC was required to render a complex and difficult legal opinion:

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here . . . [Abu Zubaydah] is withholding information regarding the terrorist networks in the United States or Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. . . . [Y]our intelligence indicates that there is currently a level of “chatter” equal to that which preceded the September 11 attacks.

Classified Bybee Memo at 1.

While quick to smear Judge Bybee and Professor Yoo by leading its Draft Report with a reference to “detainee abuse by United States soldiers at the Abu Ghraib prison,” and to next engage in a lengthy paean to sensationalist, ill-informed and highly biased critical statements by selected “[c]ommentators, law professors and other members of the legal community,” OPR *avoids* any discussion of the extraordinary “facts and circumstances [facing the attorneys] as they existed at the time of the conduct in question,” as the D.C. Bar rules mandate. Given that the Memoranda were drafted under enormous pressure as part of our government’s response to one of the seminal, most catastrophic events in U.S. history, this omission is both shocking and revealing of the bias that OPR has brought to this matter. But since OPR has failed to assess Professor’s Yoo’s conduct in the context of the post-9/11 crucible, we do so here.

When the Bybee Memo and Classified Bybee Memo were signed on August 1, 2002, the Nation was less than eleven months removed from the deadliest terrorist attack ever on United States soil. The seven and a half years since 9/11 without a similar attack have perhaps dulled memories of the lingering uncertainty that gripped the Nation at that time. Dennis C. Blair, President Obama’s Director of National Intelligence, described the country’s mood in 2002 in these terms:

It is important to remember the context of these past events. All of us remember the horror of 9/11. *For months afterwards we did not have a clear understanding of the enemy we were dealing with, and our every effort was focused on preventing further attacks that would kill more Americans.* It was during these months that the CIA was struggling to obtain critical information from captured al Qaeda leaders, and requested permission to use harsher interrogation methods. The OLC memos make clear that senior legal officials judged the harsher methods to be legal.

Statement by the Director of National Intelligence Dennis C. Blair (Apr. 16, 2009), *available at* http://www.dni.gov/press_releases/20090416_1_release.pdf (emphasis added).

Leaders in Congress and in the intelligence community offered similar assessments of the state of the Nation following 9/11. Senator Bob Graham (D-Fla.), who was chairman of the Senate Select Committee on Intelligence in 2002, said at that time that “[u]nfortunately, we are not living in times in which lawyers can say no to an operation just to play it safe. . . . We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal opinion just because it is easier to put on the brakes.” The Washington Post’s Bob Woodward, hardly a hawk in normal times, wrote in his book *Bush at War* that “I asked the president whether he and the country had *done enough* for the war on terror The possibility of another major attack still loomed.” (Emphasis added). Bret Stephens, *The Politics of Liberal Amnesia*, Wall St. J. (Apr. 28, 2009) (citing and quoting sources above). These are, of course, but two snippets from tens of thousands of accounts of the justified fear that gripped the United States in late 2001 and early 2002.

It is undeniable, if not as front of mind as once was the case, that in the weeks and months immediately following 9/11 the entire Nation was gravely concerned that another catastrophic attack might be imminent. It is also now known, as noted above, that during this time “the CIA was struggling to obtain critical information from captured al Qaeda leaders.” And it is also known, as the OPR itself acknowledges in the “Background” section of the Draft Report (but subsequently forgets), that the White House (and others) were most anxious for OLC to complete its work on the Bybee Memo and the Classified Bybee Memo “as soon as possible.” D.R. 35 (quoting Yoo email of July 26, 2002). Patrick Philbin indeed told OPR that OLC faced “time pressures” and on August 1, 2002 was told that “this has to be signed tonight.” *Id.* at 39.

With this extraordinary context in mind, a number of OPR’s critiques of Professor Yoo and his colleagues can readily be seen to be not only unfair, but bordering on ridiculous. In this context, for example, OPR’s pseudo-dramatic assertions to the effect that OPR had “found evidence that the OLC attorneys were aware of the result desired by the client,” that ██████ admitted her “personal perspective was there could be thousands of American lives lost’ if the techniques were not approved,” and that “OLC attorneys tailored their research and analysis to achieve the result desired by the client,” *id.* at 180-81, demonstrate that OPR has completely lost its bearing (if not its mind) with respect to these “facts and circumstances.”

Of course the attorneys at OLC knew what the CIA wanted, since they knew the Agency was attempting to get information to thwart further terrorist attacks, and indeed OLC obviously

was being asked to opine on specific interrogation techniques that it knew the CIA wished to use if it legally could do so. In any event, it was hardly improper that OLC knew what its client wanted; even in ordinary circumstances an attorney issuing a legal opinion nearly always knows “the result desired by the client,” and to suggest that there is something nefarious or unusual about this is either naïve or disingenuous. And *of course* OLC attorneys had a “perspective” that thousands of lives could be lost if the CIA could not go forward with its interrogation program—that is what they were being told by the experts at the Agency, and they were in no position to dispute this proposition. And *of course*, to be blunt, Professor Yoo and others sought to determine whether there was a *legitimate* legal basis to permit the CIA to go forward with what the lawyers were being told was a national security imperative of the highest order. OPR’s apparent abhorrence of this perfectly appropriate fact demonstrates its complete inability to grasp the significance of the “facts and circumstances as they then existed”—as well as how OLC has properly operated within the Justice Department for decades.

Unlike the law professor critiques beloved by OPR, or indeed the Draft Report itself, Professor Yoo and the others at OLC did not face what was primarily an academic exercise, but rather very difficult, real-life issues as to which there was limited existing legal guidance. In its exercise of “post-post-9/11” hindsight, OPR gives no weight at all to the intense situation facing Professor Yoo and other OLC attorneys, and in particular the real and very grave concern that if the OLC was unduly conservative in its legal analysis the result quite literally could be the loss of thousands of lives. OPR, from its biased vantage point, recognizes only *one side* of the difficult problem presented to OLC: the danger of condoning what some might later conclude, correctly or incorrectly, to constitute “torture.” It utterly fails to see—or perhaps consciously refuses to admit—the *other side* of what was in fact a razor’s edge: the danger, measured in potential innocent lives lost, of being that lawyer feared by Senator Graham who says “no to an operation just to play it safe.” *In undertaking the tasks assigned to him, Professor Yoo did not have the practical option of simply taking the “safe” route and saying no, where he believed in good faith that the answer was “yes.”* Nor, as a practical matter given the requests of his client, did Professor Yoo have the option to say “no comment” on the topics that OPR blasts as “unnecessary,” as we address below.

Apart from this huge blind spot, OPR’s analysis also suffers from other failures to evaluate Professor Yoo’s conduct in context. The Draft Report repeatedly suggests, for example, that Professor Yoo and other OLC attorneys who contributed to the Bybee Memoranda were not working under time pressure. D.R. 24 & n.28; *id.* at 179 n.167. Certain of them (including Professor Yoo) did, concededly, have several months to work, time enough to complete a creditable job. But there was significant time pressure, as noted above, and the OLC attorneys did not have the luxury of sufficient time to give thorough treatment to every conceivable issue or set of facts that an OPR attorney with four-and-a-half years and a body of *ex post* criticism might deem relevant. As Professor Yoo noted in his statement to the House Judiciary Committee: “[W]e gave our best effort under the pressures of time and circumstances. We tried to answer these questions as best we could. Certainly we could have used more time to research and draft the legal opinions. But circumstances did not give us that luxury.” *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration*

Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 110th Cong. 11 (June 26, 2008). [CA*2]⁹ OPR takes no account of these facts and circumstances.

In addition to downplaying the obvious time constraints, OPR also completely ignores the fact that OLC was limited in the resources it could to bring to bear given the security classification of the matter, the logistical issues that accompany such classification, and the many other pressing national security concerns demanding the attention of its attorneys. It is of little significance that Levin and Bradbury—with the benefit of hindsight and time—altered the legal analysis slightly or addressed some additional factual considerations, because it is clear that the bottom-line OLC advice did not change. The authors of the Draft Report may believe that the Levin and Bradbury Memoranda are superior to the Bybee Memoranda, but that is no grounds for disciplinary sanction, especially when the circumstances facing the authors of the Bybee Memoranda are fairly considered.

The failure of OPR to account for the facts and circumstances facing Professor Yoo and others as it must do in order to judge their conduct properly cannot, at the end of the day, be discounted as a mere oversight; rather it appears to be nothing short of intentional. OPR quotes academics who wrote in the safety of their ivory towers in 2004, D.R. 2—but not those in the real world who understood the enormous burdens facing government officials charged with protecting the Nation immediately after 9/11. OPR emphasizes that OLC attorneys faced an “issues of major importance”—but means only the “issue” of preserving “a norm of jus cogens” under international law, *id.* at 130, not the importance of preventing another terrorist attack on American soil. And OPR takes four and one half years to produce a document that shamelessly borrows virtually all of its cited case law from biased critics and itself makes numerous glaring, fundamental errors in its analysis—but then seeks to micro-critique the work of attorneys who had only a small fraction of this amount of time, were forced to struggle with seriously difficult issues, and (unlike OPR) had very limited ability to seek help from outside sources, without any recognition of these burdens and constraints. As we demonstrate further below in addressing its particular critiques of the Memoranda, OPR’s analysis is, at the end of the day, heavily infected and biased by this failure to take proper account of the facts and circumstances facing Professor Yoo and others at OLC in preparing the Memoranda at issue here.

B. OPR Ignores That The Specific Conclusions Reached Regarding Permissible Interrogation Techniques Were Confirmed By Numerous Other Attorneys, and Use of Those Techniques Were Approved By Numerous Policymakers.

Following its pattern of selective analysis, the Draft Report conspicuously omits the fact that the core conclusions of the two Bybee Memoranda were never disavowed or repudiated during the Bush administration. It was perhaps to avoid this fact that OPR attempted to prevent

⁹ References to “CA*__” refer to the Classified Addendum to this submission.

Professor Yoo and his attorneys from reviewing the Bradbury Memoranda, which prove the point.¹⁰

The Draft Report places great emphasis on the fact that the unclassified Bybee Memo was “replaced” by the Levin Memo,¹¹ but fails to mention that the Classified Bybee Memo—which provides the detailed guidance—remained in effect. The Levin Memo *confirmed, rather than disavowed, the conclusions reached by Professor Yoo and his colleagues as to what precisely the CIA could and could not do*. The Levin Memo underscores this point:

While we have identified disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and *do not believe that any of their conclusions would be different under the standards set forth in this memorandum*.

Levin Memo at 2 n.8 (emphasis added). [CA*4]

The Classified Bybee Memo was later *superseded* by the Bradbury Memoranda, but as we now know the bottom-line advice again did not change. As the now-public Bradbury Memoranda make clear:

In order to avoid any confusion in this extremely sensitive and important area, the discussion of the statute in the [Levin Memo] and this memorandum *supersede* that in the [Classified Bybee Memo], however, this memorandum *confirms the conclusion of* the [Classified Bybee Memo]

Bradbury Techniques Memo at 6 n.9 (emphasis added).¹²

Although the Levin and Bradbury Memoranda modify slightly the specific intent and statutory interpretation analyses, the differences are not great. And while the Levin Memo also omits discussion of the Commander-in-Chief power and common law defenses, it does so only because it brands the discussions “unnecessary.” *Id.* at 2. Of course, as David Addington made clear in his testimony before the House Judiciary Committee, Professor Yoo and Judge Bybee did not have the luxury of ignoring the very questions asked by their client. *See* Section III.A.3, *infra*.

¹⁰ OPR describes and defines the Bradbury Memoranda at footnote 6 of the Draft Report and the accompanying text. Notwithstanding OPR’s refusals, most of these memoranda were publicly released on April 16, 2009, near the end of the period that OPR reluctantly allotted for Professor Yoo and Judge Bybee to comment on the Draft Report.

¹¹ Memorandum for Deputy Attorney General James B. Comey *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (December 30, 2004).

¹² The Classified Bybee Memo of course relies heavily on its unclassified counterpart.

The Levin Memo also emphasizes the distinction between legal advice and policy advice. It explicitly makes the point that OLC attorneys—including the authors of the Bybee Memoranda—understood this distinction and offered only legal advice:

[OLC's] task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

Levin Memo at 4 n.11. The Yoo Memo makes a similar point: “By delimiting the legal boundaries applicable to interrogations, we of course do not express or imply any views concerning whether and when legally-permissible means of interrogation should be employed. That is a policy judgment for those conducting and directing the interrogations.” Yoo Memo at 1 n.1. Thus, not only did OLC attorneys understand this distinction, but their repeated statements ensured that the audience of the memos understood it, too.

