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

Submitted on Behalf of Judge Jay S. Bybee

Maureen E. Mahoney
Everett C. Johnson
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Jay S. Bybee

October 9, 2009

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I. INTRODUCTION

When Attorney General Mukasey and Deputy Attorney General Mark Filip were given access to the Office of Professional Responsibility's (OPR) Draft Report in the waning hours of the Bush Administration, they concluded that it represented an "unprecedented" exercise of disciplinary authority based on "unsupported speculation," legal analysis by "commentators and scholars with unstated potential biases," and a "misunderstanding" of important "Department of Justice and Executive Branch interagency practices." Letter from Michael B. Mukasey & Mark Filip to H. Marshall Jarrett at 2-3 (Jan. 19, 2009). They urged OPR to reverse course because there was "[no] reason to believe that these OLC lawyers were acting in anything but good faith" at a time when the nation was confronted with "the express threat of further [terrorist] attacks and murders" *Id.* at 14. They warned OPR that the use of its disciplinary powers to find misconduct in these circumstances would be "likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* OPR forged ahead and has now issued a Final Report that is based on all the same flaws and that poses all the same dangers. It is, indeed, "unprecedented" and unprincipled.

Critics of the interrogation policies have long speculated that OPR had uncovered damning facts that would reveal a conspiracy between the White House and OLC to provide sham advice to justify interrogation techniques that plainly constituted "torture" under 18 U.S.C. §§ 2340, 2340A ("the Act"). The Report confirms, however, that OPR found nothing of the kind. Even though OPR intends to "notify bar counsel in the states where ... Bybee [is] licensed" that he acted "in reckless disregard" of his ethical duties by issuing the Bybee Memos[1] on August 1, 2002 (Report at 260), OPR does not actually dispute the facts that prove just the opposite:

- Judge Bybee acted in good faith, honestly believed the advice he gave, did not know that the memos were "incomplete or one-sided" and "did not commit intentional professional misconduct." Report at 256.

- Judge Bybee, as the Assistant Attorney General for OLC, "should not be held responsible for the accuracy and completeness of every ... argument" in these memos, which were researched and drafted by other OLC attorneys with established "expert[ise] in presidential war powers." Report at 255, 256.

- The memos were reviewed by a dozen or more Executive branch lawyers, including Attorney General Ashcroft, Deputy Attorney General Larry Thompson, Assistant Attorney General Michael Chertoff, and Legal Adviser to the National Security Council, John Bellinger, and *no one ever* told Judge Bybee not to issue the opinions. *See* Attachment 19.

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[1] We refer to the Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A* (Aug. 1, 2002) as the "Bybee Memo." Similarly, we refer to the previously classified Memorandum from Jay S. Bybee for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002) as the "Classified Bybee Memo."

- Other AAGs who succeeded Judge Bybee at OLC also determined that the CIA's proposed techniques, including waterboarding, did not violate the Act. *See id.*

- Judge Bybee's period for reviewing the draft memos was truncated because he was informed that the CIA had to have the signed advice by August 1, 2002 in order to proceed with an urgent interrogation of a high ranking member of al Qaeda believed to have information critical to the prevention of a threatened second wave of attacks. *See infra* Section II.C.

- The client representative of the CIA understood that "the issues were uncertain and that there were no controlling precedents" and did not request "an exhaustive memorandum that thoroughly discussed all possible counter arguments." Rather, he was seeking "OLC's best judgment about the correct answer to a difficult question of law" so that it "could proceed with a vital interrogation, using lawful methods, as soon as possible." Letter from Maureen Mahoney to John Rizzo (Oct. 5, 2009) ¶ 1. ("Rizzo Letter").

- The central elements of the statutory interpretation advanced in the Bybee Memos have been adopted by the D.C. Circuit and the Third Circuit in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) and *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008), and OPR did not even attempt to find that "the Bybee ... Memos [did not] arrive[] at a correct result." Report at 160.

Based on these uncontested facts, any fair adjudicator familiar with the law of ethics would conclude that, right or wrong, Judge Bybee did not violate his duties of competence, independence, or candor, as those disciplinary rules have always been understood. OPR nonetheless seems to rest its finding of misconduct on a violation of D.C. Rule 2.1, although it never expressly says so. Report at 21-23, 255-57. As one of the foremost ethics experts in the nation has confirmed, however, the duty of candor requires a lawyer to give his "honest assessment" and Judge Bybee had no duty to "advert[] to counter-arguments that might have been conjectured." Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney ¶ 13 (Oct. 7, 2009) ("Hazard Letter"). Professor Hazard instead concluded that the Bybee Memos are "extensive, detailed, careful and sober," and that there is "no basis for charging Judge Bybee with failure to conform to recognized standards of professional conduct." *Id.* at ¶¶ 4, 18. And even though OPR trumpets latter day criticisms of certain features of the memos by other Executive Branch officials, it conveniently fails to tell its readers that every one of them has emphatically stated that they do not believe that perceived deficiencies fell below the standard of care. As Jack Goldsmith told OPR in no uncertain terms, "he never believed ... that the analysis in these opinions implicated any professional misconduct." Memorandum for David Margolis from Jack Goldsmith, *Re: OPR Report on OLC Lawyers* 4 n.7 (June 5, 2009) ("Goldsmith Submission").

Confronted with these settled disciplinary standards, OPR just invents new ones. It ignores the express definition of "candor" in the comments to Rule 2.1—counsel's "honest assessment"—and replaces it with a duty to provide a "thorough" and "objective" recitation of "any counter arguments." Report at 24, 256. It does not cite a single Rule 2.1 decision from any jurisdiction to support its version of the duty and instead relies exclusively on two research and

writing treatises and "aspirational" OLC guidelines that were written years after the Bybee Memos were issued. *Id.* at 24. Nor does OPR bother to explain how this guideline could reflect an "unambiguous" duty not to prepare "incomplete ... one-sided" opinions (Report at 256), as required by OPR's own standards,[2] when OLC's files are literally overflowing with short opinions that fail to address "counter arguments." As Professor Hazard notes, the shortest OLC opinion appears to be 28 words, and one of Judge Bybee's successors authorized the CIA to use waterboarding in a two-page letter that said analysis would follow "at a later date." Hazard Letter at ¶¶ 11, 12; Letter for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Daniel B. Levin 1 (Aug. 6, 2004). OPR avoids this rather obvious impediment to its theory by failing to cite a *single* OLC opinion issued prior to the Bybee Memos.

OPR then proceeds to engage in a form of analysis that is unheard of in the annals of disciplinary proceedings. It spends nearly 100 pages scrutinizing the wording of the memos and the supporting authorities on a line-by-line basis hunting for "errors, omissions, misstatements, and illogical conclusions" in the analysis. Report at 159. This so-called "analytical approach" (Report at 24) is undoubtedly foreclosed everywhere because OPR never cites a single opinion finding a disciplinary violation at any point in its 261 pages of analysis. But more importantly, this approach is expressly forbidden by the rules in D.C., which OPR purports to apply. OPR accordingly ignores the fact that the D.C. Board on Professional Responsibility, in an opinion affirmed by the D.C. Court of Appeals, squarely held that the central focus of a disciplinary inquiry must be the lawyers' "[]attention" to the matter—and not the quality of the analysis—because disciplinary authorities must not "put [themselves] in the position of a sort of court of appeals from lawyers' judgments" and engage in "the worst sort of second-guessing or Monday morning quarterbacking." *In re Stanton,* 479 A.2d 281, 287 (1983). Yet OPR rests on almost 100 pages of "second-guessing" for virtually every professional judgment that was made in the preparation of these memos.

While conducting that analysis, OPR purported to find that the "flaws consistently favored a permissive view of the torture statute." Report at 159. Yet most of the "flaws" OPR identifies weren't "flaws" at all. They are either the product of OPR's poor understanding of the law or issues that are open for genuine debate. But no matter. The most telling feature of OPR's hunt for flaws is its failure to discuss the implications of the D.C. Circuit's decision in *Price* at any point in its Report. One month before the Bybee memos were completed, the D.C. Circuit adopted a definition of "torture" under an analogous statute that vindicates Judge Bybee's analysis. To this day, *Price* is the leading decision on the definition of "severe pain" as it pertains to the statutory definition of "torture," and held that Congress adopted a rigorous definition of "torture" that used "agony" as a benchmark. 294 F.3d at 93. That definition is arguably more restrictive than the one adopted in the Bybee Memos. So OPR *never cites it a single time anywhere in the report.* Then there is the matter of the Third Circuit's *en banc* decision in *Pierre*, where a ten-judge majority adopted the memos' analysis of the specific intent element for proof of torture. 528 F.3d at 187. OPR's response to *Pierre*? A footnote explaining that it doesn't count because "it was decided after the issuance" of the Bybee Memos. Report at 175 n.132. Under OPR's approach, OLC lawyers can accurately predict the outcome of future

[2] *See* U.S. Dep't of Justice, Office of Prof'l Responsibility, *Analytical Framework* ¶ B(3) (2005) ("OPR Analytical Framework"),

litigation in U.S. courts but be referred to the D.C. Bar for misconduct because they did not recite all the arguments that the losing parties would make in their briefs. That is exactly what is happening here.

And then there is OPR's finding of recklessness. OPR does not cite a single recklessness case from any jurisdiction. Not one. As Judge Bybee informed OPR in response to its draft, the Supreme Court recently held that the adoption of a plausible but erroneous interpretation of an unsettled question of law could not be reckless as a matter of law. *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007). OPR's response? It is a single footnote claiming that the standards established in *Safeco* are irrelevant because the statute at issue there "requires willfulness to establish civil liability" while OPR's standards only require "recklessness." Report at 19 n.19. Here is what the Supreme Court actually held: "[R]eckless action is covered" by the civil liability provision at issue because "the standard civil usage" of "willful" means "reckless." 551 U.S. at 52, 57. The Court's entire analysis of the conduct at issue there, *i.e.* adoption of an erroneous interpretation of the law, was assessed solely with reference to "the common law understanding" of the concept of "recklessness." *Id.* at 69. Sanctions for OPR counsel anyone?

So much for duties against "one-sided" presentations. But perhaps OPR thinks these new duties only apply to former officials of an Administration that adopted policies "many would argue violated the torture statute" (Report at 251)—even if they don't. The pervasive theme in the OPR report is that if you criticize the Bybee memo you're right and worthy of consideration, and if you support the memo you're biased and to be ignored. Nothing shows that perspective more clearly than OPR's repeated reliance on successors' select criticisms of the memos (*e.g.*, Report at 159-160), while dismissing their widespread agreement with the memos' conclusions as "not relevant to [their] analysis." Report at 160.

As a matter of policy, OPR's analysis, if adopted, will prove to be a cancer within the Justice Department. Advice on the most difficult legal questions of our time will become watered down, equivocal, queasy, and useless. Dissent and debate—because they become after-the-fact evidence of recklessness—will be discouraged. Supervisors will be unable to rely on the work or advice of the very attorneys they must rely upon. And Department officials will be understandably paralyzed by the fear that the next Administration will disagree.

Outside the Department of Justice the consequences will be worse. The OPR report and everyone who participated in it will be subjected to the same scrutiny applied to Judge Bybee and the same legal standard it purports to adopt. Ethics charges and bar complaints will become the licensed currency of political disagreements. And while the Department of Justice can push this snowball down the hill, its size, speed, direction, and ultimate stopping place will be beyond the control of the Department or anyone in the Executive Branch.

The country does not want or need a debate in which the question is whether the Office of Legal Counsel in the prior administration or the Office of Professional Responsibility in the current one acted improperly, with partisan bias, and political objectives. Respectfully, the time to stop this process is now.

II. THE UNDISPUTED FACTS ESTABLISH THAT JUDGE BYBEE PROVIDED GOOD FAITH ANSWERS TO UNSETTLED QUESTIONS OF LAW AT A TIME OF NATIONAL CRISIS

A. Judge Bybee Acted In Good Faith

OPR concedes that Judge Bybee acted in good faith. The Report states unequivocally that OPR "found insufficient evidence to conclude that Bybee knew at the time that the advice in question was incomplete or one-sided." Report at 256. OPR nevertheless fails to recite most of the evidence demonstrating that Judge Bybee made a good faith effort to satisfy his ethical obligations and issued an opinion that reflected his honest assessment of the legal issues presented. We accordingly summarize those facts here.

First, the individuals with personal knowledge of the relevant events have uniformly confirmed that Judge Bybee believed the advice he gave and signed the Bybee Memos in good faith.[3] Three attorneys within OLC and one attorney in the Office of the Attorney General worked directly with Judge Bybee on the preparation of the Bybee Memos. As we previously informed OPR (Bybee Draft Response[4] at 7), all of these lawyers authorized us to represent that they believe that Judge Bybee performed his duties in good faith and that the memos reflected his honest assessment of the law.

One of the two Deputies assigned to the matter, Patrick Philbin, [redacted] told OPR that it would be "unjust" to accuse Judge Bybee (or John Yoo) of an intent to "provide ... immunity to CIA operatives." [redacted]. To the contrary, Philbin emphasized that "[i]n all the interactions" he had with Judge Bybee, "the clear understanding" was that the Classified Bybee Memo served to "plac[e] narrowly defined limits on the practices" and "[t]here was never any discussion or any suggestion in Mr. Philbin's presence that [other] sections of the Bybee Memo were intended to have (or could be read to have) any effect of providing an immunity." [redacted] The other deputy, John Yoo, similarly testified before Congress that everyone at OLC, including Judge Bybee, was determined to interpret the law, in good faith, "as best we could with the materials that we had available under the circumstances." *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary* ("DOJ Hearing"), 110th Cong. 8-9 (2008) (testimony of John C. Yoo).

Other officials who were involved in 2002 have echoed that assessment of the facts based upon their personal knowledge. Timothy Flanigan, Deputy White House Counsel at the time, stated in a declaration submitted to OPR that he has "no doubt that Judge Bybee, Professor Yoo, Attorney General Ashcroft and the other senior DOJ attorneys who reviewed and contributed to [the Bybee Memo] intended only to provide an honest, good faith assessment of these very

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[3] Judge Bybee himself has affirmed that everyone who worked on the memos gave their "'best, honest advice, based on our good-faith analysis of the law.'" Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. Times, Apr. 28, 2009 (quoting Judge Bybee).

[4] We refer to Judge Bybee's May 2009 response to OPR's Draft Report as the "Bybee Draft Response."

difficult and challenging questions of law." Declaration of Timothy E. Flanigan ¶ 3 (May 2, 2009) ("Flanigan Decl.") (Appendix 2). John Rizzo, Acting General Counsel to the CIA, said that he "never doubted that the [Bybee Memos'] conclusions reflected Jay Bybee's and John Yoo's honest assessment of the legal issues they addressed." Letter from Maureen Mahoney to John Rizzo ¶ 2 (Oct. 5, 2009) ("Rizzo Letter") (Appendix 1). And Michael Chertoff, the Assistant Attorney General for the Criminal Division, also authorized Judge Bybee to represent that he had no information to suggest that Judge Bybee acted with anything other than good faith.

Judge Bybee's successors as head of OLC, some of whom were critical of portions of the memos, also concurred in this assessment. Jack Goldsmith, who succeeded Judge Bybee, became very familiar with the events at issue and has publicly reported his conclusion that the memos were written "in good faith." Jack L. Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 167 (2007) ("Goldsmith, *The Terror Presidency*"). Moreover, Goldsmith felt strongly enough to submit his own unsolicited memorandum to DOJ. Goldsmith informed OPR that "I am confident, based on what I know, that Jay Bybee acted in good faith (i.e. did not think he was violating the law) and satisfied his professional responsibilities." Memorandum for David Margolis from Jack Goldsmith, *Re: OPR Report on OLC Lawyers* 4 n.7 (June 5, 2009) ("Goldsmith Submission"). OPR reports none of this in its recitation of the facts.[5] Daniel Levin, who followed Goldsmith, submitted a declaration for OPR confirming that, "[i]n [his] view, the authors believed what they wrote," and specifically clarified that he never intended any criticism of the Bybee Memo to suggest that Judge Bybee committed professional misconduct in signing the opinion. Declaration of Daniel Levin ¶¶ 6-7 (Apr. 29, 2009) ("Levin Decl.") (Appendix 3). Finally, Steven Bradbury, who issued two memoranda that withdrew several OLC opinions from early in the Bush administration, stated that "[n]either memorandum is intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." Memorandum for the Files from Steven G. Bradbury, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* 1 n.1 (Jan. 15, 2009) ("Bradbury 2009 Memo").

In addition, all three of the Attorneys General who served in the Bush Administration have expressed their view that the OLC attorneys acted in good faith when issuing these opinions. Attorney General Mukasey and Deputy Attorney General Filip reached this conclusion after reviewing OPR's Draft Report and discussing the investigation with OPR. *See* Letter from Michael B. Mukasey & Mark Filip to H. Marshall Jarrett (Jan. 19, 2009) ("Mukasey Letter"). The Mukasey Letter (at 10) explains: "After reviewing relevant documents from this time period and interviewing all the attorneys involved in requesting and providing the advice, OPR found no direct evidence that the opinions in question reflected anything other than Mr. Bybee's or Mr. Yoo's best legal judgment at the time—a fact that OPR confirmed in our recent meeting, but that the Draft Report does not once mention....Absent any evidence to disbelieve the testimony of Mr. Bybee and Mr. Yoo, we respectfully submit that the speculation currently contained in the Draft Report is insufficient to support a finding that these attorneys were not acting in good faith

[5] Without citing anything else from his submission, OPR acknowledges in a footnote of its legal analysis that Goldsmith "never believed that the analysis in the opinions 'implicated any professional misconduct.'" Report at 197 n.151 (citing Goldsmith Submission at 1).

or rendering their best independent assessment of the law in providing the advice contained in these opinions." *See also* Transcript of Reporters Roundtable Discussion With Attorney General Michael B. Mukasey (Dec. 3, 2008) ("Roundtable with Attorney General Mukasey") ("[T]here is absolutely no evidence that anybody who rendered a legal opinion ... with respect to interrogation policies, did so for any reason other than to protect the security in the country and in the belief that he or she was doing something lawful.").[6]

When Attorney General Gonzales testified before Congress, he also conveyed his conclusion that "the people at the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress." *Confirmation Hearing on the Nomination of Alberto Gonzales to be Attorney General of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 133 (2005) (statement of Alberto Gonzales). Attorney General Ashcroft likewise testified before Congress that "[t]he conclusions of all the memos were, I believe, accurate conclusions." DOJ Hearing, Part V at 41 (June 18, 2008) (statement of John Ashcroft). Ashcroft recently reiterated that the memos reached the "right conclusion" and noted that as Attorney General he relied on the "best judgments of the lawyers in the department." Dan Abrams, *Bush's Lawyers Strike Back*, Daily Beast, May 3, 2009.

Second, while all of these opinions are more than sufficient to corroborate Judge Bybee's good faith, the facts also demonstrate that OLC did not serve as a rubber stamp for the CIA. *See* Rizzo Letter ¶ 2 (confirming that OLC "did not simply 'rubber stamp' everything the CIA was considering"). [redacted] *Id.* In fact, OPR's own report reveals a series of exchanges where OLC required more due diligence for its legal advice. For example, [redacted] Perhaps most telling, OLC's resistance to one proposed technique led the CIA to drop it from the interrogation plan. *See* Central Intelligence Agency Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* ¶ 35 (May 7, 2004) ("CIA IG Report"). [redacted]

[6] *Available at* http://www.reuters.com/article/pressRelease/idUS250091+03-Dec-2008+PRN20081203.

[redacted]

Third, there is absolutely nothing about Judge Bybee's background or his relationship with the White House that would support an inference of bad faith. Judge Bybee's career reflects a long-time commitment to public service, including two years in DOJ's Office of Legal Policy, three years on the Department's Appellate Staff at the Civil Division, and another two as Associate Counsel to President George H.W. Bush. When Judge Bybee returned to government service as head of OLC in October 2001, after ten years as a law professor, he devoted himself to his job, issuing numerous opinions ranging in topics from the proper role of legal guardians in naturalization proceedings (March 13, 2002) to the delegation authority of the chemical safety and hazard investigation board (April 19, 2002). By all accounts, Judge Bybee fulfilled his responsibilities as head of OLC with dedication and distinction. Although OPR cites (speculative) accusations that Bradbury may have felt pressure from the White House in order to secure the nomination to serve as AAG of OLC (Report at 145), no similar allegations were leveled against Judge Bybee. He never served in an "acting" capacity and his nomination to the Ninth Circuit occurred on May 22, 2002, well before he even began work on the memos at issue. During the drafting process, while Judge Bybee acknowledged that he knew the White House was "anxious to ... wrap it up," he affirmed that he had never felt "any pressure on the memo from anyone in the department in terms of how it would come out and how it was written." Transcript of Confidential Deposition of Judge Jay S. Bybee at 46, 24-25 (Dec. 9, 2005) ("Bybee Tr."). Judge Bybee was ready and willing to issue advice that was unwelcome when his honest assessment of the law led to that conclusion. Nothing indicates that Judge Bybee acted otherwise on this occasion. He has continued to serve his country with distinction during his tenure on the Ninth Circuit. As OPR concedes, there is no evidence of anything but good faith on Judge Bybee's part.

B. Judge Bybee Had No Reason to Question the Memos' Candor or Competence

OPR acknowledges "that an Assistant Attorney General should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument in every legal memorandum submitted for his signature by a Deputy AAG." Report at 255. OPR nevertheless determines that Judge Bybee issued the opinion recklessly because he "should have known" that the memoranda did not meet minimum ethical standards. *Id.* at 256. The undisputed facts refute any such inference. The opinions reflect the work product of highly trained lawyers who devoted hundreds of hours to the preparation of a detailed analysis on unsettled questions of law. Nothing that occurred during the review process put Judge Bybee on notice that issuance of the opinion might violate ethical standards.

First, Bybee had reason to be confident in the analysis prepared by his office because OLC adhered to its customary procedures for the preparation of a highly classified opinion. Three exceptionally talented members of Judge Bybee's office (all former or future Supreme Court law clerks) were assigned to work on the response to the CIA: [redacted] John Yoo, the lead deputy who was "the resident expert in the OLC on foreign policy and national security issues"; and Patrick Philbin, who also had substantial experience in this field and served as the "second Deputy." *Id.* at 26, 39. Significantly, these OLC attorneys worked on the memos for

over three months before Judge Bybee ever reviewed a draft. The effort expended was commensurate with the importance of the project.

During April 2002, Yoo and [redacted] worked on multiple drafts and revisions of the memorandum before circulating an initial draft for comment on July 8, 2002. *Id.* at 43 & n.48. Yoo and [redacted] produced two more drafts in the following days and scheduled numerous meetings between July 12 and July 19 to discuss the issues with officials at DOJ, the White House, the NSC, and the CIA. *Id.* at 45, 46, 50, 52. Around this time, Philbin—the Second Deputy—began his review of the draft as well. Emails show Yoo and [redacted] referring to comments from Philbin as early as July 16, 2002, well before they delivered a draft to Judge Bybee for review. (There is no dispute that it is customary for the AAG to receive drafts near the end of the review process.[7]) Philbin continued to play an active role in the latter stages of the drafting process, providing "a lot of input" on the Commander-in-Chief section in particular.[8] *Id.* at 50.

Second, Judge Bybee was fully attentive to his supervisory responsibilities. He recognized the seriousness of the questions presented and met with Attorney General Ashcroft for the purpose of discussing the issue. *Id.* at 49 n.52. He also fully utilized the limited time available to him to review the draft memoranda. Although OPR estimates that Judge Bybee had "an approximately two-week period" for review (*id.* at 256), the first evidence of Judge Bybee's involvement in the drafting process was on July 26, 2002. This was only one week before the eventual deadline and the same day that the White House informed OLC that the memos had to be completed "as soon as possible." *Id.* at 57. Despite the need to circumscribe the period for Judge Bybee's review of the drafts, there is no dispute that he adjusted his schedule so that he could become "very involved" and "went through multiple drafts" of the memos. *Id.* at 59. Judge Bybee also had several meetings with Yoo, [redacted] and Philbin during this time period. Bybee Tr. at 32.

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[7] Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, for Attorneys of the Office, *Re: Best Practices for OLC Opinions* 3 (May 16, 2005) ("Best Practices Memo") (an opinion is ordinarily not circulated "for final review by the AAG" until after the second Deputy read is complete).

[8] It is very difficult for DOJ officials to recall their precise role in the events that occurred seven years ago. The email evidence indicates, however, that Philbin did not actually "step out until the end." Report at 59. He provided comments on numerous drafts throughout the last two weeks in July. *See* Email from [redacted] to John Yoo (July 16, 2002) ("Also, do you have a couple minutes to discuss some of Pat's comments?"); Report at 53 ([redacted] also sent Yoo a new draft, dated July 23, 2002, noting in her email that she had incorporated the cite check, new material on specific intent, and Philbin's comments."); Report at 57 ("In a July 26, 2002 email, Yoo asked [redacted] to 'stop by and pick up [Philbin's] comments and input them.... You also have Mike Chertoff's comments, to input.' Two days later, on July 28, 2002, Yoo sent [redacted] a new draft that he stated included 'the Philbin, Gonzales and Chertoff comments.'"); Email from [redacted] to Philbin (July 31, 2002) (seeking additional comments, and Philbin responding that he would provide some "in a few minutes"); Email from Philbin to [redacted] (July 31, 2002) ("[A]lso, if you have a new draft of the other memo that I should look at, I can do that whenever."); Email from Philbin to [redacted] (Aug. 1, 2002) ("I stopped by, but you had stepped out for a minute. Please swing by my office when you have a chance—I have a couple questions I'd like to talk about."); Email from [redacted] to Yoo (Aug. 1, 2002) ("I have incorporated Jay's edits and most of Pat's edits (some of his comments require a little legwork). Jay is reading what's been entered so far right now. I'm editing the second memo based on Jay's comments and comments from the agency. I'll bring you a copy of the draft Jay is reading if you like.").

While OPR seeks to marginalize Judge Bybee's contributions by characterizing his comments on a single draft as "all minor" (Report at 60 & n.60), this assessment is based on a record lacking much of the relevant documentary evidence, including most of Yoo's and Philbin's emails. *Id.* at 5 n.3. In addition, available email correspondence between Yoo and [redacted] confirms that Judge Bybee provided comprehensive line edits and structural suggestions to improve the memos—most of which [redacted] and Yoo incorporated into the drafts.[9] *Id.* at 59. By July 31, 2002, the time constraints increased dramatically when the White House informed OLC that both memos had to be completed and signed by the next day for exigent reasons discussed in Section II.C, *infra*.[10] *Id.* at 61. Judge Bybee worked on the issues intensively in the remaining time. He reviewed multiple drafts on August 1, 2002 and signed the opinion late in the evening after a meeting with [redacted] Yoo, Philbin, and Adam Ciongoli, Counselor to the Attorney General. *Id.* at 60 n.60, 62.

Judge Bybee properly used the limited time available to review the memos for logical consistency and relied on his highly-trained staff to analyze the governing precedents and conduct original research. As head of OLC, Judge Bybee had managerial responsibility over an office with more than twenty experienced attorneys who generated opinions at a daunting pace, including nineteen publicly released in 2002. Combined with the intense pressures of the national security environment in early 2002, delegation was an essential feature of Judge Bybee's position. As former Attorney General John Ashcroft, who held ultimate responsibility for the OLC memos, explained, "scores of critically important matters came to my desk" and by necessity "I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staffed the Department." DOJ Hearing, Part V, at 5 (June 18, 2008) (statement of John Ashcroft). Judge Bybee also properly relied on his dedicated staff and did not discover any of the alleged deficiencies in research and case analysis that OPR (unfairly) attributes to OLC. Instead, as OPR acknowledges (Report at 256), Judge Bybee's review of the memos did not cause him to doubt that they were competent and candid.

Third, Judge Bybee had no objective basis to conclude that the memos were not competent or candid. OPR's contrary conclusion proceeds from the inappropriate premise that Judge Bybee should have found the conclusions surprising based on norms condemning torture. *See, e.g.*, Report at 256-57. Yet OPR seems to forget that Congress adopted a narrow definition of torture that excluded many forms of cruel, inhuman, and degrading treatment. The core question was whether the techniques at issue satisfied that statutory definition. Nor does OPR recognize that the Supreme Court has firmly established that U.S. law does afford immunity to acts of outright torture in various settings. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (holding Saudi government immune in action alleging personal injury resulting from

[9] *See, e.g.*, Email from [redacted] to Judge Bybee (July 31, 2002) ("I have a couple of questions regarding your edits. It's not entirely clear to me where to move things in the avoidance of constitutional problems section. Let me know when you have a couple of minutes."); Email from [redacted] to Yoo (July 31, 2002) ("I have some more edits from Jay that require explanation/discussion.").

[10] It is a gross misrepresentation of the record for OPR to suggest that the OLC attorneys felt no time pressure leading up to this deadline. Report at 226 n.185 ('We note that none of the attorneys involved in drafting the Bybee and Yoo Memos asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work."). OPR itself quoted Philbin's discussion of the "situation and the *time pressures*" on the final night (*id.* at 63), and Judge Bybee answered "yes" when OPR asked him whether anyone communicated any urgency in terms of getting the memos done. Bybee Tr. at 45-46.

"unlawful detention and torture"). Invoking "jus cogens" norms (Report at 25) simply does not answer the questions that were asked. OPR would effectively adopt a presumption of reckless behavior whenever the U.S. asserts immunity in contexts involving allegations of torture. That cannot properly be the right ethical standard. *See, e.g.*, Brief for the United States as Amicus Curiae, *Saudi Arabia v. Nelson*, 1992 WL 12012040, at *16 (May 18, 1992) (No. 91-522) (arguing that Saudi Arabia was immune from intentional injury suit pursuant to the Foreign Sovereign Immunities Act).

The most salient fact, which OPR dismisses, is that both of Judge Bybee's deputies assigned to the matter told him that he could properly sign the memos as written on the date that they were due. Report at 63. That should be enough to foreclose any inference of recklessness. It is also undisputed that *no one* ever told Judge Bybee during the course of the three month review process that the advice was wrong or that he should not issue these memoranda. As set forth below, Section II.D, *infra*, more than a dozen Executive Branch lawyers agreed with the Bybee Memos' core conclusions. OPR nevertheless concludes that Judge Bybee "should have known about the serious flaws in the memoranda" because Philbin "voiced ... doubts" about certain portions of the Bybee Memo that he viewed as "*dicta*." Report at 257. But Philbin's "doubts" were hardly the type that would have given Judge Bybee cause to question the competence or candor of the memoranda. Philbin's comments would not give rise to an inference of negligence, let alone recklessness.

To start, OPR offers no evidence that Philbin expressed any concerns to Judge Bybee or anyone else related to many aspects of the advice that OPR now criticizes, including the Classified Bybee Memo that sets forth the analysis and conclusions authorizing use of the specific techniques in the interrogation of Abu Zubaydah. OPR instead identifies misgivings limited to the following issues, which did not even impact the conclusions, and certainly did not raise ethical concerns.

