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Response to the U.S. Department of Justice Office of Professional Responsibility Final Report Dated July 29, 2009

Submitted on Behalf of Professor John C. Yoo

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The comments below are submitted on behalf of Professor and former Deputy Assistant Attorney General for the Office of Legal Counsel (OLC) John C. Yoo in response to the Office of Professional Responsibility's (OPR) Report dated July 29, 2009 entitled "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" ("Final Report"). For the reasons set forth below, Professor Yoo respectfully requests that the Department of Justice set aside the findings of the Final Report and reject OPR's recommendation that Professor Yoo be referred to the Pennsylvania bar for possible sanction.[1]

I. Introduction

In its 261-page report, which took nearly five years to draft, OPR does not once conclude that Professor Yoo gave incorrect legal advice on any of the enhanced-interrogation techniques on which the Executive Branch sought OLC's advice. OPR does *not* contend that any of those techniques—including waterboarding—amount to torture under U.S. law. Nor could it. The lawfulness of *each* technique has been confirmed by every subsequent OLC opinion on the issue, until the current administration took office and withdrew the relevant opinions without offering any legal analysis demonstrating that the techniques are *un*lawful. Rather, OPR alleges that Professor Yoo violated a duty of "thoroughness, objectivity, and candor" because, in the tense wake of the September 11th attacks, and while being told by CIA experts that another massive attack appeared imminent, he did not provide a sufficient level of detail and nuance in the memoranda that provided background reasoning for the specific (and *correct*) advice given to the client. OPR cites no authority from any jurisdiction that supports imposing disciplinary sanctions for the sort of conduct that it has identified—failing to note past ambiguity in the law since resolved by the Supreme Court, for example, or using a "*see also*" when a "*cf.*" might have been more appropriate. Instead, OPR relies on non-legal standards drafted *after* Professor Yoo left OLC—including a document written by Clinton Administration lawyers to express their disagreement with Professor Yoo's work. This entire exercise reflects no credit on OPR, and, unless the Department rejects OPR's recommendation and conclusions, the Department's dedicated career attorneys will never again feel safe to give good-faith advice on controversial, disputed matters. The Department, and the public, will be the worse for it.

On virtually every major point, OPR misinterprets the law—from applying the disciplinary rules of the wrong jurisdiction, to ignoring the expired statute of limitations, to criticizing an interpretation of the torture statute that has been confirmed by an *en banc*

[1] Professor Yoo respectfully adopts and incorporates herein Judge Bybee's response in its entirety. References herein to the Levin Declaration, the Flanigan Declaration, the Rizzo Letter, and the Hazard Letter refer to the documents attached as exhibits to Judge's Bybee's submission. References to May 4 Comments refer to the comments we submitted after receiving OPR's March draft report. References to the Rotunda Letter refer to the letter from Professor Ronald Rotunda dated October 7, 2009, and attached hereto under Tab A.

court of appeals, to misapplying canons of statutory interpretation, to castigating Professor Yoo for failing to cite precedents that OLC memoranda rarely cite in analogous circumstances. Any neutral observer can see that what spurred this report was not any violation of disciplinary rules, but rather OPR's policy-based objections to the enhanced-interrogation program of the Bush Administration.

Indeed, it is difficult to read the report without concluding that OPR has lost sight of its proper role. Presumably it is not ordinarily the métier of OPR attorneys to decide whether our country's intelligence needs actually support particular covert activities, whether philosophical debates about "ticking bomb scenarios" are "based on unrealistic assumptions" that have "little, if any relevance to intelligence gathering in the real world," and whether "information" about "Abu Zubaydah, KSM, Al-Nashiri, or the other detainees subjected to EITs" sufficiently "approached the level of imminence and certainty associated with the 'ticking bomb' scenario." F.R. at 212 n.168. OLC's job was to give legal advice based on the facts as presented by the Central Intelligence Agency, not to assume the role (as OPR now has) of Junior Varsity CIA. OPR appears to think that the proper role of OLC attorneys was to reweigh the operational facts adduced by the CIA and play roulette with the lives of thousands of Americans. If that does not show that this whole enterprise is woefully misdirected it is difficult to know what would. The fact is Professor Yoo gave correct legal advice in good faith, and under pressure that few will ever experience. That should be the end of the matter.

* * *

In March 2009, OPR provided to Professor Yoo an initial version of its report, which concluded that Professor Yoo, as well as former Assistant Attorney General for the Office of Legal Counsel and now Court of Appeals for the Ninth Circuit Judge Jay S. Bybee, violated the District of Columbia Rules of Professional Conduct through their work on detainee interrogation in the aftermath of September 11, 2001 ("Draft Report").[2] As a result of its findings, OPR concluded that Professor Yoo and Judge Bybee should be referred to their respective bar authorities for possible sanction.

The Draft Report took more than four years longer to produce than OLC was afforded to write its memoranda on unprecedented and enormously consequential questions during a time of war and uncertainty, yet it was a remarkably incompetent and

[2] Applying OPR's terminology, the relevant documents include the August 1, 2002 "Bybee Memo," the August 1, 2002 "Classified Bybee Memo," the August 1, 2002 "Yoo Letter," and the March 14, 2003 "Yoo Memo." OPR does not independently analyze the Yoo Memo, focusing rather on the Bybee Memo and the Classified Bybee Memo (collectively the "Bybee Memos") and the Yoo Letter, based on its conclusion that "[t]he Yoo Memo incorporated the Bybee Memo virtually in its entirety," and "Yoo subsequently incorporated the substance of the Yoo Letter into the Yoo Memo." F.R. at 76, 238 n.196; *see also id.* at 159 n.125 ("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."). Professor Yoo therefore addresses the Yoo Memo in the context of his discussion of the Bybee Memos and the Yoo Letter.

biased work, which surely would embarrass OPR and the Department were it ever to receive critical public scrutiny. It was presented to Attorney General Mukasey and Deputy Attorney General Filip on December 23, 2008, with a statement that OPR intended to make it final and public on January 12, 2009, without any opportunity for the subjects of the investigation to review and comment on OPR's findings—an opportunity that not only is customary but also had been promised expressly by OPR to Professor Yoo. *See* January 19, 2009 Letter from Attorney General Mukasey and Deputy Attorney General Filip to OPR Counsel H. Marshall Jarrett ("Mukasey Letter"), at 1.

Attorney General Mukasey and Deputy Attorney General Filip—two highly respected former federal judges who did not join the Department until after Professor Yoo and Judge Bybee had left—strenuously objected to OPR's analysis and conclusions, and criticized OPR's extraordinarily suspicious timing and process. They also specifically requested that their letter be made public in the event that OPR's conclusions are affirmed: "to the extent the Department would ultimately make any bar referrals, at the conclusion of the internal review by Department leadership offices, we ask that this letter be included in any version of the final Report forwarded to bar authorities or released to Congress or the public." *Id.* at 2.

OPR waited for Attorney General Mukasey and Deputy Attorney General Filip to leave office before reissuing its Draft Report in March 2009, again with a view toward its expeditious publication. This time, at the insistence of the Office of the Deputy Attorney General, OPR did make the Draft Report available for comment to Professor Yoo and Judge Bybee. The principal thrust of the Draft Report was that Professor Yoo and Judge Bybee violated D.C. Rule of Professional Conduct 1.1 by providing "incompetent" legal advice in the interrogation memoranda. The Draft Report also alleged, albeit secondarily, that Professor Yoo and Judge Bybee violated D.C. Rule 2.1, because their advice "did not represent independent legal judgment or candid legal advice." This latter conclusion—which Attorney General Mukasey and Deputy Attorney General Filip had found "even more unconvincing than any proposed conclusion under Rule 1.1," *see* Mukasey Letter at 10—derived primarily from OPR's view that it is impermissible for an attorney to have the client's perspective and desired outcome in mind while rendering advice.

It would take far too long to catalog here the many factual and legal errors that underlay the Draft Report's conclusions. In fact, OPR insisted on a narrow time frame for review—making it literally impossible to address every inaccuracy in the Draft Report. Even so, Professor Yoo and Judge Bybee submitted nearly 140 pages of single-spaced specifics on numerous glaring errors in that Draft Report.

OPR took three months to rewrite its report in light of our comments, and to deliver the same to the Deputy Attorney General as a July 29, 2009 Final Report. Unlike the Draft Report, the Final Report at least strives for a patina of doctrinal rigor, albeit one that it acquired from our (and Judge Bybee's) detailed comments pointing out the many ways in which the Draft Report had not even achieved that. But the Final Report, at bottom, variously ignores or papers over almost all of the substantial errors in OPR's earlier draft, and stands by its erroneous conclusion that Professor Yoo and Judge Bybee should suffer grave sanction for Bush Administration anti-terrorism policies that were

vetted by the most senior attorneys at the Department of Justice and other Executive Branch agencies.

As was the case with the Draft Report, Professor Yoo's ability to comment on OPR's work has been significantly limited. Although much of the Draft Report was unclassified, the Final Report remained completely classified for the nine weeks that were allotted for our review—though OPR purportedly wrote the report for the express purpose of releasing it to the public. Because our review and drafting were required to occur entirely in a Department of Justice SCIF, and on a computer provided by the Department there, the circumstances do not provide a fair opportunity to comprehensively address every error in the Final Report. Yet many glaring errors can be readily identified:

- In order to apply the D.C. Rules of Professional Conduct, the Draft Report erroneously relied on a choice-of-law provision in OPR's regulations that applies only to lawyers practicing before *a court*. OPR has now cited the correct provision, which requires the application of the Pennsylvania rules, but misinterprets the relevant choice-of-law provision of Pennsylvania in order to get back to the D.C. rules, which it believes more favorable to its theory. Under the indisputably applicable Pennsylvania rules, a professional misconduct finding under OPR's theory is completely foreclosed.

- Whatever rules supply the substantive *standards* that governed Professor Yoo's advice to the President in 2002 and 2003, OPR cannot reasonably dispute that only Pennsylvania—the *sole* bar of which Professor Yoo is a member—possesses any authority to impose *discipline* on him. But Pennsylvania imposes a four-year statute of limitations, which expired long ago, on any complaint that may be filed against Professor Yoo. The Final Report advances *no* theory for believing (or even arguing) that its referral to the Pennsylvania bar would be timely.

- OPR appears to have abandoned the primary theory that underlay the Draft Report—*viz.*, that Professor Yoo rendered "incompetent" legal advice in square violation of Rule 1.1—presumably because (among many other reasons) the rules make clear that no such violation can be found for giving correct legal advice. Of course, OPR even now says that it "did not attempt to determine and did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. The Final Report, instead, rearranges all of the Draft Report's picayune criticisms of the interrogation memoranda as purported violations of Rule 2.1. To do so, it invents its own standards under the rule, adopting as *ethical* rules guidelines developed after the fact by partisan critics. Indeed, OPR adopts "as guidance" the so-called "Principles to Guide the Office of Legal Counsel," a document prepared by leading Democrats who served in OLC during the Clinton Administration in order to voice their disapproval of the Bush Administration's interrogation policies.

- The Draft Report did not even mention the critical requirement of scienter, which is unambiguously imposed, as a prerequisite to any misconduct finding, by OPR's

own policies and procedures. In fact, OPR apparently admitted to Attorney General Mukasey that it lacked any direct evidence that Professor Yoo and Judge Bybee acted with anything but utmost good faith. Mukasey Letter at 5 & n.3, 10, 14. Yet in utterly backward fashion, the Final Report now includes a new section at the end that asserts, based on such minutiae as Professor Yoo's use of a "*See also*" signal with which OPR disagrees, that he *intentionally* gave sanctionable advice. OPR makes no effort to explain its initial error and *ex post* rationalization.

- In its Draft Report, OPR failed to consider the extraordinary facts and circumstances as they existed in the immediate aftermath of the worst terrorist attack in the Nation's history, as the rules of professional conduct require. OPR now gives passing mention to the fact that "the Bybee Memo was written at a difficult time in our nation's history," F.R. at 254, but otherwise continues to ignore the facts and circumstances then existing. OPR instead skews its report to deemphasize the extreme terror threat and intelligence-gathering exigencies that existed in the aftermath of September 11, 2001, and emphasize "*jus cogens* norms" of international law, which it acknowledges as the entire "premise" of its analysis. F.R. at 24. OPR continues to engage in egregiously one-sided Monday-morning quarterbacking with grave implications for dedicated public servants.

- In its Draft Report, OPR failed even to *cite* an *en banc* decision of the U.S. Court of Appeals for the Third Circuit that adopted the same interpretation of the torture statute's specific-intent requirement as the Bybee Memo. OPR has hardly done better in the Final Report, briskly dismissing the relevance of that decision on the ground that it postdates the Bybee Memo, despite the fact that the ten-judge majority employed precisely the legal reasoning that OPR believes Professor Yoo should be sanctioned for. In the same vein, OPR ignores a D.C. Circuit decision that defined "severe" pain as pain causing "agony" that is "intense, lasting, or heinous," while criticizing the Bybee Memo for setting a similarly high threshold.

The list of similar additional errors is long. On top of its superficial "fixes," OPR also retains in the Final Report inflammatory and irrelevant facts about actions that Professor Yoo never analyzed and OLC never authorized. Such seriously misleading writing, tailor-made for cable-news sound bites, is unworthy of the Department.

For good measure, OPR has denied Professor Yoo any access to the factual materials on which OPR relied, apart from Professor Yoo's own interview transcripts. The reader must simply take OPR's word that the testimony of witnesses and the content of documents are fairly represented by the Final Report, without any selection bias. That seems unlikely in the extreme, at least judging from OPR's work in the Draft Report and Final Report.[3] The Draft Report, which OPR was prepared to publish in January 2009,

[3] To cite but one example, OPR rips out of context Professor Yoo's response to an OPR hypothetical on whether the President might make a tactical decision in war to "massacre" a village pursuant to his Commander-in-Chief power. F.R. at 64. OPR obviously includes this snippet in an effort to shock the reader and to make clear to all right-thinking people that Professor Yoo is a bad man, indeed. Of course, OPR provides none of the relevant context, in

was full of errors that would shame a law student. When those were pointed out to OPR, however, it simply invented new arguments, manufactured a new theory of misconduct, and camouflaged its errors. That OPR would do so while accusing Professor Yoo of engaging in results-driven advocacy that lacked professional candor is sadly ironic.

The Final Report is a coolly crafted libel of Professor Yoo's reputation, made all the worse because there is no forum in which Professor Yoo will be able to clear his good name in accordance with the most rudimentary procedural protections. Pennsylvania, the only state bar with disciplinary authority over him, lacks jurisdiction because OPR blew the statute of limitations. And, even if that state were to undertake an inquiry, reviewing bar officials would very likely be denied the critical classified context necessary to consider the propriety of the erroneous allegations OPR has made against Professor Yoo and Judge Bybee. This is extraordinarily objectionable. And it would be similarly objectionable—and utterly irresponsible—for the Department of Justice to make public a summary or redacted Final Report including a finding of professional misconduct when those conclusions are drawn from classified materials and facts incapable of public scrutiny or use by Professor Yoo in his own defense.[4]

The Department should put a stop to this. OPR is free to side with commentators who disagree with the legal analysis that Professor Yoo and other OLC attorneys made during the last presidency, and it has identified with the benefit of time and nearly five years worth of scholarly commentary some areas in which Professor Yoo and Judge Bybee might have made their work-product better. But the referral for professional sanction of dedicated public servants because of piddling critiques and good-faith disagreements on difficult legal questions would be an act of immense injustice.

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which Professor Yoo gave the example of President Truman's use of the atomic bomb on Hiroshima and Nagasaki, and explained that the "parade of horribles" offered by the OPR investigators did not answer the relevant separation-of-powers question being discussed. *See* July 11, 2005 Yoo Tr. at 117-20; *id.* at 119 (Professor Yoo: "[Y]ou're right. It could lead to all kind of parade[s] of horribles. You know, you could say, look, there was a legitimate use of the Commander-in-Chief power when President Truman decided to nuke, you know, two Japanese cities. And that was a terrible thing."); *id.* at 120 (Professor Yoo: "I don't think the parade of horribles answers the Constitutional question, because I could easily . . . flip them all and say Congress [instead of the President] ordered them to do it. And then you would say, well, Congress shouldn't have that power. That's such a bad result."). This excerpt is emblematic of OPR's selective use of sources, the true extent of which cannot be known by Professor Yoo or his counsel in light of OPR's steadfast refusal to make available the primary materials on which it relies.

[4] And the fact that pressure has been applied by legislators who would use OPR's considerable authority for political gain should not change the calculus. *See, e.g.*, March 31, 2009 Press Release from Senators Sheldon Whitehouse and Dick Durbin (noting their letter to the Department of Justice objecting to Professor Yoo's being afforded the opportunity to comment on OPR's Draft Report); Sheldon Whitehouse, *Official Torture*, NATIONAL LAW JOURNAL (Aug. 31, 2009) (accusing "lawyer Yoo" of "legal malpractice"). In fact, under *Pillsbury Co. v. FTC* and its progeny, such legislative interference with agency investigations and decision-making processes has long been held to violate the due process rights of those affected. 354 F.2d 952, 964 (5th Cir. 1966); *see also, e.g.*, *Esso Std. Oil Co. v. López-Freytes*, 522 F.3d 136, 148 (1st Cir. 2008).

Department attorneys should not be subject to bar referral based solely on OPR's subjective assessment of their legal analyses where those analyses are made in good faith and are not objectively wrong. The implications for following such a path are grave indeed, and are sure to cause irreparable harm to the Department.[5]

II. OPR's Erroneous Misconduct Conclusions Are Foreclosed By Binding Pennsylvania Authority.

OPR accuses Professor Yoo of failing to thoroughly discuss contrary authority in advising the President on complex, unprecedented questions of statutory, constitutional, and international law in the tense environment following September 11, 2001. Yet, in advising the Attorney General to find that Professor Yoo violated standards of professional conduct, OPR itself not only fails to identify weaknesses in its case, but, unlike Professor Yoo, unquestionably reaches the wrong conclusions on relatively simple questions of law. OPR's abject failure to interpret correctly the relevant law—or even to *attempt* to do so—unmasks its report as an exercise in political scapegoating, not "thorough, objective, and candid" legal advice.

OPR begins by applying the wrong substantive law to this case. In the Draft Report, OPR ignored its own regulation, which required it to apply the rules of Professor Yoo's "state of licensure," Pennsylvania, not the District of Columbia. It is difficult to understand how a body whose charge it is to assess the legal competence of other attorneys could not have managed, after four years, to stumble upon the correct provision of its *own* regulation. Now that we have apprised OPR of its error, OPR at last cites the correct provision of the regulations, but then blatantly misreads both the Pennsylvania

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[5] As former Attorney General Mukasey and Deputy Attorney General Filip 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 readily 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 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.

Mukasey Letter at 14.

and D.C. choice-of-law provisions to get back to the D.C. rules. OPR is wrong. The standards of conduct that apply are those of Pennsylvania, not the District of Columbia, and there is no plausible argument—OPR certainly advances none—that Professor Yoo violated Rule 2.1 as it existed in Pennsylvania at the relevant time.

For good measure, OPR has committed one of the cardinal sins of professional incompetence: blowing a statute of limitations. OPR waited to release its report until 2009, after supposedly investigating this matter for almost five years. Although OPR's purported area of expertise is the ethical rules of the several states in which Department of Justice attorneys are licensed, and although at least two OPR attorneys responsible for the Draft Report are themselves members of the Pennsylvania bar, it apparently never occurred to anyone at OPR—until we mentioned it in our response to the Draft Report—that OPR's delay might allow the statute of limitations for disciplinary complaints in that state to run. Which it did: Pennsylvania's four-year statute of limitations has expired and so Professor Yoo may not be disciplined. Even after being told about this, however, OPR has pushed ahead without even seriously—dare we say thoroughly—addressing the issue. Indeed, the Final Report would appear to mark the first time in its history that OPR has referred a *former* Department attorney to a state body that *lacks jurisdiction* to investigate OPR's allegations.

A. Under Both The D.C. And Pennsylvania Choice-of-Law Rules, Pennsylvania Rules Apply To Professor Yoo.

In the Draft Report, OPR chose to apply the D.C. Rules of Professional Conduct. It based that selection on 28 C.F.R. § 77.4(a). But, as we pointed out in our initial comments, § 77.4(a) refers only to Department attorneys practicing before a particular *court*; it is totally irrelevant to lawyers, like Professor Yoo, who give advice to the Executive Branch.

We therefore informed OPR that the applicable provision of the OPR regulations is § 77.4(c)(1), which says that "[w]here 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). Without acknowledging its earlier error, OPR has now at least gone through the motions of citing § 77.4(c)(1). *See* F.R. at 20. But OPR has now replaced its failure even to identify the correct regulation with a most cursory and equally incompetent choice-of-law analysis.

On OPR's view, because *current* Pennsylvania Rule 8.5(b) requires the application of the rules of the jurisdiction where "the predominant effect" of the lawyer's conduct occurred, and because it is supposedly unclear (to OPR) where that would be in this case, the proper course is to apply the D.C. Rules. F.R. at 20. This reasoning has no other purpose than to get back to the D.C. Rules, which OPR perceives as more favorable to its disciplinary arguments. But there are three fatal problems with it.

First, OPR (again) applies the wrong choice-of-law provision. The Pennsylvania Rules had a different choice-of-law provision before May 2004, during Professor Yoo's service at OLC. That provision said:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: . . . (2) for any [conduct not in connection with a proceeding before a court or agency]: (i) *if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction*, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Pa. R. Prof. Conduct 8.5(b) (2003) (emphasis added). Professor Yoo has never been admitted in a jurisdiction other than Pennsylvania. Under the plain text of the *applicable* Pennsylvania choice-of-law provision, then, Professor Yoo is subject only to the Pennsylvania Rules.

Second, even if the current Pennsylvania Rule 8.5(b) applied here, and it does not, Professor Yoo would not be subject to the D.C. Rules. The current Pennsylvania Rule 8.5(b) says that for any conduct not "in connection with a matter pending before a tribunal . . . 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. R. Prof. Conduct 8.5(b)(2) (2008).[6] The effects test includes foreign jurisdictions, because comment [7] explains that "[t]he choice of law provision applies to lawyers engaged in transnational practice." Nothing in this rule supports OPR's apparent belief that it can default to the jurisdiction "in which the lawyer's conduct occurred" simply because OPR cannot be troubled to undertake the primary inquiry required by the text (the locus of the "predominant effect"), or, more likely, because that inquiry would not produce a jurisdiction with rules that Professor Yoo could be said to have violated.[7]

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[6] The rule also includes a critical safe-harbor provision: "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Pa. R. Prof. Conduct 8.5(b)(2).

[7] Here, *all* relevant memos advised about the legality of interrogation techniques to be used in *other countries*. *See, e.g.*, Bybee Memo at 1 ("As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States."); Yoo Memo at 1 ("legal standards governing military interrogations of alien unlawful combatants held outside the United States.").

Third, the D.C. Rules themselves *never* apply to lawyers not licensed to practice in D.C. and not appearing before a D.C. court:

> If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) If the lawyer is licensed to practice *in this and another jurisdiction*, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

D.C. R. Prof. Conduct 8.5(b)(2) (emphasis added). Nowhere does this choice-of-law provision permit the application of the D.C. Rules to lawyers not licensed to practice in the District of Columbia.

That was by design. As recently as four years ago, the D.C. bar explained that "[i]n contrast [to the ABA Model Rules], the D.C. Rule, like the former version of the Model Rule, requires application of the rules of a jurisdiction in which the lawyer is licensed to practice." District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct* at 10 (Oct. 6, 2005).[8] *See also* Rotunda Letter at 2; Daniel Joseph & Heather Bupp-Haboda, *Guide to New Rules of Ethics* (March 2007).[9] D.C. adopted this approach specifically because of the difficulty of applying the "predominant effect" test—the very ground that OPR cites in *favor* of applying the D.C. Rules. *See id.* ("The model rule appears to be of difficult application, because of the lack of guidance of what 'predominant effect' means and of the difficulty in knowing where some conduct occurred. . . . Much of what a lawyer may do on a particular matter is performed in multiple places.").[10]

In short, OPR got the choice-of-law analysis dead wrong. Neither Pennsylvania nor D.C. would apply the D.C. Rules to this case, and the default under the relevant

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[8] http://www.dcbar.org/inside_the_bar/structure/reports/rules_of_professional_conduct_review_committee/rpcreport.cfm.

[9] http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2007/newrules.cfm

[10] The D.C. bar has also expressly disavowed any disciplinary authority over lawyers not admitted to practice in D.C. The ABA's Model Rule 8.5(a) includes this sentence: "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." The D.C. Rules purposefully *omit* that sentence. *See also* Joseph & Bupp-Haboda, *Guide to New Rules*, *supra* ("Although a D.C. lawyer may be subject to discipline in a number of jurisdictions, the D.C. Rules do not envision that such discipline can reach lawyers not admitted to practice in the District of Columbia.").

federal regulation is the rules of the attorney's state of licensure. The Pennsylvania Rules apply.

B. Under The Applicable Pennsylvania Rules, OPR's Analysis Leads To An Entirely Different Conclusion.

As the foregoing analysis shows, OPR should have applied the Pennsylvania Rules, not the D.C. Rules. And under the version of Pennsylvania Rule 2.1 in effect at the time the interrogation memoranda were drafted—which included a critical difference from D.C. Rule 2.1—Professor Yoo unquestionably did not commit professional misconduct.

The first sentence of D.C. Rule 2.1 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 had 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 (2003) (emphasis added).[11]

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 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." F.R. at 21 n.23.

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. That is why when the New York bar proposed a Rule 2.1 with the same permissive language, it explained that the "variation from the ABA rule, which uses the command 'shall,' is consistent with . . . the intention that Rule 2.1 is not to be enforced through the disciplinary process." Committee on Standards of Attorney Conduct, *Proposed New*

[11] 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.

York Rules of Professional Conduct.[12] OPR is therefore foreclosed from arguing that any "violation" of the version of Rule 2.1 actually applicable to Professor Yoo can be cited to support a finding of professional misconduct.

Now that OPR has dropped its contention that Professor Yoo's advice was so incompetent as to independently violate D.C. Rule 1.1, *see infra* Section III.B, OPR's conclusion that Professor Yoo violated D.C. Rule 2.1 is essential to the Final Report's recommendation that discipline be imposed on him. Since OPR applied the wrong Rule 2.1, and since the correct rule is not enforceable through discipline, OPR's conclusion has no basis in law.

C. Because OPR Delayed Completing Its Report For Nearly Five Years, Disciplinary Action Against Professor Yoo Is Barred By The Pennsylvania Disciplinary Board's Statute Of Limitations.

Even if OPR were correct that D.C. standards of conduct must be used to assess the adequacy of Professor Yoo's legal advice (and it is not), it is indisputable that the Pennsylvania bar is the only bar with disciplinary authority over him. Referral of Professor Yoo for potential disciplinary action must therefore comply with the rules for disciplinary complaints promulgated by Pennsylvania. For attorneys admitted to the Pennsylvania bar, alleged violations of the rules of professional conduct are subject to a four-year statute of limitations (regardless of what substantive law applies to measure the quality of the attorney's conduct). 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).

Professor Yoo's "acts or omissions" related to his work on the Bybee Memos and Yoo Letter ended on August 1, 2002, while his work on the Yoo Memo ended on March 14, 2003, shortly before he left the Department. 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.

Rule 85.10 itself sets forth the only situations in which tolling of the four-year statute is permitted.[13] Subsection (b)(2) expressly sets out the situations for which tolling applies: The limitations period is "tolled during any period when there has been litigation pending that has resulted in a finding that the subject acts or omissions involved civil

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[12] http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentFileID=2809

[13] Subsection (b)(1) of Rule 85.10 says that the four-year limitations period does not apply "in cases involving theft or misappropriation, conviction of a crime or a knowing act of concealment." Those exceptions are not relevant to this case.

fraud, ineffective assistance of counsel or prosecutorial misconduct by the respondent-attorney." This provision does not remotely apply here.[14]

Given the 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 partisan gamesmanship. Second, 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 act of incompetence subject to bar discipline. *See, e.g., In re Outlaw*, 917 A.2d 684, 688 (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 the erroneous conclusion in the Final Report. The failure of OPR to complete its investigation in a sufficiently timely manner, or alternatively to seek tolling agreements, has already been greeted by public criticism. *See* Jan Crawford Greenburg, "Tortured Timing," ABCNews.com (May 6, 2009) ("[I]f Yoo—who wrote the memos and has been vilified as responsible for approving the interrogation program—can't be disciplined under state bar rules, why then would OPR even refer the matter to state bar officials in the first place?"). The Department's decision to recommend disciplinary charges that cannot be lawfully brought would be a huge mistake that will serve only to damage institutional and public confidence in OPR's and the Department's impartiality, processes, and basic competence.

OPR dismisses this fundamental error in a footnote. *See* F.R. at 20 n.21. According to OPR, its job is "not to assist state bars in enforcing their rules," but rather "to ensure that Department attorneys adhere to the highest ethical standards." *Id.* But that rationale rings hollow in this case, because Professor Yoo is no longer a Department attorney; indeed, he left the Department long before OPR even *commenced* its investigation. There is literally *no* rationale for OPR's advisory opinion other than to feed a bitter partisan dispute by defaming Professor Yoo. And its transparent

[14] Because the Rule itself addresses tolling, there is no authority for engrafting additional tolling based on general equitable principles. But even if such principles somehow were deemed to apply, there would be no grounds for tolling in this case. Pennsylvania courts recognize equitable tolling in two situations: (1) "[i]f . . . through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry; . . . [or] (2) "if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period." *Schaffer v. Larzelere*, 189 A.2d 267, 269–70 (Pa. 1963). The first exception obviously does not apply here. Nor does the second. The Bybee Memo was publicly released in June 2004, and therefore the Pennsylvania Board could have reasonably ascertained any of the alleged disciplinary infractions at that time. Moreover, since at least that date OPR could have alerted the Pennsylvania disciplinary board to open an investigation into Professor Yoo's conduct. But it did not.

rationalization will fool no one. OPR took over four years to produce a Draft Report riddled with basic legal errors. Every attempt that has been made to point out OPR's errors—by Attorney General Mukasey, by Deputy Attorney General Filip, and by the subjects of the investigation—have been taken by OPR solely as an opportunity to reshuffle the rationalizations offered in support of the single-minded conclusion with which OPR began the investigation—that Professor Yoo and Judge Bybee are guilty of professional misconduct. The arguments in support of this conclusion keep evolving, but the predetermined outcome is immune to reason. Given that OPR's basic complaint is that Professor Yoo lacked candor and "thoroughness" because he wished to support a specific policy outcome, the irony of the situation will scarcely need additional comment to cause great harm to the Department.

Moreover, it would be extraordinarily unethical for the Department to endorse OPR's recommendations when they can never be acted upon through the disciplinary process. Rotunda Letter at 2. Because there can be no adjudicatory proceeding in which Professor Yoo could argue his case publicly with the full protections of due process and judicial review, endorsing OPR's Report will unfairly tarnish his reputation.