The authors of the Draft Report, however, apparently fail to understand this distinction, because they condemn the authors of the Bybee Memoranda on matters of *policy* even though the legal conclusions in the Bybee Memoranda were affirmed in subsequent OLC opinions. Indeed, the Draft Report's detailed (and largely irrelevant) factual background sections reveal quite clearly that OPR's real disagreement is with the Bush administration's anti-terrorism policies rather than the legal advice given by OLC. Our Classified Addendum to this letter—chronicling OPR's fixation on inflammatory and irrelevant “slippery slope” and “parade of horrors” examples from classified sources—makes this point abundantly clear. [CA*5]

Moreover, the techniques approved by the Classified Bybee Memo were vetted by senior members of Congress in the month after the memo was signed without objection:

In September 2002, four members of Congress met in secret for a first look at a unique CIA program designed to wring vital information from reticent terrorism suspects in U.S. custody. For more than an hour, the bipartisan group, which included current House Speaker Nancy Pelosi (D-Calif.), was given a virtual tour of the CIA's overseas detention sites and the harsh techniques interrogators had devised to try to make their prisoners talk.

Among the techniques described, said two officials present, was waterboarding, a practice that years later would be condemned as torture by Democrats and some Republicans on Capitol Hill. But on that day, no objections were raised. Instead, at least two lawmakers in the room asked the CIA to push harder, two U.S. officials said.

Joby Warrick and Dan Eggen, *Hill Briefed on Waterboarding in 2002*, The Wash. Post, December 9, 2007, at A1.¹³ These legislators could have introduced legislation to clarify the definition of torture in the statute, but they did not—obviously indicating that those lawmakers did not clearly consider the techniques approved by the Bybee Memoranda to fall within the statute’s definition of torture. But OPR does not find this to be a relevant fact.

These critical facts—that the bottom-line advice did not change, even after the unclassified Bybee Memo was withdrawn and subjected to public debate and criticism, and that lawmakers did not amend the statute after they were briefed on the interrogation program—should be of utmost importance when assessing Professor Yoo’s work. But OPR never mentions them. OPR merely quibbles with the analytical steps taken to reach the (repeatedly reaffirmed) legal conclusions, and objects to policy decisions the Bush administration made after consulting with bipartisan congressional leaders. But even if OPR is right on these policy fronts—and it is doubtful that one can be “right” about such subjective matters—neither is remotely sufficient to support a charge of professional misconduct.

III. OPR Has Not Remotely Demonstrated That Professor Yoo Has Committed Professional Misconduct, Much Less Done So By Clear And Convincing Evidence.

The Draft Report brims with sweeping statements delivered with magisterial assurance but wholly bereft of relevant factual and legal support. Indeed, OPR confidently asserts that Professor Yoo violated D.C. Rules 1.1 and 2.1 in multiple respects—that is, he violated the most basic duties of competence and candor—but utterly fails to substantiate this claim under the standards required by the law of the District of Columbia. In fact, the Draft Report does not even *cite* any relevant D.C. authorities. Under D.C. law, violations of the D.C. Rules of Professional Conduct must be established by “clear and convincing evidence.” *In re Romansky*, 938 A.2d 733, 739 (D.C. 2007); *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Nothing in the Draft Report remotely could meet this stringent proof requirement, and presumably for that reason OPR has not even *tried*. The fact that OPR has not only ignored its longstanding rule that a bar referral is appropriate solely for “intentional” or “reckless” violations but has also failed even to *consider* the level of proof required by the jurisdiction it believes most relevant speaks volumes of the dismayingly low level of care that the drafters of the report have brought to their result-driven task.

It would be impossible to catalog fully the factual and legal errors that permeate the Draft Report, especially given the extraordinary lengths to which OPR has gone to withhold the evidence on which it selectively relies and to truncate the time and the opportunities available for

¹³ See also Michael Hayden and Michael B. Mukasey, *The President Ties His Own Hands on Terror*, The Wall Street Journal, April 17, 2009, at A13 (“Details of these [intelligence-gathering] successes, and the methods used to obtain them, were disclosed repeatedly in more than 30 congressional briefings and hearing beginning in 2002, and open to all members of the Intelligence Committees of both Houses of Congress beginning in September 2006. Any protestation of ignorance of those details, particularly by members of those committees, is pretense.”).

review by Professor Yoo and his counsel. But even within the framework of these artificially-imposed constraints there should be no doubt that the errors in the draft are so fundamental and pervasive that any issues of competence and candor that any fair minded observer could find in the current circumstances arise solely in connection with the Draft Report, not the OLC Memoranda. Indeed, the Draft Report strains at every turn to distort the analysis set forth in the Bybee Memo, ripping snippets completely out of context in order to set up strawmen. And, for good measure, the legal analysis offered in support of these attacks is deficient by any conceivable measure.

OPR asserts, for example, that it “know[s] of *no authority* . . . in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term.” D.R. 138 (emphasis added). Elementary legal research—or even the help of a reasonably able first-year law student—easily could have cured this deficiency in the drafters’ knowledge, for there are many Supreme Court cases that stand for just such a proposition. The Draft Report also rehashes the Levin Memo’s critique of “specific intent,” but never so much as cites—much less discusses—the most recent Supreme Court case on the subject, which was expressly relied on by the Bybee Memo. That case, *United States v. Carter*, 530 U.S. 255 (2000), was also relied on by the *en banc* Third Circuit when it interpreted specific intent under the CAT, by a lopsided vote of 10 to 3, much as the Bybee Memo did. *See Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008) (en banc). Indeed, given that the three judges who disagreed devoted a third of their unsuccessful opinion to a lengthy block quotation from the Levin Memo, *id.* at 193-95, it is inexplicable that OPR failed to cite or discuss this or other similar cases from other circuits. Other portions of the Draft Report dwell on picayune criticisms or are based on premises that evince little awareness of OLC’s and the Executive Branch’s longstanding positions.

Were the stakes for Professor Yoo not so high, these omissions would be ironic, for the Draft Report’s entire analysis is built on the propositions that “[l]egal research must be sufficiently thorough to identify all current, relevant primary authority,” and that competence “requires the ability to research the law and to identify controlling legal authority.” D.R. 127. In fact, although Attorney General Mukasey and Deputy Attorney General Filip pointedly noted a number of crass, comparable legal errors in the December version of the report, it appears that OPR responded solely with cosmetic fixes—and very little evident effort to take the harshly negative views of two experienced former federal judges as a wake-up call to go back to basics and ensure the basic legal quality of its work product. Indeed, the alacrity with which OPR issued a “new” draft of the report after Judges Mukasey and Filip left the Department of Justice, the ensuing number of leaks that could have originated only with OPR, and the obvious flaws that remain, make plain that the Draft Report is driven primarily by OPR’s strong policy disagreements with the policies of the last Administration.

It is true, of course, as recent events have made quite clear, that people of good will can have reasonable disagreements with the Bush Administration’s decision to implement the specific techniques approved by the OLC Memoranda. But it is equally true that a professional misconduct investigation is not an appropriate forum to vent policy disagreements, however strongly and sincerely they may be felt. The Draft Report should evaluate only whether

Professor Yoo's *legal* work satisfied the governing standards of professional conduct. OPR has not come remotely close to proving any such thing by any standard of proof, much less by clear and convincing evidence.

A. The Draft Report Does Not Establish By Clear And Convincing Evidence That Professor Yoo Intentionally Or With Reckless Disregard Violated The Duty Of Competence.

OPR contends that “the Bybee Memo did not constitute competent legal advice within the meaning of Rule 1.1.” D.R. 178. Rule 1.1 imposes the duty of competence in these terms:

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

D.C. R. Prof'l Conduct 1.1.

The comments to Rule 1.1 flesh out this standard. Comment [1] provides that assessing whether an attorney has displayed the requisite level of knowledge and skill requires an analysis of “relevant factors includ[ing] the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.” *Id.* cmt. [1]. Comment [2] adds that “analysis of precedent, the evaluation of evidence, and legal drafting” are all “important legal skills.” *Id.* cmt. [2]. Comment [5], in turn, explains how to assess an attorney’s thoroughness and preparation, stating that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. . . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.” *Id.* cmt. [5].

The Draft Report cites Comments [2] and [5], but it never mentions Comment [1], and thus does not examine *any* of the “relevant factors” for assessing knowledge and skill in these circumstances. That OPR continues to ignore this factor is quite surprising, since Judges Mukasey and Filip left no doubt that the failure to assess the circumstances surrounding the advice when it was given was one of the signal failings of OPR’s earlier draft. As OPR well knows, and as Professor Yoo testified before the House Judiciary Committee last summer, the issues with which the Bybee Memoranda grappled arose almost immediately in the aftermath of a horrifically deadly terrorist attack—the worst in the Nation’s history—when the Nation’s leaders and everyone in the country feared that additional and similarly deadly attacks might soon ensue. Professor Yoo worked tirelessly to respond to the interrogation inquiries at the core

of the Bybee Memoranda as part of a docket that included countless other inquiries of similarly great and urgent import to the life of the citizenry. In addition, he was required to do so within the constraints of very strict classification rules that drastically limited his ability to consult with others inside and outside the Department.

Even so, the Bybee Memoranda were fully vetted by the highest officers of the Department of Justice, including the head of the Criminal Division—a distinguished former prosecutor and (later) federal appellate judge—and the Attorney General himself, an extraordinarily experienced attorney and former legislator with long service on the Senate Judiciary Committee. As Professor Yoo stated in his House testimony, “[t]hese were hard questions, perhaps the hardest that a government lawyer can face,” but he and his colleagues at OLC “tried to answer th[ose] questions as best [they] could. Certainly [they] could have used more time to research and draft the legal opinions. But circumstances did not give [them] that luxury.” *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Congress. 11 (2008) (statement of John Yoo, Professor, Boalt Hall School of Law, University of California at Berkeley) at 2. As we have noted above, the Draft Report reflects no understanding or consideration of the fact that Professor Yoo acted with the utmost good faith to interpret the law in a time of grave national emergency.

Even more inexplicably, the Draft Report does not cite a single D.C. case interpreting Rule 1.1 or disciplining an attorney for violating that rule. Yet “prov[ing] a violation” of Rule 1.1 under D.C. law requires a showing not only “that the attorney failed to apply his or her skill and knowledge, but that this failure *constituted a serious deficiency in the representation.*” *In re Evans*, 902 A.2d 56, 69-70 (D.C. 2006) (emphasis added). What constitutes a “serious deficiency” is a fact-specific determination, but “[i]t has generally been found in cases where the attorney makes an *error that prejudices or could have prejudiced a client* and the error was caused by a lack of competence.” *Id.* (emphasis added). “Mere careless errors do not rise to the level of incompetence.” *Id.*

Because it did not cite the D.C. standard, OPR never identified any “error” in the Bybee Memoranda “that prejudices or could have prejudiced” OLC’s client—the Executive Branch. Without identifying such an error, OPR cannot demonstrate a “serious deficiency” in Professor Yoo’s legal advice—and therefore necessarily has failed to compile “clear and convincing evidence” of a violation of Rule 1.1. In addition, the Draft Report fails to establish by clear and convincing evidence that Professor Yoo intentionally or with reckless disregard “failed to apply his . . . skill and knowledge” when preparing the memos. *In re Evans*, 902 A.2d at 69. As noted above, none of the “relevant factors” from Comment [1] are discussed in the Draft Report, so its assessment of Professor Yoo’s “skill and knowledge” is entirely unsupported and unexplained. This omission is glaring, for the legal questions posed after 9/11 were exceedingly “complex[]” and “specialized.”

Indeed, as the following rebuttals to the Draft Report’s substantive critiques show, OPR has demonstrated at best a difference of opinion on the way some of the issues relevant to the ultimate advice (whether specific interrogation techniques were lawful) might have been answered—not clear and convincing evidence that the answers themselves were so insufficient as to constitute professional misconduct under D.C. Rule 1.1.

1. The Interpretation of the Torture Statute in the Bybee Memo Constituted Competent Legal Advice.

The anti-torture statute defines “torture” as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.” 18 U.S.C. § 2340(1). OLC was asked to analyze this statute so that Executive Branch policymakers could determine whether possible options for responding to the War on Terror comported with the law. OPR contends that the Bybee Memo incompetently analyzed the meaning of the phrase “severe physical or mental pain or suffering” in that statute. That contention, which is based on a gross distortion of the memo’s analysis, is wrong. Professor Yoo and the other authors of the Bybee Memo competently performed this task, using well-accepted interpretive methods.