Philbin believed that the use of the medical benefits statute to construe the definition of "severe pain" was not very useful. *Id.* at 57. OPR does not indicate, however, whether Philbin ever raised this issue with Judge Bybee. Instead, OPR states that Philbin explained to Yoo that he did "not like" use of the statute and found it "imprudent to use in this context." *Id.* But Philbin also confirms that he believed that it was permissible, as a matter of legal reasoning, to seek guidance from these statutes. Indeed, he defended this feature of the Bybee Memo when it was later criticized by Judge Bybee's successor. *Id.* at 130. Philbin argued that the health benefit statutes could "shed light" on a lay person's understanding of severe pain. *Id.* at 130 n.103.

Philbin also told OPR that he was "concerned" with the specific intent analysis to the extent it "could be read" to exonerate interrogators who inflict severe pain with the motive of eliciting information. *Id.* at 57. Philbin recalls discussing this concern with Yoo, who responded by ensuring him that Michael Chertoff, the Assistant Attorney General of the Criminal Division, had reviewed the memo. *Id.* at 57-58. Philbin "believes" that he raised this concern with Judge Bybee as well. *Id.* at 168. Judge Bybee does not doubt Philbin's veracity, but does not recall the conversation. If Judge Bybee had properly understood the precise nature of Philbin's concern, however, he believes that he would have added clarifying language to eliminate any ambiguity. Such a sentence would have been fully consistent with the analysis set forth in both memos. As

explained in detail in Section IV.A.2, *infra*, the actual analysis used in the Classified Bybee Memo, as well as all of OLC's communications with the CIA concerning the specific intent element, demonstrate that the CIA did not actually construe the memo to mean that a motive to acquire information would be exculpatory. Judge Bybee further confirmed to OPR in his interview that he does not read the memos to adopt this view of the law and does not believe that OLC intended to convey that view at the time. Bybee Tr. at 58-59.

With respect to the Commander-in-Chief section, Philbin recalls telling Yoo that it was "aggressive" and "not necessary to the analysis"—not "plainly wrong" or unprofessional. Report at 58. Philbin said he explained his concern to Judge Bybee "on the evening the opinions were signed." [redacted] OPR is not clear about what Philbin said to Judge Bybee to explain his "misgivings about the wisdom of including [this] section[]." Report at 62. Even if Philbin used the term "aggressive" when describing misgivings about the necessity of the section (*id.* at 58), that word is hardly synonymous with "unethical advice." Telling Judge Bybee that the section went "a step beyond" what OLC had concluded in the past and that it was "superfluous" is a far cry from warning him that the memo may not satisfy ethical duties of competence or candor. *Id.* Nor does OPR state that Philbin ever expressed disagreement with the view that the statute may not be constitutional as applied to an interrogation ordered by the President in defense of the nation. In fact, that core feature of the Commander-in-Chief analysis in the Bybee Memo—which reflected John Rizzo's interpretation of the section—was never actually repudiated by Judge Bybee's successors. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Deputy Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. § 2340-2340A* at 2 (Dec. 30, 2004) ("Levin Memo") (noting that the memo eliminated the Commander-in-Chief discussion because it was—and remains—"unnecessary"); Bradbury 2009 Memo at 2-4 (identifying statements OLC disavowed but not including any passage explicitly referencing interrogations ordered by the President).

Philbin's concerns about the section of the Bybee Memo discussing possible common law defenses also fall far short of ethical warnings. OPR does not say that Philbin ever told Judge Bybee that this section was wrong or poorly reasoned or lacking in candor. Rather, Philbin described the objectionable material as "dicta" that he would "prefer to delete." Philbin Submission at 4. Philbin recalls informing Judge Bybee on the evening the opinions were signed that the defenses section was "unnecessary and unwise because the primary conclusion of the opinions was that the specific conduct OLC had been asked to analyze did not violate the statute." *Id.* at 9.

Judge Bybee does not recall Philbin's misgivings about the inclusion of the two sections relating to possible defenses. He only recalls, which OPR does not dispute, that everyone in the room on the evening he signed the opinions agreed that he could appropriately do so. Nor is it surprising that Judge Bybee would not recall Philbin's expression of his views on this limited set of issues. Debate among OLC attorneys is standard fare and colleagues frequently express "concerns" to one another, particularly on complicated issues. Regardless, it is apparent that Judge Bybee had a perfectly good reason for declining to adopt Philbin's suggestion to delete these unnecessary sections. OPR found that "some number of attendees" at a July 16, 2002 meeting at the White House requested OLC to include them in the analysis, and John Yoo agreed to add the sections. Report at 52. Although Judge Bybee did not play a part in the decision to add the two sections to the draft, he recognized the value of answering the inevitable question

"What if a court disagrees with OLC's interpretation of the statute?" He questioned in his own mind whether the sections (particularly the Commander-in-Chief section) were sufficiently fulsome, but he did not want to delay the opinion or give disproportionate emphasis to questions that were not central to the question at hand. In Judge Bybee's view, even though the sections were merely advisory, and did not form the basis for OLC's conclusion that the proposed interrogation was lawful, the client was entitled to the analysis when requested. There is surely nothing reckless about answering questions a client asks.

Moreover, the most important feature of Philbin's account for the purposes of this ethics inquiry is his confirmation that he advised Judge Bybee that he could sign the memoranda without further revisions because he "agreed that the ten specific practices approved in the Classified Bybee Memo were lawful, and the unnecessary portions of the Bybee Memo did not affect that conclusion." Report at 63. Philbin explained that "[n]one of these concerns ... affected the outcome on the important question that OLC actually had to answer for the CIA: namely, whether the ten specific interrogation practices were lawful" and "[n]one of the conclusions about the legality of specific practices in the Classified Bybee Memo turned on the portions of the Bybee Memo that caused [him] concern." [redacted] In addition, Philbin concluded that the inclusion of the unnecessary analysis did not pose any genuine risk of harm. His submission explains that "there was no reasonable basis to expect that the background analysis in the Bybee Memo would be used to justify any operational activity apart from the specific practices described in the Classified Bybee Memo." *Id.* at 10. Philbin reasoned that given the caution reflected in the CIA's request for advice on a range of techniques, the precise description of the techniques in the Classified Bybee Memo, and OLC's express warning not to deviate from the advice, it was reasonable to assume "that the CIA would not be engaging in any interrogation practices that materially departed from the specifics described in the Classified Bybee Memo." *Id.* Further, Philbin added, "given the strict compartmentation of the CIA program, there was no reason to think that advice given to the CIA would have any use outside that agency." *Id.*; *see also* Bybee Tr. at 74-75 (noting that the Bybee Memo was "so closely held with us that [distributing it to non-attorneys in the field] would have struck me at the time as ... sort of a non starter, a non sequitur"); Bybee Tr. at 89 ("[The Bybee Memo] was very, very closely held, even inside my office. I would be very, very surprised, very disappointed if it was distributed outside of the narrow range for which it was intended.").

In short, OPR does not find that Philbin ever told Judge Bybee that the memo was actually wrong, let alone incompetent. OPR instead rests its conclusion of recklessness on its finding that Philbin told Judge Bybee "that the [Commander-in-Chief and defenses] sections were unnecessary, but that he could sign the memoranda." Report at 63. This is simply not the kind of "warning" that would cause a supervisor to question the competence or candor of the opinions. Philbin could not have ethically advised Judge Bybee to sign the memos if he had ethical concerns about them. Indeed, OPR properly finds that Philbin acted ethically. *Id.* at 256-57. But if Philbin's concerns did not put *Philbin* on notice of an ethical lapse, by definition, they could not put Judge Bybee on notice.

C. It Would Have Been Irresponsible for Judge Bybee to Hold the Opinions for Further Refinement in the Midst of a National Crisis

In OPR's view, Judge Bybee should have responded to Philbin's concerns, which were conveyed to him on the evening of August 1, by disregarding the CIA's urgent deadline so that he could "conduct[] independent research" and "read[] the authorities" in order to verify that the memos presented a "thorough, objective, and candid view of the law." Report at 257. Yet Philbin, the lawyer who best understands the nature of the concerns that he conveyed, has categorically rejected OPR's view that Judge Bybee should have withheld issuance of the memos pending further review. As Philbin explains in powerful terms, withholding the memos on August 1, 2002 would have been irresponsible because the advice the CIA had requested concerning the ten specific practices had been finalized and withholding that advice would have stopped the CIA's efforts to prevent threatened terrorist attacks in the United States.

OLC's decision regarding the memos "had to be made" on the night of August 1, 2002. Philbin Submission at 4. As Philbin explained, [redacted] "It was expected to a certainty that if the intelligence community did not unravel this plot in time, hundreds of Americans would be killed." *Id.* at 4. Meanwhile, the detention of Jose Padilla in May 2002 was a "particularly alarming development" because he was a U.S. citizen with a U.S passport and "[r]eliable intelligence" indicated that he had met with high ranking al Qaeda leaders and "was part of a plot either to blow up apartment buildings or to detonate a radiological 'dirty bomb.'" *Id.* at 4, 7. "It was unknown whether other al Qaeda operatives engaged in related or separate plots had already entered the country." *Id.* at 4. Because of these fears, known as the [redacted] "the intelligence community was gripped with an all-encompassing anxiety" [redacted] Indeed, as Philbin recounts, "[c]oncern for an attack in Washington was so high that leadership components in the Department, including OLC, were required to have a person staffing the off-site facility every business day, in case an attack disrupted operations at the Main Justice Building." *Id.*

As Philbin explained to OPR, "the two Bybee memos [were] finalized under a tight time deadline" in response to these national security concerns. *Id.* at 8. Once the CIA imposed a "hard deadline," "finalizing the opinions came down to a very intense crunch time over three to four days." *Id.* "The CIA insisted that they had to have a signed memo on the evening of August 1, 2002, because a team was waiting overseas to proceed with the investigation." *Id.* at 8. On the night of August 1st, even though it was already 9 or 10 p.m., Philbin reiterated the directive that the memos "ha[d] to be signed" that night. Report at 63. With such an "urgent need" to provide an answer, Philbin "concluded it would not be prudent to delay [OLC's] advice—and thereby delay the interrogation" in order to pursue the discussion of issues that were "unnecessary to answering the critical question" regarding the ten specific practices requested by the CIA. [redacted]

OPR never actually finds that Philbin's account of the events is inaccurate. To the contrary, it was corroborated by others. For example, John Bellinger, Legal Advisor to NSC,

told OPR that [redacted] that "the CIA did not believe that they could get the information necessary to prevent the attacks and save American lives" without the use of harsh techniques that they believed to be "safe and effective." Report at 38. Instead of refuting these facts, OPR simply dismisses their relevance because "situations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear." *Id.* at 254.

But surely situations of "great ... danger" would justify Philbin's judgment, and that of Judge Bybee, that delays for the purpose of pondering over unnecessary portions of the memoranda would be unwarranted. In fact, OPR does conclude that Philbin acted ethically when he advised Judge Bybee that he could sign the memos—a conclusion which is unquestionably correct. Yet OPR does not explain why the time pressures that excuse Philbin's decision to put aside his qualms regarding the memos do not apply with at least equal force to Judge Bybee, who was told about the issues the evening the opinion was due. As Philbin told OPR, "[u]nder the circumstances, urging that the opinion had to be delayed, that an interrogation had to be derailed, and that precious time had to be lost in order to resolve an argument over dicta would certainly have raised questions about Mr. Philbin's judgment." [redacted] As Philbin explained in a telling hypothetical:

> [C]onsider what the analysis of Mr. Philbin's conduct would be now if he had somehow prevented the issuance of the opinions, but events had turned out differently. What if the [redacted] threat had materialized in an attack that killed several hundred Americans? What would the Bi-partisan Congressional Commission appointed to investigate the failure to prevent the attack have said about Mr. Philbin's conduct if their investigation showed that the CIA had in custody an individual whom they believed could have provided information to prevent the attack; that all lawyers involved had agreed at the time that specified interrogation practices to secure vital information were lawful (and, indeed, later OLC analysis confirmed that the practices were lawful); but that one lawyer had prevented the CIA from gathering intelligence that would have saved American lives because he objected to dicta in a supporting memorandum *that was unnecessary to the conclusion that the specified practices at issue complied with the law?* Could any reasonable person think that the Congressional Commission would be praising Mr. Philbin's judgment if he had been that lawyer?

Id. at 23-24 n.9 (emphasis in original).[11]

The same analysis holds true for Judge Bybee. At this late stage, with the deadline at hand, Judge Bybee was hardly in a position to start the review process over in the way OPR suggests. If Philbin actually had concerns that the advice did not meet minimum ethical standards, he obviously could not and would not have counseled Judge Bybee that he could sign the memoranda.[12] After all, Philbin later showed on multiple occasions that he was willing to withhold his concurrence or advise his superiors against approving a particular opinion. Report

[11] All emphases are added unless otherwise noted.

[12] As Judge Bybee told OPR, the long-standing tradition at OLC was that "before an opinion was brought to me it also always had to go through a second deputy to read." Bybee Tr. at 12. OPR itself conceded that a "second Deputy AAG reviews every OLC opinion *before* it is finalized." Report at 39 n.41.

at 78 ("Philbin told OPR that he had concerns about the Yoo Memo and that it was issued without his concurrence."); *id.* at 141 ("Philbin said he recommended to former DAG Comey that Comey should not concur in the Bradbury Combined Effects Memo."). The fact that he did not do so on August 1 demonstrates that he did not perceive or convey a risk that OLC was crossing an ethical line or granting the CIA a blank check to use whatever interrogation methods it wanted. The gravamen of OPR's whole case against Judge Bybee is accordingly premised on a distorted interpretation of Philbin's expression of concern on August 1, 2002. *Id.* at 257.

D. Numerous High-Level Officials Reviewed And Concurred With The Memos

Judge Bybee's judgment that the memoranda fully satisfied OLC's ethical duties was also informed by the concurrence of other Executive Branch officials. As reflected in the attached chart, *see* Appendix 19, the undisputed facts show that despite the highly classified nature of the subject matter, a number of top officials beyond Judge Bybee's immediate team at OLC read and approved of drafts of the memos in part or in their entirety. Several others knew of the techniques under consideration and the basic legal arguments supporting their use. Yet there is no evidence that *any* of these individuals objected to OLC issuing the memos or raised any concerns regarding their contents with Judge Bybee. To the contrary, according to Philbin, **"[t]here was 100% agreement among officials in the Department who had been briefed (including the Attorney General, the Deputy Attorney General and the AAG for the Criminal Division) that even the harshest of the practices (waterboarding) did not constitute torture as defined in the statute."** [redacted] Rizzo confirmed that "*all of the Executive Branch lawyers* involved in reviewing the issues were satisfied that the memos reasonably concluded that the techniques at issue would not constitute torture." Rizzo Letter ¶ 3. In addition, numerous officials learned of the legal analysis after-the-fact and again ratified the memos in part or in full. OPR considers these facts "[ir]relevant" to its analysis (Report at 160), but the whole purpose of broad circulation is to provide an opportunity for review to generate objections. As OPR implicitly concedes, there were none. *Id.* at 259. And that can only be explained by the fact that the memoranda, whether they were right or wrong, obviously satisfied ethical standards.

As explained below, in addition to the OLC lawyers, the following officials reviewed and concurred in the memos or many of its core conclusions, either before they were issued or in the review that followed their issuance. Undoubtedly, many other attorneys—including, perhaps, dozens of DOJ attorneys—would have had some role in advising these officials. *See id.* at 130 (noting that "[v]irtually all of OLC's attorneys and deputies were included in the review process" of the Levin Memo).

Attorney General **John Ashcroft**

Deputy Attorney General **Larry Thompson**

Assistant Attorney General, Criminal Division, **Michael Chertoff**

Counselor to the Attorney General **Adam Ciongoli**

White House Counsel **Alberto Gonzales**

Deputy White House Counsel **Timothy Flanigan**

Counsel to the Vice President **David Addington**

Acting CIA General Counsel **John Rizzo**

Legal Advisor to the NSC **John Bellinger**

CIA General Counsel **Scott Muller**

Assistant Attorney General, OLC, **Jack Goldsmith**

Acting Assistant Attorney General, OLC, **Dan Levin**

Deputy Attorney General **James Comey**

Acting Assistant Attorney General, OLC, **Steven Bradbury**

Attorney General John Ashcroft. Ashcroft was briefed by Judge Bybee, received "regular briefings" about the opinion-writing process from Yoo, and received at least one draft of both the Bybee and Classified Bybee Memo toward the end of July. Report at 49, 60. Ashcroft may not have read the Bybee Memo but did read the Classified Bybee Memo and "engaged Yoo in a vigorous discussion of the memorandum's legal reasoning." *Id.* at 60. Ashcroft was reportedly "ultimately satisfied with the opinion's reasoning and analysis" and concluded that Yoo's position regarding waterboarding was "aggressive, but defensible." *Id.* National Security Advisor Condoleezza Rice, in fact, indicated that she would authorize the techniques as long as Ashcroft provided a personal opinion affirming their legality. *Id.* at 61.

Ashcroft generally recalled that he "was made aware that a legal opinion relating to the interrogation of al-Qaeda detainees was being prepared by OLC, that a draft or drafts were provided to [his] office, and that [he] was briefed on the general contours of the opinion's substantive analysis and on its conclusions, and that [he] approved its issuance." DOJ Hearing, Part V at 5 (statement of John Ashcroft). Later, at a meeting [redacted] Ashcroft "forcefully reiterated the view of the Department of Justice that the techniques employed by CIA were and remain lawful and do not violate either the anti-torture statute or US obligations under the [CAT]." Report at 107-08. At the same meeting, Ashcroft and Philbin gave a "lengthy explanation of the law and the applicable legal principles" regarding the interrogation program. *Id.* at 109. [redacted] Ashcroft himself "had reviewed and approved them as lawful under US law." *Id.* at 110. A year later, in a letter to John McLaughlin (Acting CIA Director) on July 22, 2004, Ashcroft again confirmed that all of the EITs described in the Classified Bybee Memo, putting waterboarding aside, complied with U.S. law. *Id.* at 124. (Review of the waterboard was ongoing due to concerns that the CIA had exceeded OLC's guidance. *See infra* Section II.F).

[13] [redacted]

Deputy Attorney General Larry Thompson. Yoo recalled briefing Thompson "at some point." Report at 60 n.59. Philbin expressed his understanding that Thompson was one of the DOJ officials who "had been briefed" and was in "100% agreement" that the practices in question did not constitute torture. [redacted] When the memoranda were complete, Yoo instructed [redacted] to deliver copies to Thompson's office. Report at 64.

Assistant Attorney General, Criminal Division, Michael Chertoff. Yoo briefed Chertoff on the CIA's proposed interrogation program as early as April 2002. Report at 42. After Philbin raised concerns regarding the Bybee Memo's specific intent analysis, Yoo asked Chertoff to review the memorandum. *Id.* at 57. Although there is some dispute as to the care with which Chertoff and Yoo discussed the memo, Chertoff remembered reading it and making two comments regarding the specific intent section. *Id.* at 58. With the caveat that he "had not checked the memorandum's legal research and that he assumed it was correct," Chertoff told Yoo that "although the discussion of specific intent might be correct 'in law school,' he would not want to defend a case in front of a jury on that basis." *Id.* at 58-59. Additionally, Chertoff told Yoo that "the more investigation into the physical and mental consequences of the techniques they did, the more likely it would be that an interrogator could successfully assert that he acted in good faith and did not intend to inflict severe physical or mental pain or suffering." *Id.* at 59. (As discussed below, Section II.E, *infra*, the final memos highlighted these observations.) With regard to the rest of the Bybee Memo, Chertoff told OPR that he did not look at the defenses section "particularly closely," and recalled that although he was "not in a position to sign onto [it]," he did not "disagree" with the Commander-in-Chief section. Report at 59.

[redacted]

Counselor to the Attorney General, Adam Ciongoli. Like Ashcroft, Ciongoli received "regular briefings" from Yoo and received drafts of both memos in late July. *Id.* at 49, 60. On August 1, 2002, Judge Bybee, Yoo, and [redacted] met with Ciongoli and "described the analysis and conclusions of the Bybee Memo." *Id.* at 62. Although Ciongoli did not recall reading the opinion or giving any comments, Yoo told OPR that Ciongoli was in the room when Bybee signed the opinion and "reviewed the last draft and continued to make edits until the last minute." *Id.* [redacted] also recalls Ciongoli suggesting changes to the Classified Bybee Memo at the final meeting. *Id.*

[redacted]

White House Counsel Alberto Gonzales. Gonzales met with Yoo and [redacted] on multiple occasions during the drafting process. On July 12, 2002, for example, Yoo and [redacted] "summarized the memorandum's conclusions" and provided Gonzales with a copy of the draft for review. *Id.* at 46. Several days later, on July 16, 2002, Yoo and [redacted] met again with Gonzales. While none of the individuals recall what was discussed, Yoo recalled providing Gonzales with a copy of his July 13, 2002 letter to John Rizzo discussing the specific intent element of the anti-torture statute. *Id.* at 50. [redacted] reportedly "agreed that the use of the water board [with respect to Abu Zubaydah and Khalid Sheik Muhammed] was well within the law, even if it could be viewed as outside the 'safe harbor.'" *Id.* at 105. At his confirmation hearing in 2005, Gonzales could not remember "whether or not [he] was in agreement with all of the analysis" of the Bybee Memo, but testified that he did not "have a disagreement with the conclusions then reached by the Department." *Confirmation Hearing of Alberto Gonzales* (2005).

Deputy White House Counsel Timothy Flanigan. Although it could not identify which meetings Flanigan attended, OPR believes it is possible that he joined Gonzales during one or more of his discussions at the White House with Yoo and [redacted] Report at 46, 50, 52. According to Flanigan, he was present at two briefings by OLC regarding the interrogation memos, during which he "probably asked some questions about the analysis." *Confirmation Hearing on the Nomination of Timothy Flanigan*, 109th Cong. (2005) (statement of Timothy Flanigan). Flanigan elaborated: "I think I may have asked questions about the statutory analysis to be sure that I understood what it was they were after. As a former head of the Office of Legal Counsel, my principal concern would have been to be sure that they had the statutory analysis correct, and that it sounded correct. I obviously didn't have the time or the resources or the role to redo the research that they were doing, but I just needed to hear them talk about the statute to be clear that this was something that made sense." *Id.* Flanigan also confirmed in a declaration submitted to OPR that he "believe[s] that [the Bybee Memos'] essential analysis is sound." Flanigan Decl. ¶ 3.

Counsel to the Vice President David Addington. Like Flanigan, Addington likely joined Gonzales during at least one of his discussions with Yoo and [redacted] Report at 46, 50, 52. In addition, Addington testified before Congress that Yoo added the Commander-in-Chief and defenses sections to the Bybee Memo because "that is what his client asked him to do." DOJ Hearing, Part III at 42 (testimony of David Addington). Addington testified that he considered himself "essentially as the client" given his role in the issues presented. *Id.* Addington also attended the March 24, 2003 meeting at which the group discussed the administration's legal posture regarding EITs." Report at 99.

Acting CIA General Counsel John Rizzo. Attorneys at the CIA were actively involved at every stage of OLC's opinion-writing process. The CIA IG Report confirmed that the CIA's [redacted]

Office of General Counsel "conducted independent research and consulted extensively" with DOJ and NSC. CIA IG Report ¶ 6. Rizzo, a thirty-year veteran of the agency, said that he "had substantial personal involvement in the process." Rizzo Letter ¶ 2. He told Congress that he was aware of the Bybee Memo when it was issued and "did not, certainly, object to the memo." *Nomination of John A. Rizzo to be General Counsel of the Central Intelligence Agency: Hearings Before the Select Comm. on Intelligence*, 110th Cong. 26 (2007) (testimony of John Rizzo). Rizzo further confirmed to OPR that he concurred in OLC's view that the techniques were lawful even though "close to the line." Report at 37 n.36. He also confirmed that he did not "offer any specific objections to the analysis." *Id.* at 51.

[redacted]

Legal Advisor to the NSC, John Bellinger. Like Rizzo, Bellinger was very involved in reviewing and approving the legality of the proposed interrogation techniques under the anti-torture statute in 2002. The day after the opinions were signed, a CIA lawyer sent a cable confirming that the CIA had "extensive discussions" with Bellinger, as well as with DOJ, and received confirmation that "the use of [the EITs] is lawful." *Id.* at 65. Although Bellinger told OPR that he had a "turning point" in May of 2005 when OLC opined that the techniques were not cruel, inhuman, or degrading under Article 16 of the CAT (*id.* at 150), there is no indication that Bellinger ever raised any objections to the conclusions set forth in the Bybee Memos.[17] To the contrary, Rizzo confirmed that Bellinger "did not express reservations about the conclusions set forth in the memos" and "was firmly on board with OLC's assessment that the techniques at issue did not meet the restrictive definition of torture set forth in the statute." Rizzo Letter ¶ 3.

From the outset, Bellinger played a central role in the review process. He hosted the initial meeting with OLC and the CIA on April 16, 2002, and assumed responsibility for briefing NSC Advisor Condoleezza Rice, Deputy NSC Advisor Stephen Hadley, and White House Counsel Alberto Gonzales. Report at 40, 42. He continued to attend meetings during the summer (*id.* at 46, 61), including the July 13, 2002 meeting, where Yoo provided him with a copy of the draft memorandum. *Id.* at 47. Bellinger also attended an NSC meeting with Rice, Hadley, and [redacted] (CIA Director Tenet's Chief of Staff) the day before the memos were due, which included a discussion of the proposed interrogation of Abu Zubaydah. *Id.* at 61.

[17] OLC was never asked to address Article 16 in the Bybee Memos. *Cf.* Bradbury Techniques Memo at 3 n.5 (noting that OLC had not yet addressed the possible application of Article 16 of the CAT).

When the CIA sought reaffirmation of the legality of the interrogation program the following year, Bellinger attended the July 29, 2003 meeting where Ashcroft "forcefully reiterated" the legality of the interrogation techniques. *Id.* at 106. In addition, Bellinger actively participated in the administration's response to the Leahy letter concerning the humane treatment of detainees. Bellinger attended the White House meeting on June 20, 2003 to discuss the letter, edited the response, and agreed that the use of the waterboard on Khalid Sheik Muhammed and Abu Zubaydah was "well within the law." *Id.* at 104-05.

CIA General Counsel Scott Muller. As CIA General Counsel from October 2002 through 2004, Muller played a significant role after OLC issued the Bybee memos. First, as OLC was drafting the Yoo Memo in 2003, Muller wrote [redacted] that he had "read and reread the DOJ opinion and we are fine." *Id.* at 79. Muller noted that he "gave John Yoo some other edits to eliminate or tone down any reference to the need for necessity as a defense." *Id.* Second, Muller was instrumental in the development of the "Bullet Points" summarizing OLC's legal advice to the CIA. *Id.* at 100-03. Muller told OPR that both OLC and CIA attorneys "formally concurred" on the Bullet Points on June 4, 2003. *Id.* at 102. [redacted] In the subsequent discussion, Muller explained that the instances of detainee deaths were unrelated to the interrogation program. *Id.* at 109. Muller also gave a description of the CIA's waterboard technique, which reportedly prompted Ashcroft to say that the CIA was "well within" the scope of OLC's legal advice. *Id.* [redacted] reiterated the CIA's reliance on the Bullet Points at the meeting itself, and agreed afterward with Bellinger and [redacted] that the CIA's use of the waterboard remained "well within the law." *Id.* at 104-05.

Assistant Attorney General, OLC, Jack Goldsmith. Judge Bybee's successors at OLC continued to approve the CIA's interrogation techniques relying primarily on arguments and authorities set forth in the Bybee Memos. OPR is fixated on select criticisms of portions of the memos without giving any credence to repeated reaffirmations of the conclusions. It bears emphasis that Goldsmith, who was obviously not reticent to withdraw memos that he questioned, chose not to withdraw the Classified Bybee Memo. Goldsmith instead expressly reaffirmed the legality of nine of the ten techniques and only suspended approval of the waterboard pending review of allegations that CIA interrogators had exceeded important limitations outlined in OLC's advice. *Id.* at 115, 123.

Goldsmith's harshest criticisms were actually directed at the 2003 Yoo Memo. *See id.* at 112. While there is no ethical violation in the Yoo Memo, OPR bases its findings of misconduct exclusively on the Bybee Memos. *Id.* at 255 (contending that Judge Bybee assumed responsibility for the ethical soundness of the Bybee Memos when he reviewed and signed them). Although there was substantial overlap between the memos, many of Goldsmith's criticisms were directed at portions that were not included in the Bybee Memos. *Id.* at 117-21. Indeed, OPR elsewhere recognizes that Goldsmith characterized the "*Yoo Memo*"—not the Bybee Memos—as a "'blank check' to create new interrogation procedures without further DOJ review or approval." *Id.* at 112. Goldsmith explained that the Yoo Memo, unlike the Bybee Memo, was not issued in tandem with the Classified Bybee Memo that included a series of

limitations on the CIA's program. Goldsmith was concerned that the Yoo Memo, standing alone, "could have been used to justify many additional interrogation techniques." *Id.* at 112. Philbin similarly told OPR that he "was not concerned that the Bybee Memo would be used independently to approve further interrogation practices," but that the Yoo Memo "presented a different picture" because "there was no document from OLC like the Classified Bybee Memo limiting the advice to DOD." [redacted] Thus, OPR overstates the scope of Goldsmith's criticisms of the Bybee Memo (*e.g.*, Report at 160) and places no weight whatsoever on Goldsmith's decision to preserve the Classified Bybee Memo and to reaffirm its core conclusions.