Such an action runs contrary to the Department's longstanding commitment to protecting the privacy of individuals who are investigated but not tried. The Department, for example, does not include the names of uncharged co-conspirators in indictments unless absolutely necessary. *See* U.S. Attorney's Manual § 9-11.130 ("In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments."). That obligation arises out of "[t]he Due Process Clause of the Fifth Amendment," which "protects an individual from government accusations of criminal misconduct without providing a proper forum for vindication." *Doe v. Hammond*, 502 F. Supp. 2d 94, 101 (D.D.C. 2007); *see also United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1049 (N.D. Cal. 2005) ("The underlying policy for redacting an unindicted coconspirator's name from an indictment is to avoid the 'very real stigmatization' that they might suffer. . . . [N]aming them serves no purpose other than to publicly smear the individual who 'has not been provided a forum in which to vindicate his rights.'" (internal citations and quotation marks omitted)).

A similar concern for fairness underlies the grand-jury secrecy rule. "A cornerstone" of that rule is "the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but who are never indicted." *In re Am. Historical Ass'n*, 62 F. Supp. 2d 1100, 1103 (S.D.N.Y. 1999); *see also Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979) ("[B]y preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule."). Such persons, like Professor Yoo, would have no forum to refute the government's allegation of wrongdoing if their names were disclosed.

Unfortunately, a steady stream of leaks surrounding OPR's Draft Report has already needlessly and shamefully harmed Professor Yoo.[15] And the detailed, specific nature of the leaked information—together with the descriptions of the reporters' sources—overwhelmingly suggest that the sources of the leaks are OPR employees, or individuals within the Department of Justice who have reviewed personally the investigation's tentative results.[16] Indeed, shortly after the new administration took office, one of the first reporters to publicize the leaked information, Michael Isikoff, sought comment from Professor Yoo in an email that on its face asserted that "Marshall Jarrett's folks"—*i.e.* OPR attorneys—were unhappy with Attorney General Mukasey's refusal to endorse OPR's conclusions—and thus strongly suggested a source in or close to OPR. (We previously provided a copy of Mr. Isikoff's email to the Office of the Deputy Attorney General.) These leaks presumably are unauthorized, because OPR's Policies and Procedures contemplate that OPR's findings "may be publicly disclosed" only when OPR's investigation is "final," and "after all available administrative reviews have been completed." OPR Policies and Procedures ¶ 12.[17] Of course, the news reports cited above plainly refer to OPR's report on OLC attorneys as a "draft," and the leaks would therefore seem to be a blatant violation of OPR policy. Worse yet, if the unnamed sources are attorneys—as they are likely to be—the leaks appear to violate those lawyers' duty to maintain client confidentiality. *See* ABA Model R. Prof. Conduct 1.6. It is certainly the case that these leaks seem to be far clearer violations of professional ethical norms than anything reflected in the Final Report.

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[15] *See, e.g.*, Terence Chea, *Bush Attorneys Who Wrote Terror Memo Facing Backlash*, ASSOCIATED PRESS (May 10, 2009); Carrie Johnson, *Bush Officials Try to Alter Ethics Report*, WASH. POST (May 6, 2009); David Johnston and Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. TIMES (May 6, 2009); Michael Isikoff, *A Torture Report Could Spell Big Trouble For Bush Lawyers*, NEWSWEEK (Feb. 23, 2009).

[16] *See* Chea, *Bush Attorneys*, *supra* ("The draft report from an internal Justice Department inquiry sharply criticizes Mr. Yoo and Mr. Bybee and recommends referring their cases to state bar associations for possible disciplinary actions, a person familiar with the inquiry said. The person spoke on condition of anonymity because he was not authorized to discuss the inquiry."); Johnson, *Bush Officials Try to Alter Ethics Report*, *supra* (noting that "sources . . . spoke on the condition of anonymity because the process is not complete"); Johnston and Shane, *Interrogation Memos*, *supra* ("An internal Justice Department inquiry has concluded that Bush administration lawyers committed serious lapses of judgment in writing secret memorandums authorizing brutal interrogations but that they should not be prosecuted, according to government officials briefed on its findings. . . . The conclusions of the 220-page draft report are not final and have not yet been approved by Attorney General Eric H. Holder Jr. The officials said that it is possible that the final report might be subject to further revision but that they did not expect major alterations in its main findings or recommendations."); Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, *supra* ("According to two knowledgeable sources who asked not to be identified discussing sensitive matters, a draft report was submitted in the final weeks of the Bush Administration [that] sharply criticized the legal work of two former top officials—Jay Bybee and John Yoo . . . .").

[17] OPR's Policies and Procedures, Analytical Framework, and Annual Reports are available at http://www.usdoj.gov/opr/other_opr_docs.htm.

Moreover, the leaked material appears to be protected by the Privacy Act. *See* 5 U.S.C. § 552a. None of the exceptions to the Privacy Act's ban on disclosure of protected information appears to apply here, *see id.* § 552a(b), meaning the Department could be liable for civil monetary damages (and attorney's fees) should the targets of OPR's investigation bring suit for the apparent violation of their Privacy Act rights, *see id.* § 552a(g)(4). And the sources of the leaks may also be guilty of a crime: Department officers and employees who violate the Privacy Act are "guilty of a misdemeanor" and are subject to criminal penalties. *See id.* § 552a(*i*)(1). In light of these facts, it is apparent that a more appropriate subject of professional conduct investigation would be the individuals within OPR or the Department responsible for these shameful and malicious leaks.

Finally, even apart from the Department's obligation not to publicly accuse Professor Yoo of professional misconduct when it knows that he will have no way to clear his name, the Department would also violate basic tenets of professional ethics by referring him to an adjudicatory body that it *knows* has no power to act. D.C. Rule of Professional Conduct 3.1 says: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." The same standard is used to assess Rule 3.1 violations as sanctions under Rule 11 of the Federal Rules of Civil Procedure. *See* James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. Legal Prof. 231, 233 & nn.8–10 (1996) (citing G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.1:301 (1985 & Supp. 1997)). And it is well-known that an attorney may be sanctioned under Fed. R. Civ. P. 11 for filing a complaint when the attorney knows or should know that the statute-of-limitations period has expired. *See, e.g., Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996); *Cargile v. Viacom Int'l, Inc.*, 282 F. Supp. 2d 1316, 1319–20 (N.D. Fla. 2003). Referring Professor Yoo to the Pennsylvania Disciplinary Board, then, puts OPR attorneys in danger of violating their own ethical obligations under Rule 3.1 (or an analogous rule in their states of licensure). It is difficult to see why the Department would authorize such a course, where OPR has never so much as proffered an *argument*, much less a meritorious one, for believing its referral would be timely.

III. OPR Has Applied An Utterly Improper Heightened Standard To Assess Professional Misconduct.

OPR contends that Professor Yoo intentionally violated a *sui generis* professional standard that OPR has derived from three sources: (1) D.C. Rule of Professional Conduct 2.1, "Advisor" (as purportedly informed by D.C. Rule 1.1, "Competence")[18]; (2) a May

[18] In the Draft Report, OPR addressed Rule 1.1 independently. In the Final Report, however, OPR considers Rule 1.1 as it is "relevant" to its Rule 2.1 analysis. F.R. at 22. This shift is apparently in response to criticisms of OPR's own competence, the inapplicability of Rule 1.1 where the advice given is correct and does not prejudice the client, and the fact that Rule 1.1 does not fit easily into OPR's new-found theory that Professor Yoo acted with "intent" to violate the

16, 2005 memorandum by Steven Bradbury entitled "Best Practices for OLC Opinions" ("Best Practices Memo"); and (3) a December 21, 2004 document by Walter Dellinger, Dawn Johnsen and other former OLC attorneys from the Clinton Administration entitled "Principles to Guide the Office of Legal Counsel" ("Principles Memo"). F.R. at 15–24. OPR rests its recommendations that Professor Yoo and Judge Bybee face disciplinary sanction on the heightened hybrid standard of "thoroughness, objectivity, and candor" that it has created by amalgamation from these sources. *See, e.g.*, F.R. at 11, 251 (finding individual responsibility for violations "of the standards of thoroughness, objectivity, and candor"); *see also, e.g.*, *id.* at 160, 175, 192, 193, 201, 220, 226, 227, 234, 236, 237, 254, 255, 257, 260.

Of course, under OPR's own Analytical Framework, Professor Yoo must have violated a "known, *unambiguous* obligation" for OPR to recommend bar referral. F.R. at 18 (emphasis added); *see also* OPR Analytical Framework ¶ B(3). But nowhere in the Final Report does OPR identify such an unambiguous obligation. No D.C. disciplinary case has found a lack of thoroughness to be sanctionable where the advice given was not prejudicial to the client. The D.C. Rules nowhere mention objectivity (which evidently means to OPR that legal analysis should be undertaken without knowing a client's preferred course of action). And there is no authority for the proposition that a lawyer's honest assessment of the law can form the basis for a violation of the duty of candor. No doubt recognizing these problems, OPR custom-designs its standard to fit its version of the facts—that Professor Yoo, while not necessarily providing incorrect legal advice and while certainly giving his honest opinion, did not imbue the legal memoranda on which he worked with enough caveats and nuance.

But that is not all. Unsure that it has adequately rigged the standard to guarantee its preordained outcome, OPR further ups the ante, requiring the "*highest* degree of thoroughness, objectivity, and candor." F.R. at 11 (emphasis added). Again, OPR cites no case articulating such a heightened standard or sanctioning an attorney on the ground that he did not meet the "highest degree" of professional conduct. OPR's only basis for this aspect of its "known, unambiguous obligation" is its own assertion 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 professional conduct." F.R. at 25. OPR's made-up standards do not withstand scrutiny.

A. The Steven Bradbury "Best Practices" Memo And Dawn Johnsen "Principles Memo" Are After-The-Fact, Non-Binding, And Aspirational Documents That Cannot Form The Basis For A Finding Of Professional Misconduct.

OPR resorts to the Best Practices Memo and the Principles Memo because "the reported decisions and professional literature provided little guidance for application of the [Model Rule 2.1] standard in this context." F.R. at 22. OPR's citation of these

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rules of professional responsibility (*i.e.*, while OPR's theory is that Professor Yoo intentionally gave advice unduly supportive of his client's policy goals, it recognizes that it cannot plausibly maintain an independent argument that Professor Yoo was "intentionally incompetent").

documents as a basis for recommended professional sanction is absurd. Professor Yoo could not have relied upon or been bound by these documents when he worked on the Bybee Memos in 2002 and Yoo Memo in 2003 because they did not yet exist. In fact, the Principles Memo was drafted by a number of lawyers who served in OLC during the Clinton Administration, well after Professor Yoo had left the Department, to criticize the Bush Administration's policies in the war on terror, including the use of enhanced interrogation techniques. *See* Dawn E. Johnsen, *Guidelines for the President's Legal Advisors*, 81 Ind. L.J. 1345, 1346, 1348 (2006) (introducing the Principles Memo and explaining that "what inspired the drafting of the document" was the authors' desire to "restore" OLC's role in "promoting presidential adherence to the rule of law"). Similarly, the Best Practices Memo was drafted only well after the memoranda were written.

Whatever their provenance and intent, the one thing that is clear is that these are aspirational "best practices," not the type of the minimum standards for which bar sanction might attach. And OPR's own policies allow a finding of professional misconduct only when an attorney intentionally or recklessly violates an "*unambiguous obligation* imposed by law, rule of professional conduct, or Department regulation or policy." F.R. at 18; *accord* OPR Analytical Framework at 3 ("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. . . ." (emphases added)). No such unambiguous obligation (or even binding standard) is found in the aspirational, after-the-fact documents on which OPR rests its conclusions.

Moreover, OPR's use of the documents is selective. For example, even the Principles Memo recognizes that OLC does not exist simply to "predict a legal outcome" in court as OPR suggests, F.R. at 24, but rather recognizes that:

> OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law.

Principles Memo at 3. Moreover, the Principles Memo makes clear that "OLC *must* take account of the administration's goals and assist their accomplishment within the law." *Id.* at 5 (emphasis added); *accord* Levin Decl. ¶ 8 ("In my experience, in crafting legal advice, OLC attorneys are generally aware of the course of action the client wishes to take, especially in areas that raise questions involving national security. In my opinion, it

is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons."). Even Professor Yoo's most vocal critics from the Clinton Administration OLC would agree that the work of the office need not be completely "objective," then, as OPR implausibly asserts on the basis of no authority whatsoever. Rather, OLC quite properly takes the President's policy objectives into account when giving advice.

Additionally, notwithstanding OPR's apparent belief that the *ex-post* Best Practices Memo demonstrates that it has been OLC's practice from time immemorial to discuss all possible counterarguments to its legal conclusions, *see, e.g.*, F.R. at 24, Steven Bradbury, who authored that memorandum, informed counsel that this has *not* been OLC's past practice, and that many past OLC opinions say little about opposing arguments. Bradbury also confirmed that the Best Practices Memo was not intended to describe the ethical duties of OLC attorneys, and that his statement that the memo "reaffirm[s] traditional practices" of OLC, F.R. at 15, does not apply to every aspect of the memo, including the treatment of counterarguments. A review of past OLC opinions in fact confirms that thorough treatment of counterarguments has not been the traditional practice of the Office, and the Best Practices Memo itself is written in tentative language: "[i]n general, we *strive* in our opinions for . . . a balanced presentation of arguments on each side of an issue . . . taking into account all reasonable counterarguments." 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, especially when the aspirational goal has not been the uniform past practice of the Office, much less of the legal profession generally. *Cf.* F.R. at 24 (noting OPR's task to determine whether "*minimum* standards" were met (emphasis added)).

B. OPR's Heightened Standard Of "Thoroughness, Objectivity, and Candor" Has No Basis In The Rules Of Professional Conduct.

Recognizing that its reliance on the Best Practices and Principles Memos cannot withstand critical scrutiny, and that it cannot establish a violation of any particular rule of professional conduct on the rule's own terms, OPR carefully calibrates a new heightened standard to reach its preordained result. To do so, it plucks "candor" from D.C. Rule 2.1, "thoroughness" from D.C. Rule 1.1, and blindfolded "objectivity" from a source known only to OPR's attorneys. Of course, OPR cites no authority for this line-blurring hedge, which it has apparently pursued in the hopes of reducing its burden under the individual rules. But the practical result is that OPR must demonstrate an independent, sanctionable violation of *both* rules for the conclusions reached under its hybrid approach to stand. OPR has not, and cannot, make such a showing.

1. Rule 2.1

The central conclusion of the OPR Report is that Professor Yoo and Judge Bybee violated the Rule 2.1 duty of candor, which is "not simply aspirational." F.R. at 17. As discussed above, however, this is an unquestionably erroneous conclusion under the controlling Pennsylvania standard applicable to Professor Yoo, which at the relevant time

clearly provided that Rule 2.1 was only permissive. And OPR has recognized, as it must, that where a standard's language is permissive, an attorney's alleged failure to follow the standard "should not be subject to disciplinary review." F.R. at 21 n.23. To an impartial arbiter, that should end the case. But even if OPR were somehow correct that Rule 2.1 was (as to Professor Yoo) a mandatory requirement subject to bar sanction, OPR has not come close to demonstrating that Professor Yoo violated the rule here.

The first sign of OPR's overreaching is its inability to identify any persuasive or binding precedent finding misconduct for a violation of Rule 2.1. Given that Rule 2.1 was a permissive standard in Pennsylvania at all relevant times, it is unsurprising that OPR was unable to find any Pennsylvania authority subjecting an attorney to discipline under the rule. But even on the assumption that D.C. Rules apply, what is more curious is that OPR was unable to find a single case from D.C. *or any other jurisdiction* that would support its theory here. OPR admits that "the reported decisions and professional literature provided little guidance for application of the [Model Rule 2.1] standard in this context," F.R. at 22, but disregards the natural conclusion that the complete absence of any precedent whatsoever suggests their invocation of the rule is inappropriate.

In the absence of any relevant authority, OPR has elected not to apply Rule 2.1 faithfully. The comment to Rule 2.1, which OPR at least manages to cite, recognizes that "[a] client is entitled to straightforward advice expressing the lawyer's *honest* assessment." F.R. at 21 (emphasis added); *see also* Rotunda Letter at 2–3; Hazard Letter at 4. But nowhere does OPR show, or attempt to show, that Professor Yoo did not provide his honest assessment of the law, much less acted in bad faith. To the contrary, OPR notes that "John Yoo has vigorously defended his work since leaving the Department," F.R. at 4 n.1, and it evidently admitted to Attorney General Mukasey that it lacked any direct evidence that Professor Yoo acted in bad faith. And those who have commented on whether Professor Yoo gave his honest assessment of the difficult issues that he addressed in the memos have steadfastly maintained that he did. *See, e.g.*, Levin Decl. ¶ 7 ("In my view, the authors believed what they wrote. Over the years I had a number of discussions with Mr. Yoo and I never had any reason to believe that he did not set forth his honest assessment of these difficult questions."); Rizzo Letter ¶ 2 ("[I] have never doubted that the conclusions reflected Jay Bybee's and John Yoo's honest assessment of the legal issues they addressed."); J. GOLDSMITH, THE TERROR PRESIDENCY 167 (2007) ("[Yoo] has defended every element of the opinion to this day, and I believe he has done so in good faith."); C. Savage & S. Shane, *Terror-War Fallout Lingers Over Bush Lawyers*, N.Y. TIMES (Mar. 9, 2009), at A1 (paraphrasing Columbia Law Professor Daniel C. Richman for the proposition that discipline is "unlikely unless e-mail messages or early drafts turn up proving that they blatantly altered their legal conclusions to fit a policy agenda . . . [T]hat would be unlikely for Mr. Yoo, who had pushed an aggressive theory of presidential power long before the administration recruited him."); *cf.* OPR Analytical Framework ¶ B(4) ("An attorney who makes a good faith attempt to . . . comply with the[] [obligations and standards imposed on the attorney] in a given situation does not commit professional misconduct."). OPR thus does not even attempt to make the case, required by Rule 2.1, that Professor Yoo gave anything less than his honest assessment, because he emphatically did.

Instead, OPR just rewrites the standard by introducing the word "objective" without explanation. *Compare*, F.R. at 11, 24 *with* F.R. at 21–24. Of course, a lawyer is required to be "objective" in the sense that he must offer his true belief about the answer to a particular legal question—which Professor Yoo unquestionably did. But since OPR sees "objectivity" as a requirement separate from both "candor" and the "duty to exercise independent legal judgment," OPR must mean something other than the "honest assessment" called for by Rule 2.1. *See* F.R. at 11 ("[W]e concluded that [Yoo] committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.").

What OPR seems to mean by "objective" is that OLC lawyers, much like a judicial tribunal, must draft legal opinions in a vacuum, completely tone-deaf to the interests of their Executive Branch client. *See, e.g.*, F.R. at 227 (OPR "found evidence that the OLC attorneys were aware of the result desired by the client"). In this case, the client's paramount interest, as OLC well understood, was the urgent need to implement an interrogation program considered vital to preventing potentially imminent terrorist attacks. OLC was not asked to "predict a legal outcome," as OPR evidently believes, *compare* F.R. at 24 *with* Principles Memo at 3, but simply to determine whether the interrogation program could be legally justified. The Executive Branch client did not want an opinion about whether a court or commentator might someday question the legality of the interrogation program, and certainly not on the wisdom or morality of the techniques at issue, but rather on whether, in OLC's opinion, the program violated the torture statute. Professor Yoo answered that question honestly, and OPR has produced no evidence or argument that he did not. But under the banner of "objectivity," OPR appears to assert that Professor Yoo should have supplemented his good-faith interpretation of the statute with a protracted on-the-one-hand, on-the-other-hand digression that the client did not ask for. *See* F.R. at 24 ("[A] thorough discussion of the law should include the strengths and weaknesses of the client's position and should identify any counter arguments." (citing legal-writing books)); Rizzo Letter ¶ 1 ("[I] did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counterarguments," but rather "sought OLC's best judgment about the correct answer to a difficult question of law.").

That proposition has no support in the text of Rule 2.1 or its comments, which require only an "honest assessment." Rotunda Letter at 2–3; Hazard Letter at 4. It also ignores the fact that Justice Department lawyers are ethically bound (again, on the assumption that D.C. Rules apply) 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. 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 plans to take, OLC lawyers are ethically bound to determine the "meaning . . . of the law" and to opine on the issue presented or the legality of the proposed course of action, as requested. *Cf.* D.C. R. Prof. Conduct 2.1 cmt. [3] ("A client may expressly or impliedly

ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value.").

As discussed above, longstanding OLC practice makes clear that in matters of executive authority and otherwise the Office is not divorced from the policy goals of the President. 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 Assistant Attorney General for 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 either to 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) (internal footnotes omitted).

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," *see* D.C. R. Prof. 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 direct questions from the Executive Branch would constitute a vast departure from existing norms of legal practice. Doing so would

conflate the role of OLC and the attorneys who serve there with the role of the President's myriad policy advisers.

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 that 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 discussing every possible argument, but to render a good-faith opinion addressing the ultimate 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 absurd and irresponsible.

2. Rule 1.1

In its Draft Report, OPR grounded the majority of its findings of substantive violations on the Rule 1.1 duty of competence. OPR based its standards of competence on entirely irrelevant sets of sources, such as the OLC Best Practices Memo that did not yet exist when Professor Yoo was at OLC, five books on legal research and writing (none aimed at identifying standards of bar discipline), and 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. It also took goals clearly meant to be *aspirational* and converted them into *minimum* standards. And OPR ignored important comments to Rule 1.1 and the D.C. case law interpreting the rule.

As a result, we devoted a large portion of our initial comments to explaining that Professor Yoo had acted competently, reaching the correct legal conclusions on all of the issues in the Bybee Memo (and far surpassing the minimum level of competence). We also showed that OPR could not possibly meet the requirements of D.C. law, which precludes discipline even for failures of skill and knowledge unless those failures "constituted a serious deficiency in the representation," that is, generally the type of conduct "that prejudices or could have prejudiced a client and [that] was caused by a lack of competence." *In re Evans*, 902 A.2d 56, 69–70 (D.C. 2006) (quoting board report adopted by court). *See* May 4 Comments at 22–48.

In its Final Report, OPR has apparently abandoned its independent Rule 1.1 theory, focusing instead on its hybrid theory ostensibly arising out of Rule 2.1. That is no doubt because OPR reached *no* conclusion about whether the ultimate analysis in the memoranda was correct: "We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. As we explained in our initial comments, absent complete inattention a lawyer cannot be held to have given advice that is simultaneously incompetent and correct. *See* May 4 Comments

at 23. Correct legal advice cannot prejudice a client, and OPR has shown no prejudice here.

Even a rudimentary review of judicial decisions applying Rule 1.1 would have demonstrated to OPR that lawyers have been disciplined under it only for egregious incompetence significantly prejudicing a client. *See, e.g.*, *In re Cole*, 967 A.2d 1264, 1265–66 (D.C. 2009) (lawyer failed to file timely asylum application for client and falsely told client that application had been filed); *In re Outlaw*, 917 A.2d 684, 686–88 (D.C. 2007) (lawyer allowed statute of limitations to expire); *In re Nwadike*, 905 A.2d 221, 226–27 (D.C. 2006) (lawyer failed to file a timely and complete discovery statement under D.C. Rule of Civil Procedure 26(b)(4)); *In re Càter*, 887 A.2d 1, 5, 16–17 (D.C. 2005) (lawyer delegated duties to nonlawyer employee, who then embezzled from incapacitated clients); *see also* Alan B. Morrison, *Alas, no disciplinary action*, NATIONAL LAW JOURNAL (Aug. 17, 2009) at 38 (noting that Rule 1.1 requires "'the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,'" but concluding that "there is no doubt that the lawyers who wrote the torture memos met those requirements").

Given Rule 1.1's requirement that a violation be prejudicial to the client, and OPR's apparent unwillingness or inability to refute the memos' conclusions, OPR is forced to subordinate its Rule 1.1 argument on its second go-around. But unwilling to completely let it go, OPR now tries, citing no legal precedent, to smuggle parts of the Rule 1.1 standard into Rule 2.1: "Relevant to Rule 2.1's duty to exercise independent professional judgment and render candid legal advice are the provisions of D.C. Rule 1.1." F.R. at 22. This sleight-of-hand allows OPR to cherry-pick the words "thoroughness" and "care" from Rule 1.1 and its comments and then import them into Rule 2.1. That has the effect of raising the bar for Rule 2.1, rendering even an attorney's "honest assessment" a violation if it is supported by supposedly insufficient thoroughness or care. But unlike Rule 1.1 proper, OPR's hybrid rule can apparently be violated even if the legal advice is correct and the client is not prejudiced. This sloppy, outcome-driven legal analysis does not itself meet a basic standard of competence.

OPR goes on to invoke its hybrid rule to accuse Professor Yoo of violating a duty of "thoroughness," despite Professor Yoo's ultimately correct analysis of the specific interrogation techniques at issue, because he supposedly did not cite enough contrary authority—in a memorandum drafted under extreme pressure and intended for a most sophisticated audience. *See, e.g.*, F.R. at 11, 251. In support of its approach, OPR further enhances its own manufactured standard by citing a *legal writing text* for the proposition 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." F.R. at 24 (emphasis added). But legal writing texts do not establish professional-responsibility standards, and there is no ethical requirement for thorough treatment of counterarguments in a legal opinion. Rotunda Letter at 3; Hazard Letter at 4. Moreover, the CIA "did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counter arguments," but rather sought "OLC's best judgment about the correct answer to a difficult question of law." Rizzo Letter ¶ 1. And, ironically, while it may be debatable

whether OLC was "predict[ing] a legal outcome" in evaluating whether enhanced interrogation techniques violated the torture statute, it is certainly not subject to reasonable dispute that OPR is "predict[ing] a legal outcome" in evaluating whether Professor Yoo and Judge Bybee violated the standards of professional conduct so as to merit sanction by the jurisdiction of their licensure. Yet OPR gives no credence to counterarguments in its Final Report and presumably does not concede its own professional responsibility violations on this score.

Professor Yoo's conduct could not possibly amount to a violation of either Rule 1.1 (because he provided correct legal advice that was not prejudicial to his client) or Rule 2.1 (because he gave his honest assessment of the law). But OPR's prefabricated rule effectively permits it to find violations of Rule 1.1 without the showing of prejudice required by D.C. law, and violations of Rule 2.1 even for honest assessments.[19] And, as described elsewhere in this response, OPR itself *repeatedly* fails to cite contrary authority in a far more egregious way on far less difficult issues and with far more time to research. It is truly astounding that OPR condemns OLC lawyers for omitting contrary authority when OPR does so over and over again even *after* being apprised of it. If OPR's heightened competence standard had any merit, and were not tailor-made to attack Professor Yoo and Judge Bybee, any responsible official at the Department would be under an ethical duty to seek professional discipline for OPR's attorneys. *Quis custodiet ipsos custodes*?

C. There Is No Basis For OPR To Apply A "Super Standard" Of Professional Conduct In This Case.

OPR's entire analysis operates from the "premise" 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 professional conduct." F.R. at 24–25 (emphasis added). In establishing this premise, OPR eschews its statement in the immediately preceding paragraph that it is only assessing "*minimum* standards." *Id.* at 24 (emphasis added). And, apparently recognizing the risks inherent in applying an elevated professional standard, OPR expressly limits its analysis "to the particular circumstances of *this* case, which . . . involved issues of the highest importance that demanded the highest degree of thoroughness, objectivity, and candor from the lawyers involved." *Id.* at 11 (emphasis added). The logical leaps OPR must take to conclude that a heightened standard applies to Professor Yoo and Judge Bybee—and for this case only—reveal the pervasive bias that infects its analysis.

[19] Moreover, to the extent the disciplinary rules address the level of explication that must attend an attorney's advice, the appropriate provision would appear to be D.C. Rule 1.4(b), which is nowhere mentioned (much less discussed) in OPR's analysis. That rule requires only that a lawyer "explain a matter to the *extent reasonably necessary* to permit the client to make informed decisions" (emphasis added). In fact, "[o]rdinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult." *Id.* cmt. [4]. No one could reasonably contend that OLC's opinions at issue failed to explain the issues to the extent "reasonably necessary" for the White House's and CIA's evaluation of the advice.

Apart from bias, adoption of this sort of analysis is fraught with danger for the Department and its dedicated attorneys. As a general proposition, no one disputes that the degree of care and attention that a matter requires should be commensurate with its importance. But much, if not all, of what the Department does is important, whether it is a capital case, a terrorism prosecution, an immigration matter, a Supreme Court argument, or advising the Attorney General on whether voting rights may be constitutionally extended by Act of Congress to the Nation's capital. Indeed, when federal prosecutors weigh whether to seek the death penalty, or to decline to prosecute a suspect who may have committed a violent crime and may do so again, they are making far more direct life-or-death decisions than Professor Yoo made in advising the actual policymakers about the legality of certain interrogation techniques. Yet no one has ever contended that those Department lawyers would be subject to anything other than the ordinary rules of professional conduct. *See* 28 C.F.R. § 77.1(c) (stating that 28 U.S.C. § 530B "imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys").

The Department can derive cold comfort from the fact that OPR's newly minted super standard—"highest degree of thoroughness, objectivity and candor"—purports to reach only "*jus cogens* norms." Those peremptory norms of international law include not only torture, but also "genocide," "slavery," "prolonged arbitrary detention," and "systematic racial discrimination." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). With a fraction of the inventiveness that OPR has brought to this investigation, much of what the Department does could be framed as an enforcement "policy" that involves a "derogation" of these norms.

Indeed, most reported cases on torture involve the Department's immigration attorneys advocating for a narrow definition of torture (and particularly the specific-intent requirement) in order to return aliens to a country where, it is claimed, they will in fact be tortured. The Department's civil-rights attorneys, who enforce laws against peonage and involuntary servitude (and, of course, racial discrimination) might likewise find themselves acting in derogation of "*jus cogens*" norms if they decline to prosecute every allegation that such an offense has occurred; in fact, it is not immediately apparent why any high-level decision to allocate greater prosecutorial resources to other enforcement priorities could not be characterize as a "policy" of derogating from those "norms." Similar arguments can be constructed about detention decisions by criminal-division attorneys, and, in particular, the Bureau of Prisons. Without going too far into hypotheticals, the Solicitor General is currently arguing, on behalf of the Administration, that the Bureau of Prisons can lawfully confine inmates whose incarceration sentences are at an end if they present certain dangerous tendencies. *See United States v. Comstock*, No. 08-1224. Is she acting "in derogation" of the *jus cogens* norm barring "prolonged arbitrary detention"?[20]

[20] Of course, the fact that the Solicitor General is defending the constitutionality of an Act of Congress presumably would be considered as persuasive by OPR as the notion that OLC attorneys were safeguarding Executive authority. Even OPR would not maintain that its "*jus*

The Department also should be very concerned about any suggestion that a heightened standard of professional responsibility applies only to matters deemed important during OPR's after-the-fact review. The Department's attorneys are presumably held to the highest standards in *every* matter they handle, regardless of whether OPR takes interest or not. OPR's mandate is not to assess whether Department attorneys have met the great expectations placed upon them, and presumably the Department does not consult OPR when it comes time for merit promotions. To the contrary, OPR is charged with ensuring that Department attorneys meet *minimum* standards under established rules of professional conduct. *See* F.R. at 24. Under these rules, there is no "highest" standard of review based on OPR decree, and Department attorneys should not be forced to divine OPR's predilections while assessing difficult questions of law. Given OPR's analysis here, however, one cannot help but wonder whether OPR would be applying a heightened standard (or even conducting an investigation) had OLC concluded that each of the enhanced interrogation techniques proposed by the CIA was unlawful. Or whether a heightened standard of review would apply had OLC rendered such a conclusion and a catastrophic terrorist attack had been the result. Department attorneys tasked with answering extremely difficult questions should not find themselves asking such questions.