The Bybee Memo began by looking to the plain meaning of the word “severe,” because Congress did not define that word statutorily. They first looked to its dictionary definition, which disclosed that pain or suffering is “severe” if it is “of such a high level of intensity that the pain is difficult for the subject to endure.” Bybee Memo at 5. The Bybee Memo then examined other statutes that used the term “severe pain” to determine whether Congress’s use of the word “severe” in those statutes “shed more light on its meaning” in § 2340(1). *Id.* Their research disclosed that Congress used the term “severe pain” in six different provisions (relating to health benefits) when defining an emergency medical condition. Under those statutes, an emergency medical condition is one:

manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—
(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part. 42 U.S.C. § 1395ww-22(d)(3)(B).

The Bybee Memo expressly acknowledged that these statutes “address a substantially different subject from Section 2340,” but, after citing *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), found them “nonetheless helpful for understanding what constitutes severe physical pain,” Bybee Memo at 6. The memo concluded that these health benefits statutes “suggest” that for pain to be sufficiently “severe” under Section 2340 such pain must rise to a “similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions.” *Id.* at 6 (emphasis added). As the Bybee Memo makes clear, those statutes were deemed relevant because they *confirmed* the ordinary meaning of the statutory language: “[T]his view of the criminal act of torture is consistent with the term’s common meaning. Torture is

generally understood to involve ‘intense pain’ or ‘excruciating pain,’ or put another way, ‘extreme anguish of body or mind.’” *Id.* at 13.

The Draft Report, however, rips the health benefits citations completely out of their context and falsely treats them as if the Bybee Memoranda had used “death, organ failure, and serious impairment of bodily functions” as a ready-made, three-prong test for torture to be used (or misused) by “interrogators” in the field—even though the memoranda manifestly were written to guide a very small and quite sophisticated legal audience, not for any “interrogators” in the field or the bloggers from which OPR evidently gets *its* legal analyses. D.R. 139 & n.123. And although the memorandum expressly asserts that the health-benefits statutes were *not* related to the torture statute, and though Judge Bybee expressly informed OPR that he and Professor Yoo used those statutes for other legally appropriate reasons and *not* in reliance on the “*in pari materia*” canon, OPR nonetheless asserts that the Bybee Memo *must* have relied on that canon because (1) the memorandum cited *Casey*, which according to OPR “was premised upon the *in pari materia* doctrine,” D.R. 139, and (2) OPR “know[s] of no authority . . . in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term,” *id.* at 138. On the basis of this reasoning, OPR concludes that the Bybee Memo’s analysis of the phrase “severe pain” was “illogical,” “unsupported by conventional legal analysis,” and “not supported by relevant legal authority.” D.R. 135, 139.

Every component of this argument is wrong. As already noted, the Bybee Memo acknowledged that the health-benefits statutes “address a substantially different subject matter from” the torture statute but cited them because, in conjunction with dictionary definitions, they could “shed more light” on the ordinary meaning of “severe pain.” Bybee Memo at 5. *Casey* directly supports the appropriateness of examining unrelated statutes in this way, to help clarify the meaning of statutory terms. In *Casey*, the interpretive issue was whether the term “attorney’s fees” in a civil-rights litigation fee-shifting statute included fees for expert witnesses. *See Casey*, 499 U.S. at 84. The Supreme Court answered that question by surveying the fee-shifting provisions of more than 34 other *unrelated* statutes, including the Toxic Substances Control Act and the Endangered Species Act. *Id.* at 88-89 & n.4. Based on its review of those unrelated statutes, the Court concluded that “the record of statutory usage demonstrates convincingly that attorney’s fees and expert fees are regarded as separate elements of litigation cost.” *Id.* at 88. Indeed, the persuasive value of unrelated statutes in evaluating plain meaning is so powerful that *Casey*, in the passage cited by OPR and the Bybee Memo, *rejected* the petitioner’s effort to *trump* it by relying on the *in pari materia* canon—*i.e.*, by relying on related statutes that seemingly took a different approach to the fees question. Far from supporting any notion that Professor Yoo failed to engage in “conventional legal analysis,” *Casey* plainly shows that OPR’s approach to statutory interpretation is spectacularly mistaken.

Given that the authors of the Draft Report could not be troubled to extend their legal research as far as the adjacent pages of *Casey*, it is not very surprising that they also did not survey other Supreme Court precedent in assessing the Bybee Memo’s statutory interpretation. Even a brief survey of that precedent confirms that the Bybee Memo’s approach fell well within the realm of “conventional legal analysis.” At least five Supreme Court cases follow that same approach:

- In determining the meaning of the word “now” under the Indian Reorganization Act, the Court found it relevant that the dictionary definition was “consistent with interpretations given to the word ‘now’ by this Court . . . with respect to its use in other statutes.” *Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009). The Court cited its prior decisions interpreting the word “now” in unrelated statutes: a federal criminal statute and a statute granting citizenship status to certain foreign-born children. *See id.* (citing *Franklin v. United States*, 216 U.S. 559, 568-69 (1910); *Montana v. Kennedy*, 366 U.S. 308, 310-11 (1961)).
- To support its conclusion that the term “sanction” in the Clean Water Act refers to “coercive fines,” not to punitive fines—and thus does not waive the United States’ sovereign immunity—the Court found that “examples of usage [of the term ‘sanction’] in the coercive sense” in unrelated statutes were relevant interpretive aids. *Dep’t of Energy v. Ohio*, 503 U.S. 607, 621-22 (1992). Among others, these included the Federal Rules of Civil Procedure, the California Civil Procedure Code, and a statute waiving sovereign immunity for federal medical-waste disposal facilities. *See id.*
- In holding that personal injury awards could fall within the definition of “income” under the Aid to Families with Dependent Children statute, the Court looked to definitions of “income” in the Internal Revenue Code and the Food Stamp Act. *Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality opinion). That Congress expressly *excluded* personal-injury awards from “income” under those statutes, the Court said, supports the proposition that such awards are *included* in “income” under the AFDC statute, which is silent on the subject. *See id.*
- In determining that “in concert” under the Comprehensive Drug Abuse Prevention and Control Act means “cooperative action and agreement,” the Court found it relevant how the phrase had been used in unrelated statutes. Citing six statutes on different subject matters, including the Federal Election Campaign Act, the Merchant Marine Act, the Commodity Futures Trading Commission Act, and the Interstate Commerce Act, the Court conclude that the phrase had generally had the same meaning. “This,” the Court said, “suggests that Congress intended the same words to have the same meaning” in the Act being interpreted. *Jeffers v. United States*, 432 U.S. 137, 148 n.14 (1977) (plurality opinion).
- In concluding that partnerships were included in the definition of the term “whoever” in a criminal statute relating to the safe transportation of dangerous material, the Court deemed it relevant that Congress had specifically included partnerships within the definition of “person” in “a large number of regulatory acts,” including the Civil Aeronautics Act, the Federal Communications Act, the Shipping Act, and the Tariff Act. *United States v. A & P Trucking Co.*, 358 U.S. 121, 124 n.3 (1958). Based on the language of these unrelated statutes, the Court concluded that Congress had “show[n] its intent to treat partnerships as entities” in the criminal statute. *Id.*

Finally, although OPR failed to read *Casey* or conduct a minimally competent search of Supreme Court cases before asserting that there is “no authority” for examining unrelated laws in statutory interpretation, it apparently believes that its view is supported by the Sutherland treatise. D.R. 137-38. That treatise, OPR sarcastically notes, “was available in the main DOJ library when the Bybee Memo was written.” *Id.* at 137-38 & n.121. Evidently, however, the treatise had ceased to be available at the Justice Department library when the Draft Report was prepared. From the briefest perusal of it, OPR could have learned that it devotes an entire chapter to “interpretation by reference to statutes on *other subjects*,” with a section entitled “interpretive relevance of *unrelated* statutes.” 2B NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION ch. 53, § 53:03 (6th ed. 2000) (emphases added). The treatise explains that “[t]hose forces which operate to produce a sufficient incidence of congruence *even among statutes on different and dissimilar subjects* are conventional modes of thinking about legislative problems and solutions, *common idioms and customary language usage*, and established approaches to the design of the statutory provisions.” 2B SINGER § 53:01 (emphases added); *see also* 2B SINGER § 53:04. Indeed, “[t]he difference between statutes which are closely enough related to be regarded as *in pari materia* and those which are not is . . . only one of degree.” 2B SINGER § 53:02.

In sum, the Draft Report commits a litany of legal and logical errors in trying to show that the Bybee Memo’s reference to health-benefits statutes falls well outside the scope of conventional legal analysis. The Bybee Memo made an informed and good-faith attempt to give concrete meaning to a particular statutory term. It was well within the bounds of competent legal practice to look at other statutes that, though concededly unrelated in subject matter, used similar language that could throw additional light on the interpretive task. Conceivably, OPR might be able to articulate a reasonable and reasoned basis for following a different approach (though it has yet to do so), but, as should be evident to any impartial observer, reasonable disagreements among lawyers are not the stuff of professional irresponsibility.

2. The Bybee Memo Competently Analyzed—and Correctly Interpreted—The Statute’s Specific Intent Requirement.

In examining the elements of “torture” under 18 U.S.C. § 2340A, the Bybee Memo correctly noted that the statute requires that “severe pain and suffering must be inflicted with specific intent,” which it interpreted as an intent “to achieve the forbidden act.” Bybee Memo at 3. Citing and quoting from the Supreme Court’s then-recent decision in *United States v. Carter*, 530 U.S. 255 (2000), which examined the distinction between “general” and “specific” intent in the context of the bank robbery statute, the Bybee Memo then explained that Congress’s use of “specific intent” in the torture statute meant that the infliction of “severe pain . . . must be the defendant’s precise objective.” *Id.* By contrast, “[i]f the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent.” *Id.* at 3-4. Thus, even if a person knows that severe pain will result from his actions, he lacks the requisite specific intent “if causing such harm was not his objective.” *Id.* at 4. The Bybee Memo concluded by noting that “good faith” is recognized as a defense to “specific intent” crimes, but cautioned that, as a practical matter, a jury was unlikely to credit such a defense if the defendant lacked a reasonable basis for his beliefs. *Id.* at 4-5. This analysis is not merely “competent.” It is manifestly *correct*.

According to OPR, however, the Bybee Memo “failed to adequately advise the client of the state of the law,” because it relied “on brief excerpts from a limited number of cases” and “secondary sources” that failed to disclose “the uncertainty” and “ambiguity of federal case law.” D.R. 142. To support these assertions of “uncertainty” and “ambiguity,” OPR quotes snippets from decades-old Supreme Court opinions stating that distinctions between “general” and “specific” intent can be “elusive” or “difficult,” coupled with the Court’s 1980 observation that in “most crimes the limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the result[s].” *Id.* at 140 (citing and quoting from *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *Bailey v. United States*, 444 U.S. 394 (1980)) (second brackets in Draft Report). OPR also notes that in *Bailey* the Court suggested that conventional analyses of intent might be replaced by a “current trend” exemplified by the Model Penal Code, which would adopt a “‘hierarchy of culpable states of mind.’” D.R. 141. And, according to OPR, “[t]his trend is also reflected in the current model jury instructions for federal criminal cases,” which “discourag[e]” charging juries on specific intent. *Id.* at 141-42. To the same effect, OPR quotes *Liparota v. United States*, 471 U.S. 419 (1985), for the proposition that a “more useful instruction might relate specifically to the mental state required under [the statute in question] and eschew use of difficult legal concepts like ‘specific intent’ and ‘general intent.’” D.R. 140 (brackets in Draft Report).¹⁴

These criticisms are woefully misdirected. A simple reading of the torture statute discloses that “specific intent” *is* “the mental state required” under *this* statute. No client would be interested in learning that the Supreme Court—at least as it was constituted in 1980—might have preferred that Congress legislate in terms slightly more pleasing to the American Law Institute or more consistent with its Model Penal Code. This was particularly true in 2002 of the Counsel to the President of the United States, who, in the middle of advising the President on urgent matters of war, presumably did not have copious amounts of free time for aimless philosophical reflection about alternative legal universes. Nor would a client be served by being told that model jury instructions crafted for *other* statutes discourage judges from telling juries about the particular intent level that Congress happened to pick for *this* statute. And although there might well be policy reasons for criminalizing certain kinds of conduct when the defendant

¹⁴ The federal law at issue in *United States v. Bailey*, 18 U.S.C. § 751(a), penalized the crime of prison escape. 444 U.S. at 396. Neither the language of the statute nor its legislative history mentioned the *mens rea* required for conviction. *Id.* at 406. In *United States v. United States Gypsum Co.*, the Court endorsed a “knowledge” standard for the criminal antitrust prosecutions under Section 1 of the Sherman Act, despite that Section 1 did not include a *mens rea* term. 438 U.S. 422, 444 (1978). The federal law at issue in *Liparota v. United States* penalized anyone who “‘knowingly . . . transfers, acquires, alters, or possesses’” food stamp coupons in a manner not authorized by regulation. 471 U.S. 419, 420 n.1 (1985) (quoting 7 U.S.C. § 2024(b)(1)). The Supreme Court interpreted this statute to require proof that the defendant “knew that his conduct was unauthorized or illegal.” *Id.* at 434.