Acting Assistant Attorney General, OLC, Dan Levin. After Goldsmith resigned, Levin took over as head of OLC and approved use of the waterboard on an individual detainee [redacted] within a matter of weeks of the CIA's request.[18] Letter from Levin to Rizzo (Aug. 6, 2004) (Appendix 15). Levin stated that the question was a "close and difficult" one, but concluded that the technique was lawful, noting in his letter to Rizzo that OLC would "supply, at a later date, an opinion that explains the basis for this conclusion." *Id.* Like Goldsmith, Levin elected not to withdraw the Classified Bybee Memo and in fact approved the use of three new techniques (dietary manipulation, nudity, and water dousing) on individual detainees in addition to those previously addressed by OLC. *See* Letter from Levin to Rizzo (Sept. 6, 2004); Letter from Levin to Rizzo (Sept. 20, 2004) (Appendix 15). When Levin replaced the Bybee Memo in the wake of public criticism, he followed a process that included "[v]irtually all of OLC's attorneys and deputies," as well as comments from Paul Clement (Solicitor General), Philbin, and others. Report at 130. The final product, however, included many of the same arguments and authorities as the Bybee Memo, adopted standards with minimal differences, and in many respects provided the CIA with far less information about the most relevant case authority. Even as Levin replaced the Bybee Memo, he reaffirmed the advice OLC gave in the Classified Bybee Memo. Levin Memo at 2 n.8. Moreover, the Levin memo also includes many of the same "errors" and "omissions" that OPR has allegedly discovered in the Bybee Memo.[19]

Deputy Attorney General James Comey. Comey joined Ashcroft at a NSC Principals Meeting on July 2, 2004 to discuss the possible interrogation of CIA detainee Janat Gul. Report at 123. Ashcroft and Comey conferred with Goldsmith after the meeting, leading to Goldsmith's letter to Muller approving all of the techniques described in the Classified Bybee Memo except

[18] The waterboarding technique that Levin authorized was, in fact, far more intensive than the procedure outlined in the Classified Bybee Memo. Whereas the Classified Bybee Memo cautioned against substantial repetition (Classified Bybee Memo at 2), [redacted]

[19] Notably, even concurring officials often disagreed among themselves about the proper analysis, illustrating why these matters represent fair ground for debate. Philbin, for example, had "spirited discussions" with Levin regarding the proper analysis of severe pain, defending the analysis from the Standards Memo. Report at 130. Levin, in turn, thought that Bradbury's Article 16 Memo was "just wrong." *Id.* at 150. These debates further highlight the danger of allowing analytical disagreements to form the basis for ethics investigations.

for the waterboard. *Id.* Comey later reviewed and approved the Bradbury Techniques Memo,[20] which expressly concluded that the use of the waterboard in the manner described did not constitute torture in violation of the statute. *Id.* at 130, 141. Although Comey withheld his concurrence for the Bradbury Combined Techniques Memo at Philbin's recommendation, his decision was based primarily on the fact that the memo was inappropriately "theoretical" because it was "not tied to a request for the use of specific techniques on a specific detainee." *Id.* at 141.

Acting Assistant Attorney General, OLC, Steven Bradbury. In 2005, Bradbury drafted a series of opinions that reaffirmed—indeed, even expanded upon—the analysis set forth and techniques approved in the Bybee Memos. The Bradbury Techniques Memo, for instance, "found the CIA's proposed use of thirteen EITs, including forced nudity, extended sleep deprivation,[21] and the waterboard to be lawful." *Id.* at 141. Notably, Bradbury approved the use of shackling to keep detainees awake and determined that stress positions were allowable because they were "limited by the individual detainee's ability to sustain the position." Memorandum from Steven G. Bradbury for John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of A High Value al Qaeda Detainee*, at 33, 34 (May 10, 2005) ("Bradbury Techniques Memo"). Like Levin, Bradbury also repeated much of the analysis OPR finds objectionable, particularly with respect to the element of specific intent. *Id.* at 27-28.

All in all, this history demonstrates that from the earliest stages attorneys throughout the executive branch—including DOJ, the White House, the NSC, the CIA, and beyond—reviewed, approved, and ratified the advice contained in the Bybee memos. OPR easily quotes authors, pontificators, and pundits, but fails to acknowledge that *every* high-ranking government official—charged with making actual decision—agreed with the memos' core conclusions.

If the memos' conclusions were as untenable as OPR alleges, surely some of these sophisticated lawyers would have counseled Judge Bybee not to issue these opinions. They did not. OPR properly finds that none of them engaged in misconduct. Report at 259. But the same conclusion applies with equal measure to every DOJ lawyer involved in responding to these difficult questions.

E. The Memos Were Limited In Scope And Adequately Disclosed Risks And Uncertainties Which the CIA Understood

OPR asserts that OLC's legal advice in the Bybee Memo was "an aggressive interpretation of the torture statute," that was "drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs." Report at 226, 230. That is in itself a rather surprising conclusion since OPR declines to determine whether that

[20] We refer to the Memorandum from Steven G. Bradbury for John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of A High Value al Qaeda Detainee* (May 10, 2005) as the "Bradbury Techniques Memo."

[21] [redacted]

reading of the statute was wrong, let alone obviously wrong (*id.* at 160), and never explains how the anti-torture statute could have been properly interpreted to prohibit the proposed conduct. OPR also repeatedly finds that the Bybee Memos did not adequately inform the CIA of risks and uncertainties associated with the proposed course of conduct. *See, e.g., id.* at 175, 231. Those conclusions are not supported by the actual language of the memos or the evidence concerning the CIA's understanding of the risks disclosed throughout their "extensive discussions" with DOJ. *Id.* at 65. Indeed, OPR's conclusions are directly contradicted by the CIA General Counsel at the time, who confirmed that "the memos adequately informed [him] about the relevant risks and provided [him] with the information that [he] needed to advise the CIA." Rizzo Letter ¶ 4.

OPR studiously ignores or discounts the limiting language that pervades both Bybee Memos, characterizing key qualifications as "cursory" or insufficient in light of documents Judge Bybee never reviewed or was even aware of. Report at 175.[22] And OPR never attempts to square its conclusion with the fact that the Bybee Memo was issued in tandem with the Classified Bybee Memo, an opinion Goldsmith described as "hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question." *Id.* at 122; *see also* Bybee Tr. at 115 (noting that the two memos "were intended to be read" together). OPR has no explanation for why OLC's attorneys would produce such a "hyper narrow" document if, as OPR contends, they "were aware of the result desired by the client and drafted memoranda to support that result." Report at 227. As demonstrated by the attached chart, *see* Appendix 18, any fair reading of the Bybee Memos in their entirety reveals that both memos contained ample cautionary and conditional language that limited their actual conclusions to the question at hand: whether the use of the ten specific interrogation techniques identified by the CIA for use on a single detainee would violate §§ 2340-2340A. And the undisputed facts confirm that the CIA understood the risks.

First, as shown in Appendix 18, the Bybee Memo set forth OLC's interpretation of the statute in careful terms, attempting to draw a concrete and understandable line between those extreme activities that constitute torture and other, lesser forms of harsh treatment that might constitute cruel, inhuman, and degrading conduct:

- In analyzing the specific intent element of the statute, OLC described certain arguments as "theoretical" in nature (Bybee Memo at 4, 5), hardly a sensible characterization for an "aggressive interpretation" of the statute. Report at 230. This section also stated not once, but twice (and probably as a direct result of Chertoff's comments) that a jury could infer a defendant's specific intent, and indeed would "in all likelihood" do so in instances where the defendant knew that his actions would produce the prohibited result. Bybee Memo at 4, 5.

- In the severe pain section, OLC did not hide the fact that it was reasoning by analogy in referencing the health care statutes; it acknowledged straight away that those statutes "address a *substantially different subject* from Section 2340," but found that "they are nonetheless helpful for understanding what constitutes severe physical pain." *Id.* at 6. OLC

[22] For example, OPR faults Judge Bybee for errors and omissions it thinks are in the Bullets Points. Report at 161, 175, 232. That memo was issued in June 2003, months after Judge Bybee left the Department. *Id.* at 100-02, 165. To this day, Judge Bybee has not seen the Bullets Points.

also did not limit the kinds of disorders that would satisfy the prolonged harm requirement for mental pain and suffering under the statute. Rather, it noted that examples such as chronic depression "are in no way intended to be an exhaustive list," but are "merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that 'disrupt[s] profoundly the senses or the personality.'" *Id.* at 11-12.

- In the section on U.S. Judicial Interpretation, OLC explicitly cross-referenced an appendix of cases involving conduct (including seven typical acts of violence) which courts have determined amounted to torture. *Id.* at 24. OLC cautioned that "[w]hile we *cannot say with certainty* that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law." *Id.* (second emphasis in original).

- In the Commander-in-Chief section, OLC repeatedly references the Commander-in-Chief power as it pertains to the *President* and any orders he may give regarding interrogation of enemy combatants. *Id.* at 31, 39.

- Finally, the Standards Memo emphasizes on numerous occasions that any defenses that "might be available" would only "potentially" eliminate criminal liability. *Id.* at 39; *see id.* at 1 ("*possible* defenses"), 2 ("necessity or self-defense *may* justify interrogation methods"), 40 ("necessity defense *may* prove especially relevant"), 46 ("necessity or self-defense *could* provide justifications").

Second, the Classified Bybee Memo was even narrower in scope, examining the ten specific interrogation techniques while repeatedly cross-referencing the Bybee Memo. Classified Bybee Memo at 9, 10, 11, 12, 13, 15, 16, 17. Critically, the aspects of the Bybee Memo that OPR finds most objectionable—the so-called information motive, the Commander-in-Chief limitation, and the common law defenses—are not incorporated in *any manner whatsoever* in the Classified Bybee Memo. Rather, OLC stated (accurately) that "[t]o violate the statute, an individual must have the specific intent to inflict severe pain or suffering." *Id.* at 16. In addition, OLC placed numerous restrictions on the CIA's proposed program itself, making clear that its advice was "limited to the[] facts" presented to it, and that its advice "would not necessarily apply" "[i]f these facts were to change." *Id.* at 1. For example, OLC limited the duration of the enhanced interrogation phase, stating that it was expected to last "no more than several days" and in any event no more than thirty days. *Id.* It also included time restrictions on the specific techniques. Confinement of the detainee, for example, could not last more than two or eighteen hours, depending on the size of the space. *Id.* at 2-3. The waterboarding technique in particular was highly circumscribed. In fact, use of the waterboard was limited to no more than 20 minutes during any application. During that period, the detainee's air flow would be restricted for at most 20 to 40 seconds at a time, and after the 20 to 40 seconds, the detainee must be "allowed to breathe unimpeded for three or four full breaths." *Id.* at 4. And there were restrictions on repetition; OLC expressed its understanding that although some techniques might be used more than once, "repetition will not be substantial because the techniques generally lose

their effectiveness after several repetitions."[23] *Id.* at 2. Along with these parameters, OLC required that a specially-trained medical expert, with the authority to terminate the interrogation if necessary to prevent severe physical or mental harm, had to be present at all times. *Id.* at 4, 16. The Classified Bybee Memo ended with a final note of caution, "emphasiz[ing] that this is our best reading of the law," while noting "that there are no cases construing the statute, just as there have been no prosecutions brought under it." *Id.* at 18.

Third, the force of these cautionary statements may have been lost on OPR but they were not lost on the CIA. John Rizzo, the CIA counsel identified as a "client" on the OLC log sheet, told OPR that he understood that the issue of legality was "close to the line." Report at 37 n.36. Rizzo likewise said that he was "aware that the issues were uncertain and that there were no controlling precedents." Rizzo Letter ¶ 1. Another CIA lawyer, [redacted] confirmed his understanding the day after the memos were issued that the statute would not prohibit the techniques proposed "in light of the specific facts and circumstances" that had been described. Report at 65. And Yoo made clear to Rizzo that the CIA's due diligence to establish good faith was not a foregone conclusion but depended on "such actions as surveying professional literature, consulting with experts, or evidence gained from past experience." *Id.* at 48.

Read together, the Bybee Memos are forthright in acknowledging the complexity and uncertainty of the anti-torture statute, providing a comprehensive but adequately qualified interpretation of the various elements and the allowable interrogation techniques. The scale and scope of the limiting language in the memos belies OPR's assertion that OLC drafted them to support the result "desired by the client." *Id.* at 227. As OPR noted, the CIA was understandably "seeking maximum legal protection for its officers" (Report at 226), but OLC established key legal and factual boundaries that fell far short of the advance declination the CIA requested from the Criminal Division.[24] *See* Rizzo Letter at ¶ 5 (noting that once Rizzo was "advised that the Criminal Division would not issue an advance declination of prosecution, [he] did not pursue the issue any further.").

F. OLC's Clients Did Not Misinterpret The Legal Advice Set Forth In The Memos

OPR repeatedly insinuates that OLC's legal advice was open to misinterpretation and thus may in some measure be responsible for instances of detainee abuse inflicted by CIA interrogators. *See, e.g.*, Report at 233 (contending that Judge Bybee and Yoo were wrong to argue "that there was little danger of people in the field using the Unclassified Bybee Memo to justify actions that went beyond those specifically approved in the Classified Bybee Memo"). But there is no evidence that OLC's clients—the White House or the CIA—ever misinterpreted the legal advice set forth in the memos or used it to justify interrogations beyond the limits established in the Classified Bybee Memo or to shield themselves from prosecution. To the contrary, the CIA told OPR that its interrogation program "relied on the analysis provided *in the*

[23] OPR also expected the techniques "to be used in some sort of escalating fashion," rather than simultaneously, Classified Bybee Memo at 2, another important constraint on the CIA's program. [redacted] This further demonstrates that OLC was hardly a rubber stamp providing the CIA with approval for anything it wished.

Classified Bybee Memo" (*id.* at 124 n.95), and not the allegedly broad language of the Bybee Memo. *See also* Rizzo Letter ¶ 5 (in advising the CIA, Rizzo "relied on the analysis and limitations set forth in the [C]lassified Bybee Memo because it specifically addressed the application of the statute to the proposed conduct"); *id.* ¶ 3 (Rizzo was "principally concerned with the conclusions in the Classified Bybee Memo"). Moreover, Rizzo confirmed that he never interpreted the Bybee Memo to immunize interrogators so long as they had a motive to obtain information, did not cause organ failure, acted pursuant to the Commander-in-Chief power, or asserted a common law defense. *Id.* ¶ 5. And even if there were evidence of misinterpretation, OPR never actually refutes Philbin's correct assessment "that there was no reasonable basis to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63. The undisputed facts demonstrate that the risk OPR imagines never materialized because it was never a genuine risk.

First, three independent commissions investigated instances of detainee abuse and *none* concluded that OLC's legal advice or approved interrogation techniques were responsible.[25] In May 2004, the CIA Inspector General conducted an extensive investigation including substantial criticisms of the CIA program. The IG never suggested that OLC's advice had contributed in any way to abuses that it discovered. To the contrary, the IG found that OLC provided "finely detailed analysis to buttress the conclusion that Agency officers *properly carrying out EITs* would not violate the Torture Convention's prohibition of torture." CIA IG Report ¶ 253. According to the Report, the few instances of unauthorized techniques involving the waterboard "went beyond the projected use of the technique as originally described to DoJ." *Id.* ¶ 10; *see also* Letter from Jack Goldsmith to Scott Muller (May 27, 2004) (noting that the CIA's actual interrogation practice "may not have been congruent with all of the[] assumptions and limitations" contained in the Classified Bybee Memo).

Two other investigations reached the same conclusion. In August 2004, a panel chaired by former Secretary of Defense James R. Schlesinger issued a report concluding that "[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred." James R. Schlesinger, *Final Report of the Independent Panel to Review DoD Detention Operations* at 5 (Aug. 2004). And in March 2005, after conducting an extensive investigation, including over 800 interviews, Vice Admiral A.T. Church III concluded that there was "no link between approved interrogation techniques and detainee abuse." A.T. Church III, Office of the Secretary of Defense, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* 13 (Mar. 7, 2005) ("Church Report").[26] The report found that "[a]n early focus of [the] investigation was to determine whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees. *We found this was not the case.*" *Id.* at 3.

[25] In fact, most of the instances of detainee abuse occurred outside of the interrogation context. [redacted]

[26] Moreover, a similar Senate Armed Services Committee Report did not find any causal connection between OLC's legal advice and the few rogue individuals who used unauthorized interrogation techniques.

OPR offers no facts of any kind to refute the unanimous judgment of these three investigations. It offers details of detainee abuse without ever explaining why OLC could possibly have responsibility for that abuse. Report at 86-90. The decision to include these incidents cannot be explained. It is inflammatory and irresponsible. There was no evidence—none—that the CIA interrogators who were involved acted on the basis of some belief that they had been "immunized" by OLC. To the contrary, the CIA [redacted] described the interrogation techniques used on Al-Nashiri as *unauthorized* in his referral to the CIA Inspector General. *Id.* at 87. [redacted]

Second, there is no indication whatsoever that the CIA interpreted OLC's advice to allow the use of unauthorized techniques based on the view that the interrogators had no "purpose" to disobey the law (*id.* at 171), or only acted with a motive to "obtain[] information" (*id.* at 169), or were shielded by the President's Commander-in-Chief powers (*id.* at 197), or were entitled to claim necessity or self-defense. *See* Rizzo Letter ¶ 5 (confirming that Rizzo did not interpret the Bybee Memo to provide immunity from prosecution on any of these grounds). To the contrary, OPR actually concedes that the CIA only relied on the Classified Bybee Memo. Report at 124 n.95 ("Prior to the Bullet Points controversy, the CIA did not seek OLC approval to use EITs on new prisoners brought into the CIA interrogation program, but *simply relied on the analysis provided in the Classified Bybee Memo*. After Goldsmith disavowed the Bullet Points, however, the agency appears to have sought written approval when it intended to use EITs."). As explained in Section IV.H, *infra*, the analysis in the Classified Bybee Memo did not rest in any way on any of these issues.

In addition, the documents that OPR uses to reveal the CIA's understanding of the standards in the Bybee Memo (*e.g.*, Report at 65-66) do not suggest there was any misinterpretation going on. As shown in subsequent sections, these documents (which Bybee never wrote or saw) were actually *correct* statements of the law. [redacted] memo to the Abu Zubaydah interrogation team, for instance, which quoted from Yoo's July 13, 2002 fax to Rizzo, provided a *correct* summary of the specific intent element. Report at 66; *infra* Section IV.A. It is *correct*, as Yoo wrote, that if an individual "undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture." Report at 48; *infra* Section IV.A. The Bullet Points that the CIA prepared in 2003 also provided a *correct* summary of types of investigation that would establish a good faith belief that one did not intend to cause severe pain or suffering. Report at 103; *infra* Section IV.A. Notably, the CIA *never* mentions the motive of the interrogator as somehow negating the specific intent element of the anti-torture statute. And the CIA *never* mentions the Commander-in-Chief powers or the common law defenses in any of its cables or interrogation manuals.

The evidence demonstrates that the CIA did not share OPR's illusions regarding the scope of OLC's legal advice. Rizzo has confirmed (Rizzo Letter at 3) that the he never relied on the Bybee Memo as any sort of "golden shield" or "advance pardon," as Goldsmith described. Report at 197. Moreover, the CIA confined itself to the narrowly circumscribed analysis in the

Classified Bybee Memo in conducting its interrogation program, and recognized explicitly in Fredman's cable to the field that the legal conclusions were made "in light of the specific facts and circumstances of the interrogation process."[27] *Id.* at 65. The CIA's own Interrogation Guidelines, moreover, make no reference to any of the exceptions OPR claims were susceptible to misuse. Although OPR never cites them, they state that "medical and psychological personnel must be on site during all detainee interrogations employing Enhanced Techniques" and that in each case they "shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is *likely to result* if the interrogation is not suspended." DCI Guidelines on Interrogations 2 (Jan. 28, 2003), *included at* CIA IG Report app.E. That guidance obviously forecloses any claim that the CIA was reading the memos to authorize interrogations motivated by the need for information. If the CIA believed it received a "golden shield" from OLC, the Classified Bybee Memo would have been superfluous, it would have written its guidelines differently, and it likewise would never have needed to refer the instances of unauthorized interrogation techniques to federal prosecutors. Report at 90.[28]

Third, OLC never sought to provide the CIA with immunity and no one could rationally rely on any attempt to do so. The Bybee Memo only discussed possible defenses for "properly authorized" interrogations. Bybee Memo at 45. Both Judge Bybee and Philbin confirmed that OLC never intended to provide the CIA with the exculpatory grounds OPR says the OLC legal advice implies. *See* Bybee Tr. at 112-13 (OLC did not give the CIA carte blanche "to do whatever it wished"); Report at 199 ("Philbin told OPR that he was not aware of any evidence of intent to provide immunity to CIA officers."). Philbin went on to say, and OPR cites nothing to the contrary, that there was "no reasonable basis to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63.[29] Even OPR's lead investigator stated that it would be a "gross distortion" to read the Bybee Memo as allowing an interrogator to avoid prosecution by claiming that he used unauthorized techniques "in furtherance of the president's war-making powers." Bybee Tr. at 90.

OPR also fails to recognize that no CIA interrogator could rationally rely on the Bybee Memo as a form of immunity because Judge Bybee had no power to bind courts or future administrations. For example, common law affirmative defenses, such as necessity or self-

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[27] Rizzo's recollection that neither Bellinger nor Yoo expected him to brief OLC "on every new variation or technique that comes up," Report at 233, has absolutely nothing to do with Judge Bybee and is flatly contradicted by the text of the Classified Bybee Memo.

[28] Notably, the declination memorandum prepared by the CIA's Counterterrorism Section regarding the death of Gul Rahman provides a *correct* explanation of the specific intent element and did not rely on any motivation to acquire information. Report at 92. If Zirbel, as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute. And it is also telling that the declination did not even discuss the possibility that the prosecution was barred by the Commander-in-Chief section of the Bybee memo.

[29] As discussed below (Sections IV.B.2, IV.F.1, IV.H), Philbin reasoned that given the caution reflected in the CIA's request for advice on a range of techniques, the precise description of the techniques in the Classified Bybee Memo, and OLC's express warning not to deviate from the advice, it was reasonable to assume that the CIA would not depart from the specific techniques listed in the Classified Bybee Memo.

defense, would fall within the province of a court and/or jury.[30] It would be little comfort to a defendant facing a criminal charge that OLC, the "definitive interpreter of the law within the Executive Branch," said that certain defenses *might* be available. Likewise, the Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the Bybee Memo explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "*he* believes necessary to prevent attacks upon the United States" (Bybee Memo at 39), which is how Rizzo interpreted it. Rizzo Letter ¶ 5 (Rizzo "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President but [he] did not view it as a form of 'immunity'"). And of course an OLC opinion can be revoked at will by the next head of the office, which is precisely what happened to the Bybee Memo, and later to the Levin Memo and the Bradbury Memos. *See* David J. Barron Memorandum for the Attorney General, *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009). Hardly a shield made of gold. In short, OLC never gave, and the CIA never thought it received, any protection based on a motive for information, the Commander-in-Chief powers, or common law defenses.

III. OPR'S FINDINGS OF MISCONDUCT ARE PREDICATED ON A COMPLETELY ERRONEOUS INTERPRETATION OF THE GOVERNING STANDARDS

OPR's finding that Judge Bybee engaged in misconduct cannot be upheld because the entire analysis is based on the supposed violation of ethical duties that do not exist. As discussed in the succeeding sections, OPR implicitly concedes that: (1) the opinion reflected Judge Bybee's (and John Yoo's) honest assessment of the correct interpretation of the law; (2) the core of the analysis has been vindicated by appellate decisions and none of the actual conclusions were contrary to settled precedent; (3) the research and analysis that was done to form the basis of OLC's conclusions did not fall below the required level of competence; and (4) the clients understood that these were unsettled questions of law with risks and uncertainties. These concessions would lead any other disciplinary body to dismiss the charges out of hand. But OPR ignores them. According to OPR, the Bybee Memos violated a duty to provide "thorough, objective, and candid legal advice" (*e.g.*, Report at 254), because the discussion supporting OLC's conclusions was "incomplete and one-sided." *Id.* at 258. In OPR's view, there is a duty to "identify any counter arguments" whenever counsel prepares a written memorandum explaining his opinion. *Id.* at 24.

That has never, ever been the law. Professor Hazard's expert opinion establishes this beyond any doubt. Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney ¶ 11 (Oct. 7, 2009) ("Hazard Letter") (Appendix 4). But there is also another easy way to tell. Just take a look at the authorities that OPR cites to support its interpretation of the governing ethical standards. OPR has produced a 261 page report that ***fails to cite a single case that found a violation of a disciplinary rule***. Not one. Given the millions of opinions lawyers have written over the course of our profession, surely some bar authority somewhere would have found a violation of the duty that OPR has identified. Perhaps OPR should have recognized that its

[30] *See, e.g.*, Ronald Smothers, *Judge Won't Let Accused in Clinic Attack Argue That Killing Was Justified*, N.Y. Times, Oct. 5, 1994, at A18 (court rejected necessity defense in homicide case where "the defense [was] trying to apply the justification defense to something that is protected by law").

premise was wrong when it could not find a single decision that even suggests such a duty. It nonetheless proceeded to find misconduct while citing a sum total of five cases that have nothing anything at all to do with the ethical standard OPR created. Report at 22-24. Three of the five involve judicial sanctions for inadequate research. *Id.* at 23-24. A fourth involves an ineffective assistance claim based on defense counsel's negligent investigation of his client's criminal record. *Id.* at 23. The fifth, *In re Ford*, 797 A.2d 1231 (D.C. 2002), is cited in a footnote to support OPR's concession that errors must rise to the level of a "serious deficiency" in the representation to support a finding of misconduct. Report at 23 n.25. And *Ford* is the *only* D.C. precedent cited in OPR's entire report despite OPR's finding that the "D.C. Rules of Professional Responsibility apply to [Bybee's] conduct." *Id.* at 20. (But that is an improvement over OPR's Draft Report which ignored even *Ford*, and failed to cite a single D.C. case.)

A review of the text of the rules, the comments, and the governing body of precedent leave no doubt that OPR has inexplicably misinterpreted the law. No disciplinary opinion has ever adopted standards that permit the kind of line-by-line scrutiny of the quality of legal work product undertaken by OPR in this report. To the contrary, the D.C. Court of Appeals held in no uncertain terms that ethical conduct must be assessed through reference to counsel's "[]attention" to the matter—and not the quality of the lawyer's analysis—because disciplinary boards cannot serve as a "sort of court of appeals from lawyers' judgments." *In re Stanton*, 470 A.2d 281, 287 (D.C. 1983). OPR has done precisely what *Stanton* forbids, and along the way failed to make the findings actually required for proof of a disciplinary violation under standards established by OPR's own guidance and the D.C. Rules. Its conclusions must be rejected.

A. OPR Has Impermissibly Adopted Standards That Exceed Requirements of the D.C. Rules

1. OPR failed to find that there is clear and convincing evidence that Judge Bybee violated a specific rule of professional responsibility as required by D.C. law

A bar referral must be premised on clear and convincing evidence of a violation of a specific rule in the D.C. Rules of Professional Conduct.[31] OPR did not even meet these threshold prerequisites.

First, OPR never expressly states what rule Judge Bybee violated. The section of the report that includes the findings that pertain to Judge Bybee state only that the Bybee Memos did not present a "thorough, objective, and candid view of the law." Report at 255-57. That mantra is repeated throughout the report without reference to a specific rule. It certainly appears that OPR is relying on D.C. Rule 2.1, because that rule is identified in the section discussing professional standards. *Id.* at 21-23. Then again, the report also references the "Duty of Thoroughness and Care" under D.C. Rule 1.1, which OPR cites as "*[r]elevant to* Rule 2.1's duty to exercise independent professional judgment and render candid advice." *Id.* at 22. This leads to analytical confusion that the D.C. rules do not permit. If OPR is contending that OLC's analysis was not sufficiently thorough, then it must establish that the terms of Rule 1.1 have been

[31] All rule citations are to the D.C. Rules of Professional Conduct unless otherwise noted. Rules 1.1, 1.4, and 2.1 are attached at Appendix 10.

violated. Yet it never actually addresses that question. If it is contending that Rule 2.1 has been violated, then it needs to offer proof that conform to *Rule 2.1*'s terms, and not some other rule. OPR cannot just pick and choose terms it likes from different rules, cobble them together, and call it a duty to give "thorough, objective, and candid" advice. Yet that is precisely what OPR has done.

The D.C. Rules foreclose this hybrid approach and instead require violations to be established on a rule-by-rule basis. Rule 6.3,[32] which governs notices of Informal Admonition, requires Bar Counsel to "recite the misconduct in summary form and *specify the disciplinary rule or rules that respondent violated.*" Rule 7.1 states that if Bar Counsel institutes formal contested disciplinary proceedings by filing a petition with formal charges, the petition must clearly and specifically inform the attorney of "the alleged misconduct and *the disciplinary rule or rules alleged to have been violated.*" Rule 11.5 states that "[b]ar counsel shall have the burden of proving violations of *disciplinary rules* by clear and convincing evidence," and Rule 17.3 requires that the petition for negotiated discipline contains, *inter alia*, a stipulation of facts and charges, including *citation to the Rules of Professional Conduct that respondent has violated.*

OPR's own published standards require equal clarity. The standards provide that a referral must be based on the violation of "unambiguous" duties that are "unambiguously" applicable to an attorney's conduct. *See* U.S. Dep't of Justice, Office of Prof'l Responsibility, *Analytical Framework* ¶ B(3) (2005) ("OPR Analytical Framework") (Appendix 11) (explaining that "[a]n 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 ...."); *id.* ¶ B(4) (explaining that "[a]n attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows, or should know based on his or her experience and the *unambiguous* nature of the obligation or standards, of an obligation or standard, (2) the attorney knows, or should know based on his or her experience and the *unambiguous* applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or standard, and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances.").

Second, in D.C., like other jurisdictions, violations of the specific rules of professional misconduct must be proven by clear and convincing evidence. *See In re Douglass*, 859 A.2d 1069, 1071 (D.C. 2004); *see also In re Discipline of Schaefer*, 25 P.3d 191, 204 (Nev. 2001); *Noojin v. Ala. State Bar*, 577 So. 2d 420, 423 (Ala. 1990). OPR has not even purported to find "clear and convincing evidence" of a reckless violation of whatever rules it has in mind. It has conceded that its findings are based solely on a "preponderance of the evidence standard." Report at 13. OPR acknowledges this failing (*id.* at 13 n.13), but nonetheless asserts that the preponderance of the evidence standard is appropriate because that is the standard required for current Department of Justice employees who are subject to departmental discipline. That rationale makes no sense where, as here, Judge Bybee is a former employee who is only subject to discipline by the D.C. Bar. It is highly inappropriate to make a referral when it is apparent that the governing standard of proof can not be met and the D.C. Bar will have far less access to evidence than OPR. There is certainly nothing in the OPR Standards that would have prohibited

[32] All rule citations in this paragraph are to the D.C. Board on Professional Responsibility Rules.

OPR from finding that the evidence was "clear and convincing." It did not do so because even OPR could not pretend it was true. Thus, OPR has implicitly conceded that its conclusions do not, and could not, support a finding of misconduct in D.C. A referral to the D.C. Bar is accordingly wholly unwarranted and entirely improper—equivalent to violating Rule 11 by knowingly filing a complaint with insufficient evidence to meet the governing standards.

2. OPR's findings are impermissibly predicated on aspirational guidelines written long after the conduct at issue.

OPR asserts that the "legal standards" that "apply to OLC attorneys" are not limited to the "rules of professional responsibility" because OLC attorneys also "must adhere to the well-established principles that were described in [OLC's] own Best Practices Memo," a memo issued by Steven Bradbury in 2005. Report at 16. This was not merely an off-hand comment. OPR actually relies on the Best Practices Memo as a key source of Judge Bybee's alleged duty to "identify any counter arguments" in the Bybee Memos. *Id.* at 24. OPR also cites "Principles to Guide the Office of Legal Counsel," a document drafted in 2004 by former attorneys at OLC, as a relevant source for defining OLC's duties. *Id.* at 16, 22; *see* Walter E. Dellinger, Dawn Johnsen et al., *Principles to Guide the Office of Legal Counsel* 5 (Dec. 21, 2004) ("OLC Guidelines"). Neither document establishes minimum ethical standards that govern proof of a violation of the D.C. Rules of Professional Conduct.