It is also worth noting—regardless of OPR's apparent policy preferences—that the Bybee Memos in no way advocate the "abrogation or derogation" of the prohibition against torture. To the contrary, their very purpose was to ascertain the boundaries beyond which CIA interrogators could not venture under the law. That the Bybee Memo considered whether certain defenses *might* be available to those interrogators if they overstepped their bounds does nothing to undermine this purpose. And the fact that the Bybee Memo also discussed whether the President has the constitutional power to override a particular statute during the exigencies of war is a very different question from whether the President should, as a matter of policy, do so. The implications of such a decision are obviously great—whether discussed in terms of "*jus cogens* norms" or not—and the President did not require OLC attorneys to inform him of that fact. Nor, of course, did the President need OLC to inform him of the thousands or perhaps millions of lives at risk if he did not consider all means at his disposal to prevent al Qaeda's unabashed violations of *jus cogens* norms. By invoking *jus cogens* as a basis for applying a supremely heightened standard of professional responsibility to Department attorneys assessing the legality of enhanced interrogation techniques, OPR knowingly stacks the deck with a deeply malleable card. No one should be under any illusions that this tailor-made "highest" standard of care will not find new and unforeseen uses down the road, when electoral fortunes once again turn and a new crowd of partisans agitates for retribution against their political opponents in the last administration.[21]

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cogens" disciplinary review would vary if Congress had passed a law *requiring* "torture" in the field of battle.

[21] In light of OPR's application of the *highest* standards to Professor Yoo and Judge Bybee, it is worth considering why OPR goes out of its way to apply the *lowest* possible standard when it comes to its own burden. OPR concedes that state bar authorities "generally use the higher 'clear

In the Draft Report, OPR concluded that it was "self-evident" that its heightened standard should apply to Professor Yoo and Judge Bybee. D.R. at 129–30. In its Final Report, OPR no longer contends that this proposition is self-evident, but continues to offer no persuasive rationale for it. Department attorneys should be held to applicable professional standards in all of their many important matters, whether they are addressing the legality of interrogation techniques to be used on al Qaeda terrorists, or investigating dedicated civil servants who performed their duties in good faith during uncertain and trying times. There is no place for the imposition of policy-laden value judgments on the ethical standards to be applied to the work of Department attorneys, as OPR has done in applying a heightened standard here. The net of the matter is that OPR has not relied on a "known, unambiguous obligation" in its Final Report because Professor Yoo did not violate one.

IV. OPR Ignores The Approvals And Subsequent Reaffirmation Of Judge Bybee's And Professor Yoo's Legal Conclusions At The Highest Levels Of The Department of Justice And Elsewhere.

The list of Department of Justice and other Executive Branch attorneys who vetted the Bybee Memos without demur is long and distinguished. Attorney General John Ashcroft. Deputy Attorney General Larry Thompson. Assistant Attorney General for the Criminal Division Michael Chertoff. Counselor to the Attorney General Adam Ciongoli. White House Counsel Alberto Gonzalez. National Security Council Legal Advisor John Bellinger. The list is even longer when including those Department attorneys who later agreed that waterboarding and other enhanced interrogation techniques do not amount to torture within the meaning of the statute. And this is to say nothing of the many bipartisan policymakers who approved of the techniques.

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and convincing evidence' standard of proof," F.R. at 13 n.13, which is true for both D.C. and Pennsylvania. *See In re Romansky*, 938 A.2d 733, 739 (D.C. 2007); www.padisciplinaryboard.org/faqs/consumers.php ("What is clear and convincing evidence? It is the burden of proof by which ODC [the Office of Disciplinary Counsel] must show alleged attorney misconduct. It is a heavier standard of proof than would be necessary to prevail in a civil action."). But OPR hides behind an entirely inapposite statute for the proposition that a preponderance of the evidence is "the statutory standard of proof for upholding a disciplinary action for misconduct." F.R. at 13 n.13. The citation OPR provides, 5 U.S.C. §770(c)(1)(B), is nowhere to be found in the United States Code. Presumably this is a typographic error, however, and OPR intends to rely on 5 U.S.C. § 7701(c)(1)(B) to support its argument. But that provision specifies the standard used by the Merit Systems Protection Board for an appeal by an aggrieved "employee or applicant for employment." Both Professor Yoo and Judge Bybee are *former* Department employees, of course, and their appeal lies to the Office of the Deputy Attorney General, not to the MSPB. Whatever standard that agency uses is of absolutely no relevance whatsoever here. The only relevant standard of proof here is the standard that would be applied on the merits by the bar authorities to which OPR proposes to refer Professor Yoo and Judge Bybee, and *those* authorities apply the clear and convincing standard. OPR makes no claim that it could satisfy that standard, however, because even under a preponderance of the evidence its case is an utter sham. That OPR proceeds undeterred should come as little surprise, one must suppose, as it has already demonstrated that it is perfectly prepared to make a sanctionable bar referral of a clearly time-barred claim, and it repeatedly demonstrates it has no intent of holding *itself* to high standards.

OPR in fact determined that Attorney General John Ashcroft "was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program." F.R. at 259. And OPR determined that Ashcroft and other senior Department officials "should have looked beyond the surface complexity of the OLC memoranda and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound." F.R. at 259. But earlier in the Final Report, OPR recognizes that Ashcroft in fact "engaged Yoo in a vigorous discussion" of the "legal reasoning" behind the approved interrogation techniques and was "ultimately satisfied" with the "reasoning and analysis." F.R. at 60. With respect to waterboarding specifically, Ashcroft and his counselor (Ciongoli) "concluded that Yoo's position was aggressive, but defensible." F.R. at 60. OPR nevertheless concludes without discussion that "as a matter of professional responsibility," it was acceptable for Ashcroft and other "senior Department officials to rely on advice from OLC." F.R. at 259.

Notwithstanding its assertion 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 professional conduct," F.R. at 25, OPR apparently believes that this heightened standard applies only to Professor Yoo and Judge Bybee and not to the Attorney General or other senior Department attorneys equally aware—after "vigorous discussion"—of the significant issues involved and who strenuously defended the legality of the EITs in the highest councils of government.[22] Although Model Rule of Professional Conduct 5.1, as adopted in the District of Columbia and elsewhere, imposes a duty to supervise on senior attorneys, OPR makes no effort to analyze the supervisory requirements under this rule, Department rules and regulations, or other sources.

This is not remotely to say that Attorney General Ashcroft or others committed professional misconduct. Like Professor Yoo and Judge Bybee, they assuredly did not. Rather, the point is that the OPR attorneys never bothered to consider the issue, because they had identified their chosen targets early in the investigation and spent the next several years attempting to build a case against them. In fact, any impartial observer who reads the transcripts of Professor Yoo's interviews in June and July 2005—he voluntarily appeared for interview without counsel twice, without any legal obligation to do so—would recognize the accusatory template for OPR's "questions" to bear a striking similarity to the draft "report" issued by OPR four years later. This is not the work of "objective" investigators.

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More astonishingly, notwithstanding five years of work, OPR states that it "did not attempt to determine and did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. It similarly dismisses "the fact that other OLC attorneys subsequently concluded that the CIA's use of EITs was lawful" as "not relevant to [its] analysis." F.R. at 160. OPR apparently cannot be bothered with the inconvenient fact that Professor Yoo and Judge Bybee gave correct advice to their client on the use of those interrogation techniques, even though the issues were close and difficult, and the national exigency following September 11, 2001 did not allow them a half-decade to ponder the question, or afford them the luxury of punting on the answer. Rather, OPR seeks professional sanction for Professor Yoo and Judge Bybee for giving legal advice that it concedes may be completely sound because it thinks some other things might be said on the issues presented. Of course, OPR cites no authority for the proposition that lawyers can be sanctioned for giving correct legal advice based on good-faith analysis. And, OPR's protestations notwithstanding, the fact that other OLC attorneys did subsequently affirm the advice given is *highly* relevant. *See* Rotunda Letter at 3–4.

[redacted]

In support of its conclusions, the Final Report places great emphasis on the fact that the unclassified Bybee Memo was "replaced" by the Levin Memo,[24] but gives no credence to the fact that the Classified Bybee Memo—which provides the detailed operational guidance—remained in effect. In fact, 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.* And the Levin Memo underscored the point:

> While we have identified various 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).

And, although the Classified Bybee Memo was later *superseded* by the Bradbury memoranda,[25] 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 discussions 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 (emphases added). The Classified Bybee Memo of course relies heavily on its unclassified counterpart.[26]

Although the Levin and Bradbury memoranda modify the specific intent and statutory interpretation analyses, the differences are far from monumental. 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." Levin Memo at 2. Of course, as David Addington made clear in his testimony before the House Judiciary Committee, *see infra* Section VI.F, Professor Yoo and Judge Bybee did not have the luxury of ignoring the very questions asked by their client.

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[24] Memorandum for James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (Dec. 30, 2004).

[25] OPR defines and discusses these memoranda on page 132 of the Final Report.

[26] Similarly, OLC's advice to the Department of Defense concurred in the context of its consideration of the legality of specific techniques. In reliance on that advice, the DoD Working Group ultimately approved 24 specific techniques, most of which were already authorized by the Army Field Manual. All of them were—and remain—unquestionably lawful. *See, e.g.*, J. GOLDSMITH, THE TERROR PRESIDENCY 153 (2007).

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 both Bybee Memos—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.

OPR, however, apparently fails to understand this distinction, because it condemns the authors of the Bybee Memos on matters of *policy* even though the bottom-line advice that particular techniques were lawful in the Bybee Memos were affirmed in subsequent OLC opinions. Indeed, the Final Report's detailed (and in large part 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. OPR even dwells on the use of unauthorized, abusive interrogation techniques and prisoner abuse wholly *unrelated* to interrogation (*e.g.*, a death caused by hypothermia when the prisoner was allegedly deprived of clothing as punishment for attacking guards). F.R. at 88–90. None of this has anything remotely to do with any legal advice provided by Professor Yoo or Judge Bybee or anyone remotely connected with OLC.

These critical facts—that the Bybee Memos were approved at the highest levels of the Department of Justice, that lawmakers did not take issue with OLC's interpretation (much less amend the statute to codify any disapproval) after they were briefed on the details of the interrogation program, and that the bottom-line advice did not change even after the unclassified Bybee Memo was withdrawn and subjected to public debate and criticism—should be of utmost importance when assessing Professor Yoo's work. But OPR pays them no heed. OPR merely critiques some of the analytical steps taken to reach the (repeatedly reaffirmed) legal conclusions, and apparently objects to policy decisions the Bush administration made with the support of bipartisan congressional leaders. But even if OPR is right on the policy front—and it is doubtful that one can be "right" about such a subjective matter—this is not remotely sufficient to support a charge of professional misconduct.

V. 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. Rules, "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 has not assessed Professor Yoo's conduct through that prism; in fact, OPR has not even *tried*. Among other shortcomings, OPR omits any serious 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 in 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.

Although quick to cite critics of the Bush Administration's anti-terrorism policies, OPR avoids any meaningful discussion of wholly unprecedented circumstances that confronted Professor Yoo and indeed the entire Nation in 2002. 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 attacks ever on United States soil. 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 now known, as noted below, that during this time "the CIA was struggling to obtain critical information from captured al Qa'ida leaders." And it is also known, as OPR itself acknowledges, 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." F.R. at 57 (quoting Yoo email of July 24, 2002); *see also* F.R. at 61 (July 31, 2002 email from [redacted] to Philbin noting that "the White House wants both memos signed and out by COB tomorrow"). Patrick Philbin indeed told OPR that OLC faced "time pressures" and on August 1, 2002 was told that "this has to be signed tonight." F.R. at 63.

The eight 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 Qa'ida 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). To put it bluntly, the OLC attorneys were being told that all objective evidence suggested that the Nation's enemies were preparing, perhaps imminently, another terrorist attack that could kill thousands, and that there was good reason to believe that a notorious terrorist then in custody had valuable information that could avert that tragedy. The circumstances did not permit OLC the luxury of years of drafting and re-drafting—and it was not really an option for OLC's attorneys—to borrow a page from Bartleby, the scrivener—to respond that they "would prefer not to."

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." Bret Stephens, *The Politics of Liberal Amnesia*, Wall St. J. (Apr. 28, 2009) (citing and quoting sources above). 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." *Id.* (emphasis added). 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.

Even the briefest recitation of this context (far more, of course, could be said), should suffice to see that OPR's critiques are not only unfair but bordering on the preposterous. For example, OPR's pseudo-dramatically asserts that OPR has "found evidence that the OLC attorneys were aware of the result desired by the client," and that [redacted] even admitted her "'personal perspective was there could be thousands of American lives lost' if the techniques were not approved." F.R. at 227. This is rather damning, according to OPR, especially where one considers that the CIA told OLC that the specific interrogation techniques "were . . . essential to the success of the program." F.R. at 227. It would be surprising if OPR had not "found evidence" that OLC attorneys considered the judgment of the CIA experts to the extent it assessed the terror threat as it then existed. Until OPR came along, it had not occurred to anyone that it was the ethical duty of OLC attorneys to minimize or discount the facts as related by expert intelligence agencies and to play roulette with the lives of thousands of Americans.

OPR's analysis betrays a mulish refusal to consider the context maturely and responsibly. *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. 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." To suggest that there is something nefarious or unusual about this is either naïve or disingenuous. That OPR believes this provides a reason for professional discipline should alarm any responsible decisionmaker at the Department of Justice.

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* 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.[27]

Unlike the law-professor critiques oft-cited by OPR, Professor Yoo and 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 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 conduct that some might later conclude, even if incorrectly, to fall just over the line that statutorily defines

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[27] In this regard, it is no surprise that in May the senior legal ethics counsel for the D.C. bar wrote a letter to the *Washington Post* discussing why Bush Administration lawyers could not be sanctioned under the D.C. Rules for establishing a good-faith legal basis for approving enhanced interrogation techniques:

> If a client instructs his lawyer, "I want to perform a certain act; find me a legal way to do it," that lawyer's professional duty is to find a good-faith basis in the law to meet the client's needs while carefully advising the client of the risks of pursuing such a course of action. Such a lawyer not only acts well within the Rules of Professional Conduct, but he also serves his client well.
>
> Waterboarding is a perfect example. A lawyer may personally believe that such a practice constitutes torture, but there is, at the very least, a good-faith argument to be made that it is not—as evidenced by the fact that even now respected authorities argue that this is not torture. Thus, even if the ultimate arbiter decides that waterboarding is torture, that does not mean that lawyers who advised to the contrary should be professionally disciplined.

Saul Jay Singer, Letter to the Editor, WASH. POST (May 11, 2009).

"torture." It utterly fails to see—or perhaps consciously refuses to admit—the *other side* of what was at issue: 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 now blasts as "unnecessary."

Apart from this huge blind spot, OPR's analysis also suffers from other failures to evaluate Professor Yoo's conduct in context. The Final Report claims, for example, that "none of the attorneys involved . . . asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work." F.R. at 226 n.185. This is true in the limited sense that the OLC attorneys produced work of high quality under extremely trying circumstances, but OPR deliberately engages in outright deception by suggesting that OLC attorneys had every luxury of 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. OPR, in fact, well knows that "the attorneys involved" have "asserted" quite the opposite. 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., No. 110-189, at 11 (June 26, 2008).[28] In fact, OPR not only disregarded the House testimony, though brought to its attention, but has combed his sworn statements to OPR looking for anything it can portray as supporting its case, while

[28] Professor Yoo also made this point clear in his voluntary interviews with OPR. After noting that the memos were produced in a few short months, even though "[s]ometimes the office takes years," Professor Yoo said that there was time pressure and that "a lot of the time pressure is just because only late in the game do we decide to do this second opinion. . . . I think for most of the time until maybe the last week and a half or two weeks, we had thought we were only going to do one." July 11, 2005 Yoo Tr. at 28–29. Indeed, according to OPR's own chronology, the Commander-in-Chief and defenses sections that it has singled out for particular criticism were added and finished in about two weeks, at the very end of the process, and at the client's express request. F.R. at 52. Professor Yoo also made clear that the memos needed to be finished by a date certain so that policy decisions of the utmost national-security importance could be made at the highest levels of government: "[A]s of a certain date . . . the President and NSC and the CIA were going to decide whether to do it. And so we had to, I know we had to get it done before then. But I think only late in the game is it clear that that becomes this August 1st date." July 11, 2005 Yoo Tr. at 29. OPR is supremely misleading when it claims that "Yoo told us that he did not feel time pressure to complete the memoranda," F.R. at 43, because what he actually said was that he "originally" did not feel time pressure, and he then went on to discuss the time pressure that he ultimately felt down the stretch. July 11, 2005 Yoo Tr. at 28.

wholly disregarding whatever is inconvenient for its pre-determined position.[29] OPR does not even try to keep its slanders consistent, at once faulting the OLC lawyers for fearing the imminent loss of thousands of lives *and* supposing that, in these circumstances, they thought they could take the time to produce, years down the road, an encyclopedic analysis of every possible caveat.

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. This was, after all, only *one* of the many urgent national-security inquiries with which OLC was bombarded in this time period. It is of little significance that Levin and Bradbury—with the benefit of hindsight and more time—altered the legal analysis slightly or addressed some additional factual considerations, because it is clear that the bottom-line OLC advice on the techniques at issue did not change. The authors of the Final Report may believe that the Levin and Bradbury Memos are superior to the Bybee Memos, but that is no grounds for disciplinary sanction, especially when the circumstances facing the authors of the interrogation memoranda are fairly considered.

The failure of OPR to account for the facts and circumstances facing Professor Yoo and others, as it must do 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, *see, e.g.*, F.R. at 2–3—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 were dealing with "a *jus cogens* norm" under international law, F.R. at 25, but give no credence to the importance of preventing another terrorist attack on American soil. And OPR takes four and one half years to produce a Draft Report that makes numerous glaring, fundamental errors in its analysis (and additional months to craft a "Final Report" that simply papers over the errors)—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.

[29] It is impossible to know the extent to which OPR has played its cherry-picking game with other parts of the factual record—because OPR resolutely refuses to make that "investigation" available for any sort of critical review. But the approach that OPR has used in those parts of its works that can be checked inspires less than minimal confidence in its competence—and none in its honesty or objectivity.

VI. OPR's Substantive Analysis Is Fundamentally Flawed.

OPR's rampant procedural errors turn out to be merely a prelude to its woefully deficient critique of the substance of the memoranda. In attempting to prove that the authors of the memoranda lacked candor, OPR does not even acknowledge many fatal weaknesses in its argument—weaknesses to which we alerted OPR in our prior comments—much less persuasively respond to them. Those weaknesses are as basic as misunderstanding canons of statutory interpretation, citing irrelevant authority, mischaracterizing the memoranda's arguments, and ignoring judicial precedents that squarely validated the memoranda's analytical approach. The result is a set of criticisms so fundamentally flawed and so obviously results-driven that this report will profoundly embarrass the Department if ever subjected to objective scrutiny.

A. Specific Intent

Exhibit number one in OPR's catalogue of supposed "errors, omissions, misstatements, and illogical conclusions," F.R. at 159, in the Bybee Memo is that memorandum's treatment of "specific intent." 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 *Carter v. United States*, 530 U.S. 255 (2000), which examined the distinction between "general" and "specific" intent in the context of the federal 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." Bybee Memo at 3. 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 is 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 does not simply vault the professional-conduct bar, it is manifestly *correct*. As we told OPR in our response to its Draft Report, two recent cases in the Third Circuit (one of them *en banc*) have adopted the Bybee Memo's analysis of specific intent. In those 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." 8 C.F.R. § 208.18(a)(5) (emphasis added).

In *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), a distinguished panel of the Third Circuit (composed 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 to have that meaning, despite the immigration context in which the torture question had arisen in that case. *Id.* at 145. Relying, like the Bybee Memo, on *Carter*, *Auguste* 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 the Bybee Memo quoted, 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 n.23 (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"). Notwithstanding years of investigation and research, OPR's Draft Report completely failed to mention this case.

In *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008) (*en banc*), another torture case that somehow also had completely escaped OPR's notice in the Draft Report, 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 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 question of a defendant's knowledge 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).

It would appear that an understanding similar to the Third Circuit's 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 Senate knew full well that they were 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.").

The Bybee Memo therefore correctly interpreted the specific intent requirement of the torture statute—*without* the benefit of the subsequently developed body of case law addressing intent specifically in the context of torture. Its conclusions have been ratified by every court of appeals to consider the question. OPR nevertheless makes this undisputedly correct analysis the centerpiece of its argument that Professor Yoo committed professional misconduct—a telling barometer of the Final Report's overall strength. OPR's critique, the substance of which appears to be wholly lifted from secondary sources, not only is riddled with errors, but would be equally applicable to the sitting federal judges who have now adopted the Bybee Memo's interpretation of the torture statute.

First, OPR concludes that the Bybee Memo "failed to note the ambiguity and complexity in this area of the law." F.R. at 160. To support that critique, OPR quotes snippets from decades-old Supreme Court opinions stating that distinctions between "general" and "specific" intent can be "elusive" or "difficult[]." F.R. at 169–70 (citing and quoting from *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *United States v. Bailey*, 444 U.S. 394 (1980)). Bizarrely, OPR also notes that in *Bailey* the Court suggested that conventional analyses of intent might be replaced by the American Law Institute's Model Penal Code, which would adopt a "'hierarchy of culpable states of mind ..., commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence,'" F.R. at 170 (quoting *Bailey*, 444 U.S. at 403–04) (alteration in original), and 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.'" F.R. at 170 (alteration in original).[30]

[30] 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. at 443–44. 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

OPR cannot be serious, and if it is, cannot be taken seriously. How could anyone find fault with Professor Yoo's analysis on the theory that he should have "eschew[ed]" the "difficult legal concept" of "specific intent" in favor of the "mental state required" under the torture statute, when "specific intent" *is the mental state expressly required by the statute*? Analysis of this quality calls into question whether anyone at OPR has *read* the federal torture statute. No sane client would be interested in learning that the Supreme Court—at least as it was constituted 29 years ago—might have preferred that Congress write its laws using the terminology of the Model Penal Code when Congress, in the particular statute actually at issue, quite obviously did not do so.[31] Indeed, had Professor Yoo undertaken the analysis that OPR suggests, he might have been justifiably criticized for providing confusing, incompetent, and useless legal advice.

The Bybee Memo was not alone in failing to ponder the potential ambiguity in "specific intent"; neither did the Third Circuit opinions in *Auguste* and *Pierre*. The *en banc* Court in *Pierre*, for example, stated succinctly that "[s]pecific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result." 528 F.3d at 189. *Auguste* treated the issue as an easy one: "specific intent" is a term of art that has a well-known meaning in American law—and it treated as self-evident the proposition that anyone would know from *Carter* what that meaning is. Nowhere did these cases or similar others from other circuits discuss the difficulty of interpreting "specific intent"; the *en banc* Third Circuit even cited *Bailey* as supporting the point that "'"purpose" corresponds loosely with the common-law concept of specific intent,'" without noting *Bailey*'s dicta about the "difficulty" of the concept, *id.* at 190 (quoting *Bailey*, 444 U.S. at 405). Surely OPR does not mean to suggest that the federal judges writing and joining those decisions, including a current Supreme Court Justice, are guilty of professional misconduct for failing to ruminate on the supposed ambiguity in the phrase "specific intent."

OPR's response in the Final Report to the fact that federal courts have confirmed Professor Yoo's analysis—case law that OPR did not even bother to cite in its Draft Report—is that "*Pierre* [and the other cases were] decided long after the Bybee Memo was issued, and [have] no bearing on whether its authors presented a thorough view of the law at that time." F.R. at 175 & n.132. In typical fashion, OPR misses the point, which is this: If Professor Yoo is guilty of misconduct for surveying the legal landscape and finding the meaning of "specific intent" in the torture statute relatively clear, why is the same not true for the federal judges who looked at the exact same precedent and conducted the exact same analysis? Our argument is not that Professor Yoo was

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authorized by regulation. 471 U.S. at 420 n.1 (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.

[31] 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.

sufficiently thorough merely because his *conclusion* was validated by subsequent courts, but that Professor Yoo was sufficiently thorough because his *reasoning* and *methodology* were replicated by the later judicial opinions that reached the same conclusion based on the same authorities. It appears that in OPR's world, Department of Justice attorneys must be clairvoyant enough to abide by the subjective standards of conduct promulgated by their political opponents and critics years after the event (*e.g.*, they should have followed Johnsen's and Dellinger's "Principles Memo"), but they are to be given no credit for using the traditional tools of the legal craft to analyze a relevant legal issue, without the benefit of squarely applicable precedent in the torture context, in a manner that is subsequently vindicated by the unanimous judgment of courts of appeals that have considered the question. Indeed, although OPR does not acknowledged it, at the time the Bybee Memo issued, it was already clear that "torture can occur . . . only when the production of pain is purposive," that "torture requires acts both intentional and malicious," and that the defendant "must impose suffering cruelly and deliberately, rather than as the unforeseen or unavoidable incident of some legitimate end." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

Here, again, OPR scours the transcripts of Professor Yoo's voluntary interviews with OPR in search of statements that it believes buttress its case. It highlights, in particular, Professor Yoo's statement that he had found the law on "intent" "confusing." F.R. at 166. Professor Yoo, of course, is not a criminal-law specialist, either as a practitioner or as an academic. There is no reason for him to have any specialized antecedent understanding of the issue. What OPR does not highlight, indeed it goes out of its way to minimize, is that this prompted Professor Yoo to seek specialized help of the highest conceivable quality—not only by ordering another lawyer to research the issue thoroughly, but also by vetting the memo's analysis with Michael Chertoff, the head of the Criminal Division, who was a former federal prosecutor (and future federal appellate judge).[32] Whatever the degree of criminal-law expertise that he himself brought to the table—and however derisively OPR may now seek to characterize it—it is abundantly clear that Professor Yoo availed himself of the tools of a lawyer's craft to produce an analysis that was, and remains, impeccably correct.

There is in fact a good reason that Professor Yoo's final memorandum did not note the "uncertainty or ambiguity" in the meaning of "specific intent": There was none. In June 2000, shortly before Professor Yoo sat down to write the Bybee Memo, the United States Supreme Court had issued *Carter*, which concluded that one subsection of the bank-robbery statute created a "general intent" crime while the other required a showing of "specific intent" to steal, and offered examples to "help to make the distinction between 'general' and 'specific' intent less esoteric." 530 U.S. at 268–70. In explaining the precise and straightforward distinctions between "general" and "specific" intent, the Court cited the LaFave treatise, *id.* 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* F.R. at 169. This supposed inconsistency did not trouble the Supreme Court,

[32] Others, of course, also vetted the analysis and conclusion of the memoranda, including Attorney General Ashcroft, who himself had served as Missouri Attorney General and on the Senate Judiciary Committee.

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) (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]").

Unlike the Bybee Memo, the Draft Report *did not even cite* the Supreme Court's decision in *Carter*, let alone discuss it. And the Final Report mentions *Carter* only in passing, making no effort to explain how Professor Yoo's reliance on the most recent Supreme Court opinion on specific intent could remotely suggest that Professor Yoo's analysis was not thorough, much less incompetent. OPR evidently believes that Professor Yoo should have emphasized for the client that *older* Supreme Court cases had found the concept of specific intent difficult or elusive, though the more recent (and binding) decision in *Carter* had not. As a basis for professional discipline, this analysis borders on the frivolous. It may be that OPR attorneys do not believe in the ameliorative influence of the Supreme Court's opinions on the uncertainties and difficulties that attend most areas of law, but the rest of the legal profession (including judges and disciplinary boards) is generally required to work on the assumption that more recent, definitive rulings from that Court reflect a mature consideration and resolution of earlier-expressed uncertainties.

Second, OPR concludes that "OLC's advice erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information." F.R. at 160–61. But OPR is unable to point to any statement in the Bybee Memo that says or even implies this, instead relying on the following sentence: "'Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.'" *Id.* at 167 (quoting Bybee Memo at 4). This criticism appears lifted from the Levin Memo. *See* F.R. at 168 (quoting Levin Memo at 17).

Whatever Mr. Levin may have thought, every jot and tittle of the statement quoted by OPR is an entirely accurate statement of the law. Indeed, it precisely echoes the holding of the *en banc* Third Circuit in *Pierre*: "We disagree that proof of knowledge . . . that severe pain or suffering will be the practically certain result . . . satisfies the specific intent requirement in the CAT. Rather, we are persuaded . . . that the specific intent requirement, included in the ratification history of the CAT, requires a petitioner to show that his prospective torturer will have the motive or purpose to cause him pain or suffering." 528 F.3d at 189. Under OPR's view, the ten judges in the Third Circuit majority have now committed professional misconduct by creating the impression—at least to OPR and Mr. Levin—that a torturer acting with the purpose of obtaining information is immune from prosecution. But this is an unfounded criticism. In fact, when the minority in *Pierre* expressed the same concern, *id.* at 196, the ten-judge majority had little difficulty in explaining why this criticism is wrong and unjustified. *Id.* at 190 n.7. Significantly, it was obvious to all thirteen judges that the issue they were debating had arisen in the context of the Bybee Memos; the minority noted that "Jay

Bybee . . . set forth an interpretation of 'specific intent' that is similar to that espoused by the majority," *id.* at 193, and the three judges who disagreed with the majority's analysis issued an opinion that was largely a pages-long quotation of the Levin Memo. OPR cannot credibly assert, merely because *it* finds the minority's views more persuasive, that the analysis that rather decisively carried the day in *Pierre* is sanctionable.

Moreover, a moment's thought would have revealed to OPR why Congress believed the specific-intent requirement so important for the torture statute and why Professor Yoo properly stated that knowledge alone is insufficient. In the absence of a specific-intent requirement, a general-intent 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," because "causing such harm is not his objective." The surgeon, in other words, would save the man's life painlessly if he could. But nowhere does the Bybee Memo state or imply that a defendant's actual intent to cause severe pain is absolved by an ultimate motive to obtain information.[33] And critically, OPR does not cite any evidence—because there is none—suggesting that the CIA believed it could lawfully "torture" a detainee so long as it was trying to elicit information.