“merely knew of the practical certainty of” particular results, Congress did not do so. The statute requires “specific intent,” not “knowing” conduct.¹⁵

In fact, although an attorney’s advice must be based on the language Congress actually chose rather than on the policies that might have supported a different choice, Congress certainly had compelling reasons for requiring a very high level of intent in this particular statute. Some of these reasons might have occurred even to OPR—if only it had devoted a moment’s worth of reflection to the issue. In the absence of a specific intent requirement, a statute criminalizing “torture” could, for example, reach a surgeon who performs open heart surgery in an Army base in Germany, or a physician who must amputate a leg in the field of battle in order to save a soldier’s life. Both “know” to a *certainty* that their conduct will inflict “severe pain or suffering,” but neither, of course, is guilty of “torture.”

It is particularly astounding for OPR to say that Professor Yoo “failed to adequately advise the client of the state of the law.” D.R. 142. The “state of the law” was this: in 1994 Congress passed a statute using the common law term “specific intent” and, in June 2000, the United States Supreme Court had just issued an opinion examining the distinctions between “general” and “specific” intent and not finding the concepts troublesome or elusive in the least. *See Carter v. United States*, 530 U.S. 255 (2000). *Carter* analyzed the differences in the context of two different subsections of the bank robbery statute. The Court concluded that one subsection created a “general intent” crime while the other required a showing of “specific intent” to steal, and offered examples to “help make the distinction between ‘general’ and ‘specific’ intent less esoteric.” *Id.* at 268-70. On that basis, the Court concluded that one crime was not a lesser-included offense of the other.

In explaining the precise and straightforward distinctions between “general” and “specific” intent, the Supreme Court cited the LaFave treatise, *Carter*, 530 U.S. at 268-69, the same authority that OPR now cites for the proposition that “specific intent” has not been used consistently by the courts. *See* D.R. 139-40. This supposed inconsistency did not trouble the Supreme Court in the least, presumably because the LaFave treatise *also* states, and demonstrates through numerous examples, that specific intent actually has *one* most common meaning in American law. 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 354 (2d ed. 2003) (“the most common usage of ‘specific intent’ is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime[s]”). With its trademark impeccable candor, OPR naturally mentions *none* of this.

¹⁵ OPR also criticizes the Bybee Memo (D.R. 143), because it cited *Ratzlaf v. United States*, 510 U.S. 135 (1994), as an *example* of a statute that was construed to require specific intent. But this was *correct*: the willfulness requirement at issue in *Ratzlaf* is, in fact, a specific intent requirement. *Ratzlaf* not only said so, but this is not a particularly controversial proposition. *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 697 n. 9 (1995) (amendment to environmental statute in which “willfully” was replaced by “knowingly” made criminal violations of the act “a general rather than a specific intent crime”) (internal quotation marks omitted).

Under the most elementary rules of interpretation, Professor Yoo was required to give the common law term that Congress used—“specific intent”—its established common law meaning. *See, e.g., Evans v. United States*, 504 U.S. 255, 259 (1992). The Bybee Memo did so by citing *Black’s Law Dictionary*, lower court cases, and *Carter*—the Supreme Court’s most recent decision on the very point. Bybee Memo at 3-4. The memorandum also quoted at length one of the examples that *Carter* used. The Draft Report does even cite or discuss *Carter*, much less explain why reliance on the most recent Supreme Court opinion on the subject could remotely be a mark of deficient performance. We daresay that most practicing attorneys would be amused and surprised to learn that reliance on the most recent, on-point authority from the Supreme Court of the United States to answer a question of federal law amounts to misconduct because the case is only one of a “limited number of cases” that were cited. D.R. 142.

In this light, it is quite ironic that the essence of OPR’s misconduct finding is that “adverse authority was not discussed and its effect on OLC’s position was not assessed accurately and fairly.” D.R. 182. The Bybee Memo correctly interpreted the intent requirement of the torture statute *without* the benefit of a developed body of case law addressing intent specifically in the context of torture. Today, of course, there *is* a developed body of case law addressing “specific intent” requirement in the context of torture, but one would not know this from the Draft Report because OPR, apart from not citing the most recent Supreme Court authority on specific intent, also either (1) failed to Shepardize that case, or (2) consciously chose to omit the information because it is extremely inconvenient for OPR’s position.¹⁶

¹⁶ In choosing the most likely explanation, a disciplinary authority charged with assessing the competence and candor of the authors of the Draft Report might find the following factors relevant. First, the authors had every luxury of time, having spent more than four years investigating and supposedly researching the issues, and having had the benefit of analysis and commentary from virtually every political opponent of the last administration’s terrorism policies. Second, it appears from the Mukasey memorandum that the authors of the report falsely represented to the Attorney General of the United States that Judge Bybee and Professor Yoo had not been assured an opportunity to review the report before it issued. Third, although Judges Mukasey and Filip expressly advised the drafters that OPR’s use of unpublished Ninth Circuit opinions could subject *them* to discipline, the OPR attorneys ignored the criticism. *See* D.R. 147 (continuing to rely on *Khamuja v. INS*, 11 Fed. Appx. 824 (9th Cir. 2001) (unpub.)). Fourth, while the Draft Report relies on decades-old, inapposite cases, it fails to discuss binding, recent authority from the Supreme Court and fails even to advert to a wealth of appellate precedent that is squarely adverse to OPR’s position. Fifth, OPR denied Professor Yoo access to any of the evidence with the exception of his own statement and insisted on a compressed time for review, possibly in order to diminish the likelihood that the flaws in its report could be thoroughly exposed. Sixth, the existence and content of the report, as well as AG Mukasey’s decision to return the report to OPR, were leaked to the news media. The reporter who publicized the news wrote to Professor Yoo seeking comment; the reporter’s email (previously provided by us to the Office of the Deputy Attorney General) on its face recited that OPR’s attorneys were unhappy with AG Mukasey’s decision and thus strongly suggested a source in or close to OPR. As was easily foreseeable, the leak immediately prompted calls for immediate release of OPR’s handiwork as it then stood from Senators opposed to the Bush Administration’s terrorism policies. Although a fair-minded observer could conclude that these factors are very strongly suggestive of intentional misconduct, it is nonetheless *possible* that the true explanation is simply rank incompetence.

For example, in two recent cases the Third Circuit construed the definition of “torture” pursuant to regulations issued by the Department of Justice to implement the Convention Against Torture. Those regulations provide, in accordance with the United States’ reservations at the time of ratification, that “[i]n order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.” *Pierre v. Attorney General of U.S.*, 528 F.3d 180, 186 (3d Cir. 2008) (en banc) (quoting 8 C.F.R. § 208.18(a)(5) (emphasis by court)). In *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), a distinguished panel of the Third Circuit (comprised of Judge Fuentes, the late Judge Becker and then-Judge Alito) concluded that the phrase “specific intent” has an “ordinary meaning” “in American criminal law,” and for that reason it must be construed in accordance with that established criminal-law meaning despite the immigration context in which the torture question had arisen in that case. *Id.* at 145.

Relying on *Carter*, the Third Circuit then discussed the issue as follows: “The specific intent standard is a term of art that is well-known in American jurisprudence. The Supreme Court has explained that in order for an individual to have acted with specific intent, *he must expressly intend to achieve the forbidden act.*” *Id.* (emphasis added). After quoting at length the *same example* from *Carter* that was quoted in the Bybee Memo, the Court concluded that “to constitute torture, there *must* be a showing that the actor had the intent to commit the act *as well as the intent to achieve . . . the infliction of the severe pain and suffering.*” *Id.* at 145-46 (emphasis added). That is precisely the analysis set forth in the Bybee Memo. *See* Bybee Memo at 4 (“a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering”). Indeed, it would appear that a similar understanding has prevailed in “[e]very other circuit to consider the question” under the Convention Against Torture. *Villegas v. Mukasey*, 523 F.3d 984, 988 (9th Cir. 2008) (citing, *inter alia*, *Auguste*); *see also Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007) (noting, in another CAT case, that “the phrase ‘specifically intended’ incorporates a criminal ‘specific intent’ standard The President and the Senate knew full well that they construing a treaty designed to stop criminal conduct. We cannot ignore the word ‘specifically’ in the ratification understanding . . . and we decline to give it a counter-intuitive spin.”). OPR, needless to say, does not discuss *any* of these authorities.

In *Pierre v. Attorney General*, another immigration case that somehow also escaped OPR’s notice, the Third Circuit sat *en banc* to consider whether the “specific intent” requirement under the Convention Against Torture is satisfied by a mere showing that an official “knows” that it is “practically certain that [the victim] will suffer severe pain.” 528 F.3d at 182-83. By a lopsided vote of 10 to 3, the en banc court answered that question in the negative. As it had in *Auguste*, the Court again adverted to the ratification history, including the fact that “[b]oth the President and the Senate indicated their understanding” that the Convention “contains a specific intent requirement.” *Id.* at 187. That “understanding,” the Court noted, “has domestic legal effect.” *Id.* The Court also reaffirmed *Auguste*’s reliance on *Carter*, as well as *Auguste*’s conclusion that specific intent to torture requires *both* the intent to do the act *and* the intent to “achieve the consequences of the act, namely the infliction of the severe pain and suffering.” *Id.* (internal quotation marks omitted); *see also id.* at 189-90 (discussing *Carter* and noting that “an actor who knowingly commits an act but does not intend the illegal outcome of that act, can only be held liable for a general, not specific intent crime”).

Accordingly, the Court concluded, “a petitioner cannot obtain relief under the CAT unless . . . [the] prospective torturer *will have the goal or purpose of inflicting severe pain or suffering.*” *Id.* at 190 (emphasis added). The Court addressed the “knowledge” question as follows:

We disagree that proof of knowledge on the part of government officials that severe pain or suffering will be the practically certain result . . . satisfies the specific intent requirement of the CAT. Rather, we are persuaded . . . that the specific intent requirement . . . requires a petitioner to show that his prospective torturer *will have the motive or purpose to cause him pain or suffering.* . . . *Mere knowledge that a result is substantially certain to follow from one’s actions is not sufficient to form the specific intent to torture.* Knowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent.

Id. at 189 (emphasis added).

In light of this analysis, the en banc Third Circuit also squarely rejected the notion that “willful blindness” could be relevant to an analysis of specific intent to torture. *Id.* at 188, 190. “Willful blindness,” the Court explained, “can be used to establish knowledge but it does not satisfy the specific intent requirement in the CAT.” *Id.* at 190. The Second Circuit reached the same conclusion in its own *Pierre* decision (involving a different petitioner with the same surname), explaining that it could “not see how” either “willful blindness” or “deliberate indifference,” “which may bear on knowledge to the extent they establish conscious avoidance, can without more demonstrate specific intent, which requires that the actor intend the actual consequences of his conduct.” 502 F.3d at 118. Again, OPR adverts to *none* of these authorities or their reasoning, even though, in reliance on two older cases that did *not* involve torture, it faults the Bybee Memo because “a prosecutor can challenge” an intent defense based on willful blindness or reckless disregard “under some circumstances.” D.R. 144.¹⁷

OPR’s failure to cite the Third Circuit’s en banc decision in *Pierre* is particularly indefensible, because the three judges in the minority expressly noted that “Jay Bybee . . . set forth an interpretation of ‘specific intent’ that is similar to that espoused by the majority” as a marquee argument for not adopting such an interpretation, *Pierre*, 528 F.3d at 191, 193 (Rendell, J., concurring), and they largely responded to the majority’s arguments with an extremely

¹⁷ For good measure, of course, the Bybee Memo *did* caution the client that “[w]hile as a theoretical matter such knowledge [that severe pain or suffering will result] does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.” Bybee Memo at 4 (case citations omitted). The memo further cautioned that “as a matter of practice” a defendant who acted “unreasonabl[y]” but in good faith was “unlikely” to be acquitted. *Id.* at 5.

lengthy block quotation from the Levin Memo’s analysis, *id.* at 193-95. The minority likewise expressed concern that the majority’s analysis could be read to validate interrogations that intentionally inflict severe pain for a good purpose, such as securing information (*id.* at 196)—a concern that OPR also voices (D.R. 143) even though nothing in the Bybee Memo advises the client that this would be a permissible interpretation under *its* analysis of specific intent. The majority was as impressed with this argument as it was by the rest of the Levin Memo’s analyses; it did not think there was much basis for concern that the interpretation it adopted could lead to such abuses. *See id.* at 190 n.7.