Even OPR's own Analytical Framework forecloses reliance on these documents. The Framework states that DOJ lawyers must adhere to three types of Department policies: (1) "regulations issued by the Department and codified in the Code of Federal Regulations"; (2) "regulations codified in the Code of Federal Regulations and applicable to Department employees as well as other Executive Branch employees," and (3) "Department policies contained in the United States Attorney's Manual." *See* OPR Analytical Framework ¶ B(2). Neither the OLC Guidelines nor the Best Practices memo falls into any of these three categories. That should be dispositive, but even if it were not, neither establishes duties that governed Judge Bybee's conduct.

The OLC Guidelines were not even written until December 21, 2004—more than two years after the Bybee Memos were authored, and more than a year and a half after Judge Bybee left the Department. OPR's Analytical Framework states that an "essential" element to any conclusion that an attorney committed professional misconduct is "that the attorney violated or disregarded an *applicable* obligation or standard." *Id.* ¶ B(1). A document prescribing standards that did not exist at the time of the conduct at issue cannot, by definition, be "applicable" to that conduct. Moreover, the OLC Guidelines in no way established Department policy because it was not authored or signed by anyone within in the Department. Rather, the document was "prepared" and "endorsed" by nineteen *former* Assistant Attorneys General, Deputy Assistant Attorneys General, and Attorney Advisors from the Clinton Administration and was issued just a few months after the Bybee Memo was leaked to the press.

Bradbury's Best Practices Memo was at least written by an official of the Department. Nonetheless, it cannot be the governing source of Judge Bybee's duties. The Best Practices Memo was issued on May 16, 2005—nearly three years after the Bybee Memos. Moreover, the author has authorized us to represent that it was never intended to establish minimum standards

for OLC (as the name "best practices" implies). Although the memo states that the recommended practices generally reflect the traditions of the office, Bradbury never intended it to serve as a basis for attorney discipline. In particular, Bradbury authorized us to represent that the statement that OLC opinions should strive to provide "a balanced presentation of arguments on each side of an issue" was an "aspirational" guideline that did not reflect historic OLC practice. He confirmed that many past OLC opinions provide little to no discussion of counter-arguments. OPR should have talked to the author and read past OLC opinions before relying on this supposedly unambiguous "duty" to conclude that Judge Bybee engaged in a reckless violation of ethical standards.

3. OPR impermissibly imposed a heightened standard on OLC attorneys issuing opinions about torture

OPR seems to understand that its conclusions could not withstand scrutiny under the voluminous body of disciplinary law so it tries to pretend that special heightened standards are in play here. *See, e.g.*, Report at 11, 17, 24-25. OPR's efforts to gerrymander the standards for officials of a past Administration who authorized controversial policies should be rejected.

First, OPR reasons that "OLC's duties are heightened because many of its opinions will never be reviewed by a court or disclosed publicly and are made outside of an adversarial system where competing claims can be raised." *Id.* at 17. This just plain contradicts federal regulations.

Federal law provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, *to the same extent and in the same manner as other attorneys in that State*." 28 U.S.C. § 530B(a). The regulation that implements §530B clarifies that "[s]ection 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*." 28 C.F.R. § 77.1(c). In addition, the regulatory preamble confirms that "Department attorneys face obligations similar to, *but not greater than*, those faced by non-Department attorneys." 64 Fed. Reg. 19,273, 19,274 (Apr. 20, 1999); *see also id.* ("The Department has concluded that section 530B does not authorize state authorities to impose stricter rules on Department attorneys than on other attorneys and in no way alters prevailing state and federal court rules of ethical conduct that provide exceptions for the conduct of government attorneys."). In other words, the federal regulations unquestionably ensure that no heightened standard applies to OLC attorneys despite OPR's findings to the contrary.

Second, OPR explains that the "analytical approach" it took in the report "*began with the premise*" that "the right to be free from official torture" is a "norm of *jus cogens*" under international law. Report at 24. As a consequence, OPR "determined 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." *Id.* at 25. This is a nice try for stacking the deck based on OPR's perspective of the issue. But surely OLC does not have to meet any higher standard of conduct for issuing an opinion that finds that proposed techniques would not be torture under U.S. law than for issuing an opinion concluding that they would constitute torture. After all, OLC was told that many innocent Americans could lose their

lives in a second wave of threatened attacks if the interrogation techniques could not be used. Surely OLC owed as much care in determining the scope of lawful measures that could be used to protect Americans who would be murdered by al Qaeda as it did in determining whether terrorists could lawfully be subjected to harsh interrogation techniques. This was unquestionably a matter that required great care, but not because of international law norms. Year in and year out, OLC is asked to answer questions with grave consequences for the nation. This was one of many such issues and cannot be singled out for a special standard of care. Indeed, federal appellate courts have routinely refused to apply a heightened standard of care like the one OPR adopts here even when counsel's client faces the death penalty if his efforts are inadequate. Surely hardened terrorists such as Abu Zubaydah, intent on killing innocent Americans, are not entitled to greater care from DOJ lawyers who did not represent him than capital defendants.

B. OPR Improperly Disregards Controlling Interpretations of the Duties of Competence, Communication, Independence, and Candor

By creating its own blended standard of professional conduct, OPR excuses itself from the obligation to reference controlling precedents. This will not do. It is apparent that OPR's complaints rise and fall on the view that the memos did not fully and fairly present opposing views and were "drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs." Report at 226. Three rules are potentially relevant to that theory: (1) the duty of competence governed by Rule 1.1; (2) the duty to communicate with the client governed by Rule 1.4(b); and (3) the duty to exercise independent, candid judgment governed by Rule 2.1. Although OPR only refers to two of them, none supports its view.

1. OPR fails to recognize that the standards governing "thoroughness" are defined by Rule 1.1 and are satisfied through diligent efforts to reach a sound conclusion

OPR's interpretation of the duty of "thoroughness" rests on several fundamental errors.

First, OPR seems to believe that the duty of "thoroughness" is imposed by the duty to provide candid professional judgment in Rule 2.1, and not constrained by principles developed under Rule 1.1. (Otherwise, OPR's failure to cite a single Rule 1.1 disciplinary case would be completely inexcusable since they are legion in number.) As Professor Hazard explains, OPR is wrong. If a lawyer's efforts and communications are sufficient to satisfy his duties of competence under Rule 1.1 and 1.4(b) then he *a fortiori* satisfies his duty to provide professional candid judgment under Rule 2.1 as long as the advice reflects his honest assessment. Hazard Letter ¶ 15.

Neither the language of Rule 2.1 nor its attendant comments refer to the thoroughness of an attorney's analysis or preparation and neither suggests that the rule imposes any additional duties of thoroughness beyond those established in other rules. In fact, the comments to Rule 2.1 merely require an attorney to "put advice in as acceptable a form as honesty permits." Rule 2.1, cmt. [1]. In stark contrast, thoroughness is an express element of counsel's duty of competence under Rule 1.1. That rule states that a lawyer must provide "competent representation" comprised of "legal knowledge, skill, *thoroughness* and preparation." In addition, we have

discovered no Rule 2.1 case law that assesses thoroughness in the context of a lawyer's duty of candor. But the case law assessing an attorney's thoroughness in evaluating his duties under Rule 1.1 is ubiquitous.[33]

Second, OPR has chosen to assess "thoroughness" in a manner forbidden by Rule 1.1 and settled D.C. law. Here is how OPR describes the "analytical approach" that it used to assess "thoroughness and care": OPR reviewed "the legal arguments and conclusions the authors presented" and examined them in light of the "legal authority underlying [those] arguments" as supplemented by OPR's own "independent research." Report at 24. In other words, OPR has based its analysis and conclusions on an assessment of its view of the quality of the legal analysis set forth in the Bybee Memos. This is further confirmed by OPR's explanation that it identified "flaws" in the memos that consisted of "errors, omissions, misstatements, and illogical conclusions." *Id.* at 159. Although OPR asserts that it "did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result," it nonetheless explicitly relied on its assessment of the quality of the analysis that led to those conclusions. *Id.* at 160. It pointedly *did not* predicate its conclusions on a finding that the OLC lawyers violated Rule 1.1 by falling below the standards of care for diligently researching and analyzing the relevant law when developing the basis for their conclusions.[34]

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[33] *See, e.g., People v. Boyle*, 942 P.2d 1199 (Colo. 1997) (attorney violated Rule 1.1 for failing to prepare adequately for hearing or to discover readily available evidence supporting asylum petition); *People v. Felker*, 770 P.2d 402 (Colo. 1989) (lawyer who prepared in car on way to courthouse for hearing on permanent orders in marital dissolution case, failed to seek maintenance and support arrearages, equitable division, or attorneys' fees or expenses, and failed to consult with client concerning agreement to limit child support violated Rule 1.1); *In re Mekler*, 689 A.2d 1171 (Del. 1996) (failure to check for conflicts of interest before accepting case violated Rule 1.1); *In re Guy*, 756 A.2d 875 (Del. 2000) (lawyer who failed to contact any of four potential defense witnesses named by his client in criminal case violated Rule 1.1); *In re Zimmerman*, 19 P.3d 160 (Kan 2001) (plaintiff's lawyer in a personal injury action did not hire expert witness to examine product involved in client's injury even after product was recalled and then failed to respond to motion for summary judgment); *Attorney Grievance Commission v. Chasnoff*, 783 A.2d 224 (Md. 2001) (finding violation of Rule 1.1 when plaintiff's lawyer in personal injury suit did not visit scene of accident until two years after the fact, did not attempt to locate employee who tried to help client on night of accident, did not attempt to preserve testimony of witnesses, and did not have a client monitor his medical condition to document lack of improvement); *Attorney Grievance Commission v. Middleton*, 756 A.2d 565 (Md. 2000) (concluding that lawyer representing rape defendant violated Rule 1.1 by not filing any discover requests and making no effort to obtain discoverable information from state's file); *Collins ex. rel. Collins v. Perrine*, 778 P.2d 912 (NM 1989) (lawyer violated Rule 1.1 by recommending settlement of medical malpractice case without doing sufficient legal or medical research and without consulting treating physician); *In re Kovitz*, 504 N.Y.S.2d 400 (N.Y. App. Div. 1986) (lawyer failed to investigate personal injury case for fourteen years, claiming it was a trial tactic to outwait witnesses); *Toledo Bar Ass'n v. Wroblewski*, 512 N.E.2d 978 (Ohio 1987) (lawyer for estate did not properly complete inventory and made no attempt to determine if any next of kin survived); *In re Greene*, 557 P.2d 644 (Or. 1976) (lawyer who was personal representative of estate did not ask relatives about assets and did not ascertain value of realty owned by estate); *In re Winkel*, 577 N.W.2d 9 (Wis. 1998) (lawyer failed to obtain information concerning trust funds held by clients' business, including amounts of deposits and disbursements made and claims of contractors on funds, before client surrendered assets to bank); *In re Fischer*, 499 N.W.2d 677 (Wis. 1993) (lawyer signed, as attorney of record, complex pleadings forwarded to him by the American Constitutional Coalition Foundation, which processed complaint from inmates challenging their incarceration; lawyer made no attempt to ascertain basis for their claims and made no assessment of documents).

[34] OPR finds that there were some deficiencies in research and analysis but does not ever conclude that the OLC lawyer's overall diligence and attentiveness to the matter fell below the standard of competence.

OPR apparently did not read the D.C. Court of Appeals decision in *In re Stanton*, 470 A.2d 281 (1983), even after Judge Bybee called it to OPR's attention in his response to the Draft Report. *See* Bybee Draft Response at 7, 23, 59, 84. In *Stanton*, the D.C. high court adopted the findings of the Board on Professional Responsibility ("the Board"), which concluded that the quality of a lawyer's legal opinion has virtually no role to play in determining whether the attorney committed professional misconduct. 470 A.2d at 287. At issue was the decision of the respondent attorney to urge his client to refuse a plea bargain offered by the government. In determining whether the attorney had engaged in disciplinary violations in connection with this advice, the Hearing Committee took into account its view that counsel's judgment about the merits of the offer was not so "far fetched as to justify a finding of 'neglect'." *Id.* The Board did not disagree with that assessment, but found that the decision should not be based on "the reasonableness of [counsel's] views." *Id.* The opinion explains that "[a] lawyer is duty-bound to exercise his best professional judgment on behalf of his client" and that a disciplinary board should "[n]ever be in the business of assessing the correctness of the lawyer's advice to his client" except "where *total inattention or incompetence* is made out on the part of the lawyer in reaching the decision." *Id.* The opinion emphasized that "[o]therwise, we put ourselves in the position of a sort of court of appeals from lawyers' judgments" and that "[a]ny attempt on our part to do so would be the *worst sort of second-guessing or Monday morning quarterbacking*." *Id.*

The comments to Rule 1.1 and D.C. precedents applying the rule support the same conclusion. Comment 5 explains that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"; the "use of methods and procedures meeting the standards of competent practitioners"; and "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Each of the factors is directed to the level of counsel's diligence in reaching his judgments and not the quality of his reasoning. Consistent with this emphasis on diligence, we have found no Rule 1.1 case that involves remotely analogous conduct to that at issue here. Instead, violations of Rule 1.1 in D.C. are generally confined to blatant procedural defaults such as failing to file or perfect an appeal, *In re Drew*, 693 A.2d 1127, 1127 (D.C. 1997); *In re Sumner*, 665 A.2d 986, 986 (D.C. 1995), or failure to follow other clear rules, *In re Starnes*, 829 A.2d 488, 504, 506 (D.C. 2003) (finding violation of Rule 1.1(a) and (b) where counsel failed to file a docketing statement and failed to file a change of address form). *See also In re Lyles*, 680 A.2d 408, 416 (D.C. 1996) (finding violation of Rule 1.1(b) where counsel held himself out as a bankruptcy lawyer and failed to follow the Bankruptcy Rules); *In re Spaulding*, 635 A.2d 343, 344 (D.C. 1993) (finding incompetence where the lawyer failed to comply with discovery deadlines and let the time for certiorari pass without filing a petition).

To be sure, there can be some limited overlap between the assessment of counsel's diligence and the content of his advice. The failure to find controlling adverse precedent certainly provides some evidence of insufficient diligence, but the focus of the inquiry is on the methods and efforts of counsel, not the substantive advice. This is further illustrated by a recent decision of the Virginia Supreme Court. In *Barrett v. Virginia State Bar ex rel. Second District Committee*, 634 S.E.2d 341, 347 (Va. 2006), the Court held that discipline under Rule 1.1 is "not justified based on research that results in the wrong legal conclusion because incorrect legal research alone, although attorney error, *is not clear and convincing evidence of incompetence* for purposes of that Rule." In *Barrett*, the court reversed a finding of incompetence against an

attorney who had failed to file a client's personal injury lawsuit within the limitations period, failed to read responsive pleadings in a timely manner, and delayed withdrawing a special plea of immunity in his client's resulting malpractice case. *Id.* Despite the concrete prejudice suffered by the client, the court refused to find that the attorney had violated the rules of professional conduct because "research that results in the wrong legal conclusion" is "attorney error" but not incompetence. *Id.* Thus, even if an attorney's ultimate conclusion is incorrect and prejudices his client, these facts alone do not constitute an ethical violation.

Third, to the extent the quality and thoroughness of the analysis reflected in the opinions has a bearing on the assessment of OLC's competence, the inquiry would be informed by principles of judgmental immunity, which OPR also ignores. Findings of incompetence are impermissible when counsel has provided an opinion on an unsettled question of law that is not wholly unreasonable. As the D.C. Court of Appeals recently explained, a lawyer's advice cannot be deemed to fall below the standard of care for competence "if 'reasonable attorneys could differ with respect to the legal issues presented'" because "'the second-guessing after the fact of ... professional judgment [i]s not a sufficient foundation'" for a negligence action, let alone an ethical violation. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 668 (D.C. 2009) (citation omitted).[35]

Biomet was a malpractice decision, but its reasoning plainly informs the proper interpretation of the duties of thoroughness and competence established in Rule 1.1, as Professor Hazard confirms. *See* Hazard Letter ¶ 9. In *Biomet*, the D.C. high court examined whether counsel had satisfied its duty to use "a reasonable degree of knowledge, care, and skill," and expressly referenced D.C. Rule 1.1. 967 A.2d at 665. The Court reviewed the history of the judgmental immunity doctrine and emphasized that "[i]t has long been recognized" that "mistakes made in the honest exercise of professional judgment" do not fall below the standard of care for competent advice. *Id.* It emphasized that the "acceptance of the judgmental immunity principle" is so "widespread" that the Sixth Circuit had noted that "neither counsel nor we have found an American decision" that ever found that an attorney violated the requisite standard of care based on "the good faith exercise of professional judgment." *Id.* at 665-66 (quoting *Woodruff v. Tomlin*, 616 F.2d 924, 930 n.1 (6th Cir. 1984)). Despite this precedent, OPR makes no finding that the advice at issue here did not reflect the "honest" views of Judge Bybee or John Yoo, nor any finding that "reasonable attorneys could [not] differ" on the questions answered in the Bybee Memos.

Fourth, OPR was required to assess the Bybee Memos with reference to the "skill and care commensurate with that generally afforded to clients by other lawyers in similar matters" under Rule 1.1, but inexplicably determines that the fact that many other Executive Branch

[35] *See also Robinson v. Southerland*, 123 P.3d 35, 43 (Okla. Civ. App. 2005); *Meir v. Kirk, Pinkerton, McClelland, Savary & Carr, P.A.*, 561 So. 2d 399, 402 (Fla. Dist. Ct. App. 1990) (because timing of statute of limitations period was debatable point of law, attorney's judgment was immune from malpractice claim); *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 818 (Minn. 2006) (an attorney is not liable for an error of judgment or mistake in a point of unsettled law); *Baker v. Fabian, Thielen & Thielen*, 578 N.W.2d 446, 451-52 (Neb. 1998) (attorney's judgment or recommendation on unsettled point of law is immune from liability); *Roberts v. Chimileski*, 820 A.2d 995, 998 (Vt. 2003) (judgmental immunity doctrine protects attorneys from liability where they advised client about development scheme, the legality of which was unsettled at the time advice was given).

lawyers "concluded that the CIA's use of EITs was lawful was *not relevant* to [its] analysis." Report at 160. Given that the rule expressly demands a comparison to "other lawyers in similar matters," what could be more "similar" than the determination by "other [Executive Branch] lawyers" that the proposed techniques did not violate the torture statute? As Professor Hazard confirms, this evidence was unquestionably relevant to an assessment of a disciplinary violation and OPR was required to consider it. Hazard Letter at ¶ 6. *Cf. State v. Carnail*, No. 78143, 2001 WL 127749, at *4 (Ohio Ct. App. Feb. 15, 2001) ("[T]he fact that the same advice was given by an another attorney supports the [conclusion] that [defense] attorney's advice and conduct regarding the plea fell within the wide range of reasonable professional assistance."); *State v. Price*, No. 19722-7-II, 1996 WL 740847, at *2 (Wash. Ct. App. Dec. 30, 1996) (rejecting ineffective assistance of counsel claim where defendant received the same advice from both attorneys he consulted).

It is bad enough that OPR failed to recognize the relevance of this highly exculpatory evidence. What is worse is that it repeatedly relies on subsequent criticisms of portions of the memos as support for its findings. It opens the report with criticisms by human rights activists who unsurprisingly called the Bybee Memos "blatantly wrong" (Report at 2-3), and peppers its findings with select criticisms from later OLC lawyers *who agreed with the core conclusions. See, e.g., id.* at 112, 160, 179. OPR is more than willing to find that criticisms of select portions of the analysis are relevant to a finding of misconduct, but when it encounters agreement with OLC's conclusion that "the use of EITs was lawful," it deems it "[ir]relevant"? What is going on here?

Finally, OPR refuses to give any weight whatsoever to the fact that core portions of the Bybee Memo's analysis have been vindicated by decisions of the federal courts of appeals. It reasons that "cases decided after issuance of the Bybee ... Memos" are "not relevant to whether the OLC attorneys present a thorough" analysis of the law in 2002. *Id.* at 175 n.132. If OPR is going to assess the duty of thoroughness through reference to the quality of OLC's legal analysis then it certainly is duty bound to give OLC credit for accurately predicting the judgments of the federal courts. Once again, Professor Hazard confirms the obvious relevance of these precedents. Hazard Letter ¶ 7. In sum, OPR's findings that the Bybee Memos failed to meet the standards for "thoroughness" set forth in Rule 1.1 cannot possibly be upheld because they were not made in accordance with the governing law of ethics.

2. OPR fails to recognize that the duty to communicate risks to the client is defined by Rule 1.4(b) and does not mandate discussion of all counter arguments

OPR's core concerns have nothing to do with the actual thoroughness of the work OLC did to form its conclusions. Its real focus is on the "thoroughness" of OLC's discussion of counter-arguments. It repeatedly contends that the memos have "omissions" that would lend support to a contrary view. Report at 160, 174, 192-93, 204, 209, 235. And it expressly concludes that there is a duty to prepare opinion letters that include a "thorough discussion of the law" setting forth "the strengths and weaknesses of the client's position" and that "identif[ies] any counter arguments." *Id.* at 24. While the law does impose a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," that duty is established by D.C. Rule 1.4(b) and it has never been interpreted to

require counsel to write "a brief for the opposing view." Hazard Letter ¶ 11. OPR cites no contrary authority and has failed to make findings that conform to the standards set forth in Rule 1.4(b), which govern the adequacy of counsel's communications about the risks associated with his advice.

First, given the obvious relevance of the text of Rule 1.4(b) to the issues that OPR is addressing, it is quite curious that OPR ignores it entirely. Either it failed to read the D.C. rules "thoroughly," or it recognized that it could not fit its duty to disclose all counter-arguments into the text of the rule, so just ignored it. But this is the rule that governs the "adequacy of communication" with the client and establishes the "guiding principle[s]." Rule 1.4(b) cmt. [3]. Thus, OPR's lament that the memos did not tell the CIA about arguments that could be made on the other side (*e.g.*, Report at 235, 236), falls squarely within the subject addressed by this rule.

But there is not a hint anywhere in the text of the rule, its comments, or in the case law that would require counsel to provide its advice in the form of an opinion letter that discusses all potentially adverse arguments and authorities. To the contrary, Rule 1.4(b) provides that counsel's duty is to "explain" the advice "to the extent reasonably necessary to permit" an "informed decision" and that the "guiding principle" is to "fulfill reasonable client expectations for information" consistent with "*the client's* best interests and ... [its] overall requirements and objectives." Rule 1.4(b) & cmt. [3]. Yet OPR never even attempts to measure the adequacy of the disclosures at issue here in light of the CIA's ability (or that of the White House) to make an "informed decision" or its "expectations for information" or its "overall requirements and objectives." *See* Rizzo Letter ¶ 1 (Rizzo "did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counterarguments").

Second, none of the authorities OPR cites purports to establish an ethical duty to "thoroughly" discuss arguments in opposition to counsel's honest legal judgment. OPR's legal analysis in support of its recognition of this duty consists of a single paragraph in the report (at 24). This paragraph does not cite the language of any disciplinary rule or comments. It does not cite any cases. Indeed, it does not cite any ethics authorities whatsoever. All it cites are two books on legal research and writing and the OLC Best Practices Memo. The fact that books on legal research and writing might recommend a discussion of counterarguments in legal memos has nothing to do with counsel's ethical duties when rendering opinions.

As for the Best Practices Memo, it does say that OLC should strive "in general" to write opinions that include a "balanced presentation of arguments on each side of an issue ... taking into account all reasonable counter arguments." Report at 24 (quoting Best Practices Memo at 3). But as set forth, *supra* Section III.A.2, the author of the Best Practices Memo expressly confirmed that this practice was only aspirational and most certainly had not been the long-standing custom of the office. As described below, OLC files are filled with opinions that do not begin to meet this standard. OPR could not possibly have read OLC opinions before adopting this mandatory ethical duty and using it here to make findings of misconduct against Judge Bybee. And expressing counter arguments surely did not represent an "unambiguous" duty in August of 2002—more than two years before the guidance was even drafted—as required by OPR's own governing standards.

As Professor Hazard explains (Hazard Letter ¶¶ 10-14), it would be thoroughly impractical to impose such a duty on counsel preparing opinions. Clients often want their counsel's best judgment and not a treatise on the law. *See* Rizzo Letter ¶ 1 ("When [Rizzo] asked for OLC's views, [his] overriding objective was to secure a definitive opinion on an expedited basis."). Yes, clients need to know whether the position poses risks. But that information can be communicated without writing the dissenting opinion. And with sophisticated clients, they often know that the issue is uncertain by the time they request the opinion. *See id.* (Rizzo was "aware that the issues were uncertain and that there were no controlling precedents"). The lawyer does not have to print a disclaimer in bold saying that a court might resolve the question a different way. That is inherent whenever counsel gives advice on unsettled questions of law. Clients often cannot afford the time or money for a "thorough" discussion of all opposing arguments. In OPR's view, counsel would violate the rules of ethics if it gave the clients what they wanted.

A simple survey of Attorney General and OLC precedent (which OPR studiously ignores) makes clear that the executive branch attorneys have *never* been required to provide an extensive written opinion detailing all possible counterarguments, disclosing every conceivable risk to the client, and citing every case arguably on point—even on indisputably weighty matters.[36] Indeed, the Department often states its opinion in conclusory and confident fashion or elects to memorialize only the most important portions of that advice.[37]

For example, President Andrew Johnson's Attorney General wrote one of the shortest opinions on record (28 words): "Sir: I am of the opinion that the persons charged with the murder of the President of the United States can rightfully be tried by a military court." Luther A. Huston, *The Department of Justice* 26 (1967). Much later, in 1940, during World War II, Attorney General Jackson was similarly curt with a two-page opinion interpreting a selective service statute, the analysis of which consisted of a *single conclusory paragraph. Registration of Aliens Under Selective Training and Service Act*, 39 Op. Att'y Gen. 504, 505 (Oct. 11, 1940). No contrary views were presented. Not a single court case was cited. Similarly, in 1990, Attorney General Barr confidently concluded, in a two-page opinion, that the President had the authority as Commander-in-Chief to commit U.S. troops to Somalia for humanitarian assistance without Congressional approval. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (Dec. 4, 1992). He considered no judicial precedent and no counterarguments. And, in 1995, Deputy Assistant Attorney General Shiffrin concluded in a four-page opinion that a legislative provision prohibiting President Clinton from placing U.S. troops under U.N. control

[36] *See, e.g., Shiffrin 1995 Opinion* (four-page opinion providing very little analysis in holding legislation unconstitutional under Commander-in-Chief clause); *Constitutionality of Health Care Reform*, 17 Op. O.L.C. 124, 126-27 & nn. 6-9 (Oct. 29, 1993) (Dellinger) (rejecting Tenth Amendment challenge to sweeping health care bill without considering recent landmark decision in *New York v. United States* (1992), instead relying on case law from 1937); *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas*, 41 Op. Att'y Gen. 313, 314, 326, 329 (Nov. 7, 1957) ("Little Rock Opinion") (addressing "grave constitutional issues" and holding that the President had "undoubted power" to send troops to restore law and order in the states, notwithstanding the Posse Comitatus Act, even though there was "no judicial decision on this question").

[37] Little Rock Opinion at 332 (noting that the written opinion is merely "the *more significant* aspects of my advice"); Hazard Letter ¶ 11 (noting that, in the Eisenhower administration, one lawyer simply advised: "Resign immediately and in writing.").

would unconstitutionally infringe on the Commander-in-Chief authority and that an attempt to prevent the President from using antipersonnel mines would be constitutionally problematic. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act*, at 1 (Sept. 15, 1995) ("*Shiffrin 1995 Opinion*") (Appendix 14). Even on such weighty matters, Shiffrin only needed to employ limited analysis, did not disclose all possible counterarguments, and did not cite all potentially-relevant cases (such as *Youngstown*). These are but a few of the many examples demonstrating that OPR's purported standard plainly cannot be the law.

Third, case law interpreting Rule 1.4(b) sets a high bar governing the materiality of information that must be disclosed on pain of disciplinary sanctions. Because the duty is expressly designed to ensure that a client can make an "informed decision," counsel has no duty to impart information that the client already has or that is not likely to alter the client's decision. For example, in *In re Thonert*, the Indiana Supreme Court found that an attorney violated Rule 1.4(b) when the attorney counseled his client to pursue an appeal of a DWI conviction but "fail[ed] to apprise his client of a ruling in the *controlling* jurisdiction that was adverse to the legal arguments contemplated for his client's case on appeal, and instead cho[se] only to advise the client of an earlier appellate decision favorable to his position." 733 N.E.2d 932, 934 (Ind. 2000). The Indiana Supreme Court held that the attorney "effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and [impeded his client's ability] to make informed decisions regarding whether to go forward with [the appeal]." *Id.* OPR does not assess the "omissions" from the Bybee Memos under this standard because it mistakenly concluded that the duty of "thoroughness" extends to "any counterarguments." Report at 24.

Fourth, the nature of the disclosures that are required are measured by the client's sophistication in legal matters as well as an assessment of its overall objectives. The D.C. Rules of Professional Conduct, ABA Standing Committee opinions, the Restatement (Third) of the Law Governing Lawyers, and case law all uniformly confirm that the level of a client's sophistication is relevant in assessing whether an attorney's conduct violated his ethical obligations. *See, e.g.*, Rule 1.0 (Terminology) cmt. [2] ("In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is *experienced in legal matters generally* and in making decisions of the type involved...."); Rule 1.7 (Conflict of Interest) cmt. [28] ("Lawyers should also recognize that the form of disclosure sufficient for more *sophisticated* business clients may not be sufficient to permit less *sophisticated* clients to provide informed consent."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 at 5 (2002), *Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims* (Feb. 20, 2002) (noting that Rule 1.4(b) requires lawyers to explain the implications of binding arbitration provisions in attorney-client contracts and stating that "[d]epending on the sophistication of the client and to the extent necessary to enable the client to make an 'informed decision,' the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement").

The Restatement (Third) of the Law Governing Lawyers—also demonstrates that OPR did not identify or apply the relevant factors. Comment c to Section 20 explains that an assessment of a lawyer's duty to inform "depends upon such factors as the ... *the client's*

sophistication and interest" and comment e states that "[t]he lawyer ordinarily must explain the pros and cons of reasonably available alternatives" but that "the appropriate detail" depends on factors that include not only the importance of the decision, but also "how much advice the client wants," what "the client has already learned and considered," as well as "the time available for deliberation." *Id.* § 20, cmt. [2]. Those factors are highly relevant here, as the Rizzo Letter demonstrates beyond any doubt, but OPR gave them no consideration. Indeed, in *Jeansonne v. Attorney's Liability Assurance Society*, 891 So. 2d 721, 730 (La. Ct. App. 2004), the court upheld a finding that an attorney's "professional judgment as to the nature and extent of explanations and advice to his client cannot be challenged as a matter of law" where the attorney "exercised his professional judgment under circumstances where *his client was sophisticated and experienced.*"

In summary, OPR should have read and applied the standards set forth in D.C. Rule 1.4(b) instead of the one it found in a primer about legal writing.