Third, OPR concludes that "[s]ome of the Bybee Memo's analysis was oversimplified to the point of being misleading," F.R. at 171, because it "suggested that, in order to violate the torture statute, a defendant would have to act with a 'purpose to disobey the law,'" F.R. at 173. OPR's criticism is premised on a gross distortion of the memo's two-sentence discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994).

The Bybee Memo cited *Ratzlaf* as an "example" of the application of a specific-intent requirement. The memo explained that because the statute at issue in *Ratzlaf* required "'specific intent to commit the crime,'" the defendant in that case had to act with the express "'purpose to disobey the law.'" Bybee Memo at 3 (quoting *Ratzlaf*, 510 U.S.

[33] Nor does the Bybee Memo's reference to the absence of good faith alter the analysis. Take, for example, a battlefield surgeon who amputates a soldier's leg to save his life. Clearly the physician lacks the specific intent to cause severe pain and has not committed torture. Now, imagine that the physician acts in bad faith, prioritizing the surgery over other battlefield wounded and conducting the procedure ahead of the others for the sole reason that the soldier owes the physician a large debt that he would like to see repaid. The physician still lacks the requisite specific intent to cause severe pain to the wounded who must wait and is not guilty of torture, notwithstanding his bad faith. While such hypotheticals may be rare in practice, they are the tools through which lawyers and judges inform legal concepts like "specific intent." It is for this reason that the paragraph in question begins with the statement that it is discussing the law of specific intent as a "theoretical matter," and concludes with the overwhelmingly clear caveat that "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. And other lawyers' and bloggers' ruminations about what the statement "sort of suggested" to them or how it "made them wonder," F.R. at 167–69, are entirely irrelevant.

at 141). OPR evidently believes that because the specific intent required in *Ratzlaf* was a specific intent to violate the law—a form of specific intent that statutes typically signal with the term "willful"—Professor Yoo was suggesting that the same *type* of specific intent was required under the torture statute.

No reasonable person could think that, given the Bybee Memo's *very next sentence*: "Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective." Bybee Memo at 3. Nowhere does the Bybee Memo suggest that intent to violate the law is required under the torture statute, and no one reading the memo's *Ratzlaf* discussion could take that away from it. In fact, if the memo even remotely was intended to suggest that intent to violate the law *was* required, one would expect to see this purported requirement used or even alluded to in the Classified Bybee Memo—which was issued *on the same day* for the purpose of analyzing the specific techniques proposed by the CIA under the standards outlined in the Bybee Memo. But nothing there, of course, supports OPR's strained reading.[34]

Fourth, OPR claims that the good-faith defense to a specific-intent crime "is generally limited to fraud or tax prosecutions." F.R. at 174. OPR cites no authority for this, relying only on a quotation from a jury-instructions treatise that does not support the assertion. In fact, two paragraphs later OPR actually cites a case that stands for the opposite proposition: In *United States v. Goings*, 313 F.3d 423 (8th Cir. 2002), the court found in a *theft* case that "[t]he district court *properly* gave the Eighth Circuit stock instruction on good faith." *Id.* at 427 (emphasis added). OPR thus manages, for once, to successfully refute an argument.

Fifth, OPR argues that "[t]he availability of good faith as a defense to torture is not a foregone conclusion" because a 1983 Fourth Circuit decision did not allow a defendant to invoke the good-faith defense when prosecuted under a statute criminalizing the export of firearms. F.R. at 174 (citing *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983)). OPR's argument here is misleading. In *Wilson*, like in *Ratzlaf* (but unlike here), the statute had a willfulness requirement—*i.e.*, a requirement that the defendant act with the specific intent to violate the law. *See* 721 F.2d at 970 n.1, 971. The defendant argued that he had believed his actions were lawful because they had been authorized by government officials, and therefore that he did not have the requisite specific intent to violate the law. *See* 721 F.2d at 974–75 & n.10. The Fourth Circuit found "insufficient *evidence* to justify" an instruction on the good-faith defense, however, because "none of th[e] evidence show[ed] that Wilson was still working for the government, or impliedly

[34] In fact, a draft statement that specific intent requires "knowledge of the legal prohibition" was *deleted* from the final version, as OPR points out. OPR oddly concludes that this demonstrates the section is misleading, though it is not immediately apparent who might be "misled" by a statement in an earlier *draft*, which never saw the light of day. *See* F.R. at 173. Indeed, it is ironic that OPR believes that an attorney can violate duties of candor (or competence) based on drafts that are never conveyed to the client. Its own Draft Report—which OPR *did* deliver to its client in December 2008, with the express desire to further publish it forthwith—would fare rather badly under OPR's own standards.

authorized by government officials to export firearms illegally." *Id.* at 975 (emphasis added). In other words, the defendant's good-faith defense had a factual predicate—that government officials had authorized his actions—for which the defendant had put forward no evidence. That holding casts no doubt on the Bybee Memo's discussion of specific intent.

Relatedly, OPR says that the Bybee Memo was deficient in "fail[ing] to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness." F.R. at 174. The *en banc* Third Circuit in *Pierre*, however, had no trouble concluding that "willful blindness" is not relevant to an analysis of specific intent to torture. 528 F.3d 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. Willful blindness can be sufficient for knowledge (and thus general intent), but not specific intent.

OPR attempts to counter *Pierre*'s willful-blindness holding by arguing that its Draft Report "did not assert that the government could establish a defendant's specific intent through a willful blindness theory," but rather that "a willful blindness instruction might be granted under some circumstances to counter a defendant's claim that he held a good faith belief—based on knowledge obtained from the CIA—that the use of EIT's would not result in the infliction of severe mental or physical pain or suffering." F.R. at 175. In other words, OPR conceives of a hypothetical defendant who might be deemed to "know" (based on willful blindness) that a particular interrogation would result in the infliction of pain and suffering, despite what the CIA might have told him. Apart from being contrived and arcane, this feat of contortionism still misses the point: As *Pierre* holds, "knowledge" or awareness of the "result," even if it "could" be severe pain, does not meet the statutory standard, which requires the purposeful infliction of such pain. And, as in its Draft Report, OPR continues to rely solely on older cases that did not involve torture for its contentions that "the availability of good faith as a defense is not a *foregone* conclusion" and that "a prosecutor *can* challenge" an intent defense based on willful blindness "under *some* circumstances," and to criticize the Bybee Memo's failure to discuss "the *possibility* that a court *might* refuse to extend the good faith defense to a crime of violence such as torture" as rendering the analysis "incomplete." F.R. at 173–74 (emphases added). Of course, the Bybee Memo *did* caution that "as a matter of practice in the federal criminal justice system" a defendant who acted "unreasonabl[y]" but in good faith was "unlikely" to be acquitted. Bybee Memo at 5. OPR's contrivances notwithstanding, the Bybee Memo is simply not subject to criticism in this regard.

OPR dismisses as "cursory" the Bybee Memo's significant qualifying language, which made clear that a good-faith defense was unlikely to be successful if not reasonable. F.R. at 175. As OPR concedes, the memo "included qualifying language that made it clear that notwithstanding legal theory, as a practical matter a jury could

infer specific intent from a defendant's actions." F.R. at 167. As a matter of fact, despite that the specific-intent discussion is only two pages long, the Bybee Memo notes in *several* places that much of the discussion is "theoretical," and that juries might well find specific intent notwithstanding the theory. *See, e.g.*, Bybee Memo at 4 ("While 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.") (internal citations omitted); *id.* at 5 (noting that "as a matter of practice in the federal criminal justice system" a defendant who acted "unreasonabl[y]" but in good faith is "unlikely" to be acquitted.). It cannot be credibly said that these repeated qualifications are only cursory, nor can Professor Yoo and Judge Bybee be condemned for accurately describing the law while conveying real-world limitations on the legal doctrine. A fair reading of these two pages reveals that OPR's assertion is baseless.

No doubt recognizing the highly qualified (and manifestly correct) specific-intent analysis provided in the Bybee Memo, OPR is forced to point to other sources to support its theory that the advice was insufficient. OPR states, for example, that "OLC's advice to the CIA on specific intent and good faith was not limited to the Bybee Memo. In the Yoo Letter, the Classified Bybee Memo, and the CIA Bullet Points, OLC presented an unqualified, oversimplified view of the law without acknowledging potential problems." F.R. at 175–76; *see also* F.R. at 227 ("Yoo provided the CIA with an unqualified, permissive statement regarding specific intent in his July 13, 2002 letter"). But OPR's reliance on these documents merely demonstrates the lengths it is willing to go to present its entirely one-sided view. The Yoo Letter and the Classified Bybee Memo were delivered to the client along with the Bybee Memo on August 1, 2002, and were clearly meant to be read in conjunction with it. It is unreasonable to suggest that each of the documents should have re-plowed all of the ground covered in the Bybee Memo, much less that the failure to do so amounts to sanctionable conduct. The so-called Bullet Points, a *CIA document* providing an *overview* of OLC's analysis, would not be expected to provide the same detailed analysis as the Bybee Memo, and OPR does not allege that the specific-intent summary, *see* F.R. at 103, 165, incorrectly states the law.[35] The July 13, 2002 letter, moreover, was clearly tentative, summary advice superseded by the more detailed analysis provided in the Bybee Memo. *See* F.R. at 162 & n.126 (noting the closing statement of the July 13, 2002 letter, "'[a]s you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340,'" and stating

[35] With respect to the Bullet Points, OPR concludes, based only an internal CIA memorandum for the record, that "the document 'was fully coordinated with John Yoo.'" F.R. at 102. Of course, OPR never bothered to ask Professor Yoo about this issue during either of his voluntary interviews, and, contrary to the CIA's assertion, he recalls informing the CIA that any summary of OLC's analyses would be the CIA's only, and could not be endorsed by OLC. Although OPR claims that [redacted] provided comments to the CIA, that the CIA believes OLC "formally concurred" on the Bullet Points on June 4, 2003, and that the CIA sent a final version of the document to OLC on June 16, 2003, Professor Yoo left the Department in late May 2003. F.R. at 27. Whatever their merits or shortcomings, Professor Yoo was not responsible for the CIA Bullet Points, and OPR's suggestions to the contrary, *see, e.g.*, F.R. at 161, are factually baseless.

that "[w]hen the Bybee Memo was issued a few weeks later, it included a more extensive discussion of the specific intent element.").

Sixth and finally, 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 the torture 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." F.R. at 169. OPR appears to be suggesting that Professor Yoo should have omitted the clearly correct legal analysis of specific intent and instead ducked the issue altogether—declining to interpret one of the elements of the criminal statute that he was tasked with analyzing. But this is wrong under elementary principles of criminal law. A person does not violate a criminal statute unless his conduct meets *each* of the elements; and no competent lawyer could offer advice on whether conduct violates a criminal proscription without examining each element of the relevant statute. In other words, a complete and competent analysis could not conclude that "conduct that might otherwise amount to torture" actually *is* torture under this statute without first defining specific intent. OPR's inability to understand this simple point is inexplicable.

B. Severe Pain

One of the most challenging tasks that the authors of the Bybee Memo faced was to give concrete meaning to the torture statute's ambiguous term "severe . . . pain" so that it could be applied to real-world interrogations of terrorists with information about future attacks. They first looked to dictionaries, which said 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. As any competent lawyer would do, the authors 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 layperson, 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) (2003). 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 body functions." *Id.* at 6 (emphases added). OLC deemed those statutes 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 (quoting dictionaries).

The Draft Report gave the Bybee Memo's consideration of the medical-benefits statutes top billing in OPR's catalogue of supposed analytical failings, emphatically asserting that citation to those statutes clearly was unconventional legal analysis amounting to professional misconduct. By OPR's lights, a lawyer could reasonably cite other statutes in construing statutory language if those statutes were sufficiently related in subject matter as to be considered "*in pari materia*," but it was obvious incompetence for any trained lawyer to consider *unrelated* statutes in advising a client. And this should have been obvious to Professor Yoo, the Draft Report asserted, because *Casey* "was premised upon the in pari materia doctrine." D.R. 139. "We know of no authority," OPR said, "in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term." D.R. at 138. Indeed, Professor Yoo easily could have discovered this obvious interpretive no-no, OPR sarcastically noted, because the Sutherland treatise on statutory interpretation "was available in the main DOJ library when the Bybee Memo was written." D.R. at 137–38 & n.121.

We responded to the Draft Report by listing numerous cases—including *Casey*—in which the Supreme Court of the United States has cited unrelated statutes in statutory interpretation.[36] We also noted that this commonplace technique—for which OPR could

[36] *Casey* directly supports the appropriateness of examining unrelated statutes to help clarify the meaning of statutory terms. The interpretive issue in *Casey* 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 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 "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88; *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009) (to interpret the meaning of the word "now" under the Indian Reorganization Act, 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); *Dep't of Energy v. Ohio*, 503 U.S. 607, 621–22 (1992) (interpreting the term "sanction" in the Clean Water Act to refer to "coercive fines," rather than punitive fines, based on "examples of usage" in unrelated statutes, including the Federal Rules of Civil Procedure, the California Civil Procedure Code, and a statute waiving sovereign immunity for federal medical-waste disposal facilities); *Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality opinion) (personal injury awards are "income" under the AFDC statute because the Internal Revenue Code and the Food Stamp Act expressly *excluded* personal-injury awards from "income"; this supported the proposition that such awards are *included* in "income" under the AFDC statute, which was silent on the subject); *Jeffers v. United States*, 432 U.S. 137, 148 n.14 (1977) (plurality opinion) (interpreting "in concert" under the Comprehensive Drug Abuse Prevention and Control Act to mean "cooperative action and agreement" by relying on how the phrase had been used in six statutes on different subject matters, including the Federal Election

find "no authority" after four years of research—is also discussed in the Sutherland treatise itself, which to devotes an entire chapter to "interpretation by reference to statutes on *other subjects*," with a section entitled "interpretive relevance of *unrelated* statutes." *See* 2B NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION ch. 53 (6th ed. 2000) (emphasis added). It is worth noting, again, that OPR was prepared to issue its Draft Report as final in January 2009, after *years* of supposedly exhaustive investigation and drafting had resulted is astoundingly incompetent legal work.

At this point, even Emily Litella would have had the sense to say "never mind," and call it a day.[37] But not OPR. Without acknowledging its previous errors, OPR now says that examining the language of unrelated statutes "*is a recognized technique of statutory interpretation.*" F.R. at 182 (emphasis added). But OPR contends that for a lawyer to do so the statutes must be "similar in purpose or subject matter" *or* that there must "generally" be "a logical basis" for "courts [to] look to unrelated statutes for guidance." F.R. at 182–83. Here, OPR contends, the "medical benefits statutes were neither related, similar, nor analogous to the torture statute," and this, "coupled with the fact that they did not in fact define, explain or interpret the meaning of 'severe pain' . . . led us to conclude that the Bybee Memo's reliance on those statutes was unreasonable." F.R. at 184. Unsurprisingly, however, OPR's newest set of fabricated rules of statutory interpretation once again fail to support the predetermined outcome to which OPR so relentlessly clings.

The fundamental flaw in OPR's analysis lies in its failure (or unwillingness) to recognize *why* the Supreme Court so often consults unrelated statutes that contain language similar to the language under review. Unrelated statutes are relevant evidence of the *ordinary meaning* of the disputed language. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009) (usage in unrelated statutes confirmed the "ordinary meaning" of statutory language as set forth in dictionaries). As Sutherland explains, in a passage that OPR again declines to mention, one reason that looking to unrelated statutes is such a common technique of statutory interpretation—albeit one not as persuasive as looking to statutes *in pari materia*—is that the way Congress has used a particular phrase in the past, "even among statutes on different and dissimilar subjects," can reveal "common idioms and customary language usage." 2B SINGER § 53:01. Because of that, "[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." *Id.* § 53:02.

Moreover, as *Casey* noted in the passage that was cited in the Bybee Memo, the Supreme Court construes new statutory language "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and

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Campaign Act, the Merchant Marine Act, the Commodity Futures Trading Commission Act, and the Interstate Commerce Act); *cf. United States v. A & P Trucking Co.*, 358 U.S. 121, 124 n.3 (1958) (partnerships were included in the definition of the term "whoever" in a criminal statute regulating safe transportation of dangerous material based on Congress' inclusion of partnerships within the definition of "person" in a number of statutes, including the Civil Aeronautics Act, the Federal Communications Act, the Shipping Act, and the Tariff Act).

[37] *See, e.g.*, http://www.hulu.com/watch/4256/saturday-night-live-emilys-editorial-reply-22

subsequently enacted law," *because* "it is our role to make sense rather than nonsense out of the *corpus juris*." 499 U.S. at 100–01. That is, the *entire* "body of the law" (the *corpus juris*) provides a fundamental backdrop for consistent interpretation of like statutory terms, at least when the text of the new statute does not itself affirmatively "prevent[] such accommodation." *Id.* at 101; *see, e.g.*, *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (court's "natural reading" was "confirmed" by the use of the same word "elsewhere in the United States Code"—not just those parts of the Code that were "similar" or had a supposed "logical connection" with the subject matter). OPR does not contend that the torture statute by its terms foreclosed reliance on the medical-benefits statutes; nor could it, given that those statutes were cited solely because they appeared to *confirm* the ordinary meaning suggested by dictionary definitions, and even OPR does not contend that a lawyer commits misconduct by consulting standard English dictionaries.

OPR does not address the reasoning of these cases, but it simply announces that unrelated statutes may not be consulted at all unless there is a "logical basis" for doing so. OPR does not explain what exactly are the contours of this requirement (much less whence it comes), but the examples it cites make clear that this "test" is either trivial (in the sense that *every* unrelated statute meets it) or meaningless, or both. For example, OPR first says that it makes some difference that the word or phrase in the unrelated statute "has been interpreted by the courts." F.R. at 183. This point appears designed solely to distinguish *Carcieri v. Salazar*, *supra*, which interpreted the word "now" in the Indian Reorganization Act in part by looking to how the Court had previously interpreted the word in a federal criminal statute and a citizenship statute. 129 S. Ct. at 1064. Of course, when Congress uses a phrase that has *previously* acquired a well-settled meaning in judicial rulings courts will presume that the same meaning is intended in the new statute. But that is not remotely what happened in *Carcieri*, where the Court made clear that one of the interpretations on which it relied *post*-dated the Indian Reorganization Act. *Id.* What was at issue instead was the policy identified by the Supreme Court in *Casey*—*viz.*, construing like terms similarly in order to "make sense rather than nonsense" out of the entire United States Code. (Indeed, *Casey* expressly noted that, absent this policy, it would not make sense to consult "both previously and subsequently enacted law," because "how could an earlier Congress know what a later Congress would enact?" 499 U.S. at 100-01). In any event, OPR does not explain why it should make any difference that the particular unrelated statute *has* received a judicial construction; if, by OPR's lights, the underlying statute lacks a "logical connection" to the statute being construed, then presumably any judicial interpretation of that unrelated statute would be just as logically *un*connected to the problem at hand.

OPR distinguishes *Buckeye Check Cashing*, *supra*, by claiming there was "some logical basis" for referring "to language in completely dissimilar statutes" throughout the United States Code in that the term at issue was used elsewhere consistently with the meaning that the Court had already derived by consulting other sources, and "the Court did not rely *solely* upon similar language in dissimilar statutes." F.R. at 183–84 & n. 138 (emphasis added). If this distinction is not wholly question-begging (*i.e.*, there is a "logical" connection only if OPR subjectively believes the citation supports the point at

issue), the same could be said about the Bybee Memo, which used the medical-benefits statutes in conjunction with dictionary sources.

Finally, OPR's distinction of *Department of Energy v. Ohio*, 503 U.S. 607 (1992), not only is unhelpful to OPR's case but also shows its "logical connection" test to be utterly trivial. According to OPR, the "logical basis" for the Court's use of unrelated statutes in *DOE* was that the unrelated statutes showed "usage of [the] term in other contexts." F.R. at 183. But of course *any* inclusion of a term in another statute gives context to the term. That was the reason that the Bybee Memo looked to the use of "severe pain" in the medical-benefits statute—to infer from its context the level of pain that the ordinary meaning of the term connoted.[38] OPR's "logical basis" requirement is thus a meaningless distinction drawn to salvage a fatally flawed argument, akin to the last-minute scribbling on a law-school bluebook when the student realizes that the entire premise of his answer is mistaken.

OPR's remaining criticisms are similarly misdirected, and none provides a basis for professional discipline. OPR contends that the Bybee Memo paraphrased the language of the medical-benefits statutes in a way that heightened the standard for severe pain. According to OPR, for instance, the Memo equated the medical-benefits statutes' phrase "serious jeopardy" with the word "death." F.R. at 178. It did not. What the Memo said was that the statutes treat "severe pain as an indicator of ailments that are *likely* to result in permanent and serious physical damage . . . . *Such damage* must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function." Bybee Memo at 6 (emphases added). The import of these sentences is that the pain must be such that accompanies conditions *likely* to result in death or other serious conditions—in other words, pain that accompanies conditions that put a person's health in "serious jeopardy."

OPR's other claims of a "heightened standard" rely on an absurdly narrow parsing of the medical-benefits statutes' language. OPR believes that "serious dysfunction of any bodily organ," for example, may not be paraphrased as "organ failure," and that "serious impairment to bodily functions" may not be paraphrased as "permanent damage." F.R. at 178. OPR gives no explanation for why it thinks these phrases are not equivalent, and many reasonable English speakers would surely think that they are. It is curious that OPR finds it acceptable to paraphrase D.C. Rule 2.1's "honest assessment" requirement as a duty of "thoroughness, objectivity, and candor," but considers it sanctionable for the Bybee Memo to have paraphrased "serious dysfunction of a bodily organ" as "organ failure."

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[38] OPR's effort to distinguish *DOE* so as to fit into its invented, malleable "logical basis" canon also runs into earlier aspects of OPR's own analysis. At the outset, OPR criticizes the Bybee Memo because the medical-benefits statutes do not "define or even describe" severe pain. F.R. at 178. A mere five pages later, in its attempt to escape *DOE*, OPR is forced to concede that one can look to an unrelated statute not just to "define[]" but also to "give[] context to the term."

OPR also contends that the Bybee Memo's analysis was "illogical" because "the intensity of pain that accompanies organ failure or death has no commonly understood meaning." F.R. at 178. But this is a most debatable proposition. The medical-benefits statutes themselves, after all, call for a judgment about whether a "prudent lay person" would think a level of pain is sufficiently severe as to indicate a serious jeopardy to health or bodily functions. And it is certainly not unheard-of to describe the severity of the pain that is required under the torture statute as "agony," even though "agony" can literally precede, and often does precede, death. For example, in interpreting the definition of "torture" in the Torture Victim Protection Act, the D.C. Circuit explained with respect to the meaning of "severe" that "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price*, 294 F.3d at 93; *see also id.* at 95 ("excruciating and agonizing"); *id.* at 92 ("The severity requirement is crucial to ensuring that the conduct proscribed . . . is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes"). The court provided no more detailed explanation than that. Just as with the Bybee Memo's description of "severe pain," there is no "readily identifiable level of pain" associated with "agony" that is "intense, lasting, or heinous." But surely OPR would not contend that Judges Edwards, Silberman and Sentelle committed professional misconduct by describing the severity of the pain associated with torture in such terms.[39]

OPR's related contention that there are some forms of death or organ failure "not associated with pain" is beside the point. The Bybee Memo's bottom line was that the pain must be "pain or suffering of the *kind* that is equivalent to the pain that would be associated with serious physical *injury* so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Bybee Memo at 13 (emphases added). Anyone reading that in context would understand that the Memo is talking about pain from an "injury," *i.e.*, a trauma of the sort that could be inflicted in an enhanced interrogation, not dying in your sleep.

Perhaps most unfairly, OPR alleges that "[t]he Bybee Memo's definition could be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury." F.R. at 180. It could not. The Memo says that the pain must rise to 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." Bybee Memo at 6. There is no way to interpret this sentence other than that if the pain is equivalent to the pain that accompanies those conditions, the infliction qualifies as torture, whether or not it actually does result in those

[39] The Bybee Memo had cited the district court's decision in *Price*, which had found the conduct at issue to be torture, in the appendix. It did not cite, however, the D.C. Circuit's opinion reversing that conclusion, possibly because that decision issued a month before the memoranda was signed, after the work was already well underway and the new opinion was overlooked during the paralegal's cite-checking. However the error came to occur, OPR never mentions it. In fact, OPR never cites *Price at all*, even though we previously brought it to its attention. It is not difficult to imagine why: the case strongly supports the memoranda's analysis of "severe pain" but it was an error to omit it from the Bybee Memo. It therefore both supports the memoranda's analysis and also gives the lie to OPR's basic theory that Professor Yoo's supposed "errors," once corrected, consistently undermine the memo's analysis of the torture statute.

conditions. It certainly would not be so misinterpreted by the sophisticated legal audience at which the Bybee Memo was directed—especially given the analysis in the Classified Bybee Memo, which carefully examined the level of physical pain caused by the individual interrogation techniques even though *none* of those techniques cause death, organ failure, or serious impairment of bodily functions. *See* Classified Bybee Memo at 9–10 ("With respect to *physical* pain, we previously concluded that 'severe pain' within the meaning of Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury.").[40]

Finally, OPR appears to suggest that the phrase "severe pain" is not ambiguous, because "any difficulty in interpreting the term 'severe pain' is more properly attributable to the subjective nature of physical pain, rather than ambiguous language." F.R. at 181 n.135 (quoting Levin Memo at 8 n.18). But pure linguistic ambiguity—*i.e.*, ambiguity arising out of multiple dictionary definitions of the same word—does not exhaust the realm of statutory ambiguity. The classic cases of ambiguous phrases in the administrative-law context have no linguistic ambiguity at all—think, for example, of "just and reasonable" in the rate-setting statutes—but rather ambiguity arising out of the "subjective nature" of the assessment called for by the term. And the Supreme Court would no doubt be surprised to learn that the terms "due process" or "cruel and unusual" are entirely free from ambiguity, or that the phrase "serious potential risk of physical injury to another" in the Armed Career Criminal Act is clear just because its dictionary definition is undisputed, *compare, e.g.*, *James v. United States*, 550 U.S. 192, 209–12 (2007), *with id.* at 227–28 (Scalia, J., dissenting). Moreover, it would be passing strange, to say the least, for OPR to maintain that the phrase "severe pain" is somehow used in a completely *different* way in the medical-benefits statutes but that the phrase itself is *not* ambiguous—and thus necessarily to be given the *same* interpretation in all contexts in which it appears.

* * *

[40] [redacted] But, of course, neither Professor Yoo nor Judge Bybee have anything to do with writing or reviewing [redacted] and they could reasonably assume that their *own* work product would be read in good faith and consistently with its terms by a sophisticated audience even if a particular reader did not read it carefully or willfully disregarded its terms.

It is entirely possible for reasonable lawyers to have good-faith disagreements about difficult and ambiguous concepts such as "severe pain." Persons of good will may equally disagree on the specific question here—*i.e.*, whether the Bybee Memo correctly identified the line that marks conduct beyond which pain becomes sufficiently heinous, excruciating and agonizing to constitute "torture." But no reasonable, fair-minded observer can believe that strongly held views on these questions justify OPR's history of making up legal rules, ignoring precedent, and embracing any and all theories that it believes will justify professional sanctions for attorneys who produced high-quality work under the direst circumstances and in a time of great peril to the Nation. That OPR could so consistently commit pedestrian legal errors in pursuit of this goal is embarrassing. That it is so obviously does so for unworthy motives and without candor or decency is shameful.

C. CAT Ratification History

OPR also asserts that the treatment of the CAT ratification history in the Bybee Memo amounts to professional misconduct. OPR makes two principal arguments in this regard: (1) the Bybee Memo failed to discuss the Bush Administration's withdrawal of the Reagan Administration's understandings concerning common-law defenses, F.R. at 217–19; and (2) the Bybee Memo considered the Reagan Administration's understandings of other aspects of the treaty (in addition to the Bush Administration's), although the Reagan Administration's understandings were not ratified by the Senate, F.R. at 184–86. Neither criticism supports the claim that Professor Yoo committed professional misconduct.

With respect to the first argument, the Bybee Memo clearly identifies the fact that the CAT made an "effort to bar a necessity or wartime defense." Bybee Memo at 41 n.23. But the ratification history of the treaty, which is not self-executing, cannot change the fact that the positive law enacted by Congress did not foreclose common-law defenses. Under our own domestic law the *statute* must be construed in light of the common-law background that defenses are *assumed* to be available. *See infra* Section VI.F.2. Indeed, it is certainly not unusual for criminal prosecutions in the United States to vary from or even violate the international obligations established by treaties. *See generally Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). The authors of the Bybee Memo therefore quite reasonably concluded that Congress's failure to incorporate the provision into the criminal statute left the possibility of the defenses open.

Moreover, the Bush Administration's "Explanation" for deleting the understanding concerning common-law defenses was that it was "felt to be no longer necessary," not that the defenses were foreclosed. S. Exec. R. 101-30, at 37 (Aug. 30, 1990). Although citation of the April 4, 2004 Mullin Letter identified by OPR might have improved the Bybee Memo by providing additional context to the discussion, it is not at all clear that the conclusion would have been different. In any event, the emails cited by OPR show that Professor Yoo suggested that [redacted] add a footnote addressing the withdrawal of the understanding after she confirmed her research. F.R. at 218. Those same emails also suggest that [redacted] did not identify or point Professor Yoo

to the language in the Mullin Letter that OPR cites. And [redacted] made clear to OPR that she fully resolved any concerns about the defenses sections. *See* F.R. at 50 n.53 ([redacted] told us that she ultimately resolved all of her problems with the defenses and concluded that the defenses were applicable to the torture statute."); F.R. at 78 (dismissing concerns of some DOD Working Group members that "necessity defense sweeps too broadly"). This is simply not evidence of professional misconduct.

With respect to the second argument, OPR concedes that the Bybee Memo identified the differences between the Reagan and Bush Administration's understandings (and the fact that the Bush Administration's understandings were the ones ratified by the Senate), but contends that the memo "minimized [the] importance" of the distinctions between the two. F.R. at 185. OPR accuses the Bybee Memo of not revealing that the Bush administration's proposed understanding, defining "torture" as used by the 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 vastly 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 not be surprising or controversial. 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, 294 F.3d at 92 (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* F.R. at 185 (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 (again) presume that it would not be its position that a unanimous panel of the D.C. Circuit 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. *See* F.R. at 185.

OPR takes the view that the Bush understanding was a rejection of the Reagan standard. But OPR does not 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, then a deputy in the Criminal Division, in particular described the Bush understanding in terms which seems to meet the Reagan standard as well: "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Id.* (alteration in original). And the written "Explanation" given for the change in the statutory language was simply that it was "[r]evised to clarify the definition of mental harm." S. Exec. R. 101-30, at 36. In the end, it is unclear why OPR attaches particular significance to this alleged difference between the Reagan and Bush administrations. 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." Bybee Memo at 19.