It seems abundantly apparent that OPR performed *no* independent legal work of any nature whatsoever before charging a sitting Article III judge and a tenured member of the Berkeley faculty with professional misconduct based on *their* analysis of intent—though it would seem more than “self-evident that Department attorneys considering” such a grave accusation “must be held to the highest standards of thoroughness and attention.” D.R. 130. And though “the analysis of precedent is an essential element of competent legal advice” (D.R. 127), OPR appears simply to have lifted criticisms and citations wholesale from the Levin Memo, a document that relied solely on decades-old authorities and did not even purport to construe definitively the intent requirement of the torture statute.¹⁸ Beyond cribbing from this source, OPR evidently took *no* steps, much less “adequate” ones “to identify any subsequent authority that affirms, overrules, modifies or questions a cited authority.” D.R. 128; *see also id.* at 164 n.147 (sarcastically extolling the virtues of “[a] simple cite check” that can reveal “dozens of relevant federal appellate decisions”). In sum, “[g]iven the importance of the matter in question,” the fact that *OPR’s work product* falls “far short of the standards expected of competent Department of Justice attorneys” is not reasonably subject to dispute. D.R. 188.

¹⁸ Indeed, OPR cites the Levin Memo *approvingly* for the proposition that it would not be “useful to try to define the precise meaning of ‘specific intent’” in this criminal statute, because “it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.” D.R. 142 n.125. If anything, one may fairly wonder how *that* manifestly circular chain of reasoning constitutes competent legal advice: OLC was asked to interpret a criminal statute that forbids “torture.” Like all criminal statutes, this one has several elements, with “specific intent” indisputably being one of those elements. And, as with all criminal statutes, if proof of any *one* element is missing, the defendant cannot possibly be guilty of the crime. *See, e.g., In re Winship*, 397 U.S. 358, 361 (1970). Thus, it is far from apparent how a competent lawyer could say that “conduct that might otherwise amount to torture” actually *is* “torture” under this statute without defining specific intent and considering whether the defendant harbored it. Presumably, OPR would not contend that one “need not consider” the meaning of the “agreement” element of the conspiracy statute (see 18 U.S.C. § 371), because citizens should not engage in conduct that, in the absence of agreement, “might otherwise amount” to criminal conspiracy.

3. The Bybee Memo Provided A Competent Overview Of The Commander-In-Chief Power And Common Law Defenses At Client Request.

OPR takes issue with the Bybee Memo's discussion of the Commander-in-Chief powers and of *possible* defenses to torture. The premise for this argument is that, while "earlier sections" of the memorandum "were generally responsive to the CIA's request for advice," these "last two sections went beyond that request." D.R. 155. John Rizzo advised OPR that the CIA "did not ask OLC to include those sections," but OPR notes that David Addington, who was then Counsel to the Vice President of the United States, expressed satisfaction to learn that these issues would be addressed in the memorandum. *Id.* at 156. OPR further notes that "these sections were drafted after the Criminal Division" advised the CIA that it would not agree to an "advance declination" of prosecution for the CIA's use of enhanced interrogation techniques. *Id.* "Based on this sequence of events," OPR contends, it is "*likely*" that OLC and White House lawyers engaged in a conspiracy to include these additional sections in the memorandum as the way "to achieve indirectly the result desired by the client—immunity for those who engaged in the application of EITs." *Id.* (emphasis added). Thus, according to OPR, "these sections in effect constituted and advance declination of prosecution for future violations of the torture statute, notwithstanding Criminal Division AAG Chertoff's refusal to provide a formal declination." *Id.* at 155.

One might be saddened but not be surprised to find reckless contentions of this type in the fever swamps of the Internet, where it evidently has become customary to ascribe all manner of wrongdoing to the Bush Administration simply as a matter of course. But Department of Justice attorneys ought to exercise the barest modicum of responsibility and judgment before uncritically embracing and trumpeting conspiracy theories of this type with precious little *evidence* for them.

In fact, the evidence available to OPR discloses that the client *did* ask for a discussion of these matters to be included in the memorandum. The Bybee Memo itself begins the constitutional discussion by referencing "your request for legal advice." Bybee Memo at 31. Moreover, while OPR cites Mr. Addington's testimony before the Judiciary Committee that he was pleased to hear the memorandum would address constitutional issues and potential defenses (D.R. 156), it omits Mr. Addington's more relevant and direct answers that explain *why* he might have felt that way—*i.e.*, that he had *asked* for these issues to be covered. In particular, Mr. Addington explained in his House testimony that, in his official capacity, he was "essentially . . . the client on this opinion," and he responded to criticism of the Bybee Memo's discussion of these issues thusly: "[i]n defense of Mr. Yoo, I would simply like to point out that [this] *is what his client asked him to do.*" *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III), Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the House Comm. on the Judiciary*, 110th Cong. 38, 42 (June 26, 2008). ("House Hearing") (emphasis added). [CA*6] Even the evidence cited by OPR is to the same effect; it shows that Professor Yoo initially determined not to discuss these subjects in the Bybee Memorandum, but he changed course after a mid-July meeting at the White House and, in an obvious reference to the client's wishes,

advised a colleague who inquired about these new issues that “they want it in there.” D.R. 155-56. As Mr. Addington noted before the House of Representatives, “it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on.” House Hearing at 42.

OPR does not cite or discuss this testimony by Mr. Addington, nor does OPR contend that it can be professional *misconduct* for an attorney to consider the issues that the client wants considered. It is certainly far from odd or surprising, moreover, that in a time of great national emergency the White House would seek advice on any and all conceivable legal theories that might become relevant to the President’s exercise of the duties of his office in the crisis. Most citizens presumably would expect their government to do just that, and few outside OPR would conclude from this that it is *therefore* “likely” that the highest echelons of our government are engaged in a criminal conspiracy. Nor would most reasonable observers believe that the strength of this inference is *increased* by virtue of the fact that the attorneys involved in providing the legal advice at issue expressly *rejected* the supposedly unlawful “advance declination.” To put it most charitably, OPR’s attempt to draw these outlandishly strained inferences primarily on the basis of the timing of edits to the Bybee Memo scarcely satisfies the “clear and convincing evidence” standard that is required to prove a violation of Rule 1.1 in the District of Columbia.

a. The Commander-in-Chief Discussion Was Consistent With Past OLC Opinions.

OPR criticizes the Bybee Memo’s discussion of the Commander-in-Chief power on a number of specific grounds. Most are borrowed from Bush Administration critics or commentators; none is compelling. Indeed, on several of these matters, OPR’s analysis is not merely wrong but also reflects a profound ignorance of the vast body of agency precedent that governs the day-to-day conduct of OLC’s business. In the main, however, OPR simply disagrees with OLC’s advice on difficult questions that are far from settled merely because OPR and others believe that the advice did not reflect the “mainstream” of academic thought on the matter. This sort of disagreement cannot reasonably be taken to suggest ethical misconduct.

First, OPR fails entirely at the outset to give any weight to the extremely cabined scope of the Bybee Memo’s discussion of the President’s Commander-in-Chief authority. The Bybee Memo started by considering whether the statute might be construed so as not to apply to the President, and only considered the constitutional question in the event the statute were deemed to apply *and* the *President* himself *personally* decided that particular interrogations that arguably violated it were warranted. Bybee Memo at 33-35 (discussing constitutional avoidance). The notion that federal statutes, even those entirely directed to challenging governmental decision-making, do not necessarily apply to decisions taken by the President *personally* is hardly indicative of incompetent legal practice. Indeed, the Bybee Memo cited (but OPR does not address) *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), for this proposition. Bybee Memo at 34. *Franklin* reached precisely such a conclusion in the context of the Administrative Procedure Act “[o]ut of respect for the separation of powers and the unique constitutional position of the President.” 505 U.S. at 800.

In fact, OPR does not appear to dispute that the constitutional discussion was premised on potential actions the President might take *personally*, or that Professor Yoo conveyed this understanding to the CIA, but merely notes that Professor Yoo “admitted” that the memorandum itself “was probably not as explicit as it could have been.” D.R. 156. Yet the Bybee Memo signaled this understanding clearly enough for the sophisticated audience to which this discussion was addressed. The memo notes, for example, “[S]ection 2340A, as applied to interrogations of enemy combatants *ordered by the President pursuant to his Commander-in-Chief power* would be unconstitutional.” Bybee Memo at 39 (emphasis added); *see also id.* at 36 (“[C]ongress cannot compel the President to prosecute outcomes taken pursuant to the *President’s own constitutional authority.*”) (emphasis added); *id.* at 38 (“The *President’s complete discretion* in exercising the Commander-in-Chief authority has been recognized by the courts.”) (emphasis added); *id.* at 38-39 (“Numerous *Presidents have ordered* the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation’s history, including recent conflicts such as the Gulf, Vietnam, and Korean wars.”) (emphasis added). This proposition, moreover, would be quite familiar to the White House Counsel, since it comports with well-established precedent in related contexts. *See, e.g., Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 935 (D.C. Cir. 1982) (“Only the President, not the agency, may assert the presidential privilege . . .”) (citing *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 447-49 (1977)).

Second, OPR faults the Bybee Memoranda for not addressing the Take Care clause, which enjoins on the President the duty to see that the laws are “faithfully executed.” *See* D.R. 161-62. Neither Professor Yoo nor Judge Bybee, however, was required to re-plow all ground previously considered by OLC throughout previous decades of confronting these issues on a day-to-day basis. Indeed, while this question may seem novel and vexing to OPR, AAG Dellinger had previously stated OLC’s position on this issue in a carefully considered opinion that is (or should be) well known to anyone working at OLC—to say nothing of any attorney at OPR who contends that the work of that office is unethical and incompetent.

Mr. Dellinger’s analysis was based on the commonly understood principle—the same one justifying *Marbury v. Madison*’s establishment of judicial review—that congressional statutes that violate the Constitution cannot be enforced, because the Constitution is the highest form of law. 5 U.S. (1 Cranch) 137 (1803). Thus, “in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law.” Memorandum for the Honorable Abner J. Mikva, Counsel to the President, From Walter Dellinger, Assistant Attorney General, *Re: Presidential Authority to Decline to Execute Unconstitutional Statutes* at 2 (Nov. 2, 1994). Were the rule otherwise, Congress could, for example, pass a law purporting to reassign all powers of the President to the Speaker of the House, and—under OPR’s view of the “Take Care” clause—the President would be required to “faithfully execute” this “law” by handing over the keys to the White House. OPR contends that “the authors of the Bybee Memo should have considered an alternative approach that reconciled the Commander-in-Chief clause with the Take Care clause,” D.R. 162, but does not so much as suggest a plausible alternative. Indeed, OPR

shows no knowledge of the Dellinger opinion, and instead simply faults the Bybee Memo for not repeating the well-understood and common-sense concept embodied in Dellinger’s analysis.¹⁹

Third, in a similar vein OPR criticizes the Bybee Memo because it did not cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—presumably Justice Jackson’s concurrence laying out a three-part framework for analysis of separation of powers disputes—or examine Congress’s constitutional authority to enact Section 2340 under its Article I powers. The issue, of course, was not whether Congress lacked constitutional power *simpliciter* to enact the statute, but whether particular applications of the statute to actions taken personally by the President as Commander in Chief would comport with Article II. Reasonable lawyers could well reach different conclusions on that difficult question, but it would be surprising if Executive Branch attorneys, particularly those at OLC, could be deemed “incompetent” simply for answering this question in keeping with the robust view of Executive power that has long been shared by Presidential administrations of both political parties. Mr. Dellinger, for example, did not analyze conflicts between Article II and Congress’s powers using the *Youngstown* framework when he advised President Clinton that the President is authorized to decline to enforce unconstitutional statutes. Instead, he cited Justice Jackson’s concurrence in *Youngstown* for the opposite proposition promoted by OPR—that it “recogniz[ed] [the] existence of [the] President’s authority to act contrary to a statutory command.” See Memorandum for the Honorable Abner J. Mikva, Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Presidential Authority to Decline to Execute Unconstitutional Statutes* at 1 (Nov. 2, 1994).