3. OPR fails to recognize that the duty of candor is satisfied by counsel's "honest assessment" of the issues and that there is no duty of objectivity divorced from the interests of the client

D.C. Rule 2.1 imposes duties of "candor" and "independence" when rendering advice to clients. It is unclear precisely how OPR is defining these terms, but it is clear that OPR is not actually using the definitions established in the comments and case law.

First, the duty of candor requires proof that the advice did not reflect the lawyer's "honest assessment," yet OPR never applied this standard. Comment [1] to Rule 2.1 is explicit. It explains in no uncertain terms that the rule requires "straightforward advice expressing the lawyer's *honest assessment*." Although OPR quotes the comment in full (at 21), OPR never again uses the term "honest assessment" or any equivalents such as a "good faith" belief in the advice. It instead finds that John Yoo violated his duty by knowingly providing "one-sided" advice. Report at 258. It never finds that John Yoo did not honestly believe the "side" he presented (and is supported in his views by the vast majority of the judges who have considered many of the key issues). And OPR finds that Judge Bybee violated a duty of candor even though OPR finds that he acted in good faith and did not even know that the advice was one-sided. *Id.* at 256.

As OPR acknowledges, its findings are not supported by case law under Rule 2.1. It notes that there is a "dearth of Rule 2.1 cases" and seems to think this means that a case like this one has just never arisen. *Id.* at 22. The fact that there has never been a disciplinary proceeding in D.C. finding a violation of Rule 2.1 should have caused OPR to understand that the rule does not prohibit "one-sided" opinions that reflect counsel's "honest assessment." Moreover, there are Rule 2.1 cases from other jurisdictions confirming that violations of this rule have been predicated on proof of deceit or bad faith. *See, e.g.*, *In re O'Connor*, 553 N.E.2d 481, 483-84 (Ind. 1990) (disciplining an attorney for, *inter alia*, a violation of Rule 2.1 for failure to render honest advice by lying to a client's family member about his efforts to get a client released from jail even though the attorney took no action to get the client released); *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 271 (Miss. 1988) (disciplining attorney for violating Rule

2.1's obligation to give "completely honest and straightforward advice" to a client because the attorney refused to inform client of a settlement offer). OPR must have missed them.

OPR also seems to have missed the most relevant portion of its own Analytical Framework. It likewise establishes that an attorney who acts in good faith does not commit professional misconduct. *See* OPR Analytical Framework at ¶ B(4). Although OPR references a variety of sections of its Framework (Report at 18-19), it forgets to mention that "[a]n attorney who makes a *good faith* attempt to ... comply" with his duties in a given situation "does not commit professional misconduct." *Id.* OPR nonetheless finds Judge Bybee guilty of misconduct while not contesting his good faith. *Id.* at 256. Even if thoroughness played a role in an assessment of an attorney's candor, OPR fails to explain how Judge Bybee could have violated that duty by failing to disclose something that OPR finds he did not know.

Second, Rule 2.1 imposes a duty of "independence" but OPR misconstrues this to mean a duty of "objectivity" divorced from the interests of the client. Applying this revised standard, OPR criticizes OLC because it was "aware of the result desired by the client" and then "drafted memoranda to support that result." *Id.* at 227. But there is nothing wrong with OLC knowing its clients' objectives or attempting to further them in good faith. Rule 2.1's duty of "independence" does not require indifference to the client's goals. In fact, even the OLC Guidelines recognize that "OLC *must* take account of the administration's goals and *assist in their accomplishment* within the law." OLC Guidelines at 5. Or as Professor Hazard puts it, counsel is not merely free to take his client's objectives into account, but "*should* do so." Hazard Letter ¶ 16. Numerous D.C. rules state this unequivocally.[38] So does the Model Code of Professional Responsibility, which affirmatively *requires* a lawyer to seek to meet his client's "objectives." *See* DR-7-101 (1983) (A lawyer "shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules").[39]

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[38] *See, e.g.*, Rule 1.3(a) ("A lawyer shall represent a client *zealously* and diligently within the bounds of the law."); Rule 1.3 cmt. [1] ("This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to *take whatever lawful and ethical measures are required to vindicate a client's cause* or endeavor. A lawyer should act with commitment and dedication to the interests of the client."); Rule 1.3 cmt. [6] ("In the exercise of professional judgment, a lawyer should always act in a manner consistent with *the best interests of the client*."); Rule 1.4(b) cmt. [3] ("Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) *the client's overall requirements and objectives as to the character of representation*."); Rule 3.1 cmt. [1] ("The advocate has a duty to use legal procedure *for the fullest benefit of the client's cause*...."); Rule 3.2(b) ("A lawyer shall make reasonable efforts to expedite litigation consistent *with the interests of the client*.").

[39] Likewise, no cases suggest that there is ground for suspicion when attorneys agree with their clients, or are simply aware of the outcome desired by the client. Instead, courts have predicated violations of this standard based on conduct that compromises the professional relationship between the attorney and client, as in the case of inappropriate sexual relationships. *See, e.g.*, *In re Ashy*, 721 So. 2d 859, 867 (La. 1998) (finding that attorney violated Rule 2.1 after attempting to develop a sexual relationship with a female client in exchange for making certain efforts on her behalf as her lawyer because "a lawyer who engages in a sexual relationship with a client,... risks losing the 'objectivity and reasonableness that form the basis of the lawyer's independent professional judgment'") (citation omitted); *In re Schambach*, 726 So. 2d 892, 895-96 (La. 1999) (finding that a sexual relationship between attorney and client impaired the lawyer's objectivity and independent professional judgment in violation of Rule 2.1); *In re Touchet*, 753 So. 2d 820, 823 (La. 2000) (attorney disbarred for violating Rule 2.1 after

Moreover, Goldsmith's submission to OPR noted that executive branch attorneys have repeatedly sought "to help the President achieve a vital national security goal in a time of crisis." Goldsmith Submission at 3. To illustrate his point, Goldsmith recounted a number of DOJ opinions supporting controversial Presidential decisions in history, including Attorney General Edward Bates's opinion supporting President Lincoln's decision to suspend habeas corpus during the Civil War, Attorney General Robert Jackson's opinion supporting FDR's decision to send destroyers to Great Britain in 1940, and the advice supporting President Kennedy's decision to quarantine Cuba during the Cold War. *Id.* at 2-3. These lawyers, Goldsmith continued, provided acceptable interpretations of the law, even though they were aggressive and "did not always give full play to contrary arguments or precedents." *Id.* at 3-4.[40]

Many recent occupants of the office have confirmed that Goldsmith's historical account remains true today. Judge Bybee, for example, told OPR that he saw it as his "responsibility as head of [OLC] ... to be a vigorous defender of the president's prerogative." Bybee Tr. at 54. Former Assistant Attorney General Timothy Flanigan similarly confirmed that OLC attorneys are "*almost always aware of the course of action the client wishes to take*" and that it is "perfectly appropriate for OLC attorneys to determine whether there is a legal way for the client to undertake such actions and to address particular issues that the client requests be considered as long as the advice they render reflects their best professional judgment." Flanigan Decl. ¶ 5. Dan Levin agrees. He confirms that "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." Levin Decl. ¶ 8. Jack Goldsmith concurs: "Having the political dimension in view means that OLC is not entirely neutral to the President's agenda. Especially on national security matters, I would work hard to find a way for the President to achieve his ends." Goldsmith, *The Terror Presidency* at 35. And Steve Bradbury similarly authorized us to represent that he shares the views of each of the preceding individuals that OLC has an affirmative duty to take into account its clients' objectives while presenting OLC's own honest assessment of the answer to questions posed. *See also* Best Practices Memo at 16 ("Before we

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lawyer made unwanted sexual demands on six female clients and solicited sexual favor in lieu of legal fees); *Disciplinary Counsel v. Sturgeon*, 855 N.E.2d 1221, 1225 (Ohio 2006) (court permanently disbarred attorney who attempted to solicit sexual favors from his client, stating that "lawyers must always exercise independent professional judgment and render candid advice to their clients" rather than "attempt[] to engage in a sexual relationship with a client"). In other words, merely being *figuratively* in bed with the client is not enough.

[40] Indeed, in pressing for (and receiving) Attorney General Jackson's approval of his plan to send destroyers notwithstanding the Neutrality Act in *Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 Op. Att'y Gen. 484 (Aug. 27, 1940), the President even personally "*engaged in an extensive line-edit of Jackson's draft opinion*," David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1045 (2008). More recently, in 1993 when OLC found no constitutional problems with President Clinton's far-reaching health care plan—one of his administration's signature issues—OLC undoubtedly knew the President's desired outcome. *Constitutionality of Health Care Reform*, 17 Op. O.L.C. 124 (Oct. 29, 1993) (Dellinger). That opinion puts on no airs of platonic "objectivity"—dismissing a Commerce Clause challenge because "*[f]ortunately*, the Supreme Court has long since rejected [such a] crabbed view"—even though such a sweeping overhaul affecting the well-being of millions of Americans and a significant portion of the U.S. economy is clearly a weighty matter demanding the highest advisory care. *Id.* at 125; *see also id.* at 124 (stressing that such challenges "should not be allowed in any way to deflect consideration of the merits of the President's proposal"). And this all makes sense, as the Attorney General has always been charged with giving "*his* advice and opinion" (28 U.S.C. § 511; *see* Judiciary Act of 1789, 1 Stat. 73), a duty that has, in turn, been delegated to OLC (*see* 28 U.S.C. §§ 510-513; 28 C.F.R. § 0.25(a)).

proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question").

It is accordingly quite inappropriate for OPR to define OLC's duty of "independence" (or "candor") in a manner that intrudes on this conception of the AAG's role. While some believe that OLC should serve as an impartial and neutral adjudicator, others do not. Former Chief Justice Rehnquist, for instance, rejected a view of the Department of Justice as a bureaucratic entity akin to a European Ministry of Justice. In his view, the Department had to articulate reasonable positions, but was not "required to take the one which would be most restrictive on its activities." *Nominations of William H. Rehnquist and Lewis F. Powell, Jr: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 185 (1971). Then-Judge Alito has similarly noted the problems inherent with presuming too much independence on the part of OLC: "Neither the Attorney General nor OLC has independent constitutional authority; rather, they assist the President in carrying out his authority under Article II.... These factors suggest that an OLC opinion should not be ... attacked on the ground that OLC did or did not act 'independently.' OLC is really not like a court, despite the fact that it follows some quasi-judicial procedures and issues 'opinions.'" Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 510 (1993); *see also* Eric A. Posner & Adrian Vermeule, *A "Torture" Memo and its Tortuous Critics*, Wall St. J., July 6, 2004, at A22 ("Posner & Vermeule") ("[F]ormer officials who claim that the OLC's function is solely to supply 'disinterested' advice, or that it serves as a 'conscience' for the government, are providing a sentimental, distorted and self-serving picture of a complex reality.").

OPR's conception of the duty of "objectivity" ignores OLC's unique institutional status and finds no support in the relevant rules or historical practice. It is not OPR's job to define OLC's mission. That responsibility rests with the President and the officials he nominates for the office.

C. OPR Intentionally Ignores Controlling Supreme Court Precedent Defining "Recklessness"

OPR predicates its misconduct finding against Judge Bybee on its determination that he was "reckless" when he failed to withhold the opinion on August 1 in order to do sufficient research to discover that the opinion was "incomplete" and "one-sided." Report at 256. OPR nevertheless does not apply the governing legal standards for proof of recklessness or make the requisite findings. To the contrary, although it fails to cite *a single case* relating to proof of recklessness, it declines to adopt the standards in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), for reasons that could not withstand a Rule 11 sanctions motion. OPR's conclusions against Judge Bybee cannot be upheld because it never identified or applied the correct standards.

First, OPR refuses to apply the standards established by the Supreme Court in *Safeco* for assessing the culpability of a firm that adopted a wrong interpretation of the law for one and only one reason: the statute at issue in *Safeco* "requires willfulness to establish civil liability" but the "definition of 'recklessness' under the OPR standard ... does not require willfulness." Report at 19 n.19. This footnote should embarrass OPR to high heaven. It could not have read the Supreme Court's decision and offered this distinction.

Even a quick reading of *Safeco* leaves no doubt that the recklessness standard at issue there and the one in OPR's rules are indeed one and the same. The Supreme Court squarely rejected counsel's arguments (like OPR's) that the term "willfulness" should not be equated with the civil "recklessness" standard. In *Safeco*, consumers brought a class action lawsuit against insurers alleging reckless violations of the Fair Credit Reporting Act ("FCRA"). The FCRA imposes civil penalties on persons who "willfully" violate consumer notice provisions of the Act. 15 U.S.C. § 1681n(a). The threshold question in the case was whether a "willful" violation required proof of "acts known to violate" the FCRA or only "reckless disregard of [the] statutory duty." *Safeco*, 551 U.S. at 56-57. The Court held that "reckless action is covered" by the civil liability provision because "the standard civil usage" of "willful" means "reckless." *Id.* at 52, 57. The Court supported its conclusion by quoting a treatise that explained that the terms "willful" and "reckless" have been "treated as meaning the same thing." *Id.* at 57 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* § 34, p. 212 (5th ed. 1984)).

If there were any doubt remaining (and there could be none), the Court then proceeded to resolve the case by assessing the culpability of the insurers' conduct solely with reference to the ordinary civil recklessness standard. The Court explained that it saw "no reason to deviate from the common law understanding" of the concept of "recklessness." *Id.* at 69. It accordingly used standard tort law definitions. It reasoned that "'the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Thus, the Court determined that "a company subject to FCRA does not act in *reckless disregard* of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. Applying the common law definition of the term, the Court held that "Safeco's reading [of the statute] was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for *reckless* liability." *Id.* at 70. There accordingly can be no debate that the Court was interpreting and applying the civil recklessness standard in *Safeco, i.e.*, the standard adopted in OPR's guiding documents.

Second, if OPR had applied the prevailing standard for proof of civil recklessness, as explained in *Safeco*, it would have recognized that counsel's adoption of even plausible answers to unsettled questions of law cannot form the basis for a finding of recklessness. The Court held that *Safeco* was in violation of the law because it failed to send notices to new applicants based on an erroneous interpretation of the statute. *Id.* at 55. Nevertheless, the Court also determined that Safeco's conduct was not reckless as a matter of law (despite allegations of bad faith). *Id.* at 70. The Court explained that when there is a "dearth of guidance" on a particular legal issue, it would "defy history and current thinking" to find a legal interpretation to be reckless where it "could reasonably have found support in the courts"—that is, where the text and relevant precedent "allow for more than one reasonable interpretation." *Id.* at 70 & n.20.[41] In fact, the

[41] The Solicitor General filed an amicus brief in support of Safeco, arguing that recklessness requires "an aggravated or extreme departure from standards of ordinary care" and that "more than mere unreasonableness or implausibility must be shown." Brief for United States as Amicus Curiae at 21-22. Thus, there is no recklessness in advancing a "colorable" (albeit ultimately incorrect) interpretation of the law. *Id.* at 22. The Solicitor General further argued that recklessness must be analyzed against an objective standard, taking into account "the extent to which the law was well-established and clearly understood." *Id.*

Court made clear that even some "unreasonable" interpretations would not be reckless because the interpretation had to be more than "careless." The judgmental immunity decisions discussed above, *supra* Section III.B.1, reach similar conclusions even in the context of negligence actions.

Third, OPR cannot even seem to settle on a consistent recklessness standard of its own. In its standards section, OPR asserts that "an attorney's disregard of an obligation is reckless when it represents a *gross deviation* from the standard of conduct that an objectively reasonable attorney would observe in the same situation." Report at 19. But then OPR never actually compares Judge Bybee's conduct to that of other similarly situated attorneys and makes a finding that his decision to sign the memos on August 1, 2002 represented a "gross deviation" from the standard. Had it done so, it would have discovered the numerous other officials who reached the same conclusions as Judge Bybee. *See supra* Section II.D. Far from being"[ir]relevant to [OPR's] analysis" (Report at 160), these concurrences offer significant proof that Judge Bybee's conduct did not represent a "gross deviation" from a reasonable standard of care.

As applied, OPR's notion of recklessness more closely approximates a standard of negligence. It asserts that "an attorney of Bybee's background and experience" "*should have* known that the memoranda were not thorough, objective or candid." Report at 256; *see also id.* (Judge Bybee "*should have* recognized and questioned the unprecedented nature of the Bybee Memo[]."); *id.* at 257 (Judge Bybee "*should have* questioned the logic and utility of applying language from the medical benefits statutes to the torture statute"). What Judge Bybee *should have* known says little about whether he acted recklessly. In contrast to negligence, recklessness entails action or inaction "in the face of an unjustifiably high risk of harm" or unlawfulness. *Farmer*, 511 U.S. at 836. The probability that harm or a violation of the law will result must be apparent to a "high degree." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Yet OPR did not and could not make such findings.

IV. OPR'S FINDINGS OF MISCONDUCT ARE BASED ON A FLAWED ANALYSIS OF THE BYBEE MEMOS

OPR claims that it did not consider whether or not the Bybee Memos "arrived at a correct result," but then proceeds to rest its findings of misconduct on a supposed pattern of "errors, omissions, misstatements, and illogical conclusions" within those documents. Report at 159-60. For starters, we doubt that any court or bar authority has *ever* held that a lawyer's candor and competence should be assessed by disregarding the accuracy and reasonableness of his conclusions in favor of an exclusive focus on "errors" or "omissions" in the supporting analysis. Under that approach, OLC lawyers could give advice that is later upheld 9-0 in the Supreme Court but still be referred to the Bar because their analysis was too cursory or "one-sided." *Id.* at 258. Indeed, OLC's approach represents the *inverse* of the approach the Supreme Court used to assess the recklessness of the legal interpretation at issue in *Safeco*. Even though Safeco's interpretation was *rejected* by nine justices, the Court still held that the company's position was not reckless because some other judges might have adopted Safeco's view of the law. *Safeco*, 551 U.S. at 69-70. Moreover, the Court held that there was no need to remand for a trial on the details of the company's review of the governing law because the adoption of a reasonable legal interpretation could not be reckless *as a matter of law*. *Id.* at 71.

Yet here, OPR contends that a finding of reckless misconduct is warranted due to the

"cumulative effect" of supposed errors and omissions even though OPR assumes that these alleged deficiencies did not actually affect the accuracy or reasonableness of OLC's bottom line advice. Report at 159-60. This unorthodox approach to an assessment of recklessness should be rejected out of hand. *See supra* Section III.C. But even on its own terms, OPR's analysis fails. Nearly all of the supposed "errors, omissions, misstatements, and illogical conclusions" in fact represent unfair characterizations of the advice given in the memos; statements of law that are either correct or open to genuine debate; or questions of judgment on how to write a memorandum. Courts do not categorize such issues as "errors" when assessing a lawyer's ethics or competence. *See supra* Section III.B.1. When the Bybee Memo and the Classified Bybee Memo are read together in their entirety, it readily becomes apparent that most of OPR's objections are unfounded and there is—at the very minimum—fair ground for debate over these issues. Indeed, many of the supposed errors OLC identifies are also found in the Levin Memo—the 2004 OLC opinion that according to OPR "superseded the Bybee Memo and eliminated or corrected much of its analysis." Report at 6. OPR attempts to turn molehills into mountains, and succeeds only in calling its own objectivity into question.

A. Specific Intent

The federal anti-torture statute criminalizes "torture," but restricted that term to acts that are "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)." 18 U.S.C. § 2340(1). Even though Congress unequivocally established that "specific[] inten[t]" is an integral part of the definition of "torture," OPR implies that OLC never should have seriously analyzed the issue given its "complexity." Report at 160, 169 (quoting the Levin Memo's view that "it would not be appropriate to rely on parsing the specific intent element"). Never mind that a lopsided majority of the *en banc* Third Circuit subsequently adopted the same interpretation of specific intent as the Bybee Memo without any handwringing whatsoever; the court resolved the issue by a vote of 10-3 based on its "ordinary meaning in American criminal law." *Pierre v. Attorney General*, 528 F.3d 180, 187 (3d Cir. 2008) ("*Pierre*"). OPR deems that fact "[ir]relevant" because it supposedly has no bearing on whether the Bybee Memo included a "thorough, objective, and candid analysis of the law in 2002 and 2003." Report at 175 n.132. Goodness gracious. As *Pierre* makes clear, the law did not change. The Bybee Memo just accurately analyzed the most authoritative precedents. The same cannot be said for OPR. The bevy of accusations leveled at this section cannot possibly suggest misconduct in light of *Pierre*'s complete vindication of the analysis.

1. The Bybee Memos set forth a well-reasoned and correct analysis of the specific intent element

OPR does not actually find that the Bybee Memo or the Classified Bybee Memo adopts an erroneous or unreasonable interpretation of the specific intent analysis, choosing instead to build its ethical case on supposed omissions and ambiguities. But any fair ethical analysis would have to start that with an acknowledgement that the analysis accurately predicted the interpretation subsequently adopted by the courts. So we will begin with the Bybee Memo's affirmation by *Pierre* even though OPR deemed the case irrelevant. Report at 175 n.132.

Like *Pierre*, the Bybee Memo began with first principles, citing *United States v. Carter*,

530 U.S. 255, 269 (2000), for the proposition that "[i]n order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act," namely "the specific intent to inflict severe pain." *Compare* Bybee Memo at 3, *with Pierre*, 528 F.3d at 187 ("[I]n order to act with specific intent, an individual must expressly intend to achieve the forbidden act....namely the infliction of the severe pain and suffering.") (citation and internal quotation marks omitted). Like *Pierre*, the Bybee Memo went on to distinguish between specific and general intent, noting that as a "theoretical matter ... knowledge alone that a particular result is *certain to occur* does not constitute specific intent." *Compare* Bybee Memo at 4, *with Pierre*, 528 F.3d at 189 ("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."). And like *Pierre*, the Bybee Memo similarly distinguished between actions taken "because of a given end" and those taken "in spite of their unintended but foreseen consequences." *Compare* Bybee Memo at 4, *with Pierre*, 528 F.3d at 189 (finding that the pain likely to result was an "unintended consequence" and thus "not the type of proscribed purpose contemplated by the CAT"); *see also United States v. Passaro*, Nos. 07-4249, 07-4339, slip op. at 22 (4th Cir. Aug. 10, 2009) (holding that the district court did not abuse its discretion in refusing the defendant's proposed jury instruction because the court "instructed the jury that [defendant] lacked the requisite criminal intent if he 'struck Abdul Wali in order to achieve another objective and not with the express intent to cause bodily harm.'").

Given the Third Circuit's adoption of an analysis that closely tracks the one set forth in the Bybee Memo,[42] there is no reason to assign blame to any of the authors of the memo, let alone Judge Bybee. The analysis appeared persuasive to him at the time, and *Pierre* vindicates that judgment. In addition, the section had been reviewed by Michael Chertoff, the Assistant Attorney General of the Criminal Division at the Department of Justice. Chertoff sat in on multiple briefings regarding the memos, discussed the specific intent section in particular with OLC after Philbin raised concerns with Yoo, and even made comments regarding the specific intent discussion on drafts of the Bybee Memo. Report at 42, 45-46, 57-59. Chertoff concluded that the specific intent section was correct as a legal matter, even though he cautioned that a jury might not be persuaded to acquit if the interrogation actually caused severe pain—a concern that was expressly addressed, as discussed below. *Id.* at 58-59.

2. The 2002 Memos adequately disclosed risks and uncertainties

OPR concludes that this correct analysis of the law was nevertheless "incomplete" because it "failed to note the ambiguity and complexity of this area of law" and did not adequately disclose "possible problems" with a "good faith defense." Report at 160, 175. Any fair reading of the memos reveals that they plainly and emphatically disclosed the only "problems" worth worrying about.

After explaining the law of specific intent, the concluding paragraph of this section

[42] The striking parallels between the Third Circuit's decision in *Pierre* and the Bybee Memo were not lost on the three judges who concurred in the result. They pointed out that the "issue before us has been the subject of recent commentary," and then proceeded to quote both from the Bybee Memo and (extensively) from the Levin Memo. *Pierre*, 528 F.3d at 193-95 (Rendell, J., concurring).

explicitly warned the CIA that the acquittal of an interrogator would be "*highly unlikely*" if he held an "unreasonable belief" that the techniques would not cause severe pain. Bybee Memo at 5. OPR tries to paint this as a "cursory qualification[]." Report at 175. But even this stark language was not an isolated phrase buried in a lengthy section. Any fair reader of the section that appears at pages 3-5 of the Bybee Memo would see that these paragraphs are littered with repetitive qualifications cautioning the CIA not to rely on anything other than reasonable beliefs about the severity of the pain its techniques might inflict:

- "As a *theoretical* matter," knowledge alone "does not constitute specific intent." Bybee Memo at 4.
- "While as a *theoretical* matter, such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that [specific] intent is present." *Id.*
- "[W]hen 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." *Id.*
- "Where a defendant holds an unreasonable belief ... a jury will be permitted to infer that the defendant held the requisite intent." *Id.*
- "Although a defendant *theoretically* could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation." *Id.* at 5.

The centrality of these cautionary statements was underscored by the Classified Bybee Memo. That memo's analysis of specific intent centered on an assessment of whether the CIA could establish that it reasonably believed that the techniques would not inflict severe pain on Abu Zubaydah in light of his actual physical and mental condition. Classified Bybee Memo at 16-18. The concluding paragraphs stressed the CIA's representations that it had "conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah" to inform its "reasonable" belief that "the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm." *Id.* at 18. And the opening page of the Classified Bybee Memo stressed OLC's "understand[ing]" that the CIA did not have "any facts in [its] possession contrary to the facts outlined here," that the opinion was "limited to these facts," and that "[i]f these facts were to change, this advice would not necessarily apply." *Id.* at 1.

OPR does not even contend that the CIA somehow overlooked these cautionary statements or actually elected to use OLC's "theoretical" analysis of specific intent to proceed on the basis of unreasonable beliefs about the consequences of its proposed techniques. And of course there is no such evidence. *See supra* Section II.E-F. OPR contends, instead, that OLC should have expressed less certainty about its correct interpretation of the law.

First, OLC allegedly "failed to note the ambiguity and complexity of this area of the law" (Report at 160)—as if that sort of statement might have had more impact on the CIA's decisions than an explicit warning that *conviction was "highly []likely"* if the CIA proceeded in the absence of reasonable beliefs about the severity of the pain that would be inflicted. Bybee Memo at 5. OPR nevertheless points to the Levin Memo as its required mode of analysis. Report at 169. That memo, which was written for the public in the aftermath of criticism of the interrogation policies, declined to "define the precise meaning" of specific intent based on the view that "the cases are inconsistent" and that it would be "[in]appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." Levin Memo at 16-17. That advice may have been politic, but it was hardly required as a matter of ethics.

The Levin Memo acknowledged that the Supreme Court opinions cited in the Bybee Memo, *United States v. Carter*, 530 U.S. 255 (2000) and *United States v. Bailey*, 444 U.S. 394 (1980), supported the conclusion that "specific intent" involved a "purpose" or "conscious[] desire[]" to cause a certain result as opposed to mere "knowledge" that it would occur. Levin Memo at 16. It then cited one contrary Fourth Circuit case, *decided before Bailey or Carter*, as its sole example of "inconsistent" cases. *Id.* As the Third Circuit's opinion in *Pierre* later confirmed, 528 F.3d at 187, *Carter* supplied the governing definition of "specific intent" and there was just no need to discuss old lower court authorities. Indeed, *Pierre* emphasized that the interpretation adopted in the Bybee Memo represented the "ordinary meaning" of specific intent "in American criminal law." 528 F.3d at 187. The answer to the question posed was so apparent that the majority only devoted six paragraphs to the issue. *Pierre*, 528 F.3d at 188-90.[43]

Levin's second ground for avoidance was also questionable. It is not only appropriate to "pars[e] the specific intent element," Levin Memo at 17, but doing so is affirmatively required by the structure of the statute. Congress expressly tied the *definition* of conduct that constitutes "torture" to the "specific[] intent[]" of the actor. 18 U.S.C. § 2340(1). Thus, contrary to the Levin Memo's assertion, conduct undertaken without specific intent simply does not "otherwise amount to torture." Levin Memo at 17. Surely OLC cannot be faulted for providing a complete and correct answer to the question asked by the client. *See* Rule 1.4 cmt. [2] ("A client is entitled to *whatever information the client wishes about all aspects of the subject matter* of the representation ....").

[43] OPR's own recitation of supposed confusion in the law of specific intent, Report at 170-71, does not enhance its position. The passage from *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978), for instance, refers only to the well-known complexity of the *mens rea* element in criminal offenses as a general matter, without any discussion of specific intent. OPR's citation to *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985), is also inapposite. In that case, the Court found the requested specific intent instruction "potentially misleading" because the statute at issue never mentioned specific intent but rather forbade "knowing[]" food stamp fraud. *Id.* at 420 n.1. Here, OLC had no option to "eschew use of difficult concepts like 'specific intent,'" *id.* at 433 n.16, because the statute itself includes the concept. The same holds true for OPR's citation to *Bailey*, 444 U.S. at 403-04; while it may be true that statutes increasingly draw from the Model Penal Code in defining the relevant state of mind, the fact remains that Congress has *not* replaced the specific intent standard in the anti-torture statute. Finally, OPR's sampling of Sixth Circuit cases convincingly shows that even if the meaning of specific intent varies by statute, courts have little trouble determining the proper mental state for the statute in question. *See, e.g., United States v. Krimsky*, 230 F.3d 855, 860-61 (6th Cir. 2000) (deciding in four paragraphs that reckless disregard satisfies the specific intent requirement under 18 U.S.C. § 664).

At bottom, it is silly for OPR to claim that the absence of a degree-of-difficulty disclaimer in OLC opinions amounts to an ethical violation. OLC exists to resolve challenging and contentious questions within the executive branch so there is little need to state the obvious. Indeed, OPR acknowledges that the CIA only requested this advice after conducting its own analysis and determining that the issues were of sufficient difficulty that OLC should be consulted. Report at 37. And if there were any doubt about the CIA's understanding of the uncertainties, it is surely resolved by the last sentence of the Classified Bybee Memo, which stated: "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." Classified Bybee Memo at 18. *See also* Appendix 18 (detailing abundant disclosure of risks and uncertainties in the governing law).