D. U.S. Judicial Interpretation

OPR concedes that there were no reported criminal prosecutions under the torture statute for the Bybee Memo to discuss, but faults the memo's treatment of related decisions under (1) immigration regulations implementing CAT Article 3, and (2) the Torture Victim Protection Act. OPR's basic complaint here is that Professor Yoo "ignored" the immigration decisions, which were a "relevant body of case law," and that Professor Yoo's "discussion of the TVPA cases focused on the more brutal examples." F.R. at 186. Since the Bybee Memo *did* in fact discuss the "body of case law" dealing with torture in the immigration context, and the since leading cases before and after the Bybee Memo was issued have affirmed that torture encompasses only "extreme and outrageous acts," *Price*, 294 F.3d at 92, OPR's assertions illustrate nothing so much as the contortions that OPR is willing to undertake to sustain its relentless smear.

First, after grandly asserting that Professor Yoo "*ignored* a relevant body of case law that has applied the CAT definition of torture in the context of removal proceedings against aliens," F.R. at 186, OPR quickly must concede that immigration cases were discussed in the Appendix to the Bybee Memo (making it difficult to understand how anyone could claim that they were "ignored"). But OPR still finds fault with the fact that the underlying immigration regulations were not cited or discussed, and suggests that it was somehow improper to fail to cite two additional Ninth Circuit cases that "provid[ed] *additional examples* of how courts have distinguished between torture and less severe conduct." F.R. at 187 (citing *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001), *Cornejo-*

Barreto v. Seifert, 218 F.3d 1004, 1016 (9th Cir. 2000), and *Khanuja v. I.N.S.*, 11 Fed. App'x 824 (9th Cir. 2001)) (emphasis added).

It should be apparent to any impartial observer that an attorney's failure to apprise his client of "additional examples" of any legal proposition is a rather novel theory of professional irresponsibility. After all, as OPR is ultimately forced to concede, F.R. at 187 n.140, the Bybee Memo *did* discuss cases interpreting the relevant regulations. For example, *Al-Saher*, one of the cases OPR identifies in support of its argument, is included in the Appendix with a description of the conduct that 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. This is far more extensive treatment than OPR itself provides for that case in its Final Report, which cites the case without noting, stating, or discussing anything whatsoever about it beyond the fact that it involved an (undescribed) torture claim. The Appendix to the Bybee Memo also summarized a second case interpreting 8 C.F.R. 208, *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002). Nor does OPR explain why it believes that the Bybee Memo should have undertaken a completely tangential and immaterial discussion of the immigration regulations themselves as opposed to the case-law under them—it does not identify a single solitary aspect of the immigration regulations that it believes merited particular mention or discussion. OPR's theory is unexplained and inexplicable.

OPR likewise does not discuss the particulars of either *Cornejo-Barreto* or *Khanuja*, which it believes should have been cited as "additional examples." Both are inapposite. *Cornejo-Barreto* considered 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 found only 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. *Khanuja*, an unpublished and non-precedential decision, denied a petition for asylum on the ground of religious persecution, not torture, and explained only that religious persecution would not state a claim, by itself, to prevent removal on the grounds of possible torture. For good measure, as Deputy Attorney General Filip informed OPR, a citation to *Khanuja*, an unpublished decision, would have been *sanctionable* under the rules of the Ninth Circuit. R. at 187 n.141; Mukasey Letter at 6 & n.4 (citing cases in which the Ninth Circuit issued orders to show cause why sanctions should not be imposed for citing unpublished decisions). This does not detain OPR, which believes that although citing that case would be grounds for discipline in the court that issued it (*i.e.*, the court one would think most likely to find its intrinsic reasoning impressive), nothing expressly "forbids" citing the case "in executive branch legal memoranda or reports." F.R. at 187 n.141. The best that could be said for this extraordinarily strained argument is that it might conceivably persuade a singularly inattentive reader of the notion that citing *Khanuja* is only *arguably* sanctionable, not indubitably so. It does not remotely show that Professor Yoo departed from professional norms by *failing* to cite this irrelevant unpublished case in the Bybee Memo.

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In the end, even OPR understands that its arguments about the immigration cases not only are picayune to the point of absurdity but also cannot overcome the fact that the Bybee Memo *correctly* assessed the relevance of those cases to the inquiry at hand. This is in stark contrast to OPR's own Draft Report, which wholly ignored *Pierre* and *Auguste* in its discussion of intent—where they were incontestably relevant. As OPR puts it:

> The Bybee Memo's failure to discuss the CAT regulations was a relatively minor omission, and we note that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated from of cruel, inhuman, and degrading treatment. We note the omission here because of our determination that OLC's interpretation of the torture statute in the context of the CIA interrogation program demanded *the highest level of thoroughness, objectivity, and candor*.

Id. at 187 (emphasis added). This paragraph highlights OPR's consistent approach: making pedantic and strained criticisms that do not call into question the analysis or ultimate conclusions of the memo, but that supposedly are relevant to OPR's "just for this case" heightened standard of professional responsibility.

Second, OPR also criticizes the Bybee Memo's treatment of decisions under the Torture Victim Protection Act (TVPA), concluding that the discussion "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." F.R. at 186. OPR is particularly critical of the fact that that the Bybee Memo included an extended discussion of *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), because it believes that two other cases— *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001)—stand for the proposition that acts "less extreme" than the court confronted in *Mehinovic* could also amount to torture. F.R. at 188–89. OPR also complains that the Bybee Memo was wrong to say that a single blow and its attendant pain, considered in isolation, could not amount to torture, and that if *Mehinovic* were read to stand for that proposition it would be wrong. This is yet another instance of OPR faulting Professor Yoo for giving clearly correct legal advice.

The Bybee Memo made clear that *Mehinovic* was cited because, while most cases provide "limited analysis" of the torture question, *Mehinovic* was a "recent" case that "provide[d] some assistance in predicting how future courts might address this issue." Bybee Memo at 24. Nothing about providing "*some* assistance" in "*predicting*" how courts "*might*" rule in future cases would suggest to a reasonable reader that the case was being proffered as exemplifying the minimum quantum of abuse required to meet the statutory definition of torture. Indeed, the immediately preceding paragraph summarized the extreme types of abusive conduct that had been the subject of judicial rulings but expressly cautioned that "we cannot say with certainty that acts falling short of these . . . would *not* constitute torture under Section 2340 . . . ." *Id.* (emphasis in original). And the memo's discussion of the case concluded by emphasizing "that *Mehinovic* presents, with the exception of the single blow to [one of the victims], *facts that are well over the*

line of what constitutes torture." *Id.* at 27.[41] The case was nonetheless useful, the Bybee Memo concluded, in illustrating that TVPA cases "generally . . . are in keeping with the general notion that the term 'torture' is reserved for acts of the most extreme nature." *Id.*

Moreover, both *Daliberti* and *Simpson were* cited and summarized in the Appendix to the Bybee Memo as relevant authorities, so OPR's complaint—an *ethical* complaint, no less is—is that Professor Yoo cited and discussed all the TVPA authorities that OPR believes were relevant but his judgments about appropriate emphasis (and on which cases would be most informative for the client) does not accord with OPR's. Moreover, OPR's contention that both cases were obviously "less extreme" than *Mehinovic* is also rather subjective. In *Daliberti*, Iraqi guards attempted to execute one of the plaintiffs and threatened another with undeniable acts of torture, 146 F. Supp. 2d at 22–23, while *Simpson* also involved death threats and interrogation during prolonged incommunicado detention, 180 F. Supp. 2d at 81. Indeed, even if the Bybee Memo were read as asserting that the conduct in *Simpson* was not torture, it would be *correct*: the district court's opinion was unanimously *reversed* by the D.C. Circuit after the issuance of the Bybee Memo upon a finding that the acts in question did *not* amount to torture. The D.C. Circuit explained that "[a]lthough these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators, they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the Act." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (per Sentelle, J., joined by Henderson and Tatel, JJ).

OPR devotes almost an entire page of its Final Report to discussing the *district court's* decision in *Simpson* but notes only in the briefest of footnotes that the decision was reversed. F.R. at 189 & n.144. If the placement of authority in footnotes or appendices, as opposed to text, or the extensiveness of the discussion given to one versus the other *were* an ethical issue that calls for bar discipline, it is doubtful that the authors of the Final Report would ever again be permitted to leave the office of the bar's disciplinary counsel. But OPR's reasons that the D.C. Circuit opinion is simply not relevant to the analysis because it was "issued . . . after the Bybee and Yoo Memos had been issued." *Id.* The country's leading ethics experts disagree with OPR on its rather counterintuitive position that decisions that clearly prove the Bybee Memo correct must be wholly disregarded in assessing the adequacy of the advice given merely because they were not yet available at the time the memo was written. *See* Rotunda Letter at 3; Hazard Letter at 3.

[41] It is also obvious why it would make sense to discuss *Mehinovic* in some detail by way of example: Not only was it one of the more extensive opinions on the TVPA, but it also involved multiple claims of torture by multiple victims each of whom was subjected to various forms of abuse. It also reached important questions even though it did not attempt fully to delineate the meaning of torture. Unlike most opinions, for example, it explained the difference between torture and cruel, inhuman, or degrading treatment that did not rise to the level of torture. And it also considered whether torture could occur through the cumulative effect of individual acts that, standing alone, would not violate the statute.

In any event, the advice was clearly correct under the law as it existed even when the memo was written: The D.C. Circuit's decision in *Simpson* applied and quoted extensively from its earlier decision in *Price*, which *preceded* the Bybee Memo by a month. As *Simpson* noted, *Price* had already held that "'[t]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault.'" *Simpson*, 326 F.3d at 234 (quoting *Price*, 294 F.3d at 93). The allegations that *Price* had held *in*sufficient to state a claim for torture included the facts that the plaintiffs were "kicked, clubbed and beaten," "interrogated and subjected to physical, mental and verbal abuse," and "held in deplorable conditions while incarcerated, including urine-soaked mattresses, a cramped cell with substandard plumbing that they were forced to share with seven other inmates, a lack of medical care, and inadequate food." *Price*, 294 F.3d at 86. *Price* emphasized that there is an important distinction between "actual torture" and "mere police brutality," and concluded that the facts pleaded did not "reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level of torture." *Id.* at 93, 94. Never once in its report does OPR mention the D.C. Circuit's opinion in *Price*. Not once.

In sum, OPR goes to great lengths to manufacture criticisms that ignore the numerous caveats expressed by the Bybee Memo about how courts were likely to deal with claims of torture under the TVPA, and never comes anywhere close to impugning the Bybee Memo's basic conclusion that cases under the TVPA "are in keeping with the general notion that "torture" is reserved for acts of the most extreme nature." Bybee Memo at 27. That statement of the law was, and remains, wholly and unquestionably correct.

E. International Decisions

OPR objects to the Bybee Memo's discussion of two decisions from foreign tribunals: *Ireland v. United Kingdom*, a decision of the European Court of Human Rights, and *Public Committee Against Torture in Israel v. Israel*, a decision of the Israeli Supreme Court. F.R. at 190. Although OPR apparently reads this section as an incomplete effort to assess "international opinion" and comprehensively survey international law, *id.*, the Bybee Memo makes clear at the outset that these decisions were being discussed simply to illustrate how other Western countries have understood the distinction between "torture" on the one hand and "cruel, inhuman, and degrading treatment" on the other: "International decisions can prove of some value in assessing what conduct might rise to the level of severe mental pain or suffering. . . . As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture." Bybee Memo at 27 (also noting that while international decisions "can prove of some value," they are "in no way binding authority upon the United States"). OPR does not argue that this conclusion is mistaken, nor does it explain why consultation of these opinions in this way violated professional norms.

Perhaps more significantly, OPR condemns Judge Bybee and Professor Yoo for discussing these cases, but fails to grapple with its own factual finding that the limited discussion was included in response to a direct request by the CIA: "The CIA personnel

at the meeting asked Yoo for guidance on the legality of their plan under the torture statute, the CAT, and *European and Israeli case law*." F.R. at 41 & n.45 (noting that "the reference was clearly to the two cases referenced above – *Ireland v. United Kingdom* and *PCATI v. Israel*") (emphasis added). OPR's indictment of Professor Yoo and Judge Bybee for including a discussion of these particular cases, when the CIA had made a specific request for their inclusion, is simply baffling.

OPR's quibbling critiques of the section are similarly misdirected. For example, OPR compiles a list of five "important facts" related to *Ireland v. U.K.* that the Bybee Memo "ignored" and that OPR contends would have been included in a "thorough, objective, and candid examination" of the case. F.R. at 191–92. But OPR's first three facts—that an investigating commission found the techniques to be torture and the U.K. did not contest the finding, that an internal U.K. review found the techniques to be prohibited by domestic law, and that the U.K. renounced further use of the techniques—are utterly irrelevant to *the court's* determination that the methods did not constitute torture within the meaning of the law. And the fourth and fifth items on OPR's list, which fault the Bybee Memo for not describing the *dissenting* opinions in the European Court of Human Rights and for not stating that the majority held that Great Britain's interrogation methods violated the European Convention on Human Rights, are similarly without merit. 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. And 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, and 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 additionally faults the Bybee Memo for not including a discussion of every subsequent European Court case considering *Ireland v. U.K.* But OPR does not contest the Bybee Memo's conclusion that *Ireland* is the "leading" European Court of Human Rights Case, *see* Bybee Memo at 28, and OPR admits (albeit in a footnote) that "[m]uch of that case law in fact *supports* the uncontroversial conclusion that the term 'torture' should be applied to more severe forms of cruel, inhuman and degrading treatment." F.R. at 192 & n.147 (emphasis added). Although OPR suggests that a subsequent case "raised questions about the continuing validity" of *Ireland*, F.R. at 193 (citing *Selmouni v. France*), a review of that case reveals that it repeatedly cites the *Ireland* case *favorably*. That it included some general language (not tied to *Ireland*) about the European Convention being a "living document" that might be interpreted differently over time does nothing to undermine the Bybee Memo's discussion of *Ireland*. In any event, failure to discuss such vague *dicta* does not even remotely suggest professional misconduct. OPR's criticisms are inexplicably trifling.

OPR's treatment 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 the five Israeli interrogation techniques challenged therein did not amount to torture, calling this

conclusion "misleading." F.R. at 194. But the Bybee Memo concedes that "[t]o be sure, such a conclusion [regarding whether the techniques at issue amounted only to torture] was unnecessary [to the court's decision] because even if the acts only amounted to cruel and inhuman treatment the GSS lacked authority to use the five methods." Bybee Memo at 30. Rather, the memo relied, *inter alia*, on the fact that "the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture" in reaching its conclusion. *Id.* Indeed, OPR points to nothing in the Israeli opinion that describes any of the interrogation methods as rising to the level of torture, and the language used in the opinion in fact supports the Bybee Memo's conclusion. *See, e.g., PCATI* at ¶ 25 (concluding that stress position technique is "degrading"); ¶ 30 (favorably citing *Ireland* for the proposition that a "similar" combination of interrogation methods were "inhuman and degrading"). Of course, the case was also relevant in light of the Israeli Supreme Court's observation that otherwise impermissible interrogation methods can be justified by necessity in appropriate circumstances. In the end, while OPR's convoluted criticisms would be the envy of a professional contortionist, they add nothing of substance to OPR's claim that Professor Yoo violated ethical norms.

F. Commander-in-Chief Power and Possible Defenses

OPR takes issue with the Bybee Memo's discussion of the Commander-in-Chief powers and of possible defenses to a torture prosecution based on its conclusion that "it appears likely that the sections were added, following a discussion among the OLC and White House lawyers, to achieve indirectly the result desired by the client—immunity for those who engaged in the application of EITs—after [DOJ Criminal Division head Michael] Chertoff refused to provide it directly." F.R. at 198–99. But how a discussion of *possible* defenses to torture, and a power that everyone agrees must be invoked by the President himself, could possibly provide "immunity" to anyone is never addressed by OPR. Nor does OPR point to a single shred of *evidence* suggesting that anyone at the CIA thought that the Bybee Memo permitted interrogators to violate the torture statute with impunity. This is because the evidence is beyond clear that everyone involved understood that any interrogation techniques amounting to torture were flatly prohibited. Moreover, OPR fails to explain how these sections could have been added and then reviewed by Michael Chertoff without objection if their transparent purpose was to circumvent his decision not to provide an "advance declination" to the CIA.

OPR also dismisses the evidence that OLC's client requested a discussion of these matters 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 credits David Addington's testimony before the Judiciary Committee that he was pleased to hear the memorandum would address constitutional issues and potential defenses, it is dismissive of 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 the constitutional issue and "the defenses of necessity and justification" 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*

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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., No. 110-189, at 42, 38 (June 26, 2008). ("House Hearing") (emphasis added). Even the evidence on which OPR relies is to the same effect; it shows that Professor Yoo initially determined not to discuss these subjects in the Bybee Memo, but that 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." F.R. at 197.

But OPR roundly rejects, apparently for argument's sake only, David Addington's testimony that the sections were added at client request (notwithstanding the fact that OPR believes Addington "possibl[y]" was present at the July 16 meeting in which it believes the decision was made to add the sections). F.R. at 198 n.152; *id.* at 52. Instead, OPR's offers a more "nuanced" conclusion: "it is *likely* the sections were added because some number of attendees at the July 16 meeting requested the additions, *perhaps* because the Criminal Division had refused to issue any advance declinations." F.R. at 52 (emphases added). [redacted] (in fact, the Bybee Memo was addressed to White House Counsel, and later Attorney General, Alberto Gonzalez, the only person beyond Professor Yoo who OPR is *sure* attended the July 16 meeting, F.R. at 52). But the second part of OPR's conclusion—its rank speculation that the sections were nefariously added to circumvent Michael Chertoff's rejection of advance declinations requested by the CIA, [redacted]—cannot withstand scrutiny given that the sections *were added and then promptly presented to Chertoff himself* for his review and that he did review them without objection, F.R. at 59, and that John Rizzo did not interpret the sections as any sort of advance declination, Rizzo Letter ¶ 5 ("[I] did not interpret the 2002 Bybee Memos to mean . . . that the interrogators would be immune from prosecution if they crossed the careful lines drawn in the [Classified Bybee Memo].").[42]

In any event, 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." *From the Department of Justice to Guantanamo Bay, supra*, at 42. And OPR rightfully does not 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

[42] OPR's assertion that discussion of potential common-law criminal defenses was not sought by the client is undermined not only by the sworn testimony of David Addington, but by the CIA's interest in the issues. [redacted] That the CIA had identified necessity and self-defense as significant issues before February 1, 2002 is an important fact, as OLC was not brought into the discussions until April 2002. F.R. at 37. Although individuals' memories may fade over time as to who requested what sections and when, this email demonstrates quite clearly that this was a question the CIA was asking before OLC ever became involved.

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 "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 could not possibly satisfy *any* evidentiary standard. The only inference that any fair-minded observer can draw from OPR's insistence on this sort of rank partisan speculation is that OPR is not willing to engage even in a pretense of objectivity.

And OPR presents no evidence that the discussion of Commander-in-Chief powers or possible defenses ever reached (or were even intended to reach) interrogators in the field, or that anyone ever misinterpreted these sections to authorize techniques beyond those repeatedly determined to be lawful under the statutory analysis. OPR simply overreaches in its criticisms of these sections.

1. Commander-in-Chief Power

OPR boldly declares, despite its earlier statement that it had not determined whether the memos' conclusions were correct, that the Bybee Memo's determination that the torture statute "'does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority' *was wrong*." F.R. at 201 (quoting Bybee Memo at 35) (emphasis added). OPR's analysis is not merely incorrect as a matter of constitutional law and American history, but it also flies in the face of decades of settled OLC precedent. If OPR's view of the Commander-in-Chief power were adopted, it would result in a substantial narrowing of the Department of Justice's position on the scope of the President's constitutional authorities. OPR does not recognize this fundamental flaw, for it ignores years of internal Executive Branch precedent and practice, and appears not to have considered public OLC memos on presidential power stretching back several administrations. OPR seems equally indifferent to unpublished OLC opinions that, according to Professor Yoo, rely on the Commander-in-Chief clause as the source of significant authority to conduct military and intelligence operations in defense of national security.

OPR thus condemns the Bybee Memo's discussion of executive power without the faintest conception of the background understanding that OLC lawyers bring to issues involving the Commander-in-Chief power. OPR, it appears, has not even attempted to immerse itself in OLC practice and precedent, and the result is a host of basic errors. *Compare* Principles Memo at 3 ("OLC routinely, and appropriately, considers sources and understandings of law and fact . . . such as previous . . . OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch.").

First, OPR contends that the Bybee Memo "should have considered an alternate approach that reconciled the Commander-in-Chief clause with the Take Care clause."

F.R. at 204. But while the question of the relationship between the Take Care clause and other presidential responsibilities may seem novel to OPR, it has long been settled at OLC. Unmentioned by OPR is that Clinton OLC chief Walter Dellinger had previously stated OLC's position on this issue in a carefully considered opinion that would be well known to anyone working at OLC (and that should be known to any attorney at OPR who contends that the work of that office is unethical). Relying on the same analysis justifying the establishment of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Dellinger explained that a statute that violates the Constitution is unenforceable, because the Constitution is the highest form of law. *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 2 (Nov. 2, 1994). The President's responsibility to take care that the laws be faithfully executed, therefore, requires him *not* to enforce unconstitutional statutes, because in doing so he would be violating the Constitution.

That principle applies with special force to statutes that violate the separation of powers. "The President," Dellinger wrote, "has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency." *Id.* Moreover, "[i]f 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.*" *Id.* at 3 (emphasis added).

OPR shows no knowledge of the long-settled OLC view embodied in Dellinger's analysis and instead blindly faults the Bybee Memo for not re-plowing the same ground. Nor does OPR venture to suggest what "alternate approach" the Bybee Memo should have taken, presumably because the only such approach would be to interpret the Take Care clause to require the President to enforce unconstitutional laws. It appears that OPR simply thumbed through a pocket copy of the Constitution in search of constitutional provisions that the Bybee Memo did not discuss. The idea that OPR's unresearched and poorly thought-out critique could be the basis of professional discipline (at least of someone other than the OPR attorneys who wrote it) would be risible if it did not carry such serious consequences for Professor Yoo's reputation.

Second, OPR criticizes the Bybee Memo for failing to include an extended discussion of Congress's constitutional authority to enact Section 2340 under its Article I powers. F.R. at 202. The issue addressed by the Bybee Memo, however, 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.

The longstanding view of the Department of Justice has been that the President's Commander-in-Chief power gives him *exclusive* authority over the deployment and operation of the armed forces and the protection of national security. In cases where Congress has invoked related powers in an attempt to limit the President's discretion in these areas, the Department has consistently defended presidential prerogative. Conflicts between presidential and congressional authority thankfully have been rare, but when

they have arisen, the Department of Justice generally has resolved them as the Bybee memo did—in favor of the President.

The Department's view of the Commander-in-Chief power was stated most eloquently by Attorney General Robert Jackson—the author of the *Youngstown* concurrence that OPR criticizes the Bybee Memo for not citing. In a 1941 opinion, Jackson wrote that under the Commander-in-Chief clause, the President "has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States." Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61 (1941). This power, he said, which "exist[s] in time of peace as well as in time of war," is one 'with which Congress cannot interfere.'" *Id.* (quoting 1910 constitutional-law treatise). Even at the time that Jackson wrote his opinion, this understanding of the President's broad power to ensure the Nation's security had a long pedigree. *See* Censorship of Radio Stations, 30 Op. Att'y Gen. 291, 292 (1914) ("In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty," the President's "powers are broad," including the enforcement of "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." (quoting *In re Neagle*, 135 U.S. 64 (1890))).

In the few cases when the President's Commander-in-Chief power has come into conflict with the powers of Congress, the Justice Department has not hesitated to defend the executive's authority. Perhaps the best-known direct and serious intrusion by Congress is the War Powers Resolution, which declares that the President may deploy U.S. armed forces only pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States. OLC opinions have consistently rejected the argument that the War Powers Resolution could limit a military deployment ordered by the President. OLC's Assistant Attorney General in the Carter Administration wrote, for example, that "constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power" in the President to initiate military operations. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 190 (1980). Likewise, in 1984, Reagan's OLC chief opined that Section 2(c) of the War Powers Resolution "does not constitute a legally binding definition of Presidential authority to deploy our armed forces." Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 275 (1984). The President's constitutional authority to defend the Nation, these opinions reasoned, trumped any countervailing congressional power to prevent the initiation of hostilities.

Professor Yoo has informed us that OLC opinions have been equally vigorous in supporting the President's right to order covert actions by the Central Intelligence Agency even in the face of a federal statute—the very power at stake in the Bybee Memo. Many of these opinions are classified and are not available to counsel and the parties in this action, and certainly seem to be utterly unknown to OPR's investigators. But in 1986, for example, OLC concluded that the National Security Act's requirement

that the President provide timely notification of covert actions could not constitutionally limit President Reagan's decision to secretly engage in covert actions designed to free American hostages in the Middle East. OLC observed that the President possesses "inherent" and "plenary" constitutional authority in the field of international relations, and that secret diplomatic and intelligence missions sit at "the core of the President's inherent foreign affairs authority." The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. 159, 160–65 (1986). It concluded that "any statute infringing upon the President's inherent authority to conduct foreign policy would be unconstitutional and void." *Id.* at 168; *see also* Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 259 (1989) ("At a minimum," the President's executive power "encompasses the authority to direct certain covert actions without first disclosing them to Congress, among which are those actions necessary to protect the lives and property of Americans abroad.").

In the wake of September 11th, OLC relied on this firmly established view of the President's plenary authority in the realm of national security to approve the establishment of military commissions to try members of al Qaeda and the Taliban for war crimes. *See* Memorandum Opinion for the Counsel to the President, From: Patrick F. Philbin, Deputy Assistant Attorney General, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001). "One of the necessary incidents of authority over the conduct of military operations in war," OLC said, "is the power to punish enemy belligerents for violations of the laws of war." *Id.* at 7. Moreover, if the Uniform Code of Military Justice "were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President's express constitutional powers as Commander in Chief." *Id.* at 5. That logic is analogous to that used by the Bybee Memo's, but its author has not been subject to reproach by OPR.[43]

In short, OPR's charge that Professor Yoo committed professional misconduct by failing to discuss countervailing congressional powers ignores the background understanding of the President's Commander-in-Chief power that would have been familiar to any OLC attorney. OPR appears to believe that it is an open question within OLC whether a President's exercise of the Commander-in-Chief power is subject to

[43] The prevailing Executive Branch view is consistent with the few occasions when the Supreme Court has addressed the President's power over foreign affairs and national security. It should be initially acknowledged, as OPR seemingly fails to understand, that the decisions of the Court in this area are "rare, episodic, and afford little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). But the few relevant Supreme Court cases have confirmed the President's authority. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), for example, the Supreme Court upheld President Lincoln's decision to impose a blockade on Southern ports without congressional authorization, because, as the Court explained, the President has the constitutional authority to "determine what degree of force the crisis demands." *Id.* In recent decisions the Court has continued to adhere to "the generally accepted view that foreign policy was the province and responsibility of the Executive." *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (internal quotation marks omitted).

limitation by Congress. Indeed, OPR's apparent view of the interaction between the Commander-in-Chief power and congressional authority would mean that the War Powers Resolution is constitutional, a conclusion directly contrary to the consistent view of Presidents from Richard Nixon to George W. Bush. *See* Richard F. Grimmett, Congressional Research Service, Library of Congress, *War Powers Resolution: Presidential Compliance* 1 (2009) (noting that "every President has taken the position" that the War Powers Resolution unconstitutionally abridges the Commander-in-Chief power). But as an OLC attorney, Professor Yoo was justified in presuming that if the interrogation of enemy combatants falls within the core of the Commander-in-Chief power—as the Bybee Memo argued that it does—then it trumps any exercise of congressional power that purports to limit it.

Third, and relatedly, OPR faults the Bybee Memo for not discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—presumably Justice Jackson's concurrence laying out a three-part framework for analyzing separation-of-powers disputes (although OPR does not itself cite the concurrence). F.R. at 204. Rarely, however, do OLC opinions include an extensive discussion of the *Youngstown* framework, because its principles are so well understood. 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 for a principle directly counter to the one advanced by OPR: the "existence of [the] President's authority to act contrary to a statutory command." 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). And in June of this year, when the current OLC advised President Obama that he could disregard a law that restricted State Department officials from meeting with certain U.N. agencies, it cited *Youngstown* only in a footnote—and then not for its signature analysis of how to reconcile overlapping presidential and congressional authority, but rather only for the basic proposition that Article II's Vesting Clause grants the President power over foreign relations. *See* Memorandum for the Acting Legal Adviser Department of State, From: David J. Barron, Acting Assistant Attorney General, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act* at 5 n.6 (June 1, 2009).

It is unsurprising that when addressing core military and foreign-affairs powers of the President, OLC opinions would not discuss *Youngstown* in any detail or at all. That is because—certainly from the institutional perspective of OLC—any exercise of those powers falls undisputedly in Category 3 of Justice Jackson's framework (the category of powers that override congressional authority). As Judge Bybee told OPR, the authors "recognized that we're in Category 3, Congress has enacted a statute that might interfere with the Commander in Chief's authority." F.R. at 204 n.157. In contrast to the *domestic* seizure of steel factories, which was the presidential action at issue in *Youngstown* (although one would never know it from OPR's report), the interrogation of *foreign* enemy prisoners of war lies at the core of the Commander-in-Chief power. The Bybee Memo had no more need to cite *Youngstown* than the average federal judicial opinion has a need to cite the basis for the court's power of judicial review. Indeed, OPR has not

identified what exactly it believes the memo should have said about *Youngstown* beyond "acknowledg[ing] its relevance." F.R. at 204.

That OPR has not figured out exactly what the Bybee Memo should have said about *Youngstown* is unsurprising. Its view is apparently cribbed entirely from Professor Goldsmith's criticism that the Bybee Memo did not adequately consider "case law such as *Youngstown*." F.R. at 205. But while Professor Goldsmith—who, it bears repeating, believes that Professor Yoo acted in good faith and did not commit professional misconduct—is entitled to his view, Professor Yoo's decision not to cite *Youngstown* is far more consistent with OLC precedent. A review of Clinton-era OLC opinions addressing conflicts between a statute and the President's foreign-policy and military authority, for example, shows that they almost *never* cited *Youngstown* in finding that presidential authority prevailed:

- In 1996, OLC declared unconstitutional a proposed 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, From: Walter Dellinger, Assistant Attorney General, *Re: Placing of United States Armed Forces Under United Nations Operational or Tactical Control* (May 8, 1996). 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." *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, in exercising its power to regulate the armed forces, "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" because he would be unable to fulfill agreements to use force abroad with other countries. Notably, Congress's restriction here was done through the appropriations power, considered much more basic to the legislative power than almost any other. OLC did not mention *Youngstown* at all.