This highlights the fact that OPR’s criticisms are not only institutionally ill-informed but also would reverse long-standing positions of the Department of Justice. Indeed, if OPR is correct, *identical* ethical “shortcomings” have been the daily staple of OLC’s work for *decades*. For example, no fewer than nine OLC opinions produced during the Clinton administration examined conflicts among congressional enactments, the Commander-in-Chief power, and the President’s responsibility to protect the national security and conduct foreign relations. These opinion *rarely* cited *Youngstown* other than to support a presidential decision to use force abroad without clear congressional authorization and in violation of the War Powers Resolution. OPR utterly failed to cite, discuss or distinguish any of these authorities:

1. In 1996, OLC declared unconstitutional a funding rider that prohibited the placement of U.S. troops under United Nations commanders. See Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council,

¹⁹ In fact, OLC’s view has consistently been that the President must pay particular attention to this problem when a congressional enactment could threaten the Executive’s national security powers, because such questions usually will not be subject to judicial resolution. According to Mr. Dellinger, “If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. *This is usually true, for example, of provisions limiting the President’s authority as Commander in Chief.*” Memorandum for the Honorable Abner J. Mikva, Counsel to the President, From Walter Dellinger, Assistant Attorney General, *Re: Presidential Authority to Decline to Execute Unconstitutional Statutes* at 3 (emphasis added).

From: Walter Dellinger, Assistant Attorney General, *Re: Placing of United States Armed Forces under United Nations Operational or Tactical Control* (May 8, 1996). AAG Dellinger wrote that “there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces,” citing some of the same cases cited in the Bybee Memo. *Id.* at 2-3. Despite Congress’s authority to raise and regulate the military (powers that OLC mentioned, but did not analyze), OLC concluded that Congress “may not unduly constrain or inhibit the President’s authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field.” *Id.* at 3. OLC also concluded that Congress’s ban would interfere with the President’s “constitutional authority with respect to the conduct of diplomacy,” *id.*, because he would be unable to fulfill agreements to use force abroad with other countries. Notably, Congress’s attempted to restrict the President’s actions through the *appropriations* power, considered much more basic to the legislative power than almost any other. OLC did not mention *Youngstown* at all.

2. In 2000, OLC issued an opinion defending the constitutionality of the Kosovo war. See Memorandum for the Attorney General, From: Randolph D. Moss, Assistant Attorney General, *Re: Authorization for Continuing Hostilities in Kosovo* (Dec. 19, 2000). OLC claimed that Congress authorized the war by appropriating funds to continue operations, even though Congress voted down both a declaration of war and a statutory authorization for hostilities in Kosovo. *Id.* at 22. The Kosovo conflict lasted beyond the 60-day limit set by the War Powers Resolution for presidential use of force abroad without congressional authorization. *Id.* at 23. OLC did not mention *Youngstown* nor Jackson’s three-part framework, but simply concluded that Congress authorized hostilities via funding.

3. In 1995, OLC advised the White House that the President could order troops into Bosnia under his authority as Commander-in-Chief. See Memorandum Opinion for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Proposed Deployment of United States Armed Forces into Bosnia* (Nov. 30, 1995). OLC concluded that the President could deploy troops without express congressional authorization, even if hostilities were to occur, because the War Powers Resolution did not limit the President’s authority. “The Executive Branch has traditionally taken the position that the President’s power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution.” *Id.* at 7. In fact, President Nixon vetoed the War Powers Resolution because he believed it was an unconstitutional infringement on his powers as Commander-in-Chief, and that position has been held by Presidents since. Once again, OLC did not mention *Youngstown*.

4. In 1993, OLC advised the Attorney General that she could authorize the transfer of grand jury information to the President and the members of the National Security Council. See Memorandum for the Attorney General, From: Walter Dellinger, Assistant Attorney General, *Re: Disclosure of Grand Jury Matters to the President and Other Officials* (Sept. 21, 1993). Federal Rule of Criminal Procedure 6(e) prohibits disclosure of information obtained by a grand jury except, *inter alia*, to other government officials who assist in the enforcement of federal law. OLC found that the President and NSC officials could fall within this exception, but that even if they did not, “the Attorney General’s disclosures of such materials to the President could in some

circumstances be authorized on broader constitutional grounds,” including his authority to enforce the laws and defend the country from terrorist attacks. *Id.* at 6-7. OLC did not cite or discuss *Youngstown* in arguing that Rule 6(e) could be placed aside in the event of a terrorist threat to national security, even though the Supreme Court has made clear that the Federal Rules of Criminal Procedure are, “in every pertinent respect, as binding as any statute duly enacted by Congress.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

5. In 1997, OLC issued an opinion that extended this reasoning to disclosing grand jury information to the intelligence community. See Memorandum for the Acting Counsel, Office of Intelligence Policy and Review, From: Richard Shiffrin, Deputy Assistant Attorney General, *Re: Disclosure of Grand Jury Material to the Intelligence Community* (Aug. 14, 1997). OLC answered in the affirmative when asked whether such material could be “disclosed to Intelligence Community officers where the information in question is urgently relevant to a matter of grave consequences for national security or foreign relations.” *Id.* at 10. In explaining its reasoning, OLC said that “we believe such disclosure would rest upon the same fundamental constitutional principle that has been held to justify government action overriding individual rights or interests in other contexts where the action is necessary to prevent serious damage to the national security or foreign policy of the United States. See generally *Haig v. Agee*, 453 U.S. 280, 309 (1981) (invoking the principle that the Constitution’s guarantees of individual rights do not make it a ‘suicide pact’); *American Communications Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 408 (1950) (to the same effect).” *Id.* Like the 1993 opinion, the 1997 opinion did not cite or discuss *Youngstown*.

6. In 2000, OLC advised the Office of Intelligence Policy and Review that information obtained through a Title III warrant could be shared with officials of the CIA. See Memorandum for the Counsel, Office of Intelligence Policy and Review, From: Randolph D. Moss, Assistant Attorney General, *Re: Sharing Title III Electronic Surveillance Material with the Intelligence Community* (Oct. 17, 2000). OLC found that if the CIA were to help in the investigation of a crime, disclosure would fall within an exception to Title III’s prohibition on disclosure of such information. OLC also held, however, that the Department of Justice could share Title III surveillance with the CIA even beyond the law enforcement context because of the President’s constitutional authority as Commander-in-Chief and Chief Executive. Its 2000 opinion declared, “we believe that in extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President’s constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III.” *Id.* at 9. According to Mr. Moss, Title III would be unconstitutional if it were to prevent the President from transferring surveillance information to protect the national security. “Where the President’s authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President’s constitutional authority and should be read to be ‘subject to an implied exception in deference to such presidential powers.’ We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.” *Id.* (citation omitted).

7. In 1995, OLC advised the Counsel to the President that legislation relocating the American embassy in Israel to Jerusalem was unconstitutional. Memorandum for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Bill to Relocate United States Embassy from Tel Aviv to Jerusalem* (May 16, 1995). OLC found that the provision, which Congress attached to the State Department appropriations bill for fiscal year 1995, would “impair the President’s constitutional authority to determine the form and manner of the Nation’s diplomatic relations.” *Id.* at 2. The opinion did not cite *Youngstown*.

8. In 1996, OLC issued an opinion to the State Department that Congress could not place conditions on funds appropriated for diplomatic activities with Vietnam. *See* Memorandum for Conrad Harper, Legal Adviser, Department of State, From: Walter Dellinger, Assistant Attorney General, *Re: Section 609 of the FY 1996 Omnibus Appropriations Act* (May 15, 1996). The statute, passed as part of an appropriations bill, required the President to make a certification that Vietnam was cooperating in full faith on initiatives to find and recover American POWs. According to OLC, the provision, “taken as a whole, impermissibly impairs the exercise of a core Presidential power—the authority to recognize, and to maintain diplomatic relations with, a foreign government.” *Id.* at 1. OLC declared the rider “unconstitutional and without legal force or effect.” It did not cite or discuss *Youngstown*.

9. In 1996, OLC advised the White House that legislation prohibiting modification of the Anti-Ballistic Missile Treaty with the Soviet Union, without use of the treaty process, was unconstitutional. *See* Memorandum for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Constitutionality of Legislative Provision Regarding ABM Treaty* (June 26, 1996). The administration took the view that the successor states to the defunct Soviet Union remained parties to the ABM Treaty. According to Mr. Dellinger, legislation that required the President to treat an extension of the agreement to the successor states as a treaty amendment “would act in derogation of the President’s recognition power. Because the recognition power is exclusively Presidential, it is doubtful that Congress may take that step.” *Id.* at 5. The 1996 Opinion neither discussed nor cited *Youngstown*.

In sum, the Bybee Memo’s analysis of presidential power is well within the mainstream of OLC’s precedents, which have long taken a muscular view of the President’s Article II powers without examining, in each case, each and every one of the legal premises that supports this view—or the panoply of arguments that a congressional supremacist might offer in *riposte*. OPR attorneys may be new to these questions, but the fact that *they* are unfamiliar with the basic framework under which the Office of Legal Counsel operates, did not think to research basic Office precedents, and would prefer that every OLC opinion begin with first principles is not a very good basis for believing that Professor Yoo is guilty of misconduct by clear and convincing evidence.

b. OPR Overstates The Content Of The Discussion Of Common Law Defenses.

OPR devotes industrial quantities of ink and a not inconsiderable number of trees to a detailed discussion of additional matters that it believes were missing from the Bybee Memo’s analysis of *potential* defenses. This focus is curious because the Bybee Memo did not purport to

provide an all-encompassing and comprehensive canvass of every conceivable matter that might be relevant to the application in practice of these defenses. As the memo clearly stated, if its statutory or constitutional analysis were ultimately proven to be mistaken, “under the current circumstances certain justification defenses *might be* available that would *potentially* eliminate criminal liability.” Bybee Memo at 39 (emphasis added). “Standard criminal law defenses of necessity and self-defense *could* justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.” *Id.* (emphasis added).

No one reading the Bybee Memo in light of these plainly stated caveats could reasonably believe that it set forth a comprehensive catalog of every permutation that might be relevant to the application of potential defenses. Even so, the memo did discuss the important factors that the lower courts have said should be considered with a necessity defense (and several of the same elements are later discussed in the memo’s section on self-defense), including whether a defendant or a third party faced a threat of death or serious injury, *see* Bybee Memo at 41; whether there was a showing that the action taken by the defendant will avoid a greater harm, *see id.* at 44; and five other factors that are relevant to the necessity defense, such as whether a third alternative is available that will cause less harm, *see id.* at 40.

Inexplicably, OPR relegates the presence of these factors to a footnote in its report, *see* D.R. 167 n.154, and then criticizes the Bybee Memo for not containing them at all. OPR certainly does not show that the Bybee Memo’s summary of the factors relevant to necessity or self-defense misrepresented or misconstrued the basic questions at stake. OPR merely believes that each of these factors “merited discussion” (D.R. 167) beyond being accurately listed. And OPR certainly does not contend that in 2002 any federal court had opined on (much less foreclosed) the applicability of defenses to a Section 2340A charge. Indeed, OPR never explains how providing this general information—which did not even purport to definitively resolve the issue—to the Counsel for the President *upon request* amounts to “an error that prejudice[s] or could have prejudiced” the Executive Branch, *In re Evans*, 902 A.2d at 70, and thus constitutes sanctionable incompetence under D.C. Rule 1.1. It does not.

For good measure, OPR criticizes the Bybee Memo’s discussion of defenses based on mistaken legal premises. OPR’s theory appears to be that the Bybee Memo evaluated the necessity defense by looking only to *United States v. Bailey*, 444 U.S. 394 (1980), and W. LaFare & A. Scott, *Substantive Criminal Law* (1986), when it should have also examined the Court’s later decision in *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001). It is doubtless true that the Bybee Memo would have been more complete if it had cited *Oakland Cannabis*. A citation to that case, however, would not have altered the analysis. *Oakland Cannabis* itself analyzed only two significant sources of authority on the defense of necessity: *Bailey* and the LaFare & Scott treatise, the same authorities the Bybee Memo discussed. And as the Bybee Memo explained, neither authority stands for the proposition that the necessity defense is presumptively unavailable in federal criminal cases. To the contrary, they both assume that the necessity defense is generally available unless the legislature has already balanced the values at stake. OPR did not show that the Bybee Memo misread or misapplied either source.