Second, OPR faults OLC for failing to "point out that the good faith defense is generally limited to fraud or tax prosecutions" and asserts that "[t]he availability of good faith as a defense to torture is not a foregone conclusion." Report at 174. That advice would not have been well reasoned at all. Good faith is not an affirmative defense under this statute because good faith is integral to determining whether there has been specific intent in the first place. OLC explained that evidence demonstrating that "a defendant has a good faith belief that his actions will not result" in severe pain would completely "negate the specific intent element" of the statute. Bybee Memo at 8. The qualifications OPR is mandating simply have no applicability to the plain language of this statute. As *Pierre* squarely holds, 528 F.3d at 190, the defendant's own beliefs and "purpose" (and thus "good faith") are an integral part of the restrictive definition of "torture" adopted in the CAT (and thus the statute as well).[44] The D.C. Circuit likewise held in *Price*—one month before the Standards Memo was issued—that "torture can occur under the FSIA [Foreign Sovereign Immunities Act] only when the production of pain is *purposive*." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).[45] The court expressly found that the infliction of severe pain would not be "torture" if it was "unforeseen." *Id.* at 93. Similarly, DOJ regulations interpreting CAT, which were adopted several years before the events at issue, established that "[a]n act that results in *unanticipated or unintended* severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5). In other words, a defendant who does not foresee, anticipate, or intend to cause severe pain acts in good faith and cannot commit torture as defined in the statute.

Of course OPR does not fault OLC for overlooking these directly relevant authorities. Perhaps that is because they firmly supported the conclusions of the Bybee Memo and foreclosed the need to discuss OPR's preferred (and unsupportable) view of the law? Nor does OPR mention that the Levin Memo (which OPR elsewhere uses as the standard of comparison), as well as the Bradbury Techniques Memo, concluded that "an individual [who] acted in good faith" would not "have the specific intent necessary" to violate the Act. Levin Memo at 17;

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[44] The Justice Department recently cited *Pierre* for this very proposition in a case before the Sixth Circuit. *See* Respondent's Submission in Response to Court's April 16, 2009 Order at 20, *Demjanjuk v. Holder* (6th Cir. Apr. 23, 2009) (No. 09-3416) (quoting *Pierre*, 528 F.3d at 189) ("An applicant for CAT protection must establish that 'his prospective torturer will have the motive or purpose' to torture him.").

[45] As noted by the court in *Price*, "[t]he FSIA's definition of torture derives from the meaning given that term in section 3 of the Torture Victim Protection Act of 1991," which in turn "borrows extensively" from the CAT. 294 F.3d at 91-92.

Bradbury Techniques Memo at 28. Although both memos left open the question whether a good faith belief had to be "reasonable," they certainly did not caution the CIA that good faith might be irrelevant to this statute. Levin Memo at 17; Bradbury Techniques Memo at 28. Indeed, these later opinions suffer from the same alleged shortcomings OPR identifies in the Bybee Memo: they do not "point out that the good faith defense is generally limited to fraud or tax prosecutions"; they do not "address the possibility that a court might refuse to extend the good faith defense to a crime of violence"; and they do not "advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness." Report at 174.

Thus, OPR's suggestion that various documents referencing OLC's conclusions about specific intent were somehow misleading is completely misplaced. Every document OPR references—the Bybee Memo, the Classified Bybee Memo, Yoo's July 13, 2002 letter, and the CIA's June 2003 Bullet Points—all included correct statements of the law regarding good faith.[46] There was unanimity at OLC that an individual acting with a good faith belief that his conduct would not inflict severe physical or mental pain or suffering would not have the specific intent to violate the anti-torture statute. *Compare* Bybee Memo at 4, *with* Levin Memo at 17 *and* Bradbury Techniques Memo at 28.

Even though *Pierre*, *Price*, and the CAT regulations amply demonstrate that the OPR-mandated-caveats would have been unsound, the authorities OPR invokes further undermine its analysis. OPR only offers two citations in support of its assertion that "a court might refuse" to recognize that good faith as a "defense to a crime of violence such as torture" because this defense is "generally limited" to fraud or tax prosecutions. Report at 174. *United States v. Wilson*, which considered good faith in a prosecution involving the unlawful export of firearms—not fraud or tax laws—only denied the good faith instruction at issue because "there was insufficient evidence to justify it." 721 F.2d 967, 974-75 (4th Cir. 1983).[47] And OPR's citation (at 174) to Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 19.06 (5th ed. 2000 & 2007 Supp.), fares no better. The model jury instruction referenced in § 19.06 of the treatise describes the good faith defense in general terms, applicable to any appropriate criminal charge.[48]

Third, OPR contends that the Bybee Memo was deficient because it "failed to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging

[46] It is worth noting that Judge Bybee had nothing whatsoever to do with either Yoo's July 13, 2002 letter to John Rizzo or the June 2003 CIA bullet points. *See* Bybee Tr. at 116 (Judge Bybee informing OPR that he had never "heard or ever read" about anything regarding a set of bullet points). Thus, OPR's criticism that the CIA Bullet Points "do not mention the one qualification to the good faith defense cited in the Bybee Memo" (Report at 166), has no bearing whatsoever on the assessment of Judge Bybee's responsibility.

[47] Attorney General Mukasey, Deputy Attorney General Filip, and Judge Bybee all have previously made OPR aware of this fact. *See* Mukasey Letter at 6; Bybee Draft Response at 46.

[48] It is likely that OPR is unknowingly referencing a very different principle in the law. When construing statutes that are "highly technical" and not *malum in se*, as in the tax field, courts have been more willing to infer that a criminal offense requires proof that the defendant specifically intended to violate the law. *See Safeco*, 551 U.S. at 57 n.9 (citing *Cheek v. United States*, 498 U.S. 192, 200-01 (1991)). Here, the question concerns the relevance of a good faith belief that the techniques would not cause severe pain—not a good faith belief that the conduct was lawful even if it did.

willful blindness, or conscious or deliberate ignorance or avoidance of knowledge that would negate a claim of good faith." Report at 174. OLC did not use the term "willful blindness," but the Bybee Memos told the CIA everything it needed to know with respect to this risk. As explained above, OLC repeatedly emphasized the importance of due diligence, *e.g.* Bybee Memo at 8, and warned that it was "highly unlikely" that an interrogator would be acquitted in the absence of a reasonable belief. *Id.* at 5. Yoo's July 13, 2002 letter similarly explained that good faith could be established "*if* ... it was learned that the conduct would not result in prolonged mental harm" and there was "due diligence" such as "surveying professional literature, consulting with experts, or evidence gained from experience." Report at 161-62. Obviously, an interrogator could not be found to be "willfully blind" if the CIA followed this advice.

Regardless, OPR's view has been rejected. Both the Third and Second Circuits have squarely held that willful blindness is *insufficient* to establish specific intent under the anti-torture statute. *See Pierre*, 528 F.3d at 190; *Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007).[49] As the Third Circuit explained, "[w]illful blindness can be used to establish knowledge but it does not satisfy the specific intent requirement in the CAT." *Pierre*, 528 F.3d at 190. Confronted with this authority—which it completely overlooked or ignored in its Draft Report—OPR now claims that these authorities had "no bearing on whether its authors presented a thorough view of the law at that time." Report at 175. But *Pierre* treats its holding as an obvious corollary to the rule that "mere knowledge is [in]sufficient for a showing of specific intent," 528 F.3d at 190, and that interpretation had already been adopted in the CAT regulations and in *Price*. And it is beyond absurd to criticize OLC for correctly predicting the law. OPR's further claim that it only suggested that "a willful blindness instruction might be granted ... to counter a defendant's claim that he held a good faith belief" (Report at 175), misses the whole point of *Pierre*. It is the prosecution's burden to prove that the defendant did not hold a good faith belief "that the use of EITs would not result in the infliction of severe mental or physical pain or suffering" (*id.*), and that burden cannot be met with proof of willful blindness.

3. The use of two ambiguous sentences in a lengthy analysis did not render the advice "misleading"

OPR asserts that the analysis of specific intent was "misleading" because it "clearly implied" that interrogators could not be guilty unless they specifically intended to disobey the law and "erroneously suggested" that an interrogator who "acted with the goal or purpose of obtaining information" would not act with specific intent. Report at 171, 160-61. OPR seeks to pluck isolated ambiguities out of context when it knows that the intended audience—the General Counsel of the CIA and the White House Counsel—did not interpret the memos as adopting either view. Nor could they have reasonably relied on any such interpretations without seeking clarification.

First, OPR asserts that OLC's discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994), "implied that the Court had considered the meaning of specific intent and had concluded

[49] The Department of Justice itself argued this point before the Third Circuit in *Pierre*. *See* Supplemental Brief for Respondent at *11, *Pierre v. Gonzales*, 2008 WL 5793263, (3d Cir. Feb. 1, 2008) (No. 06-2496) ("Willful blindness is not tantamount to specific intent because willful blindness at most establishes the actor's knowledge; it does not establish illicit motive or purpose.").

that it required an express purpose to disobey the law on the part of the defendant." Report at 171. This is misleading, OPR reasons, because "the *Ratzlaf* decision did not address the meaning of 'specific intent' in a general sense." *Id.* Yet neither the Bybee Memo, nor the Classified Bybee Memo, nor any other OLC opinion ever sought to apply *Ratzlaf* as a rule of "general" applicability. To the contrary, the Bybee Memo explained how the Court in *Ratzlaf* construed "the statute *at issue*," noting—accurately—that under the Bank Secrecy Act the forbidden act was a "purpose to disobey the law." Bybee Memo at 3. Nowhere does OLC seek to extend the "purpose to disobey the law" language of *Ratzlaf* to the anti-torture statute or any other statutory regime. In fact, in the very next sentence the Bybee Memo makes its use of *Ratzlaf* as an "example" of specific intent analysis crystal clear. It draws a contrast to *Ratzlaf* by noting that "[h]ere," under Section 2340, the forbidden act is the "intent to inflict severe pain." *Id.* at 3. As Judge Bybee explained in his interview with OPR (Bybee Tr. at 64), "I think we've been quite clear in that next sentence, [that Section] 2340 requires the defendant act with the specific intent to inflict severe pain, and we have not echoed the holding in *Ratzlaf* described in the previous sentence that you had to act with a specific intent to violate the law."[50]

Every reference in the Bybee Memo to the requisite proof of specific intent under the anti-torture statute refers to proof that the defendant intended to cause severe pain. *See, e.g.*, Bybee Memo at 1 ("We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical."); *id.* at 3 ("Thus, to convict a defendant of torture, the prosecution must establish that ... the defendant specifically intended to cause severe physical or mental pain or suffering"); *id.* at 3 ("To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent."); *id.* at 8 ("A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture."). It never once asserts that conviction would turn on proof that the defendant intended to violate the law. The same is true of the Classified Bybee Memo. It includes a section on specific intent but never cites *Ratzlaf* or suggests that an interrogator must intend to disobey the law. To the contrary, it reminds the CIA that, "[a]s we have previously opined, to have the required specific intent, an individual must expressly intend to cause ... severe pain or suffering." Classified Bybee Memo at 16 (citing Bybee Memo at 3). The Bybee Memo expressly and correctly highlights *Ratzlaf* as an "example" of how courts apply the general rules governing specific intent explained in *Carter*, not a general rule itself. Bybee Memo at 3. Rather than reference all of these express, unequivocal statements to clarify any ambiguity created by the citation to *Ratzlaf*—as the law unquestionably requires—OPR instead seeks to bolster its interpretation by quoting a *deleted* sentence from a *draft* of the Bybee Memo. Report at 172-73. In other words, OPR considers OLC's efforts to delete sentences that would be ambiguous or inaccurate as evidence of misconduct.

Second, OPR concludes that OLC "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." Report at 160-61. This conclusion is supposedly supported by the "totality of OLC's legal advice to the CIA on this subject" (*id.* at 161), even though none of the documents OPR identifies makes *a single reference* to the CIA's purpose of obtaining information when discussing specific intent. Instead

[50] Even one of OPR's investigators, during Judge Bybee's interview, admitted as "a side issue" that he didn't think *Ratzlaf* "was a central part of what the memo was saying." Bybee Tr. at 62-63.

of genuinely evaluating the totality of the advice and the CIA's actual interpretation of the advice, OPR chooses to base bar referrals on an ambiguity grounded in a single sentence.

OPR "point[s] to the following sentence" which states that "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. Although it is possible to read this sentence to mean that a defendant who inflicts severe pain with the "objective" of securing information lacks the requisite intent, that is not the most reasonable reading of this sentence even when it is read in isolation. An interrogator who seeks to inflict severe pain in order to secure information would in fact have the "objective" of "causing such harm" as a means of achieving his ultimate "objective" of securing information. The sentence OPR relies upon never states or implies that "causing such harm" must be the defendant's sole or ultimate objective. Indeed, the Third Circuit explained this precise hypothetical in *Pierre*. The majority noted the concurring opinion's assertion that "under [the majority's] definition, it would not be torture for a jailer to use electric shock tactics to solicit information where the 'purpose in interrogating' is to obtain information." 528 F.3d at 190 n.7; *see id.* at 196 (Rendell, J., concurring). Unlike Judge Bybee, the majority in *Pierre* had the opportunity to clarify its analysis and explained that "people commonly have dual purposes" and the jailer in the hypothetical "would have a purpose of inflicting serious pain and suffering" because "the reason a jailer uses torture tactics is the jailer's belief that the pain caused will induce the prisoner to reveal information." *Id.* at 190 n.7.

The accused sentence in the Bybee Memo can and should be explained in precisely the same way here. Instead of absolving a CIA interrogator who purposefully inflicts severe pain in order to get information, the sentence is best read to describe the type of "theoretical" fact pattern that was actually presented in *Pierre*. As explained, the Haitian government knew that imprisoning Pierre would likely lead to severe pain and suffering because of the lack of adequate medical care for his health condition, and the Court held that this "unintended consequence" did not demonstrate the requisite "purpose of inflicting severe pain or suffering." *Id.* at 189-90. Thus, *Pierre* conclusively demonstrates that there is a legally *correct* reading of that sentence in the Bybee Memo that is fully consistent with its text.

OPR offers no good reason why it should prefer to adopt an *incorrect* reading of the law that is in no way required by the language that was used. Ambiguities are inherent in the drafting process and it is axiomatic that they should be resolved in favor of reasonable interpretations of the law. In *Auguste v. Ridge*, for example, the BIA opinion under review had one "troubling statement" that could be read to require proof of "an intent to inflict torture." 395 F.3d 123, 146 (3d Cir. 2005). The Third Circuit nevertheless refused to reverse the decision when "the rest of the opinion clearly indicates that the BIA appropriately understood" that the law only required "specific intent to inflict severe pain or suffering, not anything more." *Id.* at 146-47. In fact, the same criticism at issue here could be leveled against the D.C. Circuit. In *Price*, the D.C. Circuit, in an opinion by Judge Edwards, held that the definition of torture under the FSIA and TVPA required proof that the defendant "impose[d] suffering cruelly and deliberately, rather than as the unforeseen or *unavoidable* incident of some legitimate end." 294 F.3d at 93. This sentence surely could be read to mean that an interrogator's use of severe pain is simply the "unavoidable incident" of its "legitimate" quest for information, and that there is accordingly no specific intent. But we can be fairly sure that is not what Judge Edwards meant.

And any doubts about OLC's meaning are resolved through reference to the balance of OLC's advice and the CIA's interpretation. If OLC actually intended to tell the CIA that its motive to obtain information negated specific intent, it surely would have spelled that out. What an easy defense that would be. But OLC never said that anywhere. Not once. Nor would there have been any need to analyze the basis for the CIA's belief that the techniques would not actually cause severe pain or suffering. *See* Classified Bybee Memo at 4-9. It is also telling that OPR interviewed the lawyers in the CIA General Counsel's office (Report at 6-7), but never suggests that any of them ever said that they actually believed that the memo means what OPR says it means. Indeed, the CIA's internal Interrogation Guidelines, which were drafted after receiving OLC's advice, make no reference to this purported exception. They instead state that medical personnel must ensure that the detainee does not experience severe pain or suffering. DCI Guidelines on Interrogations 2 (Jan. 28, 2003) ("In each case, the medical and psychological personnel shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is likely to result in the interrogation is not suspended."). Yet OPR somehow fails to mention this evidence of how the CIA interpreted its own authority under the memos.

In the end, OPR considers it fair to adopt this resolution of the ambiguity because some OLC lawyers said it was a *possible* reading of the sentence. Levin told OPR that the memo "*sort of* suggested" this interpretation, which would be "ridiculous." Report at 168. The fact that this reading would be "ridiculous" is a rather good sign that it was not intended. Philbin said he disagreed with the memo "to the extent it *could* be read" to suggest this interpretation—not that he thought that was the best or only interpretation. Report at 168.[51] And another, unnamed attorney told OPR it "*could* be read" OPR's way and that he was "left wondering." *Id.* at 169. In other words, they all identified an ambiguity. None of them concluded that the client could reasonably rely on such a reading or that it did so. And the facts foreclose that view. There is simply no basis to treat this ambiguous sentence as contributing to any "serious deficiency" in the representation.

B. "Severe Pain"

OPR next levels multiple criticisms against the Bybee Memo's inquiry into the meaning of "severe pain." Report at 176-84. As explained below, none have merit and so they provide no basis for OPR's findings as to thoroughness, objectivity, and candor. *Id.* at 226, 228.

With the Bybee Memo, OLC attempted to provide a concrete, understandable interpretation of "severe" pain as that phrase is used in the federal criminal anti-torture statute.[52] As noted, the task is one of line-drawing—distinguishing between the extreme conduct

[51] Philbin added that there would be "*no reasonable basis* to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63.

[52] *See* 18 U.S.C. § 2340(1) (defining "torture" as an act "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)"). The statute does not elaborate on "severe physical ... pain," but defines "severe mental pain" as "prolonged mental harm" caused by one of the following predicate acts: the threat of imminent death; the threat or intentional infliction of severe pain or suffering; the threat or administration of mind-altering drugs; or the imminent threat of any of these against a third party. 18 U.S.C. § 2340(2). Severe mental pain is addressed further below. *See infra* Section IV.H.2-3.

constituting torture and other conduct that might well be cruel, inhuman, and degrading, but does not rise to the level of torture. Collectively, the Bybee Memos finds that several techniques fall on the "torture" side of the line (including burning, needles under the fingernail, electric shocks, piercing the eyeball, hanging from hands or feet, and severe beatings), while several other techniques, subject to specifically-enumerated constraints, do not (including sleep deprivation, stress positions, and waterboarding). These are reasonable lines to draw.

The Bybee Memo examines the plain statutory text, several dictionary definitions of "severe," and the statute's legislative history. After an exhaustive review of these sources—the same sources of statutory interpretation relied upon by Supreme Court justices and other executive branch attorneys—it was clear that by using the adjective "severe" to describe the pain threshold necessary for conduct to constitute torture, Congress meant to set a particularly high bar. *See* Bybee Memo at 5 (noting that dictionary definitions of severe include "pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture"; "extremely violent or grievous: severe pain"; "grievous, extreme"; "hard to sustain or endure"). OLC also reviewed the U.S. Code for other instances of the term "severe pain," and discovered that the phrase appears in only one other context in the entire U.S. Code: a collection of Health and Human Services statutes. From those statutes, the Bybee Memo determines that "severe pain" is the type that is "equivalent in intensity to the pain accompanying serious physical injury." *Id.* at 1; Classified Bybee Memo at 10. Even so, the memo stresses that "a *single incident* can constitute torture" and that "the harm sustained from the acts of torture *need not be permanent*." Bybee Memo at 26, 21; *see also* Classified Bybee Memo at 9 (analyzing each of the techniques individually because "a single event of sufficiently intense pain may fall within this prohibition").

This high bar is entirely consistent with the text and ratification history of the CAT, which distinguishes between torture and other cruel, inhuman and degrading acts, reserving for the former category only the most extreme conduct. *Compare* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Article 1 (torture), *with* CAT Article 16 (cruel, inhuman and degrading acts); *see infra* Section IV.C. As the CAT itself provides, while state parties must undertake to criminalize "torture" (Article 4), they need not do so for "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Article 16.1).

This distinction also resonates with a host of judicial opinions interpreting the Torture Victim Protection Act ("TVPA") (another statute implementing the CAT, by providing civil remedies for torture), which the Bybee Memo discussed in its text and in a substantial appendix. Bybee Memo at 22-31, 47-50. Moreover, shortly before the Bybee Memo was finalized, the D.C. Circuit explained that "severe pain" entails "'excruciating and agonizing'" pain that is "intense, lasting, or heinous" and described the "severity requirement" as "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." *Price*, 294 F.3d at 92-93 (reversing 110 F. Supp. 2d 19 (D.D.C. 2000) (cited in Bybee Memo at 47)).[53] The court thus

[53] Although not directly applicable here, torture has been described in other contexts in similarly stark terms. *See, e.g., The Margharita*, 140 F. 820, 828 (5th Cir. 1905) ("unspeakable agony"); *Wade v. Calderon*, 29 F.3d 1312, 1338 (9th Cir. 1994) (Trott, J., concurring and dissenting) ("torment or agony"); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 206 (2d Cir. 2009) (Wesley, J., dissenting) ("horrific physical and emotional pain").

rejected, as insufficient to meet this "rigorous definition of torture," the plaintiffs' allegations of being "kicked, clubbed, and beaten"; being deprived of medical care; and being "interrogated and subjected to physical ... abuse." *Id.* at 86, 93. In short, consistent with these authorities, the Bybee Memo thoroughly analyzed the meaning of the term "severe pain" and arrived at an eminently reasonable interpretation.[54] *See also* Report at 187 (noting that the Bybee Memo reached an "*uncontroversial conclusion* that torture is an aggravated form of cruel, inhuman, and degrading treatment.").

1. The Bybee Memo reasonably examines statutes with similar phrasing

OPR criticizes the Bybee Memo for interpreting "severe pain" in part by analogizing to terms used in a collection of health care statutes. Report at 176-84; *id.* at 230 (health care statutes are "of no practical value in interpreting the [anti-torture] statute"). This, however, is a standard analytical practice and certainly not evidence of ethical misconduct, even if reasonable attorneys can debate how much weight to afford an analogy to other statutes in this context. It is not for OPR to preempt OLC's reasonable judgments with its own on such basic matters of legal judgment.

After the memo examines the text of the statute and several dictionary definitions, it looks for other statutes using the same term. Bybee Memo at 5-6. The phrase "severe pain," however, appeared nowhere else in the U.S. Code, except for a collection of health care statutes addressing the provision of emergency medical services. *See* 8 U.S.C. § 1369; 42 U.S.C. §§ 1395w-22, 1395x, 1395dd, 1396b, 1396u-2. These statutes define an "emergency medical condition" as 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" "serious impairment to bodily functions"; "serious dysfunction of any bodily organ or part"; or "serious jeopardy" to the patient's health. *E.g.*, 42 U.S.C. § 1395w-22(d)(3)(B). Therefore, to "shed more light" on the common meaning of the term, the Bybee Memo considers those statutes, transparently acknowledging that they "address a substantially different subject" (Bybee Memo at 6), and determines that Congress viewed "severe pain" as akin to "the pain accompanying serious physical injury"—such as, but not limited to—"organ failure, impairment of bodily function, or death." Bybee Memo at 1; *see id.* at 5 (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991), for the general proposition that "we construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

Initially, OPR sought to advance the rather stunning argument that OLC is precluded, on pain of professional punishment, from giving *any* consideration to these admittedly unrelated statutes that use precisely the same phrase. OPR stated: "*We know of no authority*, and the Bybee Memo cited none, in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term." Draft Report at 138. That was, of course, patent nonsense, and OPR now concedes (as it must), that "[i]nterpreting

[54] The D.C. Circuit's opinion lends significant support to the Bybee Memo's interpretation of the anti-torture statute even though the Bybee Memo neglects to cite it. Indeed, the D.C. Circuit *reversed* the district court's opinion, which the Bybee Memo had discussed (at 47).

ambiguous statutory language by analogy to unrelated but similar legislation is a recognized technique of statutory construction." Report at 182. It is remarkable that OPR needed this basic principle of statutory interpretation explained and, frankly, calls into serious question anything else OPR has to say on the matter (let alone on complex matters of *constitutional* dimension, *see infra* at Section IV.F).

Of *course* courts can consider similar phrases wherever they might occur—in dictionaries, in court opinions, and in unrelated statutes—to shed light on common understandings of the English language. As the Seventh Circuit explained, "sometimes courts simply interpret ambiguous statutory language by reference to similar terms in an unrelated act." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (Flaum, C.J.).[55] And Sutherland's treatise makes perfectly clear that it is wholly appropriate to interpret one statute "by analogy" to "unrelated statutes." 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 53:3 (7th ed. 2008) ("Sutherland") (citing over 100 state and federal cases); *id.* § 53:4 (citing over twenty additional examples). Sutherland points out that "the interpretation of a *doubtful* statute may be influenced by language of *other statutes which are not specifically related*, but which apply to similar persons, things, or relationships." *Id.* § 53:3. Sutherland further explains: "Those forces which operate to produce a sufficient incidence of congruence even among statutes on different and dissimilar subject are conventional modes of thinking about legislative problems and solutions, common idioms and customary language usage, and established approaches to the design of the statutory provisions." *Id.* § 53:1. Thus, construing statutes "by reference to other"—even unrelated—statutes advances the values of "[h]armony and consistency." *Id.* In fact, "courts have been said to be under a *duty* to construe statutes harmoniously where that can reasonably be done." *Id.*[56]

OPR nonetheless argues that the use of the statutes here was "illogical" because "the intensity of pain that accompanies organ failure or death has *no commonly understood meaning* and had no practical value in explaining the meaning of 'severe pain.'" Report at 176, 178; *see also id.* at 230. In particular, OPR reasons, there is no logical connection because serious

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[55] *See also, e.g., Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008) (interpreting term by looking to use of same term in wholly unrelated statute); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (same); *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100-01 (1941) (same); *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 527 (5th Cir. 2005) (same).

[56] OPR also wisely abandons its prior contention (a red herring) that the Bybee Memo is somehow making an *in pari materia* argument simply because it quotes *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) (which in turn quotes a chapter of the 1947 edition of Sutherland's that discussed the *in pari materia* doctrine). The Bybee Memo plainly does not consider the health care statutes to be "relating to the same matter," *Black's Law Dictionary* 794 (7th ed. 1999) (defining "*in pari materia*"), *see* Bybee Memo at 6 (the health care statutes use "severe pain" in a "*substantially different*" context), a fact Judge Bybee confirmed in his interview, Tr. 73 ("[W]e haven't made an [*in pari material*] argument here, we aren't arguing that Congress ... incorporated that deliberately here."). Further, the drafting history makes clear that [redacted] added the passing citation to *Casey* simply to support the proposition that other instances of "severe pain" in the U.S. Code can "shed more light on its meaning." Report at 44. Yet, perhaps unable to let it go, OPR argues (at 181) that *Casey* is the "only legal authority" cited by the Bybee Memo (as if any were needed) to justify its analogy to unrelated statutes. But, like the Bybee Memo, *Casey* overtly turns to unrelated statutes in its interpretive process; indeed, one academic has cited *Casey* as a primary example demonstrating courts gathering interpretive insights from unrelated statutes that "concern[] different subjects." William Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. Penn. L. Rev. 171, 171 (2000).

physical injuries such as organ failure and death can occur with no pain whatsoever. *Id.* at 176 n.133, 179.

This (refined) argument still misses the point. OLC nowhere claims that, for example, organ failure *always* comes with severe pain. Instead, OLC simply attempts to flesh out a term of uncertain meaning by reference to events that evoke a common understanding of severe pain. As Judge Bybee stated in his interview, because severe pain is a "very difficult thing to define," they "simply tried to provide something else by which [they] can measure this." Bybee Tr. at 80-81; *see also id.* at 70-73 ("we're struggling" to provide a useful interpretation of the term and "we ought to look to any tools we can to try and understand *by analogy* what the term 'severe pain' means"); *id.* at 74 ("[W]e [needed] some standard against which we could measure our decision ... to try to be consistent.").

Indeed, OPR's lead attorney did the same thing, conceding that he would personally consider "painful dentistry" to be an example of severe pain. *Id.* at 80. But, of course, dentistry need not be accompanied by pain any more than organ failure or death. In fact, in modern times, it is probably far *less* likely to involve such pain. It is nonetheless an apt example—and one that the Bybee Memo itself recognized as involving severe pain. *See* Bybee Memo at 26 ("teeth pulling" involves severe pain). Likewise, although it is possible to conceive of a painless "serious physical injury," a gentle "organ failure," or a peaceful "death," that is clearly not going to be the "common understanding" that first comes to mind in the context of defining "torture" and "severe pain." The point is simply that, having no infallible mechanism for measuring pain, the OLC reasonably attempted to provide the client with useful legal advice in drawing lines and breathing life into an otherwise undefined term ("severe" pain), based on the common human experience and understanding reflected in other Congressional enactments.[57]

It is of no moment that, as OPR notes, the health benefits statutes do not "define or even describe 'severe pain'" (Report at 178), as the Bybee Memo never said they provided a concrete definition, only that they can "shed more light" on what a layperson would recognize as severe pain. That is, the Bybee Memo treated the phrase "severe pain" in other contexts as *illustrative*, not dispositive. In fact, OPR concedes that, under the health care statutes, "severe pain" is the type of pain that a "layperson" would understand might well be accompanied by "serious health consequences." *Id.* at 178 ("[The health benefits statutes] simply cite severe pain as [a] symptom[] that would lead a prudent layperson to believe that serious health consequences are likely to result ...."). And OPR acknowledges that Philbin stated that "the health benefit statutes could shed light on a 'lay person's understanding of what kind of pain would be associated with' death, organ failure, or loss of bodily function." *Id.* at 130 n.103 (quoting Philbin). Fairly read, this is all the Bybee Memo says. If (as the health care statutes assume and OPR acknowledges) it is reasonable for a layperson who feels "severe pain" to conclude that she is having "a serious dysfunction of any bodily organ or part," then it is perfectly logical to conclude (as does OLC) that there is a common understanding that "organ failure" is thought to be associated with a certain level of pain. If the association between severe pain and serious health consequences is

[57] It is not as if OLC plucked the term "severe" from statutes addressing, say, "severe weather" or "severe budget deficits"—contexts wholly unrelated to human health and physiology. *Cf.* 7 U.S.C. § 415-1(b)(2) ("severe ... poverty"); 42 U.S.C. § 17714 ("severe storms").

as attenuated as OPR asserts (whether in perception or in reality), then the health benefits statutes themselves are "illogical."

This is a particularly relevant exercise here because "severe pain" appeared nowhere else in the U.S. Code at the time; it is not a "common law term" or a "legal term of art" (Bybee Tr. at 70-73), and the legislative history is "scant" (Bybee Memo at 12). So, even if unrelated statutes are a "relatively weak aid," *Firstar*, 253 F.3d at 991, it surely cannot constitute professional misconduct to explore all available insight when attempting to discern the meaning of a statutory phrase. *See* Sutherland §§ 53:3-53:4. Similarly, although Philbin thought the medical statutes were "imprudent to use in this context," he said that the statutes could "shed light" on a lay person's understanding of severe pain. Report at 57, 130 n.103. Here, the Bybee Memo (which Philbin himself cleared Judge Bybee to sign) stressed in no uncertain terms that the health care statutes "address a substantially different subject," lest any unwary readers make too much of the analogy. Bybee Memo at 6.