- In 1995, OLC advised the White House that the President could order troops into Bosnia under his authority as Commander in Chief. 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 congressional authorization, even if hostilities were to occur, because the War Powers Resolution could 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. Once again, OLC did not mention *Youngstown*.

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- 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. 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 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 attack. 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).

- In 1997, OLC issued an opinion that extended this reasoning to disclosing grand-jury information to the intelligence community. Memorandum for the Acting Counsel, Office of Intelligence Policy and Review, From: Richard L. 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." 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)." Like the 1993 opinion, the 1997 opinion did not cite or discuss *Youngstown*.

- 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. 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." OLC explicitly said that 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). Once again, the opinion did not cite or discuss *Youngstown*.

- 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." The opinion did not cite to *Youngstown* or discuss whether Congress's use of its appropriations power made a difference in the analysis.

- In 1996, OLC issued an opinion to the State Department that Congress could not place conditions on funds appropriated for diplomatic activities with Vietnam. 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." OLC declared the rider "unconstitutional and without legal force or effect." It did not cite or discuss *Youngstown*.

- 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, raised serious constitutional questions. 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. OLC found that legislation that required the President to submit 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." The 1996 Opinion neither discussed nor cited *Youngstown*.

Fourth, OPR relies on a handful of sources, primarily secondary, to claim that "[t]orture has not been deemed available or acceptable as an interrogation tool in the Anglo-American legal tradition since well before the drafting of the United States Constitution." F.R. at 201. But the authority that OPR cites is at best marginally relevant and does not support that assertion: (1) a British judicial opinion from 2005, which could not possibly be an authoritative source on the intentions of the framers; (2) an article by a legal philosopher who is not an expert on the American Constitution, the separation of powers, or legal history and makes no claims about the understanding of the Framers[44]; and (3) an article in Pepperdine Law Review by an assistant professor who makes the claim, contrary to settled law, that the Eighth Amendment applies beyond post-conviction punishment.

Of course, no one at OLC was suggesting that the legal analysis in the interrogation memoranda established that the President could authorize "torture"; the whole point of the exercise was to identify a line that would keep interrogators from violating the particular understanding of torture reflected in § 2340. And, given the statutory language, one could certainly conceive of circumstances close to the line, where the conduct at issue might later be viewed as just-over rather than just-under. If the President in such circumstances had personally undertaken to order the interrogation on his own authority, his constitutional power as Commander in Chief could well be held sufficient to override the statute as applied. It is certainly surprising that the Executive Branch would take a different view, irrespective of which party controls the White House, and categorically rule out for all eternity the exercise of such authority even in the direst of circumstances, when the lives of thousands or even millions of our citizens may be at stake.

More critically, even if the discussion had been about whether the President could order conduct that qualifies as "torture" under any conceivable definition, any historical norm against torture would not resolve the question posed by the Bybee Memo: *which branch* has the constitutional authority in a military conflict to determine what sort of interrogation methods may be used. As Professor Yoo attempted to explain to OPR in his interview—although it evidently fell on deaf ears—a "parade of horribles" does not "answer[] the Constitutional question, because I could easily . . . flip them all and say Congress ordered them to [torture detainees]. And then you would say, well, Congress shouldn't have that power." July 11, 2005 Yoo Tr. at 120. In other words, if a norm against torture did have significance in the constitutional analysis, it could mean only that

[44] The writer in question, Professor Jeremy Waldron, in fact says quite clearly that "There is no question that [torture] could be introduced into our law, directly by legislation, or indirectly by so narrowing its definition that torture was being authorized de jure in all but name," and instead objects because such would be "contrary to the genius and spirit of our law." Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1719 (2005) (internal quotation marks omitted).

neither the President *nor* Congress has the power to authorize torture; it would say nothing about the allocation of power between the two branches, which was the subject of the Bybee Memo. OPR's argument thus betrays a stunning lack of understanding of the relevant legal issue.

OPR's real complaint appears to be with the idea that interrogation methods should fall within the Commander-in-Chief power at all. But it attempts no substantive critique of the Bybee Memo's logic, supported by legal authorities on the nature of warfare, that: (1) interrogation provides military intelligence; (2) gathering military intelligence is a critical component of conducting successful military operations; (3) conducting military operations is the core purpose of the Commander-in-Chief power. As the discussion above makes clear, the Bybee Memo's logic was in full accord with the well-developed view of the Department of Justice on the breadth of the President's authority to protect national security.

In sum, the Bybee Memo's analysis of presidential power was 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, 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 OLC operates, did not think to research basic OLC precedents, and would prefer that every OLC opinion begin with first principles is a weak basis for believing that Professor Yoo is guilty of professional misconduct.

2. Possible Defenses

OPR includes a detailed discussion of 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 (emphases 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); *cf.* Rizzo Letter ¶ 5 ("The discussion of common law defenses was equivocal and [I] did not advise anyone to rely on the availability of such defenses.").

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 42; whether there was a showing that the

action taken by the defendant will avoid a greater harm, *see id.* at 43; 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.

OPR nonetheless asserts that Professor Yoo committed professional misconduct simply by stating that some scholarly "commentators" (plural) believe that interrogations that violate Section 2340A might be justified under the doctrine of self-defense in certain circumstances. F.R. at 253–54. OPR's "smoking gun" on this point is the fact that a "*See also*" cite to an article by Professor Alan Dershowitz was added to the Yoo Memo to bolster the principal cite (from the Bybee Memo) to an article by Professor Michael S. Moore that undoubtedly supports the proposition. Based on track change edits, OPR asserts that Judge Bybee questioned the use of the plural "commentators," and that Professor Yoo added the citation to the Dershowitz article "knowing" that it did not support the proposition. F.R. at 221–22, 253–54.

OPR's principal argument is that the Dershowitz article was focused primarily on the doctrine of necessity rather than self-defense. But the Bybee and Yoo Memos lead into the relevant discussion by assuming that "[t]he threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens," and begin the paragraph in question by stating that "[t]o be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense." Bybee Memo at 43–44; Yoo Memo at 78–79. Moreover, Dershowitz plainly states in the cited portion of his article that he is "personally convinced that there are some circumstances—at least in theory—under which extraordinary means, including physical pressure, may properly be authorized." F.R. at 222. And Dershowitz is on record stating that the ticking time-bomb scenario is one such circumstance. *See, e.g.*, F.R. at 212 n.168 (noting Dershowitz's 2002 invocation of the ticking time bomb scenario). While OPR may quibble with the strength of the "*See also*" cite, then, the citation is neither improper nor even remotely evidence of knowing and intentional misconduct.

Aside from its qualms with Professor Yoo's Bluebooking choices, OPR also criticizes the Bybee Memo's discussion of defenses based on four principal grounds: (1) that OLC should have cited the "arguabl[e] *dictum*" of the *Oakland Cannabis* case in its discussion of the necessity defense, F.R. at 209; (2) that the Bybee Memo did not address all of the elements of the necessity defense identified by federal courts, F.R. at 210–11; (3) that OLC improperly relied on the *In re Neagle* case in its self-defense discussion, F.R. at 223–25; and (4) that OLC misinterpreted the CAT ratification history with respect to justification defenses, F.R. at 215–19. The fourth argument is addressed in the CAT Ratification History discussion above. The first three arguments are addressed below, in turn.

OPR's first criticism is that the Bybee Memo evaluated the necessity defense by looking only to *United States v. Bailey*, 444 U.S. 394 (1980), and W. LaFave & A. Scott, *Substantive Criminal Law* (1986), when it should have also examined the Supreme 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*. Citation of 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 LaFave & 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* F.R. at 216 ("[I]f Congress had intended to allow the necessity defense to apply to the torture statute, it could 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 reluctantly concedes that *Dixon* assumes the availability of defenses, but hides that concession in a footnote. *See* F.R. at 208 n.162.

Second, OPR argues that "[a] review of . . . judicial opinions reveals that the elements of the necessity defense in federal court differ from the elements set forth in the Bybee Memo." F.R. at 210. OPR then identifies four elements that it contends "*most* courts have endorsed." *Id.* at 210–11 (emphasis added). But the Bybee Memo's discussion tracked the Supreme Court's understanding of the necessity defense:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or *choice of evils*, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils.

Bailey, 444 U.S. at 409–10 (emphasis added); *cf.* Bybee Memo at 39 (referring to the necessity defense as "the 'choice of evils' defense").

Moreover, it is abundantly clear that most federal courts have *not* applied the elements that OPR has identified as constituting the necessity defense. Although OPR incorrectly states in a footnote that only "[a] *few* federal courts have adopted a 'choice of evils' analysis," F.R. at 210 n.166 (emphasis added), a review of the decisions on which OPR relies reveals that the courts of appeals have almost always applied this analysis when specifically considering the necessity defense. *See United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001) ("The necessity defense requires the defendant to show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law."); *United States v. Smith*, 160 F.3d 117, 123 n.3 (2d Cir. 1998) (considering Model Penal Code "'Choice of Evils'" defense); *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979) (omitting "choice of evils" discussion, but otherwise applying analysis similar to *Maxwell*); *United States v. Griffin*, 909 F.2d 1222, 1224 (8th Cir. 1990) (noting that necessity defense typical applies where defendant "acted in the interest of the general welfare" and where "the defendant's free will was properly exercised to achieve the greater good" (internal quotation marks omitted)); *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992) ("To invoke the necessity defense . . . defendants colorably must have shown that '. . . they were faced with a choice of evils and chose the lesser evil . . . ."); *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995) ("Invocation of the necessity defense requires a showing by the defendant that . . . she was faced with a choice of evils and chose the lesser evil . . . .").[45]

And the circuits that have applied the analysis OPR espouses have uniformly done so in the more general "justification" context in firearms-possession cases, or in considering the *duress* defense, not with respect to necessity in particular. In the Sixth Circuit case on which OPR principally relies for its four elements, for example, *United States v. Singleton*, 902 F.2d 471 (6th Cir. 1990), the court considered a general "justification defense" for a felon in possession of a firearm, not the necessity defense that might apply in other contexts. *See id.* at 472. The other cases on which OPR relies are similarly limited. *See United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991) ("Those courts of appeals that have considered a *justification* defense to a felon in *possession of a firearm* charge have adopted a four-part test . . . ." (emphasis added)); *United States v. Gant*, 691 F.2d 1159, 1162 (5th Cir. 1982) (considering the "justification defense to a charge of violating [the felon in possession of a firearm statute]"); *United States v. Mauchlin*, 670 F.2d 746, 748 (7th Cir. 1982) (conflating duress and necessity in context of firearm possession in a federal correctional institution); *United States v. Bell*, 214 F.3d 1299, 1300 (11th Cir. 2000) (considering "a justification defense to a [felon in

[45] Other recent appellate decisions have also applied a "choice of evils" analysis similar to that discussed in the Bybee Memo. *See, e.g., United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008); *Raich v. Gonzalez*, 500 F.3d 850, 858 (9th Cir. 2007); *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000) ("[t]he essence of the defense is that otherwise criminal conduct may be excused when the defendant commits the acts in order to avoid a greater evil").

possession of a firearm] charge"); *United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997) (considering duress defense in drug conspiracy case). OPR's contention that "most" courts apply its preferred analysis and that only a "few" courts apply the choice of evils analysis is not only misleading, it is patently incorrect. That OPR would apply this sort of one-sided analysis while purporting to condemn Professor Yoo's candor would be truly shocking were it not the *modus operandi* of the entire Report.

In any event, even though the Bybee Memo structured its discussion differently than OPR would have liked by following the lead of the Supreme Court and *most* appellate courts, each of the elements OPR identified was either addressed or not discussed because the element was clearly inapplicable in context. With respect to OPR's first element, that "the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury" (which the Supreme Court attributes to duress, not necessity, and which most federal appeals courts have not considered to be an element of the necessity defense), OPR concedes that the Bybee Memo "acknowledged this issue," but complains that it did so only "briefly." *Id.* at 211. The second element, that "the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct," which most federal appeals courts again have not articulated as an element of the necessity defense, is clearly inapposite to CIA agents in the line of duty. The third element, that "the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm," is identified in the Bybee Memo, albeit in a slightly different formulation: "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Bybee Memo at 40. And OPR's fourth element, that "a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm," was likewise noted, again using slightly different language: "it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done." Bybee Memo at 40. In the end, OPR's complaint is essentially that the Bybee Memo did not structure its overview of potential defenses in a way that OPR would have found more pleasing. But divining OPR's future predilections was not Professor Yoo's charge, and even if Professor Yoo had possessed the powers of clairvoyance necessary to predict those preferences it is not likely that they would have helped him much. As OPR has demonstrated in successive drafts of its report, it stands ready to make up a new set of reasons for a misconduct finding whenever the insufficiency of the old ones is pointed out. No crystal ball is *that* good. More importantly, for present purposes, no matter how many times OPR might rearrange the deck in order to rescue its predetermined conclusion, upsetting OPR's extremely questionable structural preferences is vastly insufficient to support a charge of professional misconduct.

Third, OPR contends that the Bybee Memo mischaracterized *In re Neagle*, 135 U.S. 1 (1890). F.R. at 223–25. 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 nevertheless concludes that there is "no support in *Neagle* for the proposition advanced in the Bybee Memo." *Id.* at 224. OPR also ventures that "*Neagle*'s

value as a criminal law precedent is arguably limited by the unusual factual background of the case." F.R. at 224 n.183.

Here again, however, OPR's position appears to be at odds with longstanding positions of the Department of Justice, which OPR dismisses without discussion because they did not rely "solely" on *Neagle* (neither does the Bybee Memo, of course) and are not "comparable to the Bybee Memo's theory." F.R. at 224 n.183. But OPR is mistaken that the opinions are not relevant to the Bybee Memo's use of the case. 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;[46] that the FBI could arrest suspects abroad, even if the apprehension would violate customary international law or treaties;[47] that the President could order the Coast Guard to intercept Haitian vessels to prevent immigrants from reaching U.S. shores;[48] 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."[49] 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 Final Report, has never been interpreted in the crabbed way that OPR proposes, especially when OPR's reading would contravene—and reverse—the Department's long-standing view of the matter.

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[46] 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).

[47] 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. O.L.C. 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)).

[48] Memorandum Opinion for the Attorney General, From: Theodore B. Olson, Assistant Attorney General, *Proposed Interdiction of Haitian Flag Vessels*, 5 U.S. Op. O.L.C. 242 (Aug. 11, 1981). According to this OLC opinion, the President's "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.

[49] Memorandum Opinion for the Attorney General, From: John M. Harmon, Assistant Attorney General, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A U.S. Op. O.L.C. 185, 185 (Feb. 12, 1980).

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G. Classified Bybee Memo

OPR's criticism of the Classified Bybee Memo, which approved the use of certain specific interrogation techniques on a detainee, is even less persuasive than its critique of the Bybee Memo. OPR relies on a number of facts that could not have been known to the authors as they worked under immense time pressure, such as obscure materials on "water torture" unearthed years later by an expert on the laws of war and facts about the sleep-deprivation techniques that the CIA did not disclose. Worse still, OPR does not make clear that the Classified Bybee Memo began by stating that "this opinion is limited to these facts," and "[i]f these facts were to change, this advice would not necessarily apply," expressly disclaiming an applicability beyond the narrow context presented. Classified Bybee Memo at 1.[50]

OPR criticizes the Classified Bybee Memo on three grounds. First, OPR faults the memo because it "did not consider the United States legal history surrounding the use of water to induce the sensation of drowning and suffocation in a detainee." F.R. at 234. Second, OPR asserts that the memo failed to address the potential differences between SERE training and the CIA program concerning mental health issues. F.R. at 235–36. Third, OPR criticizes the memo for not discussing how detainees would be kept awake or made to maintain certain stress positions. F.R. at 236–37. Based on these criticisms, OPR concludes that "the legal advice provided was not thorough, objective, and candid legal advice." F.R. at 237.

OPR derives its first criticism exclusively from a single law-review article and the materials that the article discusses. *See* Evan J. Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007). The article, researched and written by a strong critic of the *policy* of waterboarding in the years after the use of the technique became public knowledge, relies heavily on obscure primary materials.[51] Although these obscure materials might have been reasonably available to Judge Wallach, a professor who specializes in the law of war and who

[50] The Classified Bybee Memo also "emphasize[d]" as its conclusion—although you would not know it from reading the Final Report—that notwithstanding OLC's "best reading of the law," the CIA "should be aware that there are no cases construing [the torture] statute, just as there have been no prosecutions brought under it." Classified Bybee Memo at 18.

[51] Although Wallach clearly believes that waterboarding is "torture" in some unspecified lay sense, he does not directly address the criminal torture statute, much less analyze its elements, and does not attempt to refute OLC's legal analysis. Rather, he says that the OLC torture definition "*may* be subject to challenge as a matter of law," and concedes that it might be "technically valid." *Id.* at 505–06 (emphasis added). The article resorts to moral and political criticisms, and conflates many aggressive interrogation techniques without ever grounding them in the criminal statute. It is not at all clear why such a discussion would be material to an analysis of the statute: Although Rule 2.1 *permits* lawyers to consider moral and political factors, there can be little doubt that such concerns were outside the scope of OLC's mandate in drafting the memos, which were directed to lawyers equally capable of weighing such obvious concerns in advising the policymakers to whom they reported. Even OPR would seem to concede this, although it characteristically buries the concession in a footnote. F.R. at 21 n.23.

worked without time constraints, it is completely unreasonable to argue that it was sanctionable misconduct for OLC attorneys not to have turned them up at a time when "waterboarding" was not part of the public lexicon and the subject of myriad scholarly efforts. That the OPR attorneys did not even *ask* about them in their interview of Professor Yoo—which occurred well after the public debate over waterboarding had begun, but before Judge Wallach had published his article—demonstrates quite clearly that they themselves did not locate the materials.[52]

In any event, Professor Yoo committed no error in failing to discuss these materials, because Wallach's (and therefore OPR's) discussion is almost entirely inapposite. The discussion is divided into three substantive parts, each of which OPR cites: (1) post-World War II prosecution of Japanese personnel for the use of "water tortures" against allied POWs during the war; (2) the use of "water tortures" in the Philippines during the U.S. occupation and later by the Ferdinand Marcos regime; and (3) a Texas criminal case in which law enforcement officers were convicted for using a "water torture" on prisoners. Prosecutions in the Japanese cases are immaterial because they involved the rigorous protections for prisoners of war under the Geneva Conventions, which are beyond the scope of the OLC memoranda and offer dramatically broader protections than the torture statute. *See, e.g.*, 1929 Geneva Convention relative to the Treatment of Prisoners of War, Part II, Art. 5 ("Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. . . . No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. *Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.*" (emphasis added)).[53] The Texas case, *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), in which a "water torture" was held to violate civil rights laws when used by law-enforcement officers to extract confessions from prisoners, is similarly inapposite in light of the rigorous protections afforded suspects in police custody in the United States.[54]

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[52] Moreover, even if Professor Yoo had clearly erred in failing to locate and discuss these arcane materials, no one can seriously contend that merely making a mistake is grounds for professional discipline. It was not too long ago that the Solicitor General, the entire Supreme Court of the United States, plus their respective legal staffs, all missed the existence of a federal *statute* (which certainly is readily available through the most ordinary research effort) that was clearly relevant to the central issue in an important *capital case* then pending before the Court. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, *reh'g denied*, 129 S. Ct. 1 (2008). To our knowledge, no one has suggested that any of these lawyers should be sanctioned by the their respective bars.

[53] Moreover, these cases generally dealt with activities far removed from waterboarding as used in United States military SERE training or the Classified Bybee Memo. For example, Japanese methods apparently included the use of funnels to force water into the stomach and lungs before beating or jumping on the resulting distended stomachs to cause expulsion of the water. Wallach at 492. Versions of the practice also included the use of kerosene and human waste. *Id.* at 493 n.109. And most cases included severe beatings up to and including death.

[54] That this or other cases Wallach cites use the term "torture" colloquially is not informative, as the term can be applied to all manner of behavior, including cruel, inhuman, or degrading

The Philippines cases are potentially relevant, but the Appendix to the Bybee Memo clearly addressed the *Marcos* litigation to which Wallach and OPR refer. *See* Bybee Memo at 49 (discussing *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), for pattern of torture where, among other activities, "guards placed a towel over [the victim's] nose and mouth and then poured water down his nostrils"). The Bybee Memo addresses an appellate decision, not the trial court decision to which Wallach and OPR refer, but the trial court decision does not note the distinction between torture and cruel, inhuman, and degrading treatment as the appellate decision does, rather referring without analysis to both "torture" and "human rights abuses." *See In re Estate of E. Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995). The remainder of Wallach's discussion, concerning the use of the "water cure" by U.S. forces during the occupation of the Philippines, is for the most part a survey of debate over the propriety of its use as a matter of policy. *See, e.g.*, Wallach at 498 (letter from an anonymous Army captain to the New York Times noting that "[t]he water cure is very uncomfortable, but not serious" and that it was restricted to use on "outlaws," not combatants). There was one court martial related to the use of the "water cure," however, in which one defendant was acquitted and the other convicted and suspended from command for one month and fined $50. *See* Wallach at 500 n.144; F.R. at 234 n.193. The court martial was for "conduct to the prejudice of good order and military discipline" for violation of a military general order that proscribed "torture with a view to extort a confession" without defining the term. *Id.* According to the account of the court martial on which Wallach and OPR rely, in contrast to waterboarding, "the 'water cure' . . . consisted in forcing large quantities of water (sometimes salted water) into the mouth and nose of a victim as a result of which his or her stomach would inflate causing great pain and, eventually, suffocation." Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899–1902)*, 1 J. Int'l Crim. Justice 135, 143 (2003). This single court martial is beyond obscure, its facts are different, it is not an interpretation of the statute at issue, and as such it is neither precedential nor persuasive. The fact that an adjunct professor of the law of war was able to dig it up while researching an after-the-fact academic article can hardly be used to condemn the OLC authors for not having found and discussed it.

In sum, OPR's contention that the failure to discuss these inapposite and utterly obscure materials amounts to sanctionable incompetence cannot withstand scrutiny. As OPR concedes, "[n]one of these cases involved the interpretation of the specific elements of the torture statute. Nor are there sufficient descriptions in the opinions to determine how similar the techniques were to those proposed by the CIA." F.R. at 235. As with so many other parts of its report, this whole discussion appears primarily intended to add heft and a most superficial patina of academic rigor to OPR's handiwork, presumably in the hope that incautious readers will mistake prolixity for profundity, and sheer length for solid legal analysis. There is absolutely no basis for professional sanction in these circumstances.

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treatment not amounting to torture under the rigorous requirements of the criminal statute. *Cf.* Levin Memo at 4 (distinguishing "certain colloquial uses of the term ['torture']" from the statutory definition) (citing *Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004)).

OPR also criticizes the Classified Bybee Memo for not adequately addressing the differences between the effect of the waterboard in SERE training and in actual detainee captivity. F.R. at 235–36. To this end, OPR falsely claims that "the Classified Bybee Memo relied almost exclusively on the fact that the 'proposed interrogation methods have been used and continue to be used in SERE training' without 'any long-term mental health consequences.'" *Id.* at 235. But the data demonstrating that no SERE trainees had ever suffered prolonged mental harm is clearly highly relevant, and the fact that detainees are in a different posture from trainees is quite obvious. It is for this reason that the Classified Bybee Memo devoted several pages to the CIA's *individualized* psychological assessment of the high value detainee subject to interrogation: "[I]n consulting with a number of mental health experts, you have learned that the effect of any of these procedures will be dependent on the individual's personal history, cultural history and psychological tendencies. To that end, you have informed us that you have completed a psychological assessment of Zubaydah. . . . According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods." Classified Bybee Memo at 6–8. This section also noted, for example, that "it is believed that Zubaydah wrote al Qaeda's manual on resistance techniques" and that he would "draw upon his vast knowledge . . . to cope with the interrogation," that "he has a 'reliable and durable support system' in his faith," and that he demonstrates "emotional resilience." *Id.* at 7–8. The Classified Bybee Memo clearly recognized the necessity of the individualized psychological assessments that were an important component of the CIA program, and did not rely merely on the SERE data as OPR suggests.

Finally, OPR argues that "OLC attorneys limited their analysis to the physical effects of lack of sleep, without inquiring about or considering how the subject would be kept awake," and "did not consider whether subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions." F.R. at 236–37. But this information was unknown to OLC at the time, and the Classified Bybee Memo's analysis was "based upon" and expressly "limited to" the facts provided by the CIA. Classified Bybee Memo at 1 (also noting that "[i]f these facts were to change, this advice would not necessarily apply"). In any event, these techniques were validated by the Bradbury memoranda (with a more detailed knowledge of the methods used). *See* F.R. at 135 *et seq.* And even if OPR believes that the Classified Bybee Memo's analysis is not as good as the Bradbury memoranda's later analysis, there is absolutely no basis for OPR to assert that this difference amounts to sanctionable misconduct.

In support of its argument, OPR also cites a Supreme Court case (apparently) for the proposition that sleep deprivation amounts to torture. The case, *Aschraft v. Tennessee*, 322 U.S. 143 (1944), involved a murder suspect who was interrogated for thirty-six hours without sleep before he ultimately confessed to the crime. The majority opinion, finding the confession to have been coerced and overturning the subsequent conviction as a violation of due process, cited in a footnote an ABA report stating that "[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." *Id.* at 150 n.6. Justice Jackson authored a strong dissent from the majority opinion, however, joined by Justices Roberts and Frankfurter, suggesting that sleep deprivation was not a clear-cut deprivation of the

substantial rights afforded suspects in custody in the United States. In any event, no one could reasonably contend that the Court's colloquial use of the word "torture" in this context remotely bears on the elements of "torture" as defined by a particular criminal statute that was enacted fifty years later. And OPR makes no effort to show how this case would have informed the Classified Bybee Memo.[55]

H. Yoo Letter

OPR takes issue with two aspects of the August 1, 2002 letter from Professor Yoo to White House Counsel Alberto Gonzalez that accompanied the Bybee Memo (the so-called "Yoo Letter"): (1) that the letter "blurred some important distinctions" concerning treaty "reservations" and treaty "understandings," F.R. at 238–39; and (2) that the letter inadequately analyzed the possibility of prosecution under the Rome Statute in the International Criminal Court. F.R. at 239–40.

With respect to the first criticism, OPR flatly mischaracterizes what the Bybee Memo said. According to OPR, "Yoo did not elaborate on the well-established meanings of 'reservation' and 'understanding' in U.S. and international law" and so incorrectly assumed that the nominal "understanding" that the United States submitted with the CAT (defining torture in similar terms as the torture statute) would be treated as a binding "reservation" by other nations. F.R. at 239.

The Yoo Letter did not conflate reservations and understandings. To the contrary, it recognized the critical legal principle—also emphasized by the sources OPR cites but ignored by OPR itself—that whether a condition is a reservation or an understanding depends not on what the condition is *called*, but rather on its *content*. If the condition modifies a U.S. obligation under the treaty, it is a reservation, even if the Senate calls it an "understanding." *See* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 98th Cong., 2d Sess. 125–26 (Comm. Print prepared for the Senate Comm. On Foreign Relations, 1984) ("CRS Report") ("What may seem to the Senate to be a reasonable interpretation, and therefore an understanding, might appear to the other country or countries involved to be an important modification, and therefore a reservation . . . ."); *id.* at 154 ("However, whether in fact a particular statement is a reservation or merely a non-substantive addition to an agreement is determined by its content and not by its title."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 cmt. g (1987) ("When signing

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[55] It bears mentioning that OPR omits from its ostensibly "objective" analysis of the Classified Bybee Memo any mention of what the memo [redacted] *cf.* Rizzo Letter ¶ 2 (OLC "did not simply 'rubber stamp' everything the CIA was considering."). This sort of irresponsible innuendo not only reflects poorly on OPR, but is consistent with the pervasive bias of the Final Report. An objective analysis would have credited the difficult line-drawing task with which OLC was charged, and recognized that the approval of the waterboard but not [redacted] reflected a good-faith, if debatable, drawing of an extremely difficult statutory line with important national-security implications.

or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation.").

The argument of the Yoo Letter was that *if* the U.S. "understanding" set out a higher intent standard than the CAT, *then* it was a reservation and therefore exempts the U.S. from the CAT's lower intent standard—an argument that fully accords with basic principles of international law. The Yoo Letter first stated that the United States attached to its instrument of ratification a condition entitled an "understanding." Yoo Letter at 3–4. It then explained that, in the author's view, that title was correct because, according to what he considered the better reading of the CAT, the submission did not modify the intent standard but rather clarified it. Letter at 4 n.6. The Yoo Letter also then pointed out, however, that the "understanding" would be considered a "reservation" under international law "*if* it indeed modifies the Torture Convention standard." Letter at 4 n.5 (emphasis added). That is simply a straightforward application of the international-law principles described above: If the "understanding" changed the U.S.'s obligation under the treaty, it was in substance a reservation.

Not only does OPR fail to address (much less critique) this central point, but it appears not even to understand it. In footnote 197, OPR strangely faults the Bybee Memo for explaining that if the standard in the CAT is *equivalent* to the standard in the torture statute, then the "understanding" really is an understanding. F.R. at 238 n.197. That follows directly from the principles set out above, and OPR's confusion about it is baffling.

OPR's second criticism has two parts: (a) the Yoo Letter did not consider article 8(2)(b)(xxi) of the Rome Statute, which OPR asserts criminalizes "humiliating and degrading treatment"; and (b) the Yoo Letter erroneously assumed that a foreign court would accept the President's determination that members of al Qaeda and the Taliban are not protected under the Geneva Conventions. F.R. at 239–40.

First, OPR does not contest the Yoo Letter's determination that the two provisions of the Rome Statute that include a prohibition on "torture"—Articles 7 and 8(2)(a)(ii)—did not apply to al Qaeda and Taliban detainees. But OPR accuses the Yoo Letter of ignoring Article 8(2)(b)(xii), which classifies as "war crimes" any "serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law*, any of the following acts: . . . [c]omitting outrages upon personal dignity, in particular humiliating and degrading treatment." Rome Statute art. 8(2)(b)(xxi) (emphasis added). Yet OPR has identified no enforceable legal obligation "within the established framework of international law" prohibiting "humiliating and degrading treatment" of unlawful enemy combatants not covered by the Geneva Conventions, and this precise language is in fact drawn from the Conventions themselves. *See* Bybee Memo at 15 n.8; F.R. at 153, 159. The Yoo Letter did not address Article 8(2)(b)(xxi) in light of the letter's conclusion that the detainees were excluded from protections of the Geneva Conventions, the "established framework of international law" at issue.