OPR overreads *Oakland Cannabis* to suggest that common law defenses somehow are presumptively unavailable in federal court unless Congress expressly provides for them. The Court, however, left open *that* question. It had no need to reach it because it concluded that the statute at issue (the Controlled Substances Act) clearly *excluded* any defense of medical necessity by finding that marijuana has “no currently accepted medical use.” 532 U.S. at 491 (internal quotation marks omitted). *Oakland Cannabis*, therefore, turned on the Court’s conclusion that the text and structure of the statute affirmatively *precluded* the defense, and does not establish the converse proposition that OPR believes to be true, *viz.*, that a defense is not available unless it is affirmatively *included* in the statute. *Compare* D.R. 169 (“it would be far simpler and much more logical to conclude that if Congress had intended to allow the necessity defense . . . it would have made an explicit statement to that effect”). Following its decision in *Oakland Cannabis*, the Court has continued to address federal defenses in criminal cases on the assumption that they exist unless displaced. *See Dixon v. United States*, 548 U.S. 1, 13 & n.7 (2006). In fact, in *Dixon* the Court suggested that it will *not* readily infer that a particular statute *has* displaced deeply rooted common law defenses. *Id.* at 13 n.6 (“it would be unrealistic to read this concern with the proliferation of firearm-based violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense”) (citing 4 W. Blackstone, Commentaries on the Laws of England 30 (1769)). OPR briefly acknowledges that *Dixon* assumes the availability of defenses, but hides that concession in a footnote. D.R. 164 n.146.²⁰

OPR also contends that the Bybee Memo mischaracterized *In re Neagle*, 135 U.S. 1 (1890). *See* D.R. 176-77. OPR concedes, as it must, that in *Neagle* the Supreme Court expressly stated that it could “[n]ot doubt the power of the president” to defend Justice Field, but OPR offers its own idiosyncratic reading of the case as somehow turning solely on California’s “self defense statute.” D.R. 177. OPR also ventures that “*Neagle*’s value as precedent is arguably limited by the unusual factual background of that case.” *Id.* at 177 n.165. Any disagreement with this view, and particularly any suggestion that a federal government official could rely on *Neagle* to plead “that he was implementing the Executive Branch’s authority to protect the U.S. government” is, according to OPR, “unreasonable and misleading.” *Id.* (internal quotation marks omitted).

²⁰ OPR attempts to show that *Congress* somehow affirmatively eliminated the availability of defenses because the understanding proposed by the Reagan Administration—which provided that the CAT “does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others”—was deleted by the first Bush administration. D.R. 170-71. But the relevant focus here is the criminal *statute* that Congress enacted, not what the treaty might or might not mean in light of this aspect of the ratification history. The treaty, of course, is not self-executing, and under our own domestic law the *statute* must be construed in light of the common law background that defenses are *assumed* to be available. Indeed, it is certainly not unusual for criminal prosecutions to vary from or even violate the international obligations established by treaties. *See generally Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). This argument is emblematic of the lengths to which OPR has gone to spin out truly novel theories of law that it then contends no “competent” lawyer could disagree with.

Here again, however, OPR's position appears to be at odds with longstanding positions of the Department of Justice, which OPR does not even trouble to cite, much less distinguish. For example, OLC cited *Neagle* to conclude that federal employees could provide security at the 1996 Atlanta Olympic Games, even when no federal crime had yet occurred but foreign guests might be under threat;²¹ that the FBI could arrest suspects abroad, even if the apprehension would violate customary international law or treaties;²² that the President could order the Coast Guard to intercept Haitian vessels to prevent immigrants from reaching U.S. shores;²³ and that the "President's inherent, constitutional authority as Commander-in-Chief, his broad foreign policy powers, and his duty to take care that the laws be faithfully executed generally empower him to deploy the armed forces abroad without a declaration of war by Congress or other congressional authorization."²⁴ It defies reason that OPR could propose professional discipline on the basis of Professor Yoo's reliance on a case that, for all that appears from the Draft Report, has never been interpreted in the crabbed way that OPR proposes, especially when OPR's novel reading would contravene—and reverse—DOJ's long-standing view of the matter.

4. The Draft Report's Miscellaneous And Pedantic Criticisms Do Not Amount To Incompetence.

a. CAT

The Draft Report faults the Bybee Memo for its account of the ratification history of the Convention Against Torture (CAT). The question here is whether the Reagan and Bush administrations understood the definition of torture contained in the CAT to mean different

²¹ Memorandum Opinion for the Deputy Attorney General, From: Walter Dellinger, Assistant Attorney General, *Re: Use of Federal Employees for Olympic Security*, 20 U.S. Op. Off. Legal Counsel 200 (May 17, 1996).

²² Memorandum Opinion for the Attorney General, From: William P. Barr, Assistant Attorney General, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 U.S. Op. Off. Legal Counsel 163 (June 21, 1989). Mr. Barr's opinion relied upon *Neagle* for the proposition that "the President's constitutional duty is not limited to the enforcement of acts of Congress or treaties according to their terms, but that it extends also to the 'rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" *Id.* at 176 (quoting *In re Neagle*, 135 U.S. 1, 64-67 (1890)).

²³ Memorandum Opinion for the Attorney General, From: Theodore B. Olson, Assistant Attorney General, *Proposed Interdiction of Haitian Flag Vessels*, 5 U.S. Op. Off. Legal Counsel 242 (Aug. 11, 1981). According to OLC, "His power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*, 135 U.S. 1, 63-67 (1890)." *Id.* at 245.

²⁴ Memorandum Opinion for the Attorney General, From: John M. Harmon, Assistant Attorney General, *Presidential Power to Use the Armed Force Abroad Without Statutory Authorization*, 4A U.S. Op. Off. Legal Counsel 185, 185 (Feb. 12, 1980).

things. OPR accuses the Bybee Memo of not revealing that the Bush administration's proposed understanding, defining "torture" as used by treaty, was different than the Reagan understanding because it was felt that the latter set too low of a standard and reflected a lack of commitment by the United States to the treaty.

OPR over-reads the significance of the CAT ratification history. The Bybee Memo looked to both the Reagan and Bush records merely for confirmation that the definition of torture referred only to *extreme forms* of cruel, inhuman, and degrading treatment. Both administrations were concerned that the terms in the treaty, at times, were vague and open to many different interpretations. Both proposed understandings that differed in wording to address this concern, but they did *not* disagree with the fundamental conclusion that torture was reserved only for extreme acts. This fact should be not surprising or controversial for anyone capable of basic legal research. As the D.C. Circuit has recognized:

The severity requirement is crucial to ensuring that the conduct proscribed by the Convention and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. . . . The drafters of the Convention, as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that only acts of a certain gravity shall be considered to constitute torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92 (D.C. Cir. 2002) (dismissing complaint for failure to state a torture claim where plaintiffs alleged that they were kicked, clubbed, beaten, interrogated, and subjected to physical and mental abuse) (internal quotation marks omitted); *compare* D.R. 145 (criticizing Bybee Memo for suggesting that "severe pain" is "excruciating and agonizing"), *with Price*, 294 F.3d at 92-93 (noting that "the more intense, lasting or heinous the agony, the more likely it is to be torture," and citing in support of this statement the Executive's understanding that torture "is specifically intended to inflict excruciating and agonizing physical or mental pain or suffering"). OPR, naturally, does not advert to the D.C. Circuit's decision in *Price*, though we presume that it would not be its position that a unanimous panel of Judges Edwards, Sentelle and Silberman committed misconduct by citing the views of *both* Administrations.

In any event, OPR's claim that the Bybee Memo did not reveal the differences between the Reagan and Bush understandings is simply incorrect. On page 18, the Bybee Memo clearly identifies the differences in language and states: "The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture." The memo specifically cites the same pages of the same source, Judge Abraham Sofaer's prepared testimony before the Senate Committee on Foreign Relations, as does OPR for this observation. D.R. 146.

The Bybee Memo explained that the difference in language was due more to an effort to provide more definition and specificity to the treaty terms, rather than an effort to change the understanding that torture was an extreme form of cruel, inhuman, and degrading treatment. OPR seems to take the view that the Bush understanding was somehow a rejection of the Reagan

standard. Yet, OPR cites no authority for this conclusion, nor does it address statements from the 1990 ratification record, set out in the Bybee Memo, that make clear that the Reagan and Bush administration understandings are not significantly different. Judge Sofaer, for example, testified that “no higher standard was intended” by the Reagan administration than the Bush administration. Bybee Memo at 19. Mark Richard, a deputy in the Criminal Division, testified that the Bush administration’s understanding was an effort to overcome an “unacceptable element of vagueness” and to provide “sufficient specificity.” *Id.* Richard in particular described the Bush understanding in terms which seems to meet the Reagan standard as well: “torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.” *Id.*

Oddly, OPR attaches great significance to this alleged difference between the Reagan and Bush administrations (although it does not explain why it makes a difference). The Bybee Memo quite clearly says that the Bush administration understanding sets the proper definition, making any deviation from the Reagan administration “a purely academic question.” *Id.* OPR also tendentiously says that the Bybee Memo’s “almost exclusive reliance” on the Reagan understanding makes no sense, since it was not ratified. This misunderstands the nature of the treaty-making process. As OLC has said before, executive branch representations and statements to Congress receive important weight in interpretation of a treaty. *See, e.g., Price, supra; Auguste, supra.* Rather than rely exclusively on the Reagan representations, the Bybee Memo discussed both—it probably devoted more attention, in fact, to the Bush administration’s testimony before the Senate.

OPR also criticizes the Bybee Memo for not including in its examination of cases and law on the CAT regulations issued by the State Department and the Department of Homeland Security relating to immigration exclusion procedures. OPR says that the regulations and the three cases it found interpreting the regulations are “generally consistent” with the Bybee Memo’s conclusions, but that missing this source was not thorough and competent.

The spectacular audacity of this criticism would be hard to overstate, because these are the *same regulations* that were at issue in *Auguste, Pierre* and other cases that OPR has failed to cite in its report even though they are squarely adverse to its position. In addition, OPR is wrong on the facts. The Bybee Memo did discuss cases interpreting the relevant regulations, namely 8 C.F.R. 208.18. In its appendix of cases, the Bybee Memo lists *Ali-Safer v. INS*, 268 F.3d 1143 (9th Cir. 2001), and describes the conduct which the court found to be torture. The decision quoted 8 C.F.R. 208.18 and found that the conduct at issue met the regulatory definition. The Bybee Memo cited the case with the parenthetical that it was a “deportation case,” clearly marking it as involving immigration. Mistakenly, the Draft Report claims that *Ali-Safer* was an example of case law that was missed by the Bybee Memo, when it is in fact in the appendix (which OPR discusses in its report on the same page – page 147).

The appendix to the Bybee Memo also contains a second case interpreting 8 C.F.R. 208, *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002). There, as the Bybee Memo notes, the district court held that forced sterilization could constitute torture. OPR does not mention

this case, instead criticizing the Bybee Memo for failure to cite an unpublished decision in the Ninth Circuit (*Khanuja v. INS*, 11 Fed. App'x 824 (9th Cir. 2001)). It is odd for an office that is supposed to police professional responsibility to rely on a case that could not itself have been cited as precedent under court rules. Indeed, it is simply astounding that OPR continues to rely on this case after the Attorney General of the United States—who has undoubted supervisory authority over the office—advised OPR that this citation was “potentially sanctionable.” See Letter from Michael B. Mukasey to H. Marshall Jarrett, 6 & n.4 (Jan. 19, 2009). In any event the *Khanuja* case is inapposite, because it denies a petition for asylum on the ground of religious persecution, not torture, and only states that religious persecution would not state a claim, by itself, to prevent removal on the grounds of possible torture.

OPR's citation of the third case on this point, *United States v. Cornejo-Barreto*, 218 F.3d 1004 (9th Cir. 2000), is misleading. *Cornejo-Barreto* raised the question whether judicial review could extend, via habeas, to decisions by the Secretary of State to extradite fugitives who claim they will be tortured in the foreign country. The Court held that it could so exercise judicial review. It did not interpret the substantive meaning of the regulation, federal laws defining torture, or the Convention Against Torture. It only found that a fugitive could raise in habeas a claim that torture would occur—but it explicitly declared that it would not reach the merits of the petitioner's claim. *Id.* at 1017. OPR's claim that the Bybee Memo was ethically required to cite and discuss the case in an effort to interpret the meaning of Section 2340 is mistaken.

b. TVPA Decisions

The Draft Report cites no authority contradicting the Bybee Memo's conclusions that decisions under the cognate Torture Victim Protection Act do not extensively define or analyze the meaning of torture under federal law, due to the severity of the fact patterns that have arisen thus far in litigation. It also does not quote or cite any cases that show that any opinions have defined what constitutes the lower boundary of torture.

The Draft Report deliberately takes out of context the Bybee Memo's discussion of a TVPA case, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). OPR implies that OLC chose this case because it was highly unusual, but instead it was chosen only to “provide[] some assistance in predicting how future courts might address this issue.” Bybee Memo at 24. *Mehinovic* was appropriately used because it was recent in time (the amended opinion issued on May 2, 2002) and was one of the more extensive opinions on the TVPA. *Mehinovic* was also appropriately used because it reached a number of important questions. Unlike most opinions, it explained the difference between torture and cruel, inhuman, or degrading treatment that did not rise to the level of torture. It also addressed an important question ignored by the Draft Report, whether torture could occur through the cumulative effect of individual acts which, standing alone, would not violate the statute.