Furthermore, it is especially important in the context of a criminal statute to provide "some fairly concrete context" [redacted] given that courts have long recognized that criminal sanctions can only be imposed if defendants have sufficient notice of the conduct that is prohibited, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) ("'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) ("'[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant ....'" (citation omitted)). As Judge Bybee noted, there was "some concern that the statute might be void for vagueness," and, as they "had real questions" before them, they could not address the task "simply as a philosophical nicety." Bybee Tr. at 73.

OPR's argument that OLC must first recite that the term is "ambiguous" before looking to unrelated statutes is unavailing. Report at 181 n.135 (OLC "should have demonstrated that the term 'severe pain' was ambiguous before turning to other statutory sources" (citing *Casey*)). *Casey itself* did not feel constrained to find language ambiguous before assessing unrelated statutes. Instead, *Casey* found the term at issue "unambiguous" and simply looked to other statutes in the course of determining the "ordinary meaning of the statutory terms" and the "normal import of the text." 499 U.S. at 98. In any event, whatever kernel of ambiguity OPR deems necessary is readily present here. In *Price*, for example, the D.C. Circuit explained that "the meaning of 'severe'" is "ambigu[ous]." 294 F.3d at 92. The Levin Memo similarly recognized (at 8) that "[d]rawing distinctions among gradations of pain ... is obviously not an easy task"; the Bradbury Techniques Memo noted (at 2) that "severe" is an "imprecise" term imbued with a "degree of uncertainty;" and Goldsmith stated that "[i]t is very hard to say in the abstract what the phrase 'severe pain' means." Goldsmith, *The Terror Presidency* at 145; Report at 179. And the simple fact that the Bybee Memo looked beyond the face of the statute should make plain that it, too, obviously recognized that there is some "degree of uncertainty" in the phrase at issue.

Finally, OPR also argues that OLC has, in summarizing the health benefits statutes, "rephrased the language of the statutes" so as to "add further support to their 'aggressive'

interpretation of the torture statute." Report at 178. This argument lacks merit. To start with, this line of attack is in considerable tension with OPR's argument that any association between physical injuries and pain is *per se* illogical. OLC can hardly inflate the severity of the pain by altering the description of the physical injuries if there is no natural connection between the two. In any event, the Bybee Memo does not improperly "heighten the severity of the listed consequences." *Id.* The Bybee Memo forthrightly quoted the health care statutory language and then simply summarized it as directed to a "serious physical condition or injury" (Bybee Memo at 6), which is a fair approximation of such injuries as "serious impairment to bodily functions," "serious dysfunction of any bodily organ or part," and "serious jeopardy" to a patient's health. The Bybee Memo then simply provides representative, concrete examples (organ failure, death, serious or permanent impairment of bodily functions) not, as OPR seems to think, as an exclusive list. *See* Report at 177-78.[58]

Tellingly, OPR offers no solutions on what OLC should have done to interpret severe pain and what sources and analogies OLC should have used. Apparently OPR would have OLC simply throw up its hands. But this ignores that it is precisely OLC's job to attempt to give concrete answers to real-world questions. Undoubtedly, had OLC neglected to cite the health care statutes, OPR would have pounced on that as well. *Cf. infra* Sections IV.E, IV.F, IV.G. Nor did OPR consult other OLC opinions, where it would have found numerous examples of OLC making far more attenuated analogies. For example, in 1977, in the nascent Carter Administration, Assistant Attorney General Harmon, in determining whether a state can rescind its approval of a constitutional amendment, interpreted the constitutional language in Article V ("when ratified by the legislatures of three fourths of the several states") based in part on "precedents in the fields of municipal bond elections or votes on special assessments." *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 14-15 (Feb. 15, 1977). Surely this is even further removed than consulting some emergency health care statutes to "shed more light on" the meaning of "severe pain." Bybee Memo at 5. The practice of interpreting statutes by comparison to unrelated statutes continues in the present OLC.[59] OPR's failure to assess whether OLC's performance was commensurate with other OLC opinions, per D.C. Rule 1.1(b), belies the notion that OLC's duty is "unambiguously" known.

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[58] OPR states that "'serious jeopardy' became 'death,' 'serious dysfunction of any bodily organ' became 'organ failure,' and 'serious impairment of bodily functions' became 'permanent damage.'" Report at 178. These terms are all of a piece—reasonably "paraphrased" (*id.* at 178 (quoting Yoo))—and not as dissimilar as OPR believes. It is hard to see, for example, how "dysfunction of [a] bodily organ," 42 U.S.C. § 1395w-22(d)(3)(B)(iii), is that different from "organ failure." *See, e.g., Merriam-Webster's Collegiate Dictionary* 360 (10th ed. 2001) ("dysfunction" defined as "impaired or abnormal functioning"); *id.* 416 (definitions for "failure" include "state of inability to perform a normal functioning"). In any event, OPR acknowledges that OLC "restated [its] conclusion several times, with slight variations," some of which use other terms, such as "serious physical injury" and "impairment of bodily function." Report at 177. OPR gives no justification for cherry-picking certain words, divorcing them from the rest of the opinion (let alone from the ultimate approval of the 10 specific techniques). *Cf. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions ...."); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ....'" (citation omitted)).

[59] *See, e.g.*, Memorandum Opinion for the General Counsel, Small Business Administration, from Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development,*

In short, OPR is now reduced to quibbling over whether or not OLC made a fitting analogy and properly summarized an unrelated statutory scheme. But reasoning by analogy and distilling statutes is what lawyers *do*, and it is quintessentially a matter of legal judgment whether and how to compare texts, cases, and situations, to other texts, cases, and situations. Although reasonable attorneys may well disagree with OLC's analogy to the emergency health care statutes, that is the stuff of reply briefs and dueling law review articles, not ethics opinions. And OLC did not hide what it was doing or misquote the statute. The power OPR would arrogate to itself as the final arbiter of the exercise of reasonable legal judgment is simply breathtaking.

2. The Bybee Memo never states that torture requires organ failure, death, or serious physical injury

OPR also claims the Bybee Memo "suggest[s] that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury." Report at 228. This is simply false.[60] Alternatively, OPR asserts that "[t]he Bybee Memo's definition of severe pain *could* be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury." Report at 180. This is equally untenable, as it is "a gross misreading of the memorandum." Bybee Tr. at 70. Contrary to OPR's suggestion, even if Judge Bybee intended and expected the memo to be used as a field manual (he did not), no rational interrogator, concerned for his or her own liability, would read the memo that way. And Rizzo has confirmed that he "did not interpret the 2002 Bybee Memos to mean that the proposed techniques would not constitute torture unless they caused organ failure." Rizzo Letter ¶ 5.

The Bybee Memo does not require any form of serious physical injury, let alone organ failure or death, as a *prerequisite* to finding severe pain. Instead, it merely concludes that "severe pain" entails a "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—in order to constitute torture." Bybee Memo at 6. The memo does *not* state that organ failure, death, or serious injury must occur for the conduct to constitute torture. In his interview, Judge Bybee made clear that such an interpretation would be "a bad reading of the memo" and "illogical." Bybee Tr. at 78-79. He explained that the memo was simply "trying to describe the threshold of pain" and that "severe pain is the kind of pain that rises to such an extreme level that it might be associated with actions such as organ failure." *Id.* at 70. The OPR attorney then in charge of the investigation (who was subsequently reassigned) even conceded: "I'm certain that you [Judge Bybee] didn't intend that result in the memorandum ... [and] I don't necessarily take that as a result." *Id.* at 78. Indeed, the memo itself identifies as torture a host of specific activities far short of organ failure or death, including a needle under a fingernail; an electric shock; cigarette burns; hanging by hands and feet; and sustained

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and Service-Disabled Veteran-Owned Small Business Concern Programs 9 (Aug. 21, 2009); Memorandum Opinion for the Counsel to the President, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Eligibility of a Retired Military Office for Appointment as Administrator of the National Aeronautics and Space Administration* 2-3 (July 8, 2009).

[60] This canard has long resonated with critics, *see, e.g.*, David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008, at A19; Dahlia Lithwick, *No Smoking Gun*, N.Y. Times, Aug. 26, 2004, at A27, at least one of whom has since corrected her views, *see* Kathleen Parker, *Steele, But No Magnet*, Wash. Post, May 20, 2009, at A23.

systematic beatings. Bybee Memo at 16, 19-20 & nn.10, 24-25. Consistent with that, the memo states that "'although conduct resulting in permanent impairment of physical or mental faculties is *indicative* of torture, it is *not an essential element* of the offense.'" *Id.* at 21 (citation omitted). Fairly read, the Bybee Memo is plain on its face. Moreover, there is no better evidence that organ failure itself is not the relevant test than the Classified Bybee Memo, which *nowhere* mentions "organ failure" as a necessary criteria (or even as a necessary pain analogue) in analyzing particular techniques.

Furthermore, OLC *specifically rejected* the interpretation that OPR now seeks to read into the memo. An earlier draft of the memo provided that the pain must be of such intensity that it is "*likely to be accompanied by*" serious physical injury, such organ failure and the other stated examples. However, this language was deliberately changed (in a redline) to state that the pain merely must be of an intensity "*equivalent to*" the pain accompanying such serious physical injuries,[61] and it is this latter formulation ("equivalent" to or "akin" to) that survives in the final version. *See* Bybee Memo at 1 ("equivalent in intensity to the pain accompanying serious physical injury"); *id.* at 6 ("the level that would ordinarily be associated with a sufficiently serious physical condition"); *id.* at 13 ("of the kind that is equivalent to the pain that would be associated with serious physical injury"); *id.* at 46 ("of an intensity akin to that which accompanies serious physical injury "). OPR's assertion (at 180) that there is really no difference between the draft and final versions of the Bybee Memo is absurd—especially when it goes directly to the point on which OPR is "gross[ly] misreading" the final version of the memo. There is an obvious difference between saying that someone "likely" has a serious physical injury and saying that someone has pain "equivalent" to that which people ordinarily associate with serious injuries.

Had the CIA read the Bybee Memo in the way OPR has, the CIA would have been wrong. But the undisputed facts show that the CIA did no such thing. OPR does not cite a single CIA document taking the position that pain cannot be "severe" unless it causes serious physical injury. John Rizzo has unequivocally stated that was not his interpretation (Rizzo Letter ¶ 5) and the CIA's interrogation guidelines ("Guidelines")—which OPR never bothers to cite—confirm that view. [redacted] DCI Guidelines on Interrogations 1-2 (Jan. 28, 2003). [redacted] That of course is a correct interpretation of the law. [redacted]

[61] Attachment to Email from [redacted] to Yoo, July 24, 2002.

[62] OPR refused to provide access [redacted] so we are unable to analyze the text in its entirety. But it is apparent from the portions OPR cites that the guidance did not misinterpret the memos.

[redacted]

In any event, if the CIA was confused on that score or considering techniques other than those specified, OLC made clear that the CIA would need to seek further legal advice. *See* Classified Bybee Memo at 1 ("If these facts were to change, this advice would not necessarily apply.").[63] Furthermore, the memos were not written for interrogators to use as a field manual. They were addressed to the White House Counsel and the CIA General Counsel, were shared with very few individuals, and were not even released publicly until 2004 and 2009 respectively—years after they were written. OPR has not found that Judge Bybee intended or expected the advice to be distributed beyond this tightly-held group. As Judge Bybee explained: "I don't have any knowledge that anybody planned on distributing this document widely. It was so closely held with us that that would have struck me at the time as ... sort of a non starter." Bybee Tr. at 74-75; *cf.* Report at 180 [redacted] Similarly, Philbin stated that, "[g]iven the narrow advice in the Classified Bybee Memo and the fact that the CIA's program was highly compartmented, [he (Philbin)] reasonably believed that the superfluous analysis in the Bybee Memo *could not authorize any operational activity*." [redacted] *see also id.* at 23 ("[T]here was *no reasonable basis* for thinking that the Bybee Memo would be independently used for anything outside the corners of the Classified Bybee Memo ...."). Ultimately, Judge Bybee can hardly be found reckless for any unexpected distribution (and restatement) of his advice or for a hypothetical interrogator who "erroneous[ly]" interprets the memo, in the face of its plain language and specific examples.

3. The Bybee Memo's "severe pain" interpretation is similar to that in later memos

OPR places great weight on the fact that subsequent OLC officials Goldsmith, Levin, and Bradbury disagreed with how the Bybee Memos analyzed the term "severe pain." Report at 178-79. OPR states, for example, that "Goldsmith and Levin explicitly rejected" the Bybee Memo's "formulation [of severe pain] and characterized the reasoning behind it as illogical or irrelevant," *Id.* at 176.[64]

To start with, whatever their disagreements, it bears repeating that *none* of the OLC critics of the severe pain analysis believes it constitutes an ethical violation. *See supra* Section II. Levin, for example, has specifically clarified that he never intended his criticism—in the

[redacted] when OLC was much later asked to do the separate Classified Bybee Memo, which explicitly narrowed the scope of the advice—a move Yoo endorsed as a good idea.

[64] OPR also states that the Bybee Memo's formulation of "severe pain" has been "widely criticized ... outside the Department." Report at 176. "Various commentators," OPR observes, have described the definition as "absurd" (Luban), "strained logic" (Harris), and "bizarre" (Clark). Report at 176 n.133 (quoting David Luban, *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate in America 58 (Karen J. Greenberg ed., 2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Security L. & Pol'y 455, 459 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. Nat'l Security L. & Pol'y 409, 434 (2005). As discussed below, these are hardly neutral observers. *See infra* Section VI.E.

Levin Memo or otherwise—to suggest that Judge Bybee committed professional misconduct. *See* Levin Decl. ¶ 6. The statutory analysis involved "very difficult questions" on which "[r]easonable attorneys can disagree." *Id.* ¶ 5. Further, Levin stated, "the authors [of the Bybee Memo] might be right and I might be wrong." *Id.*; *see also* Report at 130 & n.103 (noting debate between Levin and Philbin). Similarly, Goldsmith has explicitly stated that Judge Bybee "satisfied his professional responsibilities" and "acted in good faith." Goldsmith Submission at 4 n.7.

Furthermore, in practical application, there was absolutely no difference between the Bybee Memo and the definition subsequently applied by OLC. All of the techniques approved in the Classified Bybee Memo were later re-approved even after the Bybee Memo was withdrawn.[65] In particular, Levin and Bradbury subsequently re-authorized them, along with four new techniques (dietary manipulation, nudity, water dousing, and abdominal slap), in the fall of 2004 and again in the summer of 2005—and not just individually, but also in combination. *See* Levin Letters; Bradbury Techniques Memo; Bradbury Combined Techniques Memo. Rizzo has expressly confirmed the obvious: the Levin Memo "did not fundamentally alter" his "understanding of the ... application of the statute to the enhanced interrogation techniques" and "did not change the answer" to the question of legality. Rizzo Letter ¶ 4.

Also, on a more abstract level, the Bybee Memo's definition of "severe pain" is not so different from the subsequent definition in the Levin Memo. Both distinguish between torture and other acts of "cruel, inhuman or degrading treatment" that do not amount to torture. *Compare* Bybee Memo at 15-16, 27, *with* Levin Memo at 6 & n.14. Indeed, Levin stresses that "distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment ... is consistent with other international law sources." Levin Memo at 6 n.14. Both describe torture and severe pain using words like "extreme," "extremely violent," "intense," "grievous," and "hard to sustain or endure." *E.g.*, Bybee Memo at 5, 16; Levin Memo at 5; *accord* Bradbury Techniques Memo at 19; *see also* Bybee Memo at 21 (torture is the "'gravest form.'" (citation and emphasis omitted)); Levin Memo at 6 (same). Both mention specific examples of torture, including shocks, hanging by hands and feet, burns, beatings, and so on. *E.g.*, Bybee Memo at 16, 19-20 & n.10, 24-25; Levin Memo at 6, 10; *accord* Bradbury Techniques Memo at 20; *see also id.* at 19 (also mentioning the boot, thumbscrews, and the rack).

Although the Levin Memo states that it is explicitly rejecting "excruciating and agonizing" as a standard because OLC "do[es] not believe Congress intended to reach only conduct involving [this level of] pain or suffering" (Levin Memo at 8), it then goes on to embrace a standard defined by "agony" on the very next page. Instead of articulating a formulation for the CIA to apply, Levin directs the reader to rely on the D.C. Circuit decision in *Price*. He reasons that "[w]e are ... aided in [the] task" of "[d]rawing distinctions among gradations of pain" by relying on the "judicial interpretations of the [TPVA]." *Id.* at 8-9. He then gives *Price* the lead in his discussion and includes extensive quotes from the opinion, which reveal that the D.C. Circuit uses "agony" as its benchmark for defining "severe," and explains that "[t]he more intense, lasting, or heinous the *agony*, the more likely it is to be torture,'" *id.* at 9 (quoting *Price*, 294 F.3d at 93). Moreover, in *Price*, the D.C. Circuit cites approvingly the very language that the Levin Memo purports to disavow. *Price*, 294 F.3d at 93 ("'The United States

[redacted]

understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict *excruciating and agonizing* physical or mental pain or suffering.'" (citation omitted)). Levin also pointed (Levin Memo at 9-10) to *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir 2003), indicating that conduct must be "sufficiently extreme and outrageous" to constitute torture. This is not to say that the Levin Memo fell below the standard of care. It just shows that is easy to come along years later and identify "flaws" in legal reasoning and that his analysis of "severe pain" is *not* demonstrably superior to the analysis in the Bybee Memo. Indeed, it arguably sets a *higher* benchmark for severity by using *Price* and *Simpson* to define the "distinctions among gradations of pain." Levin Memo at 8-9.

For purposes of defining "severe pain" (and, in turn, torture), the difference between "excruciating and agonizing" and "extreme" is elusive at best. *See, e.g., Webster's New World Dictionary* 27, 489, 1502 (2d ed. 1984) (defining "excruciate" and "agonize" as to "torture"; defining "excruciating" as "extreme"). Interpreting "severe" to mean "excruciating and agonizing" is perfectly rational. *See, e.g., Oxford American Writer's Thesaurus* 310 (2004) (synonyms of "excruciating" include "agonizing" and "severe"). Courts and individual jurists have often used "severe" pain and "excruciating" pain apparently interchangeably.[66] In fact, in an article cited both in the OPR Report (at 181 n.135) and by the Levin Memo (at 8 n.18), "severe" pain is equated to pain that is "excruciating" and "as bad as it can be." Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, at fig.1 & accompanying text (Sept. 1993). Furthermore, the Levin Memo acknowledges that there is "some support" for interpreting severe pain as "excruciating and agonizing," Levin Memo at 8 (citing Deputy Assistant Attorney General mark Richard's testimony in 1990), but nonetheless baldly asserts, without citation, that it "believe[s] that in common usage 'excruciating and agonizing' pain is understood to be more intense than 'severe' pain," *Id.* at 8 n.17.

In any event, the Bybee Memo never uses "excruciating and agonizing" pain as an *exclusive* definition of severe pain. Quite the contrary, the memo makes clear that it cites that language merely to demonstrate that the CAT's ratification history supports the memo's broader conclusions that there is a distinction between torture and cruel, inhuman or degrading conduct and that "only the most extreme acts" qualify as torture. Bybee Memo at 15, 19; *see id.* at 21 (the "CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture"); *id.* at 22 (torture is the "most egregious conduct" at the "extreme end of the spectrum of acts"); *id.* (ratification history, negotiation history, and "[e]xecutive interpretations confirm our view that the treaty (and hence the statute) prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment"); *see also infra* Section IV.C. In fact, the Bybee Memo explicitly reserves the "purely academic question" of

[66] *See, e.g., Collinsworth v. AIG Life Ins. Co.*, 267 Fed. Appx. 346, 347 (5th Cir. 2008); *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 270 (3d Cir. 2001); *Soger v. R.R. Retirement Bd.*, 974 F.2d 90, 93 (8th Cir. 1992); *Zeno v. Great Atl. & Pac. Tea Co.*, 803 F.2d 178, 183 (5th Cir. 1986) (Jones, J., concurring and dissenting); *Gallant v. Heckler*, 753 F.2d 1450, 1458 (9th Cir. 1984) (Jameson, J., dissenting); *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237, 239 (10th Cir. 1973) (quoting complaint); *see also Roach v. Prudential Ins. Brokerage, Inc.*, 62 Fed. Appx. 294, 297 (10th Cir. 2003) (noting doctor, who equated "severe" and "excruciating" with "grade 10 [out of 10] pain"). *But see Walker v. Barnhart*, 127 Fed. Appx. 207, 210 (7th Cir. 2005) ("10 was to be considered excruciating pain, 7 to 9 severe pain, 4 to 6 moderate pain, and 1 to 3 mild pain").

whether "excruciating and agonizing" represents the definitive formulation for "severe pain." Bybee Memo at 19; *infra* Section IV.C.

Furthermore, in many respects, the Bybee Memos provide much *more* useful advice than the Levin Memo. Whereas the Levin Memo makes little attempt to explain the practical application of the statute, the Bybee Memo, whether or not all would agree with it, at least attempts to set forth a recognizable standard against which to judge "severe" pain. Also, the Bybee Memo assessed far more cases addressing severe pain than did the Levin Memo. *See* Bybee Memo at 47-50 (appendix).

4. Congress later endorsed the Bybee Memo's definition of "severe pain"

It is ultimately Congress's responsibility to clarify ambiguous statutes if it disagrees with the other branches' interpretations. In initially passing the anti-torture statute, Congress offered no definition of "severe pain"—forcing courts and executive branch officials to interpolate. Later, however, Congress essentially ratified the Bybee Memo's definition of torture. OPR has no answer for this argument, which we also raised in our Draft Response (at 42-43).

The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, defines "serious physical pain or suffering" for determining the offense of "cruel or inhuman treatment"—which is a lower standard than the "severe pain" of torture—as "bodily injury that involves—(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2441(d)(2)(D) (war crimes); *accord*, 10 U.S.C. § 950v(b)(12) (offenses triable by military commission).[67] This is remarkably similar to the language the Bybee Memo used in interpreting the statute and, if anything, is *more* rigorous given that it requires "bodily injury." In effect, Congress has now weighed in and confirmed the memos' general interpretation of the statute. At the very least, contrary to OPR's conclusion (Report at 176 n.133; *id.* at 179), Congress has itself concluded that there is a logical association between pain and certain physical conditions. Accordingly, the Bybee Memo's interpretation can hardly be considered so "illogical" as to warrant ethical sanctions.

C. CAT Ratification History

OPR also concludes that the Bybee Memo misused the ratification history of the CAT to support the view that "'severe pain' under the CAT is 'in substance not different from' pain that is 'excruciating and agonizing.'" Report at 184. Yet this interpretation of the ratification history is unquestionably a fair ground for debate because a contemporaneous opinion of the D.C. Circuit read the ratification history in the precise way that OPR condemns. In addition, OPR ignores the fact that the authors of the Bybee Memos (unlike the D.C. Circuit) chose not to rely on the terms "excruciating" or "agonizing" when articulating or applying the standard for identifying "severe" pain. They explicitly acknowledged the uncertainty surrounding the

[67] This Act passed the Senate by a vote of 65-34, with the bi-partisan majority comprised of 53 Republicans and 12 Democrats, and the House by a vote of 250-170, with the majority comprised of 218 Republicans and 32 Democrats.

ratification history and eschewed reliance on the view that the standards were the same.

First, OPR mistakenly contends that reliance on the Reagan administration's proposed understandings of the treaty was "misplaced" because the Senate never ratified the Reagan understandings.[68] Report at 186. But the Reagan administration *negotiated* the CAT, which makes its understanding a highly relevant part of the treaty's ratification history. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 28 (Apr. 9, 1987) (noting that among sources of extrinsic evidence, "[t]he portions of the ratification record entitled to the greatest weight are representations of the Executive, who is in essence the draftsman of the treaty").[69] When presented with this precise issue, the D.C. Circuit unequivocally held that the "drafting histor[y]" of the CAT "address[ed]" the "ambiguities lurking in [the] definition ... of 'severe' ... pain" and that the relevant sources included the intent of "the Reagan Administration that signed it" as well as "the Bush Administration that submitted it to Congress." *Price*, 294 F.3d at 92. Indeed, as Judge Bybee previously advised OPR, Draft Response at 47, the D.C. Circuit unequivocally relied on the Reagan Administration's understanding of the treaty in defining "severe" pain. In a unanimous opinion by Judge Edwards, the Court concluded that "torture" is characterized by "*agony*" that is sufficiently "intense, lasting, or heinous," citing the precise Reagan understanding that OPR contends (Report at 186) had "no effect" on the proper interpretation of the CAT. *See Price*, 294 F.3d at 93 ("'The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.'") (quoting S. Exec. Rep. No. 101-30, at 15 (1990) ("Senate Report")). Perhaps OPR should be excused for overlooking this key precedent in its draft report because of understandable lapses in thoroughness, but OPR's failure to cite *Price* in its final draft is not so easily dismissed. It is inexcusable for OPR to have ignored *Price*. OPR must acknowledge, at a minimum, that reliance on this portion of the ratification history to help define "severe pain" cannot be the type of "error" that suggests unethical conduct.

Second, the history that OPR recites by no means proves that the Bush Administration actually disavowed "agonizing" and "excruciating" as useful standards for defining "severe" physical pain or that the Bybee Memo "inaccurate[ly]" disclosed the relevant history. Report at

[68] OPR also fails to acknowledge that the Bybee Memo explicitly states that it accorded the highest "interpretive value" to the testimony of the Bush Administration officials who testified before Congress concerning their interpretation of "severe pain" and the reasons for the revisions to the Reagan understanding. Bybee Memo at 19-20. OPR is simply wrong when it asserts that the Bybee Memo drew "primarily" on the Reagan understanding. Report at 184.

[69] As a general matter, given the complex and lengthy history of the CAT's passage, it was more than reasonable for the Standards Memo to address the entire time period in question. The CAT was an unusual treaty, "the product of 7 years of intense negotiations," S. Exec. Rep. No. 101-30 at 2 (1990), most of which occurred during the Reagan administration. As such, an account of the Reagan-era activity provides a crucial prologue to a full discussion of the CAT's ratification history. Indeed, both the Senate Foreign Relations Committee Hearing on the CAT and its eventual report include numerous references to the Reagan understandings OPR believes are unworthy of mention. *See Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 1, 3, 19, 74, 92 (1990) ("Senate Hearing"); S. Exec. Rep. No. 101-30, at 2, 4, 5, 7-8 (1990). Likewise, the Bybee Memo concluded the history by giving due consideration to the role of the Bush administration: quoting the relevant portion of the Bush administration's understanding in its entirety and making clear that the Senate ratified the Bush definition, not the earlier Reagan version. Bybee Memo at 18-19.

184-85. OPR relies on a general statement in the Senate Report explaining that the conditions proposed by the Reagan Administration "'in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide.'" *Id.* at 184 (quoting Senate Report at 4.) But that broad statement sheds no significant light on any differences between the Reagan and Bush Administration's interpretation of "severe pain." There were substantial revisions to the entire "package" of Reagan Administration conditions and the revisions were adopted for a variety of different reasons. *See* Letter from Janet G. Mullens, Assistant Secretary, Legislative Affairs, Department of State ("State Department Memorandum"), Appendix A to Senate Report at 35-38. For example, the Senate Report highlighted the Reagan Administration's refusal to recognize the competence of a monitoring committee established by the Convention as one of three core issues that "deserve[d] comment because [it] relate[d] directly to the basic goal of the Convention." Senate Report at 4-5. In words that echo the passage that OPR cites, the Report explained that "refusal to recognize the committee's competence would send the wrong signal about the seriousness of the U.S. commitment to eliminate torture." *Id.* at 5. In contrast, the understanding of the definition of torture was *not* one of the three core issues Congress highlighted in that section of the report. *Id.* at 4. The fact that the Standards Memo, like the D.C. Circuit, "did not disclose" this quotation is accordingly unsurprising. Report at 184.

Nor is OPR's reliance on *one portion* of the testimony from Abraham Sofaer (the Bush Administration's State Department Legal Advisor) dispositive on this issue. *Id.* at 185-86. Sofaer did tell Congress that the Reagan understanding of the definition of torture, which was modified by the Bush Administration, had been "criticized by some *as possibly* setting a higher, more difficult evidentiary standard than the Convention required." *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 9-10 (1990) ("Senate Hearing") (statement of Abraham Sofaer). But the Bybee Memo discusses the very same passage when considering whether this testimony established that the Reagan and Bush Administration had adopted a materially different definition of torture. Bybee Memo at 18 (explaining that "[t]he 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."). OPR simply ignores the remainder of Sofaer's explanation of the reasons for the change, as well as other evidence of the Bush Administration's intent, and leaps to the conclusion that the Reagan understanding actually set a higher pain threshold merely because Sofaer said it was revised after critics complained that it "possibly[70] set[] a higher ... standard."[71] As the Bybee Memo sets forth, Sofaer noted the criticism but went on to verify that "*no higher standard was intended*" by the Reagan

[70] Note that OPR conveniently omits the word "possibly" from its quotation of Sofaer's testimony. Report at 185.

[71] OPR apparently assumes that the deletion of words invariably means that those words were disavowed. That is obviously not correct in this context. The Bush conditions deleted more than 50 lines of text in the Reagan conditions related to the definition of torture. *Compare* Senate Report at 9, *with id.* at 13-15. Sofaer emphasized that the Reagan package was viewed as "unusually broad" in scope and that the Bush Administration sought to "simplif[y]" the package and to determine which conditions were actually "necessary." Senate Hearing at 8. By way of example, the Reagan understanding described torture as an "extremely cruel and inhuman act." Senate Report at 15. That phrase was deleted from the Bush understanding but Congress nevertheless echoed that formulation. Senate Report at 6 (torture is "an extreme form of cruel and inhuman treatment"); 8 C.F.R. § 208.18(2) ("Torture is an extreme form of cruel and inhuman treatment.").

Administration understanding. Bybee Memo at 19 (quoting Senate Hearing at 10). Then in other testimony OPR ignores, Mark Richard, the Deputy Assistant Attorney General of the Criminal Division, explained that the Bush Administration had concluded that the Reagan understanding was unnecessary with respect to the meaning of "severe pain" when applied to "physical torture" because there was already a sufficient "consensus" in international law that defined the "essence of torture" as "*excruciating and agonizing physical pain.*" Senate Hearing at 13, 16. Thus Richard explicitly *reaffirmed* the Reagan interpretation of severe pain as applied to physical pain and *nowhere* endorses the view that this benchmark is higher than the Bush Administration's interpretation. Richard further explained that a revised understanding was nevertheless necessary because there was no "satisfactory clarity" for the use of severe pain as the sole definition of "mental pain." *Id.* at 13; *see also id.* at 15 (the primary need for any reservation concerned the "imprecise definition of torture" as applied to "mental anguish"). And this reading of Richard's testimony is buttressed by the memorandum that the State Department transmitted to Congress explaining the reasons for each of the Bush Administration revisions to the Reagan conditions. That memorandum described the "Explanation" for the change in the Reagan Administration's Understanding of the definition of torture as follows: "Revised to clarify the definition of mental harm." Senate Report at 36; *see also id.* at 9 (Sofaer testimony confirming that "the reasons for [the] changes" to the Reagan conditions were explained in the State Department memorandum).