Second, OPR's criticism that a foreign court would not accept the President's "determination" that the Geneva Conventions do not apply to the detainees misleadingly suggests that the President's legal judgment was some sort of discretionary decision. The President's determination was based not on a willy-nilly subjective assessment, but on the then-prevailing interpretation of the Geneva Conventions within the Executive Branch—an interpretation that OPR does not challenge as a product of professional misconduct and that three Supreme Court Justices voted to uphold, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 718–19 (2006) (Thomas, J., dissenting, joined by Scalia, J.); *see also Hamdan v. Rumsfeld*, 415 F.3d 33, 40–42 (D.C. Cir. 2005) (per Randolph J., joined by Roberts, J.). OPR appears to be suggesting that the Yoo Letter should have analyzed the Rome Statute under what OLC at the time viewed as an *incorrect* interpretation of the Geneva Conventions, an unheard-of standard for finding professional conduct. Not only is it impossible to see how the omission of such a thought experiment could amount to a disciplinary violation, but the Yoo Letter actually *did do just that*, when it warned that "[i]t is possible that an ICC official would . . . disagree with the President's interpretation of the [Geneva Convention]." Yoo Letter at 6.

VII. OPR's After-The-Fact Scienter Findings Are Unsupportable.

In a stunning if characteristic display of incompetence, OPR failed in its Draft Report to determine at all whether Professor Yoo and Judge Bybee had acted with the level of scienter required under OPR's *own framework*. That is, in its rush to publicly castigate the authors of the memos, OPR did not even conduct the critical inquiry required in *every case*.

OPR's Policies and Procedures, as we pointed out in our comments, 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 ¶ 9 (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 ¶ B(1). *See also* OPR 2005 Annual Report at 7–8 n.3–6 (articulating standards). It is worth recalling, yet again, that in December of last year OPR was prepared to *publish* this report.

Having now been alerted to the text of its own framework, OPR has slapped onto the end of its Final Report a six-page postscript that concludes that Professor Yoo

violated a "clear and unambiguous obligation purposefully or knowingly" and that Judge Bybee acted in reckless disregard of such an obligation. F.R. at 251–57. (Recall that this "clear and unambiguous obligation" arises out of the "Best Practices Memo" and "Principles Memo" authored years after Yoo left OPR.)

OPR cannot possibly be correct that Professor Yoo *intentionally* violated the rules of professional conduct. Even if one disagrees with the analysis of the Bybee Memo presented above and ultimately concludes that Professor Yoo incorrectly analyzed some of the legal issues, there was at least a good-faith basis for his views. At most, OPR has demonstrated that there could be disagreement about difficult legal issues analyzed in the memos. Indeed, OPR leads off its scienter analysis by stating that the "Bybee Memo had the effect of authorizing a program of CIA interrogation that *many would argue* violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture." F.R. at 251–52 (emphasis added). Tucked inside the ambiguous "many would argue" is the fact that the "many" are certain academics and commentators, and those opposed to their critiques are Yoo's successors at OLC and numerous federal judges. And also excluded from the "many," of course, is OPR itself, which declines to determine whether Professor Yoo's bottom-line advice that the enhanced-interrogation techniques were not torture was correct.

OPR's specific scienter "findings" run the gamut from picayune to unsupportable to outright illogical. None supports the inference that Professor Yoo intentionally violated disciplinary rules or in any way acted in bad faith.

A. Incomplete Analysis Of The Commander-in-Chief Power.

OPR's first ground for concluding that Yoo intentionally violated rules of professional conduct is that "Yoo knowingly provided incomplete and one-sided advice in his analysis of the Constitution's Commander-in-Chief clause." F.R. at 252. As discussed earlier in this response, OPR's analysis on this point betrays a massive ignorance of OLC practice and precedent, faulting Yoo for failing to cite things like *Youngstown* and the Take Care clause that OLC memos *rarely* cite in similar circumstances because reiterating their basic relevance adds nothing to a discussion of the issue at hand.

Perhaps realizing how unsupportable it would be to base a scienter finding on its uninformed critique of the merits of Professor Yoo's analysis—and how doing so would logically require the censure of most OLC attorneys, including those, like Walter Dellinger, who signed the Principles Memo—OPR instead cites four tangential factors as a basis for its claim that Professor Yoo intentionally provided incomplete advice. None has merit.

First, OPR points to Patrick Philbin's comment that the section was "aggressive" and "a step beyond" OLC's prior opinions. F.R. at 252. Contrary to OPR's suggestion, however, Philbin did not believe that the section was *incorrect*, instead considering it unnecessary *dicta* that could be omitted because the approved techniques were lawful. (Of course, the section *was* necessary because, as Addington testified, the client had

requested it.) Had Philbin believed that the analysis was wrong, he would not have advised Judge Bybee to sign the memo. F.R. at 63. As the "second Deputy" assigned to ensure the accuracy of the memo, Philbin could not have ethically given his approval had he thought that the section misstated the law. Indeed, if he had, he would have been committing an "intentional" violation of the rules of professional conduct, a conclusion that OPR expressly disavows. F.R. at 257–58.

Second, OPR places great weight on the view of certain academics that the Commander-in-Chief power is more limited. F.R. at 252. But the fact that some *law professors* take a limited view of executive power should come as a shock to no one. What OPR omits from its discussion is that *OLC* has historically taken a *robust* view of executive power. *See, e.g.*, Flanigan Decl. ¶ 6 ("OLC's opinions interpreting the President's powers under the Constitution and relevant statutes have tended to reflect a robust view of those powers."). And a review of OLC opinions from past presidential administrations reveals that OLC attorneys have never viewed the duty of candor to require them to discuss and refute law-review articles espousing contrarian views of executive power from left-of-center academics (many of whom subscribe to very different methods of constitutional interpretation than OLC) each time they consider the issue. That Yoo followed OLC's past practices in this regard cannot be evidence of an "intentional" violation of the rules of professional conduct.

Third, OPR claims that the section did not explicitly state that a presidential order was required to invoke the Commander-in-Chief power.[56] F.R. at 252. But that is simply a misreading of the opinion by lawyers alien to OLC practice and precedent; the memo signaled this understanding clearly enough for the sophisticated audience to which this discussion was addressed. The memo noted, for example, that "section 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 ("Congress 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). The requirement that the President himself personally invoke the Commander-in-Chief power, 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)).

[56] OPR does not appear to dispute that it is common to interpret federal statutes, even those entirely directed to challenging governmental decisionmaking, not to necessarily apply to decisions taken by the President *personally*. 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 addition, Professor Yoo told OPR that OLC lawyers "would have made it clear" that the Commander-in-Chief power had to be invoked by the President personally, and that "because [CIA officers] get Presidential approval for every covert action they undertake, precisely for this reason," it would have been clear to them that a Commander-in-Chief defense had to be "traceable to [a] direct Presidential order." June 7, 2005 Yoo Tr. at 66–68. In fact, John Rizzo has made clear that he "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President." Rizzo Letter ¶ 5. OPR gives no evidence that Professor Yoo's or John Rizzo's recollections are mistaken, and, perhaps most importantly, OPR points to *absolutely no evidence whatsoever* suggesting that the CIA or anyone else thought that they could engage in acts of torture under their own invocation of the Commander-in-Chief power. If any such evidence existed, there can be no doubt that OPR would have emphasized it. In fact, OPR has no counter to the evidence that does exist—that Professor Yoo conveyed this information orally to the CIA. F.R. at 206. And we will apparently never know the extent to which OPR's interviews and materials uncovered in their investigation otherwise demonstrate that everyone involved understood that they could not unilaterally invoke the Commander-in-Chief power, because OPR has steadfastly refused to provide Professor Yoo with any access to those materials.

Fourth, OPR infers that because the Commander-in-Chief analysis was added after Michael Chertoff opted not to provide the CIA with advance declination of criminal prosecution, it must have been intended to immunize CIA agents from prosecution for acts of torture. F.R. at 252. OPR does not even attempt, however, to reconcile this assertion with the fact that Chertoff reviewed the memo's Commander-in-Chief analysis without objection, and there is no evidence that the CIA interpreted the Bybee Memo to provide immunity for its interrogators. *See* F.R. at 59.

These factors simply do not show intentional misconduct. Professor Yoo offered a good-faith, objective assessment of the Commander-in-Chief power well within the mainstream of OLC opinions.

B. The Failure To Convey Sufficient "Uncertainty Or Ambiguity" About The Meaning Of Specific Intent

OPR's second ground for finding that Professor Yoo intentionally violated the duty of candor is that the memos' "advice on the issue of specific intent did not convey any of the uncertainty or ambiguity of this area of the law." F.R. at 252–53. But as discussed above, OPR is flat-out wrong that this area of the law was so confused that it amounted to professional misconduct not to highlight the ambiguity. When courts subsequently considered the issue of specific intent as applied to torture, *none* noted that the meaning of "specific intent" is fraught with "uncertainty or ambiguity." That is because it is not. OPR's only support for its proposition is decades-old Supreme Court cases noting some degree of uncertainty about the difference between "general intent" and 'specific intent." But in 2000, the Supreme Court expressly made "the distinction between 'general' and 'specific' intent less esoteric" in *Carter v. United States*, 530 U.S. 255, 268–69 (2000), and Professor Yoo acted appropriately in relying on that recent, clear statement rather than *dicta* in much older cases. Even if one believes that Professor

Yoo would have been better advised to cite those older cases too, that omission could not possibly be evidence of *intentional* misconduct.

Moreover, OPR is incorrect that Professor Yoo's accurate statement of the meaning of "specific intent" intentionally "suggested that an interrogator who inflicted severe pain and suffering during an interrogation would not violate the torture statute if his objective was to obtain information," F.R. at 252. The Bybee Memo no more suggested that than did the *en banc* Third Circuit when it adopted virtually the same definition in *Pierre v. Attorney General*, 528 F.3d 180, 188–90 (3d Cir. 2008). Indeed, OPR has not come forward with evidence that *anyone* at the CIA, the Justice Department or the White House interpreted the memos that way. *Cf.* Rizzo Letter ¶ 5 ("[I] did not interpret the 2002 Bybee Memos to mean that . . . CIA interrogators would not violate the statute no matter what they did as long as they had a motive to obtain information.").

C. The Failure To Mention The Withdrawal Of The Reagan Administration's Proposed Understandings In The CAT Ratification History

OPR's third ground for finding scienter is that Yoo did not mention the withdrawal of the Reagan Administration's proposed understandings of the CAT concerning defenses. F.R. at 253. According to OPR, mentioning that withdrawal would have "contradict[ed] the memorandum's assertion that self-defense could be invoked by CIA interrogators charged with torturing detainees." *Id.*

The Bush Administration gave as its explanation for removing the understanding only that it was "felt to be no longer necessary," not that the defenses were foreclosed. S. Exec. R. 101-30, at 14. Given that Congress specifically declined to domesticate the provision of CAT foreclosing defenses of justification, *see* Bybee Memo at 41 n.23, Professor Yoo acted reasonably in believing that the withdrawal of the understanding as "no longer necessary" did not materially alter his analysis. To be sure, the Bybee Memo could have been improved by citing the Mullin Letter, but OPR's evidence shows that [redacted] did not alert Professor Yoo to it. F.R. at 218. The omission of relevant but ultimately non-dispositive evidence that Professor Yoo *did not know about* could not possibly show *intentional* misconduct.

D. The Use Of "*See Also*" In The Discussion Of Common-Law Defenses

OPR's final ground for finding scienter is that Yoo added to the Yoo Memo a "*See also*" cite an article by Professor Alan Dershowitz, in addition to the primary cite used in the Bybee Memo, to support the statement that "some leading scholarly commentators" have agreed that the doctrine of self-defense might apply in certain situations, even though, in OPR's view, the article does not directly support the proposition. R at 254.

As a basis for a finding of *intentional* misconduct, this is madness. Lawyers routinely bolster a contested proposition with a "*see also*" cite that their legal (or, in this case, political) opponents might disagree with. OPR has not cited a single case where a

lawyer has been professionally sanctioned for this common practice. Moreover, as we have already explained, Professor Yoo had a sound basis for citing the Dershowitz article, particularly with the "*See also*" signal that many treat as weaker than its cousin "*See*." The relevant section opened by positing that "[t]he threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens," and then further stated that "[t]o be sure, this situation is different from the usual self-defense justification, and, indeed, it *overlaps with elements of the necessity defense.*" Bybee Memo at 43–44 (emphasis added); Yoo Memo at 78–79 (same). The cited portion of the Dershowitz article states that he is "personally convinced that there are some circumstances—at least in theory—under which extraordinary means, including physical pressure, may properly be authorized." F.R. at 222. And Dershowitz has stated elsewhere that the ticking time-bomb scenario is one such circumstance. *See, e.g.*, F.R. at 212 n.168. It was plainly a rational inference to draw—particularly for an academic like Professor Yoo who was familiar with Dershowitz's views—that Dershowitz would think that a government official could invoke the doctrine of self-defense in a ticking time-bomb situation. Might it have been better practice for Professor Yoo to have used a "*cf.*" signal? Perhaps. But such an indescribably minor error could not remotely amount to evidence of an intentional lack of candor.

* * *

Succinctly put, nothing OPR has cited shows that Professor Yoo offered anything less than a good-faith assessment in the Bybee Memo. In fact, Goldsmith, on whom OPR so heavily relies, said in his book *The Terror Presidency* that "[Yoo] has defended every element of the opinion to this day, and I believe he has done so in good faith." J. GOLDSMITH, THE TERROR PRESIDENCY 167 (2007). OPR conveniently relegated that view of a key insider and expert—which flatly contradicts OPR's overall assessment that Yoo intentionally acted without candor—to the briefest of footnotes. F.R. at 197 n.151.

VIII. Conclusion

OPR dangerously contorts the rules of professional conduct, rendering them more malleable and unpredictable with each iteration of its Report. No aspect of the interrogation advice that OLC gave the President in the tense aftermath of 9/11 is too miniscule to escape OPR's tendentious characterization, detailed dissection and reflexive condemnation—and there is literally no argument, however desperately strained, that OPR is unwilling to advance in pursuit of this goal. At the same time, OPR has repeatedly ignored or misrepresented the applicable law, cherry-picked the factual record, and failed utterly to offer any rationale for believing that its proposed referral to the Pennsylvania bar is not obviously time-barred as a result of OPR's own lack of diligence and competence. The Final Report is irretrievably flawed, not merely under the *sui generis* "highest of the highest" standard that OPR has concocted solely for this investigation, but under conventional and generally applicability standards of professional responsibility that are well known to the legal profession.

This perversion of the professional rules, and myopic pursuit of Professor Yoo and Judge Bybee, can be explained only by a desire to settle a score over Bush

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administration policies in the war on terror. But policy disputes are for the ballot box, not for the bar. Professor Yoo and Judge Bybee did nothing more than provide a good-faith assessment of the legality of a program deemed vital to our national security. Their assessment was validated at the highest levels of the Department of Justice and the Executive Branch, and the bottom-line advice was repeatedly reaffirmed long after Professor Yoo and Judge Bybee had left the Department. Even OPR expressly disavows *any* finding that the conclusions they reached were erroneous. This is not the stuff of professional misconduct, as OPR's failure to marshal a single supporting authority amply demonstrates.

The Department must make an enormously consequential decision from which there can be no turning back, because any decision by the Department to adopt or publicize the Final Report's recommendations will have unfortunate and long-lived consequences. If the Department does adopt or publicize the Report, it will place itself squarely on a path of politicization and acrimony. The cable news networks will have their sound-bites, of course, and a handful of politicians will score every political point that their grandstanding will permit. But after they quickly move on to the next target of opportunity, the Department will be left to deal with the consequences. It would be utterly naïve to suppose that OPR investigations and bar complaints will not become the newest weapon of choice in the arsenal of political warfare—which, like "Borking," will be invoked by successive groups of partisans, as electoral fortunes turn, for no better reason than that "the other side did it to us." The Department's dedicated attorneys will then have to perform their enormously difficult duties under the ever-present danger that good-faith legal conclusions will come to haunt them with the shifting political winds. The result will be a diminished culture in which self-preservation is paramount and unvarnished advice is scarce. No responsible official who cares for the institutional interests of the Department can possibly contemplate such a path with equanimity.

The Department should reject OPR's extremely misguided and erroneous conclusions.

Respectfully submitted,

/s/

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October 7, 2009

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Dear Mr. Estrada,

You asked for my opinion concerning allegations that Professor John Yoo engaged in professional misconduct in certain work he performed while serving as Deputy Assistant Attorney General at the Department of Justice's Office of Legal Counsel (OLC).[1] To that end, in March of this year, I reviewed an unclassified draft report prepared by the Department's Office of Professional Responsibility (OPR). That report accused Professor Yoo of violating D.C. Rules of Professional Conduct 1.1 and 2.1. I also reviewed the "Bybee Memo" discussed in that report.

Since my original review, the Department has made public a second memo (formerly classified) issued by OLC on the same day as the Bybee Memo. I will refer to this second memorandum as the "Classified Bybee Memo." The Classified Bybee Memo assessed the validity of specific interrogation techniques under the legal standards set forth in the Bybee Memo. This more recently declassified Memo relied heavily on the expert factual advice that the CIA gave to the Department of Justice. This legal opinion was fact-bound. The CIA, relying

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[1] By way of credentials: I am the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at the Chapman University School of Law. I have co-authored the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 10th ed. 2008). I am also the co-author of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-West Group, St. Paul, Minnesota, 7th ed., 2009) and the six-volume *Treatise on Constitutional Law* (Thomson West Publishing Co., 4th ed. 2007-2008). I have chaired the subcommittee that drafted the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. In addition, I have been a member of the Publications Board of the A.B.A. Center for Professional Responsibility since 1994. I have also served on the A.B.A. Standing Committee on Professional Discipline (1991–1997), and I was Liaison to the A.B.A. Standing Committee on Ethics and Professional Responsibility (1994–1997).

on medical and psychological experts, assured the DOJ that the waterboard "procedure does not inflict actual physical harm." The CIA represented to the DOJ that "these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition." The CIA similarly assured the DOJ that the use of the waterboard, with the safeguards that the CIA said it would use, would cause no prolonged mental harm. This more recently declassified Bybee memo obviously relied on the facts that the CIA related to the DOJ. You have asked me to summarize my original conclusions about the Bybee Memo and OPR's draft report, and to set forth my views on whether the Classified Bybee Memo conforms to D.C. Rules 1.1 and 2.1. My basic conclusions are as follows:

- The D.C. Rules of Professional Conduct did not govern Professor Yoo while he was employed at OLC. Those Rules do not govern lawyers who are not members of the D.C. Bar and who do not practice before a court in Washington, D.C. Anyone who read the Rules would know that the D.C. Bar made a specific decision not to assert jurisdiction over a lawyer who is not admitted in the District of Columbia but who engages in the practice of law within the District. Because Professor Yoo is only a member of the Pennsylvania Bar and did not practice before a D.C. court while employed at OLC, the D.C. rules do not govern his conduct.

- The Pennsylvania Bar has established a four-year statute of limitations for disciplinary complaints against an attorney. *See* Pennsylvania Disciplinary Board Rules § 85.10(a) (2009) ("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)."). Given that the relevant OLC memoranda were issued more than four years ago, and none of the exceptions listed in subsection (b) of the Pennsylvania Rule apply, it is obvious that the Pennsylvania Bar does not have jurisdiction to pursue disciplinary action against Professor Yoo. It is not ethically appropriate for Department attorneys to make a referral to bar authorities—which is essentially equivalent to submitting a complaint to them—unless the attorneys have at least a colorable basis for believing that the referral is timely. It is ordinarily considered incompetent and sanctionable for a lawyer to file a complaint that he or she knows is time-barred, without any legal or factual basis for believing that the court or adjudicative body will excuse the violation of the statute of limitations.

- During Professor Yoo's tenure at OLC, Rule 2.1 of the Pennsylvania Rules of Professional Conduct varied from the A.B.A. Model Rules in that it used the permissive word "should" rather than the mandatory word "shall": "In representing a client, a lawyer *should* exercise independent professional judgment and render candid advice." Pennsylvania Rule of Professional Conduct 2.1 (2003) (emphasis added). A basic tenet of the law of professional responsibility is that Rules phrased permissibly are not enforceable through the disciplinary process. *See* Pennsylvania Rules of Professional Conduct, "Scope." Therefore, Professor Yoo was not subject to discipline under Pennsylvania Rule 2.1.

- Even if the D.C. Rules were applicable (and, by their own terms, they are not), neither the Bybee Memo nor the Classified Bybee Memo would violate D.C.'s mandatory Rule 2.1. Under that Rule, a lawyer cannot be guilty of rendering non-candid advice so long as he

gives his "honest assessment." *See* D.C. Rule of Professional Conduct 2.1 Comment 1 (2009) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment."). Rather, pursuant to Rule 1.4(b), the lawyer has an obligation to "explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation." D.C. Rule of Professional Conduct 1.4(b) (emphasis added). A lawyer has no general obligation to discuss all potential counterarguments to his good-faith conclusions or to remind a client of information of which the client is already aware. Based on my review of the Bybee Memo and the Classified Bybee Memo, there is no basis whatsoever to conclude that Professor Yoo did not explain the issues "to the extent reasonably necessary" to allow his client to make an informed decision. The Bybee Memo examined the text of the torture statute, its legislative history, and the relevant case law, and concluded that minor psychological or physical harm is not torture, while severe harm (whether mental or physical) is torture. It further advised that, if one were charged with torture, one might have some defenses that might work, or might not work. A reasonable reader of the Bybee Memo would not conclude that it was authorizing interrogators to violate the torture statute. The Classified Bybee Memo relied on the expert medical advice and the outside psychologists that the CIA consulted, and concluded "*based on the facts that you [the CIA] have provided, . . .* that the interrogation procedures that you propose would not violate Section 2340A." That Memorandum then concluded, in clearly tentative language, "We wish to emphasize that *this is our best reading of the law*; however, you should be aware that *there are no cases construing this statute*; just as there have been no prosecutions brought under it."

- Obviously, a lawyer must be competent. D.C. Rule 1.1 requires a lawyer to "provide competent representation to a client." D.C. Rule of Professional Conduct 1.1(a). Under D.C. law, a violation of Rule 1.1 must include a "serious deficiency" in the representation, which "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." *In re Evans*, 902 A.2d 56, 69–70 (D.C. 2006) (emphasis added). In my review of the Bybee Memo, the Classified Bybee Memo and OPR's draft report, I saw no evidence that Professor Yoo acted incompetently. He accurately described the reported cases dealing with torture under the statute. His analysis of "severe pain" is no more strict than was adopted by the D.C. Circuit in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). Professor Yoo's bottom-line advice about the relevance of specific intent was adopted by the Third Circuit in 2005, and 2008. *See Auguste v. Ridge*, 395 F.3d 123, 139, 153-54 (3d Cir. 2005); *Pierre v. Attorney General*, 528 F.3d 180, 189 (3d Cir. 2008) (en banc) (in fact, the three concurring judges specifically objected that the 10-judge majority was adopting the Bybee Memo, but that fact did not dissuade the majority, *id.* at 193). Indeed, the Department of Justice, under Attorney General Eric Holder, specifically advocated the Bybee Memo position on intent in its brief in *Demjanjuk v. Holder*, 6th Circuit, April 23, 2009, Respondent's Submission In Response To Court's April 16, 2009 Order Agency No. A008 237 417, at p. 20, Case Number: 09-3416. The views of the D.C. and Third Circuits, and the view of the DOJ itself in 2009, are both highly relevant in assessing whether Professor Yoo's performance was within the acceptable range of competence. While OLC later withdrew the Bybee Memo, it still approved all of the techniques that had been approved in the Classified Bybee Memo. Indeed, to this day OLC has not publicly said that waterboarding must

never be used. The DOJ cannot have it both ways — on the one hand, adopting the reasoning of the Bybee Memo in its briefs filed in federal court and refusing to issue any opinion banning waterboarding or explaining why it is illegal, but, on the other hand, seeking to discipline a lawyer who has taken the same positions.

- In the draft report, OPR applied a heightened standard of professional conduct to Professor Yoo based in part on a "Best Practices Memorandum" drafted by OLC attorneys after Professor Yoo had returned to academia. A basic element of fairness is that one does not apply rules retroactively. There is no basis in the law of professional responsibility to apply ad-hoc "best practices" standards developed *after the fact* to find a lawyer guilty of professional misconduct, especially when those standards do not purport to establish minimum requirements for professional conduct under the relevant ethical rules.

In sum, the OLC memoranda I have reviewed were carefully drafted, necessarily fact-bound, candid, and obviously well-researched. I see no basis for finding that their authors violated any rules of professional conduct because other lawyers, years later, disagreed with the legal conclusions that were expressed.

Sadly, the same cannot be said of the lawyers who wrote the OPR draft report. My assessment of the draft report leads me to believe that the lawyers at OPR may themselves be guilty of disciplinary violations. They have ignored the meaning of the ethics rules and how those rules vary across jurisdictions. They do not seem to be aware that the ethics rules of Pennsylvania, not Washington, D.C., apply. They do not seem to understand that the Pennsylvania Rules have a statute of limitations that passed quite a while ago. They have failed to such a degree to give a fair reading to the Bybee Memo and its caveats that they are likely guilty of either gross incompetence or intentional deception.

If you have further questions, please do not hesitate to contact me.

Sincerely,

Ronald D. Rotunda

Testimony of Michael Stokes Paulsen
Distinguished University Chair & Professor of Law
The University of St. Thomas

before the
Subcommittee on Administrative Oversight and the Courts
of the U.S. Senate Committee on the Judiciary
May 13, 2009

The Lawfulness of the Interrogation Memos

Dear Mr. Chairman and Members of the Committee:

My name is Michael Stokes Paulsen. I have been asked to provide written testimony concerning the lawfulness and propriety of the legal analysis and advice provided by attorneys in the Office of Legal Counsel of the U.S. Department of Justice, to the administration of President George W. Bush, concerning lawful interrogation methods and procedures used against certain high-level al Qaeda terrorists, captured by United States forces, at the direction of President Bush as Commander in Chief, in the course of the war authorized by Congress by the resolution of September 18, 2001. I apologize that I am not able to be there in person to present live testimony, because of scheduling conflicts. I would be happy to provide answers to any written questions that members of this subcommittee (or committee) may have.

I currently hold the position of Distinguished University Chair and Professor of Law at the University of St. Thomas, in Minneapolis - St. Paul, Minnesota, where I have taught for two years. Prior to that, I was McKnight Presidential Professor of Law and Public Policy, Law Alumni Distinguished Professor, and Associate Dean for Faculty Research and Scholarship at the University of Minnesota Law School, where I taught for sixteen years. My areas of primary legal scholarship include Constitutional Law, Separation of Powers, War, National Security, and the Constitution, and Legal Ethics and Professional Responsibility. My academic c.v. is attached.

I have written over sixty academic articles in these fields. Of possible particular interest and relevance are several articles concerning the Constitution's allocation of war and foreign affairs powers: *The Constitutional Power to Interpret International Law*, 118 Yale L. J. 1774 (2009); *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L.

Rev. 807 (2006); *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004); *Youngstown Goes to War*, 19 Const. Comm. 215 (2002). In addition, I note that much of my scholarship concerns more generally the separation of powers and the independent province and duty of the executive branch with respect to constitutional, statutory, and treaty interpretation: *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008); *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999); *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L. J. 217 (1994): *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 Georgetown L.J. 385 (1994); *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Finally, also of relevance, I have written several articles in the field of legal ethics and professional responsibility, including especially articles concerning the role of attorneys representing the executive branch of the U.S. government, the structure of attorney-client privilege and confidentiality with respect to representation of the U.S. government, and the ethical and professional responsibility duties of government attorneys: *A Constitutional Independent Counsel Statute*, 5 Widener L. Symposium J. 111 (2000); *Nixon Now, supra*; *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807 (1999): *Who "Owns" the Government's Attorney-Client Privilege?* 83 Minn. L. Rev. 473 (1998); *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Prob. 83 (1998).

Prior to becoming a law professor, I served in the United States as an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice, from 1989-1991, in the administration of President George H.W. Bush. In that capacity, I had the occasion to participate in the research and preparation of dozens of legal opinions, analyses, legislative comments, and other memoranda concerning matters of presidential constitutional power, separation of powers (including war and national security matters), foreign affairs powers, and other matters of constitutional, statutory, and treaty law involving the United States government. At the time, I possessed a Top Secret security clearance. I have not worked for the United States government in any capacity since fall of 1991. While I can state generally that I worked on matters of national security, foreign affairs, war powers, and actions concerning war criminals and terrorists, I retain an ongoing duty of confidentiality and attorney-client privilege with respect to matters in which I was engaged during those years. I am thoroughly familiar with the operations and role of the Office of Legal Counsel as legal counsel to the executive branch of the U.S. government, its customary practices and jurisprudence, its traditions, and its distinctive perspective on matters of constitutional law as attorney for the United States government's executive branch.

In addition to my time as an attorney in the Office of Legal Counsel, I have worked in the Department of Justice as a prosecutor and appellate attorney in the Criminal Division, including an assignment as Special Assistant U.S. Attorney for the Eastern District of Virginia (1985-1986).

I provide this testimony in my personal capacity as a scholar in these areas, and not as a representative of any university institution or on behalf of any client or other organization. The views expressed are my own.

I have attached a copy of my recent article, forthcoming in *The Yale Law Journal*, entitled **"The Constitutional Power to Interpret International Law,"** which in some respects contains more extended discussion and documentation of certain points that I make in more abbreviated form here.

* * * * *

I understand that the premise of these hearings, as suggested by the title selected by the subcommittee majority, is that there exists a need to examine "what went wrong" in the provision of legal advice by attorneys of the Office of Legal Counsel (OLC) of the Department of Justice, in the administration of President George W. Bush, concerning the legal bounds governing the use of certain interrogation methods on captured unlawful (and thus legally "unprivileged") terrorist enemy combatants. In my view, this premise is seriously mistaken. I have studied the legal memoranda in question, drawing on my expertise as a legal scholar whose work over much of the past decade has embraced these types of issues as a major area of research and writing, and on my experience as a government attorney in OLC in the late 1980s and early 1990s. The analysis contained in the memoranda in question is analysis with which, in certain respects, persons of good will can reasonably disagree, but it is well within the range of customary, legitimate, proper, and entirely ethical legal advice that may be provided by confidential legal advisors to the president and his administration. The notion that something "went wrong" in the provision of such legal advice – in any sense other than that some persons now disagree vigorously with the legal analysis and advice in question – is unsound.

In this testimony, I will sketch four brief points.

1. First and most fundamentally, the core legal analysis set forth in the OLC memoranda in question is, in my opinion, not only within the range of legitimate legal analysis and advice but is in fact *substantively correct on the merits.* There exists a basic distinction in the law between what constitutes actual, legal "torture," under applicable standards, and what may be harsh, aggressive, unpleasant interrogation tactics but not, legally, "torture." Reasonable people will come to different conclusions as to where precisely that line is, but the Bush administration's lawyers' ultimate conclusions are certainly defensible. Indeed, I believe they are ultimately correct, both as an abstract, general matter and in their specific application (matters addressed in a variety of separate OLC memoranda).[1] I do not necessarily agree with every particular point, or

[1] The memoranda to which I refer in this testimony are as follows: Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting

argument, made in support of OLC's specific statutory-interpretation conclusion. Some sub-issues I would have addressed differently; on some points I would have said more, and on others less. (I say this with some reticence, acutely aware that I speak from a retrospective vantage point that perhaps too easily permits Monday-morning-legal-quarterbacking.) Nonetheless, I believe that OLC's essential statutory conclusion that "torture" refers to a narrow, highly specific subcategory of coercive interrogation techniques, is correct. As a *legal* matter – that is, as a matter of the objective meaning of a particular statutory term-of-art – the term "torture" may differ from, and be more specific than, commonplace or public political usage. That is the distinction that the memoranda draw; and they draw that distinction on the basis of specifically legal analysis.