OPR claims that the Bybee Memo attempted to mislead by not focusing on a different case, *Dalbierti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) (incorrectly cited in the Draft Report). OPR alleges that the conduct in *Dalbierti* was “far less extreme” than the conduct

in *Mehinovic*, and so should have been discussed. OPR, however, admits as it must that the court in *Dalbierti* provided no analysis as to why it found torture to have occurred in the facts of the case, and instead simply reached its conclusion in two sentences. *Id.* at 25. The Bybee Memo nowhere suggests that it disagreed with the conclusion reached by *Dalbierti*; in fact, it provided a summary of the case in the appendix, as OPR admits. In fact, while OPR feels that the conduct in *Dalbierti* was far less extreme than *Mehinovic*, the former involved actions that could be considered clearer violations of the TVPA – actions which OPR does not mention in its report. For example, in *Dalbierti*, Iraqi guards attempted to execute one of the plaintiffs and threatened another with undeniable acts of torture. While OPR may feel these actions are “less extreme,” they would constitute clearer violations of Section 2340, which defines “severe mental pain or suffering” to include “the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering or the threat of imminent death.”

In any event, the important point here is that the Bybee Memo nowhere says that the *Mehinovic* case defined the lower boundary of conduct prohibited by Section 2340. Rather, the memo makes clear that because of lack of judicial definition, OLC was providing the facts of all known federal cases where torture had been found to occur. This was because “courts appear to look at the entire course of conduct rather than any one act, making it somewhat akin to a totality-of-the-circumstances analysis.” Bybee Memo at 24. OLC listed seven acts, drawn from the cases in the appendix, that had been found to constitute torture. The memo expressly said that it could not “say with certainty that acts falling short of these seven would *not* constitute torture under Section 2340,” but concluded that “interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law.” *Id.* (emphasis in original). The *Dalbierti* case, upon which OPR focuses, is one of the cases in the appendix, and some of the acts listed as constituting torture were drawn from its facts.

c. International Decisions

OPR faults the Bybee Memo for its discussion of two international opinions on the issue of torture, *Ireland v. United Kingdom*, a decision of the European Court of Human Rights, and *Public Committee Against Torture in Israel v. Israel*. It is not clear what OPR’s objection is to the consultation of these materials, the discussion of which OPR admits was requested by the CIA. D.R. 22. The Bybee Memo makes clear that OLC is not anticipating the recent practice of the Supreme Court of citing foreign and international decisions in the interpretation of certain provisions of constitutional law. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). In fact, the Bybee Memo says, before discussing the cases, that while international decisions “can prove of some value,” they are “in no way binding authority upon the United States.” Bybee Memo at 27. The memo makes clear that these courts are viewing policies by different governments interpreting different governing documents. The Bybee Memo looked to the opinions only to show, as it says, “that there is a clear distinction” between torture and cruel, inhuman, and degrading treatment. *Id.* OPR does not argue that this conclusion is mistaken, nor does it explain why consultation of these opinions in this way violated professional norms.

OPR also faults the Bybee Memo for not describing the *dissenting* opinions in the European Court of Human Rights' decision and that the majority held that Great Britain's interrogation methods violated the European Convention on Human Rights. Whether to mention a dissent or not is a matter of judgment; American lawyers and judicial opinions regularly discuss precedent without delving into the dissents. OPR's claim that the Bybee Memo did not disclose that the European Court had found Great Britain's methods to violate the European Convention is simply mistaken. The Bybee Memo says that the European Convention prohibits both torture and cruel, inhuman, and degrading treatment. Bybee Memo at 27-28. It states clearly that the "European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture." *Id.* at 29.

OPR's discussion of the Israeli case is similarly tendentious. OPR takes issue with the Bybee Memo's statement that the Israeli case is best read as finding that Israeli interrogation techniques challenged therein did not amount to torture. The memo made clear that the Israeli opinion did not expressly find any of the interrogation methods to be torture, and accepted that the Israeli Supreme Court was faced with the question whether the techniques amounted to cruel, inhuman or degrading treatment. OPR, however, points to nothing in the Israeli opinion that describes any of the interrogation methods as arising to the level of torture. Indeed, OPR does not explain why the Bybee Memo was mistaken to highlight the Israeli Supreme Court's observation that such interrogation methods, though constituting cruel, inhuman and degrading treatment, could be justified by necessity. OPR does not challenge as unsound the logic that this defense is only available if the methods did not rise to the level of torture, only that the question was not directly before the Court. OPR is simply being argumentative rather than trying to reach the best judgment.

B. The Draft Report Does Not Establish By Clear And Convincing Evidence That Professor Yoo Intentionally Or With Reckless Disregard Violated The Duty Of Candor When He Worked On The Memos.

As discussed in Section I.B(2) *supra*, the duty of candor in Pennsylvania Rule of Professional Conduct 2.1 was aspirational—not mandatory—when the memos were written. As a result, if Professor Yoo's conduct is assessed under the Pennsylvania rules, he could not be sanctioned for violating Rule 2.1. But assuming for the sake of argument that OPR correctly determined that D.C. Rule 2.1 applied, and thus the duty of candor was mandatory and not precatory, OPR's Draft Report still fails to present clear and convincing evidence that Professor Yoo violated that obligation intentionally or recklessly.

The most galling aspect of the Draft Report's conclusion is the standard under which Professor Yoo's conduct is condemned. Though the drafters purportedly found "a number" of cases where courts concluded that an attorney violated Rule 2.1, the Draft Report does not cite a *single example*—not *one case* from D.C., Pennsylvania, or any jurisdiction—and apply the

Rule 2.1 standard from those (uncited) cases. Rather, the Draft Report erects a Potemkin Village—a standard for finding a Rule 2.1 violation that OPR cut out of whole cloth and made solely for this case.

This approach to assessing Professor Yoo’s conduct is doubly confounding, for it shows that, in their rush to judgment, the Draft Report’s writers have themselves violated both rules that they accuse Professor Yoo of transgressing. First, if the Draft Report’s writers had actually found “a number” of related cases, their view of the duty of competence requires them to employ the “essential” legal skill of analyzing that precedent to “determine whether the facts and law of [those] case[s] are analogous to the matter under consideration.” D.R. 127. At a minimum, their “[c]onclusions of law”—such as their finding that Professor Yoo violated Rule 2.1—“*should be supported by relevant authority.*” *Id.* (emphasis added) But the Draft Report does not even purport to satisfy this requirement; it cites *no authority* to support its conclusion as to Rule 2.1, but instead bases its finding on a test conjured from thin air.

Second, competent research on D.C. Rule 2.1 would have revealed that no D.C. case has cited that rule or imposed discipline under it. Once the Draft Report’s writers obtained that knowledge, their view of the duty of candor mandates that they disclose this absence of controlling authority from the purportedly governing jurisdiction so as not to present “a one-sided and idiosyncratic view of” Rule 2.1. D.R. 182. But the writers honor their duty of candor only in the breach; they never disclose this absence of authority. This failure reeks of obfuscation worse than any purported omission alleged in the Draft Report.

Undeterred by this appearance of hypocrisy, OPR applies its made-for-this-case-only candor standard to reach its desired result, concluding that Professor Yoo and Judge Bybee helped to prepare memoranda that “were drafted to provide the client with a legal justification to engage in its planned course of conduct.” D.R. 180. But in its rush to condemn Professor Yoo and Judge Bybee, OPR never realized that its *sui generis* standard is fundamentally flawed, for it attempts to remake by fiat the role of OLC and its lawyers in the Justice Department, and it conflicts with the obligations OLC lawyers bear under Rule 1.2. These results cannot be countenanced.

OPR’s conjured Rule 2.1 standard would turn OLC attorneys into policymakers. But they are not policymakers. They are Justice Department lawyers who are ethically bound to “counsel or assist [their] client”—the Executive Branch—“to make a good-faith effort to *determine the validity, scope, meaning, or application of the law,*” D.C. R. Prof’l Conduct 1.2(e) (emphases added), and to respect the President’s “decisions concerning the objectives of representation,” *id.* R. 1.2(a). The “client has ultimate authority to determine the purposes to be served by legal representation.” *Id.* cmt. [1]. Thus, if the Executive Branch requests an interpretation of a statute, and an opinion assessing the legality under that statute of specific actions it intends to take, OLC lawyers are ethically bound to determine the “meaning . . . of the law” and to opine on the legality of the proposed course of action, as requested.

Former OLC attorneys from both political parties have publicly written about OLC’s obligation to answer specific legal questions posed by the President, even when—indeed,

particularly when—the answers to those questions will obviously shape or further the President’s policy goals. For example, Randolph D. Moss, who served as an AAG in OLC during the Clinton administration, conceived of the “extraordinarily unusual” factual circumstance that OPR believes arose here:

The President might also make clear that *he intends to resolve a particular legal question, and, in that context, might seek input of whatever type he regards helpful*. He might, for example, *conclude that he believes a particular action is legally permissible, but seek the assurance of the Attorney General that she, at the very least, agrees that the argument he finds convincing is a reasonable one*. Such cases, however, are extraordinarily unusual, and the Department, accordingly, must typically assume that, when its legal views are sought, they will become the final view of the executive branch of government.

Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318 (2000) (emphases added). Professor Nelson Lund, who served in OLC during the Reagan administration, agrees. He has written:

Like clients in private practice, the President is responsible for his own decisions, and in fact he has the authority to either make his own legal determinations without consulting any particular lawyer or to proceed in the face of contrary advice from any lawyer he does consult. Accordingly, there is no obvious reason for him to have less freedom than private clients *to require from his lawyers the kind of legal advice he thinks will be most useful to him*. It is true that the President has legal obligations that are different from those of any private citizen, but they are *his* obligations, not those of his lawyers or other subordinates.

Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 Cardozo L. Rev. 437, 449 (1993) (first emphasis added).

Given OLC’s role, and the ethical obligations of OLC attorneys to respect their client’s “ultimate authority to determine the purposes to be served by [OLC’s] representation,” D.C. R. Prof’l Conduct 1.2 cmt. [1], faulting Professor Yoo for interpreting § 2340A and assessing the legality of specific actions under that statute in the utmost good faith and in response to a direct question from the Executive Branch would constitute a vast departure from existing norms of legal practice. Doing so conflates the role of OLC and the attorneys who serve there with the role of the President’s myriad actual policy advisers. Indeed, the Draft Report’s conclusion arrogates the views of OLC attorneys on policy matters above the President’s—a contradiction that the Draft Report *never even mentions*. If OPR actually believes that OLC attorneys should substitute their policy goals for the President’s—or decline to assess legal questions any time they clearly implicate the Executive Branch’s “planned course of conduct,” Draft Report at 180—it should explicitly say so.

Moreover, the audience for the memos was a sophisticated group of attorneys and policymakers who well understood that the questions were difficult and close, with moral,

ethical, and political implications. These clients were also well aware of the difficulties in interpreting vague statutes, the separation of powers tensions which arise when the President exercises his authority as Commander-in-Chief, and the limitations and potential inapplicability of common-law defenses to statutory violations. The OLC attorneys were not asked to write a treatise on these issues discussing every possible argument, but to render a good faith opinion addressing the issues. That is exactly what they did. That the attorneys appropriately kept in mind their client's responsibility to protect the Nation, as well as OLC's well-established tradition of preserving executive authority, is unremarkable. To suggest that doing so amounts to an ethical violation—without citing a single piece of supporting authority—is patently absurd.

[CA*1, 3, 7, 8]

CONCLUSION

OPR's Draft Report is fundamentally and perhaps irretrievably flawed. Its faulty (or absent) analysis of basic issues is far more egregious than any error potentially attributable to the Bybee Memoranda, demonstrating the true folly of this exercise. For OPR to take the unprecedented tack of dissecting the good-faith legal analysis in OLC opinions on complex and sensitive matters starts down a dangerous path of politicization and acrimony within the Department of Justice, from which there may be no turning back. The Draft Report is red meat for the partisan lions, but poison for the Department. Moreover, the public release of the deeply-flawed report (or even a summary of its conclusions) when any possible sanction is already time-barred can serve no purpose beyond the political. For the sake of the current, former, and future attorneys who provide good-faith service to the Department of Justice and the Nation, the Draft Report in its current form must not stand. Any responsible official who cares for the institutional interests of the Department must recognize this, notwithstanding any personal views they may hold about the memoranda at issue.

Respectfully submitted,

/s/

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