Moreover, as a matter of constitutional law, the OLC memoranda's most sweeping, categorical, and controversial conclusion – that at all events no statute or treaty may limit the President's sole *constitutional* powers as military" Commander in Chief" to direct and conduct the use of U.S. force – is in my opinion *unquestionably correct*. The Office of Legal Counsel has long and consistently defended the view, both in Republican and in Democratic administrations, that the President's constitutional powers under Article II of the Constitution, as chief executive and as Commander in Chief of the nation's military, afford the President substantial autonomy of action in the areas of the conduct of the nation's foreign affairs and the conduct of war and military actions. These powers, as *constitutional* powers of the President, cannot constitutionally be subject to congressional regulation or control. An act of Congress, or a treaty of the United States, that infringes upon the constitutional powers of the President of the United States is, by definition, unconstitutional, under the straightforward reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, it has long been the view of the Office of Legal Counsel that any such enactments cannot legitimately constrain the actions of the President pursuant to his independent constitutional powers; and, further, that such enactments should be interpreted and understood, where fairly possible, to avoid such conflict with the constitutional powers of the President. See, e.g., Memorandum of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel to Abner Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994).

These are views that should command the respect of all presidential administrations, including the incumbent administration. The Constitution itself prescribes that all presidents

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General Counsel of the Central Intelligence Agency (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005). In addition, I am familiar with two other memoranda relevant to these issues. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004) and Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to the Files (January 15, 2009). I am familiar with further memoranda of the Office of Legal Counsel relevant to various issues of war, national security, military force, international law, and treaties that are not directly implicated here.

swear the oath to "preserve, protect and defend" the Constitution. U.S. Const. art. VI, cl.3. It is therefore the duty of all presidents to protect the constitutional powers of the office of President of the United States. It follows that it is likewise the duty of all attorneys representing the executive branch to defend the constitutional powers and prerogatives of the President of the United States.

The constitutional arguments put forward in the OLC memoranda addressing legal standards applicable to interrogation methods are fully in accord with these views, and with the duty of executive branch attorneys to advance them, *and they are in my opinion legally correct.* My most recent academic scholarship includes a lengthy examination of precisely this genus of constitutional issues. See Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 Yale L.J. 1774 (2009) (forthcoming, June 2009). That article sets forth more detailed supporting analysis than is possible to provide here, and I incorporate it by reference for purposes of this testimony. I have provided a copy of that manuscript to the committee to accompany this testimony. I call the committee's attention specifically to pages 1777-1779, 1782-1799, 1824-1828, and 1834-1854, which address both at the general level of constitutional principle and in certain instances at the specific level of contemporary illustration, the points I have outlined in the preceding few paragraphs.

Certain points and arguments advanced in earlier-dated confidential (in fact, classified) OLC memoranda subsequently were withdrawn by Bush administration attorneys in later memoranda intended for public consumption. However, none of the most important, material legal conclusions – and none of the specific legal advice as to the application of such conclusions – was repudiated. Rather, arguments were withdrawn (once memoranda had been leaked publicly) where they were judged unnecessary to the ultimate legal conclusion, politically inappropriate, contrary to subsequently-stated public presidential determinations or proclamations, or for some other unstated reason. In particular, later memoranda declined to rely on the argument that the president retains the constitutional power to make orders to U.S. forces, in the exercise of his sole constitutional power as Commander in Chief, that are (or may be) inconsistent with statutory requirements. This is not because that argument was or is incorrect, but probably because it was unnecessary (and thus impolitic) to rely on such a legal position, given President Bush's stated policy position that the United States had not engaged, and would not engage, in interrogation tactics inconsistent with the statutory prohibition of torture. None of this, in my view, affects the propriety of the constitutional argument as advanced in the earlier memoranda.

2. Second, even if one disagreed with the statutory and constitutional analysis in the OLC memoranda in question, or with the application of that analysis to specific facts, the OLC legal analysis and advice *clearly falls within the range of legitimate legal analysis and the range of reasonable disagreement common to legal analysis of important statutory and constitutional issues.*

Not all lawyers agree on all legal questions. This observation is so obviously true as to be

almost trite. Nothing is more common than for lawyers, each acting in entire good faith and employing sophisticated analysis, to reach differing conclusions. (To a certain extent, our entire adversary system of justice is predicated on this commonplace observation, and on the premise that the vigorous debate over the meaning and application of the law, by parties possessing different views and representing different interests, is the best way to provide the dynamic tension that best approximates systemic justice.) One may disagree (as I do) with certain conclusions or arguments contained in some of these memoranda; indeed, one may disagree with the analysis in its entirety. This is not surprising. Quite the contrary, I would be greatly surprised if, on some of these questions, reasonably lawyers did *not* disagree. There is evidence of disagreement within the Bush administration on these legal questions, and the vigorous expression of competing views.

This is probably as it should be. What is *not* legitimate is to assert that every view and legal analysis contrary to one's own is therefore somehow outside the range of appropriate, competent, good-faith analysis. Such an assertion is, in my opinion, simply foolishness – the arrogant projection of one's own political or legal opinions as being so indisputably and universally correct as to brook no dissent. I believe that such a view is dangerous to American political and legal traditions. People disagree. Lawyers disagree on legal questions. With all due respect: to ratchet-up simple disagreement with the legal analysis of a prior administration into the claim that such analysis was beyond the pale of legitimate legal analysis, and therefore should be investigated and punished, is to engage in a mild form of legal neo-McCarthyism.

To be sure, some legal arguments and some "legal" analysis is so far below the standards of competence, plausibility, and good faith as not to be legitimate. But the OLC memoranda in question do not come anywhere near that standard. As noted above, I believe the memoranda's conclusions to be in nearly every respect essentially *correct* as a matter of statutory and constitutional analysis. The quality of the analysis (despite my quarrels with certain points) is clearly well within professional standards. This is not even a close question. There is simply no plausible, objective basis on which it could be said that the legal opinions expressed were illegitimate or unprofessional. There is no plausible basis upon which one could fairly – objectively – conclude that the views expressed are outside the bounds of reasonable professional judgment and legal analysis. If anything, the suggestion that these memoranda lie outside the range of legal advice is *itself* a view of the applicable substantive law, and of the lawyer's professional role, so extreme and unreasonable as not to fall within the range of good-faith, objective, competent legal analysis.

Such views probably more reflect an intense political, *ideological* commitment than true legal analysis. It cannot be doubted that the issues in question raise important questions of morality about which people, quite legitimately, have passionate feelings. But one should never confuse the intensity of one's political passions and commitments with dispassionate analysis of difficult questions of law. If this distinction is observed, it is not possible fairly to assert that the views expressed in the OLC memoranda are outside the range of reasonable, professional legal analysis and advice on the statutory and constitutional questions presented.

3. Third (and in some respects building on the observations just made), it is important to recognize the clear distinction between a lawyer's opinion on questions of *legality* and *endorsement* of a client's actions themselves. The former in no way implies the latter. This is a rudimentary principle of legal ethics, recognized in every bar code of professional responsibility. ABA Model Rule of Professional Conduct 1.2(a) clearly provides that "*a lawyer shall abide by a client's decisions concerning the objectives of representation . . .*". ABA Model Rule 1.2(b) provides that "*[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.*" And ABA Model Rule 1.2(d) further provides that, while lawyers may not counsel clients to engage in conduct they know is illegal, a lawyer "*may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*" It is plain from reading the memos involved that this is exactly what the OLC lawyers were doing – discussing with their clients the legal consequences of what they proposed to do and endeavoring to assist them to ascertain the meaning and scope of the laws and constitutional provisions involved.

Not everything that is legal is a good idea, or good policy, or just, or moral. While a lawyer may in most circumstances add his or her views on such matters as well – matters of policy, propriety, morality, see ABA Model Rule 2.1 – the core of the lawyer's role is to provide objective legal advice that assists a client in understanding the legal options available.

To ignore the distinction between legal advice and moral or political advice is to make an enormous and fundamental category mistake. With respect, the suggestion implied by the subcommittee's stated theme for these hearings – "What Went Wrong" – is precisely such a category mistake. From the standpoint of competing views of policy, propriety, and morality, it may be fair to make an argument that something was "wrong" with the Bush administration's policies in certain respects. From the standpoint of the *lawyering* involved, nothing "went wrong." In my opinion, based on the public record available to me at this date, there is simply no objective basis for any claim that the OLC lawyers in the prior administration engaged in any professional impropriety or unethical conduct whatsoever. They provided fair legal advice to their client, the United States government's executive branch, on important, difficult, and sensitive matters. Disagreement with the underlying *policies* to which that legal analysis was directed is not a fair or legitimate ground upon which to criticize, or impugn the integrity of, the lawyers' analysis.

Indeed, as a matter of legal ethics and a lawyer's professional role, this has matters precisely backwards. A lawyer is not responsible for the policies of his or her client that fall within the bounds of the law. If the objection is in fact really to the policies and practices themselves, the inquiry should be directed to the ultimate policy-makers and decision-makers with respect to interrogation practices. To target Department of Justice legal advisors – and not the ultimately accountable political decision-makers – is to engage in an odd form of political scapegoating that targets the persons whose professional role actually makes them the *least* responsible for the policies or practices at issue.

4. Fourth and finally, as a practical matter, I believe it is both shortsighted and foolish to seek to punish lawyers of a prior administration because of disagreement with the content of their legal advice. In addition to reflecting a basic misunderstanding of lawyers' roles, such an approach unquestionably would have the effect (and probably already has had the effect) of chilling both valuable government service by talented attorneys and the candor, quality, and vigor of the legal advice provided by those who agree to serve as government lawyers in important roles. If a government attorney's legal advice in the service of one administration is subject not only to being reversed in a subsequent administration of different views (as is common, reasonable, and sometimes to be expected), but, further, also made the subject of retrospective investigation, punishment (in various forms), and personal attacks, there is *no question* that the attorney's advice will become more guarded, tepid, inhibited, over-cautious and – in many cases – ultimately unsound. This will be true of Democratic administrations as well as Republican administrations.

The result will be that presidents and administrations of both parties *will not obtain candid, vigorous legal advice reflecting the full range of views*, on sensitive matters of war, foreign affairs and national security. I believe that this will actually be, in subtle but material ways, over the long run, harmful to the national security of the United States. No one in the room (so to speak) will take the hard position – and certainly not commit it to writing. The product will be watered-down legal advice, offered more with a view to how future second-guessers might second-guess it, than with a view to serving the President of the United States, and the nation, as an objective legal advisor.

As noted earlier, I was a line attorney (career civil service) in the Office of Legal Counsel, from 1989-1991. I can state unequivocally, based on my experience, that this phenomenon will occur and will occur quickly. To investigate, and seek to impose political, personal, or other punishment on government attorneys who provide good-faith but controversial legal advice, whenever that advice might become out-of-favor politically, will damage the Office of Legal Counsel, the Department of Justice, and ultimately, the office of President of the United States. And, of course, ultimately, this would damage the interests of the nation that these men and women serve.

Respectfully submitted,

Michael Stokes Paulsen
University Chair & Professor of Law
The University of St. Thomas

Testimony by John Yoo
Professor of Law
University of California, Berkeley School of Law
Visiting Scholar, American Enterprise Institute

Committee on the Judiciary, United States House of Representatives
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

June 26, 2008

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I am a professor of law at the University of California, Berkeley, and a visiting scholar at the American Enterprise Institute. From 2001 to 2003, I served as a deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice. During my period of service, I worked on issues involving national security, foreign relations, and terrorism. My academic writing on these subjects can be found in two books, *The Powers of War and Peace* (2005), and *War by Other Means* (2006). The views I present here are mine alone.

As an attorney who has worked for both the legislative and executive branches, I have enormous respect for this Subcommittee's oversight functions and for the importance of cooperation between the executive and legislative branches. At the same time, as an attorney I am bound to honor the confidential and privileged nature of my work for the Department of Justice, as I previously honored the confidentiality of my work for the Legislative Branch. I may discuss my work for the Department only to the extent I am permitted to do so by the Department itself. Accordingly, when Chairman Conyers sent his April 8, 2008, letter inviting me to testify, my attorneys asked the Department of Justice about the appropriate scope of my appearance before the Committee. In response, they received an e-mail from Steve Bradbury of the Office of Legal Counsel of the Department of Justice, dated April 21, 2008. I understand the text of that email previously has been provided to Committee staff.[1]

In brief, the Department of Justice has expressly prohibited me from discussing "specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch." As I understand this instruction, I cannot share any specific comments, advice, or communications between me and any other specific members of the Executive Branch. The Justice Department, however, has authorized me to discuss "the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department." In this respect, it is my understanding that I may explain and clarify the reasoning in the legal memoranda on which I personally worked while at OLC related to the subject of today's hearing, so long as the memoranda have been made public by the Department of Justice. In addition, "as a special accommodation of Congress's interests in this particular area," the Justice Department has authorized me to discuss "in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record." I understand this to allow me to describe which offices within the Executive Branch were consulted or reviewed our opinions in draft form, but not the substance of any input they may have given OLC.

As should be apparent, these instructions, taken together, limit in important respects the matters I properly may discuss before this Subcommittee, and therefore I may not be able to respond to all of the inquiries that you may have today. I, of course, have no authority to resolve any conflicts that may arise between your questions and the Justice Department's orders directing me to safeguard the confidentiality of Executive Branch deliberations. Any such conflicts must be resolved directly between the House and the Executive Branch. But within the constraints I have been ordered to observe, I will strive today to be as helpful as I can to this Subcommittee.

I would like to begin by generally describing OLC and its functions, and the historical context within which these questions arose. The Office of Legal Counsel in the Department of Justice, known as OLC, exists to provide legal advice on the meaning of federal constitutional and statutory law to the Attorney General and other components of the Justice Department, federal agencies, and the White House. The legal issues that concern the Subcommittee today – involving the interrogation of alien enemy combatants—first arose about six months after the 9/11 attacks, in which about 3000 of our fellow citizens were killed in surprise terrorist attacks in New York City and Washington, D.C. Leaders of the Executive Branch as well as members of Congress were deeply concerned that al Qaeda would attempt follow-on attacks, as they did in Europe. In facing these questions in 2002 and 2003, we 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.

Nonetheless, we in OLC were determined, as were all of us in the Justice Department at the time, to interpret the law, in good faith, as best we could under the circumstances. We wanted to make sure that the United States had the ability to defeat this new enemy and to prevent another September 11 attack, and that we did so by operating within the bounds drawn by the laws and Constitution of the United States. Now as then, I believe we achieved this goal.

We reached our conclusions based on the legal materials at hand. These were hard questions, perhaps the hardest that a government lawyer can face. The federal criminal anti-torture law uses words rare in the federal code, no prosecutions had been brought under it, and it had never been interpreted by a federal court. We wrote the memos to give the Executive Branch guidance, not to reach any particular policy result. As you can see from the opinions, we consulted federal judicial decisions in related areas, the legislative history in Congress of the approval of the international instruments and the enactment of the anti-torture statute, even the judgments of foreign tribunals that addressed similar questions. There is certainly room for disagreement among reasonable people, acting in good faith, on these questions. But I still believe we gave the best answers we could on the basis of the legal materials available to us.

It should also be clear, however, that OLC was not involved in the making of policy decisions. OLC interpreted the law, but did not develop or advocate for or against any policy option. To the extent that the United States has successfully prevented al Qaeda from launching another successful terrorist attack on our territory since 9/11, this has been due to the policies chosen by our elected leadership, both those in the Executive Branch who developed and approved them and those in the Legislative Branch who knew of them. I personally believe that the intelligence gleaned by interrogating al Qaeda leaders has contributed significantly to the safety of the American people during these last seven years. When this Subcommittee reviews

the development of American policy during this period, I urge it to consider whether alternative policies would have provided the same level of protection to the national security against the al Qaeda threat. But all the same, those policy choices – adopting particular techniques within the lines that OLC had determined to be lawful – were not mine to make and I did not make them. I cannot, therefore, provide the Subcommittee with information about the reasons for particular policy choices. Decisions involving intelligence and covert activity during the time I served in government would have been made by the CIA, the NSC, and the White House. Decisions about interrogation methods at Guantanamo Bay were made by the Defense Department.

Turning to the specifics, during my service at OLC, I was one of five deputy assistant attorneys general who assisted the assistant attorney general for the office. I worked on two matters that have become public and drawn the attention of this Subcommittee. One was a request by the Central Intelligence Agency and the National Security Council for guidance on the rules set by federal criminal law on interrogation of a high-ranking al Qaeda leader, held outside the United States, who was believed to have information that could prevent attacks upon the Nation. The second was a similar question from the Department of Defense on the legal rules on interrogation of al Qaeda members held at Guantanamo Bay who also were believed to have high-value intelligence regarding possible attacks on the United States.

We gave substantially the same advice to both agencies. Both matters at the time were highly classified and the pressures of time and circumstances were high – we received the first request a few months after the September 11, 2001 terrorist attacks on New York City and Washington, D.C. Under those difficult conditions, OLC substantially followed its normal process for writing and researching a legal opinion on a classified matter, including consultation with components of the Justice Department and relevant Executive Branch agencies. We interpreted Congress's statute prohibiting torture as prohibiting extreme acts, as intended by the Executive branch and the Senate at the time that the United States entered the Convention Against Torture. Concerned about potential ambiguity in the statute's terms, we also provided a comprehensive analysis of alternative issues, such as a potential conflict between the Commander-in-Chief and legislative powers in wartime, which might arise if interrogation methods that were ultimately chosen by policymakers were close to or on the line set by the statute.

CIA and NSC Request for Opinion in 2002

Interrogation policy did not arise in the abstract, but in the context of a specific person at a specific point in time. On March 28, 2002, American and Pakistan intelligence agents captured al Qaeda's number three leader, Abu Zubaydah. With the death of Mohammed Atef in the American invasion of Afghanistan in November 2001, Zubaydah had assumed the role of chief military planner for al Qaeda, ranking in importance only behind Osama bin Laden and Dr. Ayman Zawahiri.

It is difficult to understate the importance of the capture. With his new promotion, Zubaydah headed the organization and planning of al Qaeda's operations and its covert cells. With al Qaeda reeling from American success in Afghanistan, and bin Laden and Zawahiri in hiding, Zubaydah took on the role of building and managing al Qaeda's network of covert cells throughout the world. More than anyone else, he knew the identities of hundreds of terrorists and their plans. If anyone had "actionable intelligence" that could be put to use straightaway to

kill or capture al Qaeda operatives and to frustrate their plans to murder our citizens, it was Zubaydah. At the same time, Zubaydah was clearly an expert at resisting regular interrogation methods.

OLC was asked to evaluate the legality of interrogation methods proposed for use with Zubaydah. While the subject matter was certainly extraordinary and demanded unusually tight controls because of its sensitivity, the question of the meaning of the federal anti-torture law was handled in the same way that other classified OLC opinions are handled. These opinions did not receive the broad dissemination within the government that would normally occur with a memorandum opinion. But this was because the question of interrogation involved national security and covert action and was classified at a top secret level. Nonetheless, the process that governed the research, writing, and review of these memos was in line with that which occurs with opinions on other classified, sensitive issues.

In particular, the offices of the CIA general counsel and of the NSC legal advisor asked OLC for an opinion on the meaning of the anti-torture statute. They set the classification level of the work and dictated which agencies and personnel could know about it. In this case, the NSC ordered that we not discuss our work on this matter with either the State or Defense Departments. The Office of the Attorney General was promptly informed of the request and it decided which components within the Justice Department were to review our work: these were the offices of the attorney general, the deputy attorney general, and the criminal division. The Office of the Attorney General also selected the Justice Department staff who could know about the request. Within OLC, career staff handled the initial research and drafting of the opinion. It was edited and reviewed by another deputy assistant attorney general. It was then reviewed, edited, and re-written by the assistant attorney general in charge of the office at the time, as is the case with all opinions that issue from OLC.

The Office of the Attorney General was also actively involved in reviewing OLC's work. Not only did OLC brief the Office of the Attorney General several times about the legal opinion, but the Office of the Attorney General made edits to the opinion, and even worked on it with OLC staff in our offices, up until the very minute the opinion was signed. We also sent drafts of the opinion to the deputy attorney general's office and to the criminal division for their views and comments. No opinion of this significance could ever issue from the Justice Department without the review of, and the approval of, the Office of the Attorney General.

We also sent the opinion in draft form to the office of the CIA general counsel, the office of the NSC legal advisor, and the office of the White House counsel for their review, as would normally be the case with any opinion involving intelligence matters. As with any opinion, OLC welcomed comments, suggested edits, and questions.

I should emphasize that our work on this issue was with regard to Zubaydah. It was not conducted with regard to Iraq, nor did it have anything to do with the terrible abuses that occurred at the Abu Ghraib prison more than a year and a half later. In fact, the legal regimes governing the war with al Qaeda and the war with Iraq were utterly different. The Geneva Convention provided the relevant rules for the war in Iraq. After extended debate, however, the Bush Administration concluded in February 2002 that al Qaeda prisoners were not covered by the Third Geneva Convention, which establishes the rules governing the treatment of prisoners of war. Al Qaeda was not a state party to the treaty nor has it shown any desire to obey its rules in

this war. Therefore, in our view at the time, the Geneva Conventions did not govern the legal regime that applied to the interrogation of al Qaeda terrorists.

What federal law commands is that al Qaeda and Taliban operatives not be tortured. Specifically, the federal anti-torture law makes clear that the United States cannot use interrogation methods that cause "severe physical or mental pain or suffering." No one in the government, to my knowledge, questioned that ban—then or now. In fact, the very purpose of seeking legal advice was to make sure that the government did not do anything that would violate this federal law. As we examined that legal question in the particular, narrow context in which it arose, we believed that the application of the legal standard set by Congress—barring any treatment that caused severe physical or mental pain or suffering—would depend not just on the particular interrogation method, but on the subject's physical and mental condition. In the particular context that we faced—Zubaydah, the hardened operational leader of al Qaeda, and perhaps others similarly situated—we did not believe that the coercive interrogation methods being contemplated transgressed the line that had been prescribed by Congress. I personally do not believe that torture is necessary or should ever be used by the United States. Nor do I believe that OLC's August 1, 2002 memorandum authorizes such a result.

It also should not go unmentioned that the importance of appropriately questioning Zubaydah—*i.e.*, of permitting our Nation to use certain coercive techniques within the bounds of the law—was demonstrated by the string of successes for American intelligence that occurred in the months after his capture. These have been widely reported. A year to the day of the September 11 attacks, Pakistani authorities captured Ramzi bin al Shibh. Bin al Shibh was the right hand man to Khalid Shaikh Mohammed, referred to by American intelligence and law enforcement as "KSM." A 30-year-old Yemeni, bin al Shibh had journeyed to Hamburg, Germany, where he became close friends and a fellow al Qaeda member with Mohammed Atta, the tactical commander of the 9/11 attacks. Hand-picked by Osama bin Laden to join the 9/11 attackers, bin al Shibh's American visa applications had been repeatedly rejected. He continued to serve as a conduit for money and instructions between al Qaeda leaders and the hijackers. He was the coordinator of the attacks.

Another six months later, American and Pakistani intelligence landed KSM himself. Labeled by the 9/11 Commission Report as the "principal architect" of the 9/11 attacks and a "terrorist entrepreneur," KSM was captured on March 1, 2003 in Rawalpindi, Pakistan. The uncle of Ramzi Yousef, who had carried out the first bombing of the World Trade Center, KSM had worked on the foiled plan to bomb twelve American airliners over the Pacific. It was KSM who met with bin Laden in 1996 and proposed the idea of crashing planes into American targets. He helped select the operatives, provided the financing and preparation for their trip to the United States, and continued to stay in close contact with the operatives in the months leading up to 9/11. After the U.S. invasion of Afghanistan and the capture of Zubaydah, KSM became the most important leader after bin Laden and Zawahiri.

According to public reports, these three seasoned al Qaeda commanders provided useful information to the United States. Not only did their captures take significant parts of the al Qaeda leadership out of action, they led to the recovery of much information that prevented future terrorist attacks and helped American intelligence more fully understand the operation of the terrorist network. One only has to read the 9/11 Commission report to see the large amounts

of information provided by the three.[2] Indeed, government officials have said publicly that these operations have allowed the government to stop attacks on the United States itself.

Revised 2004 OLC Opinion on Interrogation

At the end of 2004, well after I had left the Justice Department, OLC issued a revised opinion on some of the matters covered by OLC's 2002 memorandum. The 2004 opinion replaced the 2002 opinion's definition of torture. The 2004 memo said that torture might be broader than "excruciating or agonizing pain or suffering," using words not much different from the anti-torture statute itself. It then proceeded to list acts that everyone would agree were torture. The 2004 opinion did not provide as precise a definition of the law as the 2002 opinion. Though it criticized our earlier work, the 2004 opinion included a footnote to say that *all* interrogation methods that earlier opinions had said were legal, *were still legal.* Interrogation policy had not changed. The 2004 opinion also followed the 2002 opinion's distinction between torture and cruel, inhuman, and degrading treatment, and agreed that federal criminal law prohibited only the former. It agreed that "torture" should be used to describe only extreme, outrageous acts that were unusually cruel.

The 2004 opinion also omitted a discussion in the 2002 opinion on the scope of the President's Commander-in-Chief power and possible defenses should the statute be violated. Let me be clear that the 2002 opinion did not include this discussion because we wanted to condone any violation of federal law. Federal law prohibits the infliction of severe physical or mental pain or suffering. As government lawyers, our duty was to interpret the laws as written by Congress. There is no doubt that these were and are very difficult and close questions, made all the harder because of the lack of any authoritative judicial interpretation. Indeed, it was precisely because some might later deem a particular interrogation technique to be "close to the statutory line" that OLC believed in 2002 that it was necessary to consider all potential legal issues, including the independent constitutional powers of the President. Conversely, by finding the *same* interrogation techniques *wholly legal* without regard to any independent authority that the President might have in this area under the Constitution, the 2004 opinion necessarily found the statutory questions far easier than OLC had believed it to be in 2002.

Request from the Defense Department

Let me turn now to the second opinion request I mentioned earlier—the one OLC received from the Department of Defense, which dealt with potential interrogation methods for high-value al Qaeda members being held at Guantanamo Bay.

Interrogation methods at Guantanamo Bay were the result of a careful vetting process through a Defense Department-wide working group. In 2003, the DOD Working Group considered the policy, operational, and legal issues involved in the interrogation of detainees in the war on terrorism, and the DOD General Counsel's office requested an opinion from OLC on certain of the legal standards that would govern the interrogation of al Qaeda terrorists held at Guantanamo Bay. Our inquiry was limited to the potential application of federal criminal law. It did not analyze any issues that might arise in Guantanamo under military law, as DOD reserved analysis of those issues for itself.

Just as we had with the request from the CIA/NSC in 2002, OLC notified the components in our chain of command within DOJ about DOD's request for an opinion. As in 2002, OLC circulated drafts of the proposed opinion to the Offices of the Deputy Attorney General, the Attorney General, and the Criminal Division. The process of researching, drafting, and editing within OLC and within the Justice Department was the same as with the 2002 opinion. Although the Working Group did not know of the CIA/NSC 2002 request for similar advice, our 2003 opinion would be substantially similar to our August 2002. In fact, it had to be if OLC were to follow its own internal precedent. I met with the working group, composed of both military officers and Defense Department civilians, to discuss legal issues. Our final opinion was delivered to DOD on March 14, 2003.

That April, the Working Group issued a report that incorporated sections of OLC's opinion as part of a broader analysis of the legal and policy issues regarding interrogations at Guantanamo Bay. The Working Group, after carefully considering all the issues, approved a set of 26 well-known tactics in oral questioning while reserving anything more aggressive for use only on specific detainees with important information subject to senior commander approval. It required that any interrogation plan take into account the physical and mental condition of the detainee, the information that they might know, and environmental and historical factors. It reiterated President Bush's 2002 executive order that all prisoners be treated humanely and consistent with the principles of the Geneva Conventions. The Working Group report also outlined the potential costs of exceptional interrogation methods—loss of support among allies, weakened protections for captured U.S. personnel, confusion among interrogators about approved methods, and weakening of standards of conduct and morale among U.S. troops.

As it turned out, it appears that the Secretary of Defense refused to authorize these exceptional interrogation methods for Guantanamo Bay with the sole exception of isolation. The Secretary struck out the use of blindfolds and even mild, non-injurious physical contact from the list of conventional interrogation techniques. I repeat—of the exceptional methods, it appears that the Secretary of Defense authorized only one: isolation. He allowed it only if it generally would not be longer than 30 days. That was it. He never approved any use of dogs, physical contact, slapping, sleep deprivation, or stress positions.

Let me be clear, again, that we in OLC never proposed or selected any specific interrogation methods, either for the CIA or DOD. These difficult decisions were the province of the policymakers. But, again, judging from published reports of our intelligence successes, it appears clear those decisions almost certainly thwarted near terrorist attacks upon our citizenry.

In closing, I believe that it is important to avoid the pitfalls of Monday morning quarterbacking. It may seem apparent today–at least to some—that other choices would have led to better outcomes, though I am not so sure. In facing the questions that were posed to us, we appropriately kept in mind that the homeland of the United States had been attacked by a dangerous, unconventional enemy. But we did not make policy, and we called the legal questions as we saw them. There is little doubt that these are difficult questions, about which reasonable people can differ in good faith. Yet, the facts remain that the United States has successfully frustrated al Qaeda's efforts to carry out follow-on attacks on the Nation, and that the interrogation of captured al Qaeda leaders have been a critical part of that effort. It may be convenient to criticize those of us who had to make these difficult decisions, but it is an important exercise to ask whether others would truly have made a different decision, under the

circumstances that existed in early 2002 and early 2003—and whether, if they had, the Nation would have been as successful in averting another murderous attack upon our citizens.

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[1] The email guidance reads:

> The Department of Justice does not object to Prof. Yoo's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 8, 2008 from Chairman Conyers, subject to the limitations set forth herein. Specifically, the Department authorizes Prof. Yoo to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department (such as the unclassified August 1, 2002 opinion addressing the anti-torture statute, the published December 30, 2004 opinion addressing the anti-torture statute, and the declassified March 14, 2003 opinion to the Department of Defense addressing interrogation standards). As a special accommodation of Congress's interests in this particular area, he may discuss in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record. He is not authorized, however, to discuss specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch.

[2] Most of the details of the formation and execution of the 9/11 attacks are directly attributed in the Commission Report's text and footnotes to their interrogations. See the note on Detainee Interrogation Reports in The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attakcs Upon the United States 146 (2004).