Given OPR's failure to discuss *any* of the evidence of intent set forth in the preceding paragraph (Report at 184-86), its assertion that the Bybee Memo put too much weight on the view that the Bush Administration revisions were intended to "clarify the definition of mental pain" cannot be credited. *Id.* at 185. OPR similarly makes no attempt to reconcile any of this evidence with its apparent conclusion that the history "clear[ly]" established that the Bush Administration adopted a materially different standard for defining the requisite level of pain. *Id.* Unlike OPR, the Bybee Memo did try to make sense of *all* the evidence. There is accordingly no cause to find ethical errors in the Bybee Memo's balanced discussion of this issue merely because it shared the view adopted by the D.C. Circuit but not OPR. *See also* Levin Memo at 8 (disagreeing with this portion of the Bybee Memo's analysis of the ratification history while acknowledging that the Richard testimony provided "some support" for the competing view).

Third, any "errors" in the discussion of this issue were simply not material to the overall conclusions concerning the ratification history or the statutory definition of torture. The OLC authors explicitly acknowledged the competing inferences that might be drawn from the deletion of any reference to "excruciating" and "agonizing" pain in the revised conditions (Bybee Memo at 18), and did not rely on it to inform their definition of the relevant standards. Instead, the memo emphasizes that the key point is "that the prohibition against torture reaches only the most extreme acts," and the question whether "the Reagan standard would have been even higher" is "purely academic" because the "Bush understanding clearly established a very high standard." *Id.* at 19. Consistent with the determination that the issue was "purely academic," the Bybee Memo sets forth its conclusions in the first two pages and explains that OLC has examined the ratification history of the CAT and "conclude[s] that the treaty's text prohibits only the most

extreme acts." *Id.* at 1-2.[72] The conclusions do not say that the ratification history establishes that severe pain means excruciating and agonizing. Moreover, neither the Bybee Memo nor the Classified Bybee Memo ever imports the Reagan understanding into their definition of "severe pain" under the statute. The governing standard is repeatedly articulated and applied in the two memos and OLC never once used "agonizing" or "excruciating" to define the relevant threshold of pain. *Id.* at 1, 3, 5, 46; Classified Bybee Memo at 9. By focusing selectively on the Reagan understanding, OPR misses the forest for the trees. The Bybee Memo did not reach a *wrong* answer regarding the CAT's ratification history, let alone the proper interpretation of the statute.

D. United States Judicial Interpretation

OPR concedes that the Bybee Memo "accurately" informed its clients that there had been no reported prosecutions under the anti-torture statute. Report at 186. There was consequently no controlling authority to guide OLC's analysis. The Bybee Memo accordingly turned to cases decided under the Torture Victim Protection Act ("TVPA"), which "supplies a tort remedy for victims of torture," in order to "provide insight into what acts U.S. courts would conclude constitute torture under the [anti-torture] statute." Bybee Memo at 22. The memo then undertook extensive efforts to explain and categorize the types of conduct found to be torture under those decisions and included an extensive appendix detailing the facts at issue in each one. *Id.* at 22-27, 47-50. The memo explained that the list of acts that courts would "likely" characterize as "torture" included severe beatings with instruments, mock executions, burning, electric shocks, rape, and forcing prisoners to witness torture. *Id.* at 24. It also warned that OLC could not "say with certainty that acts falling short of these" would not constitute torture, but that other techniques would have to be "similar to these in their extreme nature" in order to violate the law. *Id.*

Despite OLC's extensive discussion of the authorities (ten single-spaced pages) and its qualified conclusion, OPR takes aim at the *manner of the presentation*. It claims that the Bybee Memo "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." Report at 186. It also notes that OLC "fail[ed] to discuss the CAT regulations" and "a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens"—even though it concedes that "the case law and CAT regulations are generally consistent" with OLC's conclusions. *Id.* at 186-87.

First, before responding to the merits of each of OPR's accusations, it is important to highlight what OPR is *not* saying. OPR is *not* contending that OLC failed to disclose adverse precedent or misinterpreted the TPVA. Nor has OPR identified a *single person* at DOJ or the CIA who ever suggested that there was *anything* wrong with this section, much less raised such concerns to Judge Bybee. Although OPR often compares the Bybee Memo to the Levin Memo when it suits its findings (*e.g.*, *id.* at 130), there is no mention of the Levin Memo in this section. With good reason. That comparison reveals that Levin made different choices in his discussion of the domestic case law, but he provided far less disclosure to the clients about the fact patterns

[72] OPR does not suggest this conclusion was unsupported or illogical. *See, e.g.*, Senate Hearing at 16 (Richard testimony confirming that torture is "understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct," as distinct from cruel, inhuman, and degrading conduct).

that had been characterized as torture and no less assurance that the standard for proof of torture is very high. Instead of ten pages discussing the case law, he includes just two and a half pages. Levin Memo at 9-10, 15. He cites no case finding that a practice was torture that was not cited in the Bybee memo and omits any discussion of approximately a half-dozen cases discussed in the Bybee memo—all of which held that the conduct in question constituted torture. Further, Levin leads the discussion with a description of two cases holding that the conduct alleged did not rise to the level of torture. He then relegates the discussion of cases finding torture to a string cite (with just four citations) and asserts they suggest the type of "extreme conduct" that falls within the statute. *Id.* at 10. All four of his selections involved heinous, barbaric treatment. *Id.*

Second, OPR claims that the Bybee Memo was "inaccurate" when it states that the TVPA cases "generally do not approach" the lowest boundary of what constitutes torture. Report at 188 (quoting Bybee Memo at 27). OPR seeks to refute that statement by pointing to two decisions cited in an appendix to the Bybee Memo—*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), *aff'd in part, rev'd in part, vacated in part* 326 F.3d 230 (D.C. Cir. 2003)—as examples of TVPA cases with "conduct far less extreme" than the case cited in the main text: *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). Report at 188-89.

Even if OPR were correct that these cases involved lesser forms of extreme conduct, the statement was not "inaccurate." The Bybee Memo states that the cases "*generally*" do not approach the lowest boundary and the case law overwhelmingly supported that characterization. The Bybee Memo appendix reveals a litany of horribly abusive acts, including pistol whipping, electric shocks, cigarette burns, rape, and even murder. Bybee Memo at 47-50.[73] Two exceptions would not alter the "generally" extreme nature of the conduct at issue in the cases.[74] Regardless, *Daliberti* and *Simpson* were district court decisions that would not warrant prominent attention. In *Daliberti*, for example, some plaintiffs had loaded guns placed to their heads, another was threatened with having his fingernails pulled out and his testicles electrocuted,[75] and another was nearly executed by a guard before another guard intervened. 146

[73] More recent TVPA cases continue to involve extreme conduct. *See, e.g.*, *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 387 (E.D.N.Y. 2008) (holding that the plaintiff's allegation that he was subjected to electric shock was "actionable" under the TVPA and "sufficiently heinous that greater detail in pleading is unnecessary"); *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416, 425 (D.D.C. 2007) (holding that allegations that defendants hung plaintiff upside down from the ceiling, shocked the soles of his feet with an electrical cable, and assaulted him in the rectum with a coke bottle all constituted torture under the TVPA); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002) (holding that being "held for fourteen months in cruel, inhuman conditions, denied sufficient food and water, subjected to constant and deliberate demoralization, physically beaten, possibly subjected to gruesome physical torture, and denied essential medical treatment" was torture).

[74] For the same reason, *Daliberti* and *Simpson* do not "contradict" the Bybee Memo's statement regarding the reason courts are not engaging in a careful parsing of the TVPA. Report at 189. OPR quotes selectively from the passage in question, which states in relevant part that "torture *generally* is of such an extreme nature—namely, the nature of acts are so shocking and obviously incredibly painful—that courts will *more likely* examine the totality of the circumstances, rather than engage in a careful parsing of the statute." Bybee Memo at 27. The Bybee Memo made no categorical statement of the kind OPR implies, just an accurate generalization.

[75] Notably, a threat to give electric shocks to a prisoner's genitalia was one of the seven types of conduct that the Bybee Memo singled out as consistently constituting torture. Bybee Memo at 24. As such, it appears that

F. Supp. 2d at 22, 23, 25. These acts caused the plaintiffs to experience psychological injuries (post traumatic stress disorder, personality changes, etc.) of the kind specifically identified in the Bybee Memo as likely to constitute prolonged mental harm. Bybee Memo at 7. As for *Simpson*, the conduct alleged in the plaintiff's complaint was admittedly less severe (the plaintiff was separated from her husband and threatened with death if she attempted to leave), but the D.C. Circuit confirmed *Simpson*'s outlier status by unanimously reversing the district court and finding that the plaintiff failed to state a claim for torture based on the acts alleged. *Simpson*, 326 F.3d at 235.

Third, OPR objects to the emphasis given to various TVPA cases, stating that OLC "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." Report at 186. Specifically, OPR complains that the Bybee Memo "focused almost exclusively on *Mehinovic v. Vuckovic*, which involved extremely brutal conduct," while "two other cases, in which far less serious conduct was found to constitute torture, were relegated to the appendix and their significance was not fully discussed." *Id.* at 228-29. This is a new low. The Bybee Memo provides detailed descriptions of all the cases at issue and did not contend that some deserved more weight than others (although it surely could have properly done so). As we have explained, far from "downplay[ing]" the supposedly "less severe" examples like *Daliberti* and *Simpson*, OLC cites both cases on the very first page of the appendix, and devotes four full paragraphs to a description of the conduct in *Daliberti*. Bybee Memo at 47-48. Nor was OLC's use of an appendix improper in any way. "Given the highly contextual nature of whether a set of acts constitutes torture," the Bybee Memo reasons, "we have set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture." *Id.* at 24. There was no effort to hide or minimize these cases, but rather a concern with efficiency to avoid cluttering the main opinion with decisions that were more properly viewed as a set with a full factual description. This should be unsurprising as OLC has provided annotated decisions in an appendix before. *See, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 203-211 (Nov. 2, 1994) (attaching summaries of opinions relating to the President's authority to decline to enforce laws he believes to be unconstitutional). The Supreme Court also includes appendices of case law on a frequent basis. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2558-61 (2009); *Sprint Commc's Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2546-49 (2008); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 195-198 (2007). For that matter, even OPR is not averse to using appendices. *See* U.S. Dep't of Justice, OIG, OPR, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, at Appendix (July 2, 2008), *available at* http://www.usdoj.gov/oig/special/s0901/final.pdf.

OPR's criticism also ignores the fact that OLC had valid reasons for selecting *Mehinovic* for inclusion in the main text of the opinion. As the memo explains (Bybee Memo at 24), many of the cases engaged in "limited analysis" (including *Daliberti*) but *Mehinovic* provided an extensive discussion of the relevant legal standards under the TVPA. *See Mehinovic*, 198 F. Supp. 2d at 1343-47. *Mehinovic* also discussed a variety of different types of alleged physical and psychological torture, and reached a number of important issues, including the difference

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the Bybee Memo may have referenced the conduct in *Daliberti* even if not mentioning the name of the case in the main text.

between torture and cruel, inhuman, or degrading treatment that did not rise to the level of torture.[76] *See* Bybee Memo at 25 n.14. Indeed, OLC used *Mehinovic* to *caution* the CIA about the potential for liability. It warns that one of the "guiding principles" drawn from the decision is that "a single incident can constitute torture." *Id.* at 26. The discussion also warned the CIA that the case "demonstrates that courts may be willing to find that a wide range of physical pain can rise to the necessary level" because the court appeared to hold that a single kick to the stomach constituted torture. *Id.* at 26-27. Although OLC expressed its disagreement with that conclusion, it warned its clients nonetheless.

OPR pretends that OLC did not use *Mehinovic* to disclose risks to the clients and suggests that the memo takes the position that the district court "would have been in error" if it had rested on a "single incident" to establish torture. Report at 189-90. The Bybee Memo said no such thing. OLC disagreed with the district court's view that "*this* single act" constituted torture. Bybee Memo at 27. But it concluded "that a course of conduct is unnecessary to establish that an individual engaged in torture" and also identified "teeth pulling" as a single incident that the district court correctly viewed as "clear[] ... torture." *Id.* at 26.

Fourth, OPR asserts that the Bybee Memo "ignored a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens." Report at 186. Specifically, OPR identifies this "body" of case law as consisting of three Ninth Circuit cases that interpreted CAT's implementing regulations: *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001), *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and *Khanuja v. INS*, 11 Fed. Appx. 824 (9th Cir. 2001) (unpublished). OPR concedes that the Bybee Memo's "failure to discuss the CAT regulations was a relatively minor omission," acknowledging "that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment." Report at 187. In truth, the CAT regulations are not just "generally consistent" with the Bybee Memo, but directly parallel and support the interpretation of the CAT that OLC adopted. *See supra* Section IV.A.2 (citing 8 C.F.R. § 208.18(a)(5)). As such, there was no need for the Bybee Memo to provide cumulative support beyond its citation to the statutory language.

Regarding the Ninth Circuit cases, even OPR admits that the Bybee Memo cited *Al-Saher* in the appendix, albeit without reference to the duplicative CAT regulations.[77] Report at 187 n.140. The opinion in *Cornejo-Barreto* is wholly inapposite, citing the State Department extradition regulations at 22 C.F.R. §§ 95.2-95.3 and not the torture definition provided at 22 C.F.R. § 95.1(b). 218 F.3d at 1011-12. The court in *Cornejo-Barreto* did not characterize the

[76] As a comparison, the Levin Memo included an extended discussion of the standard of "prolonged mental harm" as construed in *Mehinovic*. Levin Memo at 15. But OPR makes no finding that the Levin Memo thereby erroneously focused on cases with more extreme conduct.

[77] OPR neglects to mention that while *Al-Saher* cites the CAT regulations in passing, it also includes a summary of "torture techniques" that is much more in line with the conduct described in *Mehinovic* than cases like *Simpson*. *See Al-Saher*, 268 F.3d at 1147 ("According to former detainees, torture techniques included branding, electric shocks administered to the genitals and other areas, beating, burning with hot irons, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denials of food and water, and threats to rape or otherwise harm relatives.").

alleged conduct at issue and thus the case does not, as OPR claims, "provide [an] additional example[] of how courts have distinguished between torture and less severe conduct." Report at 187.

Finally, as Attorney General Mukasey, Deputy Attorney General Mark Filip, and Judge Bybee previously made clear to OPR (Mukasey Letter at 6; Bybee Draft Response at 50), citing an unpublished, two-page opinion like *Khanuja* was a dubious matter at best and could not have been cited as precedent in the Ninth Circuit. Indeed, doing so was potentially subject to sanction.[78] *See Hart v. Massanari*, 266 F.3d 1155, 1159, 1180 (9th Cir. 2001) (describing an order to show cause why an attorney should not be sanctioned for citing an unpublished Ninth Circuit opinion). In any event, *Khanuja* has never been cited by *any* court. Yet OPR refuses to give an inch even on such shaky ground, claiming that it cites *Khanuja* "not as precedent, but as an example of a judicial decision that applied the CAT regulations and which was available to the drafters of the Bybee Memo." Report at 187 n.141. OPR adds that it "note[d] the omission" because OLC's memoranda "demanded the highest level of thoroughness, objectivity, and candor." *Id.* at 187. This ignores both common sense and the rationale for the rule disfavoring unpublished opinions, which Judges Kozinski and Reinhardt explain are typically "drafted by law clerks with relatively few edits from the judges." Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, California Lawyer, June 2000, at 43, 44. Kozinski and Reinhardt concluded: "Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of [memorandum dispositions] is an uncommonly bad idea. We urge lawyers to drop it once and for all." *Id.* at 81. No duty—including the "highest level of thoroughness"—demands that OLC cite cases that the authoring court has stated are of no precedential value. OPR's persistence in citing *Khanuja* demonstrates its single-mindedness in pursuit of even the most trivial criticism.

Regardless, as OPR admits (Report at 187), cases like *Khanuja* and *Cornejo-Barreto* add little new to the CAT's definition of torture and thus would have been redundant. This may be why the Levin Memo cites *none* of these Ninth Circuit cases, or the CAT regulations for that matter. The Bybee Memo already reviewed *fourteen* relevant cases, which effectively showed the range of conduct courts considered to be torture. Two extra citations would have added little to no additional value to the discussion. At root, there is no basis for OPR to second-guess the discretionary decision of when additional citations will produce only diminishing returns.

E. International Decisions

Much like its criticism of the Bybee Memo's treatment of U.S. judicial interpretation, *supra* Section IV.D, OPR faults OLC's discussion of two international decisions—*Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (sec. A) 41 (1978) ("*Ireland*"), and *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) ("*Israel*")—for "ignor[ing] several important facts," failing to consider "a body of … case law," and making "misleading" assertions. Report

[78] As of 2002, Ninth Circuit rules provided that "[u]npublished dispositions ... are not binding precedent." In 2006, the Federal Rules of Appellate Procedure were amended to permit citation of unpublished decisions. Fed. R. App. P. 32.1(a). Nevertheless, the current Ninth Circuit rule provides that "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3.

at 191-94. But there is again no suggestion that Philbin or anyone else involved in the review of OLC opinions on this subject ever shared OPR's view or brought such concerns to Judge Bybee's attention. OPR's grievances ultimately boil down to complaints about drafting that OPR elsewhere concedes cannot be attributed to the AAG. *Id.* at 257. From Judge Bybee's perspective, OLC properly analyzed two cases that the CIA *specifically requested* guidance on.[79] *Id.* at 41. Judge Bybee surely did not have to research additional cases by the European Court of Human Rights or second-guess his staff's interpretation of those decisions.

1. *Ireland v. the United Kingdom*

The Bybee Memo cites *Ireland* because it is the "leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, and degrading treatment or punishment." Bybee Memo at 28. Specifically, the *Ireland* Court considered the legality under Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") of five specific interrogation techniques: wallstanding, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink. As OPR concedes, the Bybee Memo provides a "detailed discussion" of these techniques (Report at 191)—some nearly identical to the methods analyzed in the Classified Bybee Memo—noting that the Court found they could cause "acute psychiatric disturbances during the interrogation" and break the "physical or moral resistance" of prisoners. Bybee Memo at 29. OLC also accurately recounts the Court's conclusion "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. Nevertheless, rather than accept OLC's balanced and *correct* analysis of a plainly relevant decision, OPR resorts to petty complaints about the Bybee Memo's failure to include tangential facts and citations. None has merit.

First, OPR contends that the Bybee Memo should have mentioned some or all of the following facts: (a) The European Court reversed the report and findings of the European Commission of Human Rights ("the Commission"), which decided that the combined use of the five interrogation techniques constituted torture; (b) The United Kingdom did not contest the Commission's findings that the interrogation techniques constituted torture; (c) A committee formed by the United Kingdom prior to the Commission's investigation reached a split decision on whether the techniques needed to be ruled out on moral grounds, but agreed that they were illegal under domestic law; (d) The United Kingdom renounced further use of the techniques

[79] Put in the proper context of the CIA's request, OLC was hardly opining on "what constituted torture 'under international law,'" as OPR asserts. Report at 191 n.145 (quoting Bybee Memo at 31). Rather, the concluding paragraph of this section makes clear that OLC was discussing how two courts decided two particular *cases* under international law and adopted a very restrictive interpretation of what amounts to torture. The Bybee Memo earlier noted that these two international decisions provided only "guidance about how other nations will likely react to our interpretation," not a definitive account of international law. Bybee Memo at 27 (noting also that the opinions are "in no way binding authority upon the United States"). Regardless, even if OPR were trying to use *Ireland* and *Israel* as indicia of what is permissible under international law as a more general matter, this would not be improper. The exhaustive summary of international jurisprudence that OPR recommends—including "*all* relevant international treaties, agreements, and declarations" and "the laws, practices, and judicial decisions of other nations" (Report at 191 n.145)—would be utterly unworkable and largely irrelevant to the primary question at hand. OPR's contention is akin to saying that its report is not thorough because it fails to include a 50-state survey of every bar disciplinary proceeding, Rule 11 sanction decision, ineffective assistance of counsel case, and legal malpractice decision.

following the committee's report but prior to the Commission's investigation; (e) Four judges on the 17-judge European Court panel thought that the techniques constituted torture; (f) The European Court majority found that although the techniques were not torture, they still violated the European Convention. Report at 191-92. OPR thus advances the bizarre notion that it is professionally incompetent to cite an appellate opinion without also referencing the dissenting judges (whose view was the distinct minority in a 13-4 vote), holdings below (including the Commission's findings that were *overruled*), and facts beyond the record of the case. There is no such obligation.[80] *See Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) ("dissenting votes have no precedential authority"); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 56 (7th Cir. 1980) (reversed case is "no longer the law"). Indeed, not one of these facts would have altered the Bybee Memo's analysis or conclusions in any way. If anything, the fact that the United Kingdom did not contest the Commission's findings lends *greater* weight to the European's Court ultimate reversal. The absurdity of OPR's expectations is further highlighted by the Levin Memo, which referenced *Ireland* in a footnote, but included *none* of the facts demanded by OPR and *none* of the detail provided by the Bybee Memo. Levin Memo at 7 n.14. The Second Circuit likewise cited *Ireland* without mentioning *any* of the facts that OPR requires. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.16 (2d Cir. 1980). In any event, it was reasonable for Judge Bybee to rely on his team's characterization of *Ireland*, which was correct, without inquiring into the case's procedural history and possible changes to the United Kingdom's interrogation policy.

Second, OPR also argues that the Bybee Memo should have included a discussion of post-*Ireland* case law that even OPR admits generally supports little more than the "uncontroversial conclusion that the term 'torture' should be applied to more severe forms of cruel, inhuman and degrading treatment." Report at 192 & n.147. But there is no authority that requires citation to every single case following a landmark decision, particularly when the subsequent precedent merely echoes the holding that came before. OPR identifies a single case, *Selmouni v. France*, 66 Eur. Ct. H.R. (1999), as worthy of special mention because it allegedly "raised questions about the continuing validity of the European Court's findings in *Ireland*." Report at 192-93. *Selmouni* did nothing of the sort. In fact, *Selmouni* cites *Ireland* with approval multiple times, *see Selmouni v. France*, No. 25803/94, Council of Europe: European Ct. of Human Rights ¶¶ 88, 95, 96, 99 (July 28, 1999), including for the proposition that (pursuant to *Ireland*) the European Convention requires the Court to give proper regard to the distinction between torture and inhuman or degrading treatment. *Id.* at ¶ 96. The fact that *Selmouni* cautioned, in *dicta*, that acts classified as "inhuman and degrading" in "the past" could "be classified differently in [the] future" (Report at 192-93 (quoting *Selmouni* at ¶ 101)) cannot reasonably be read to undermine *Ireland* in a manner that required discussion. The passage never mentions or questions the *Ireland* decision and it plainly remained the law of the European Court.

OPR also contends that *Selmouni* had to be discussed because it cited the CAT definition of torture and cruel, inhuman, and degrading treatment. Report at 192. But the European Court expressly reserved the issue, stating that "it remains to establish in the instant case whether the

[80] OPR itself falls far short of this imaginary standard even in this very section of its report; both *Aydin v. Turkey* and *Aksoy v. Turkey* were split decisions (decided 16-5 and 8-1, respectively) and yet OPR makes no mention of the dissenting votes. Report at 192.

'pain or suffering' inflicted on Mr. Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention." *Selmouni* ¶ 100. And OPR once again ignores the fact that the Levin Memo cites *none* of the cases—including *Selmouni*—that OPR believes are part of the relevant "body of post-*Ireland* case law from the European Court." Levin Memo at 6-7. It becomes all too plain that OPR is taking advantage of scholarly literature written well after the Bybee Memo (*e.g.*, OPR Report at 192 n.146 (citing Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1705-06 (2005)) to retroactively assign responsibility for obscure facts and cases that no one at OLC was aware of or brought to Judge Bybee's attention. The simple fact is that *Ireland* was the key European Court decision on point and OLC described its primary holding in a detailed and responsible manner. Nothing more was needed or required.

2. *Public Committee Against Torture in Israel v. Israel*

The Bybee Memo cites *Israel* as an additional example of an international court "consider[ing] whether ... a program of interrogation techniques was permissible." Bybee Memo at 30. In *Israel*, the Israeli Supreme Court examined the legality of five interrogation techniques, including shaking, the "Shabach" (a combination of hooding, exposure to loud music, and stress positions), the "Frog Crouch" (a stress position), excessive tightening of handcuffs, and sleep deprivation. Bybee Memo at 30. Given their obvious similarity to some of the techniques in the Classified Bybee Memo, OPR does not dispute the relevance of *Israel*, but rather objects to the Bybee Memo's statement that the case is "best read as indicating that the acts at issue did not constitute torture." Report at 193 (quoting Bybee Memo at 30). Based on an examination of *Israel*, OPR concludes that the Bybee Memo's argument on this issue "was not based on the actual language and reasoning of the court's opinion, and was intended to advance an aggressive interpretation of the torture statute." *Id.* at 196. OPR's criticism is exaggerated and certainly not properly attributed to Judge Bybee in any event.

First, the Bybee Memo did not hide the primary holding of *Israel* or mask the qualified nature of OLC's interpretation of the case. Immediately after recounting the relevant facts, the Bybee Memo states (correctly) that the Israeli Supreme Court "concluded that these acts amounted to cruel and inhuman treatment." Bybee Memo at 30. The memo also states (correctly) that the Court "did not expressly find that [the acts] amounted to torture." *Id.* Such a finding was "unnecessary," OLC notes, because the Court's holding sufficed to prohibit the acts in question. *Id.* "Nonetheless," the Bybee Memo continues, "the decision is still *best read* as *indicating* that the acts at issue did not constitute torture." *Id.* In this way, the memo alerted the reader that OLC was drawing an interpretive inference and not describing a holding of the court.

Nor is OPR correct that there was "no basis" for OLC's inference. Report at 195. There is certainly room for disagreement, but there was a "basis" for the statement. As the Bybee Memo accurately explained, the court repeatedly chose adjectives to describe the practices at issue that would not generally be associated with pain of "sufficient severity to reach the threshold of torture." Bybee Memo at 30. *See Israel* 38 I.L.M. 1482-84 (observing that some of the techniques "harm[] the suspect's body," "violate[] his dignity," "cause[] pain to his back," "degrade[] him," and "give[] rise to particular pain and suffering"). That choice of language can be read to suggest that the court did not want to convey the impression that these practices rose to the level of torture. This interpretation of the court's choice of language is buttressed by the

Bybee Memo's observation that the *Israel* Court affirmatively relied upon the decision in *Ireland* as support and did not question its holding. *Id.* This is not baseless legal reasoning.

Second, there is no evidence that Judge Bybee ever had any reason to question the accuracy of this statement. OPR relies on an email exchange between Yoo and [redacted] to support its conclusion that the authors "knew the Israeli court's opinion did not provide support for their position" but persisted in this characterization which "was *intended* to advance an aggressive interpretation of the torture statute." Report at 196. OPR makes far too much of an email exchange that reflects [redacted] view at one moment in time. *Id.* ("In his comments, Yoo wrote to [redacted] '[i]sn't there some language in the opinion that we can characterize as showing that the court did not think the conduct amounted to torture?' [redacted] responded, 'Unfortunately, no.'"). It is commonplace for lawyers working together to debate points of law and shift ground as the debate continues. In any event, Judge Bybee was not a party to the exchange and no one ever raised the issue with him. As OPR concedes, Judge Bybee was "not responsible for checking the accuracy and completeness of every citation, case summary, or argument" (*id.* at 257) and that includes OLC's description and interpretation of *Israel*.

F. Commander-in-Chief Power

In addition, the Bybee Memo addresses the scope of the President's Commander-in-Chief powers to conduct interrogations of enemy combatants. OLC determines that the Commander-in-Chief powers delegated by Article II vest the President with the "power to ensure the security of the United States in situations of grave and unforeseen emergencies," Bybee Memo at 37, including the "constitutional authority to order interrogations of enemy combatants," *id.* at 31. OLC concludes that the statute, "as applied to interrogations of enemy combatants *ordered by the President* pursuant to this Commander-in-Chief power would be unconstitutional." *Id.* at 39. It reasons that "[j]ust as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence *he believes* necessary to prevent attacks upon the United States." *Id.* at 31.

Judge Bybee recognizes that certain portions of the analysis would benefit from additional clarification, and he deeply regrets that the section was not more precisely written. With additional time, Judge Bybee believes that OLC would have had a more fulsome discussion of the difficult separation of powers issues in this area. Such a discussion might have avoided some of the public criticism of OLC that arose when the Bybee Memo was publicly released without the benefit of the Classified Bybee Memo and an understanding of the context for the memos. At the time, however, Judge Bybee made the reasonable judgment that, even though it was important to respond to the client's inquiries, it was critical to avoid delay or to detract from OLC's core advice by "[o]verblow[ing]" the issue. Bybee Tr. 89. The core conclusions in this section, however, reflect reasonable answers to difficult, unsettled questions of law. OPR did not—and cannot—find that no reasonable attorney or jurist could agree with the conclusions or that Judge Bybee somehow acted recklessly or in bad faith.

OPR launches a bevy of meritless attacks on the Bybee Memo's legal judgments, as summarized here:

- *First*, contrary to OPR's suggestion (Report at 198-99), it was wholly appropriate for OLC to include this discussion in the Bybee Memo. The client wanted the information, and OLC properly responded to its request. OLC did not (and could not) just insert it to improperly provide blanket immunity, and the client did not so interpret the discussion. Rizzo Letter ¶ 5. Goldsmith's initial concerns about a "blank check" were prompted by the Yoo Memo (Report at 111-113, 117-20, 205, 233), which was issued to DoD *without* an accompanying narrow techniques memo.

- *Second*, OPR strains to read the Bybee Memo in the most unfavorable light, giving it an unnecessarily broad meaning that neither the authors nor the client contemplated. Report at 205-06. In fact, Rizzo read the section as referring to "interrogations personally ordered by the President." Rizzo Letter ¶ 5.

- *Third*, OPR condemns OLC's constitutional conclusion as, variously, "not a mainstream view," "wrong," and not "thorough, objective, and candid legal advice." Report at 122, 199, 201. Even (contrary to all available evidence) were OPR equipped to join issue on such weighty constitutional matters, it is decidedly not OPR's role to impose its own legal and policy judgments. *In re Stanton*, 470 A.2d at 287. Moreover, OPR nowhere asserts that no reasonable jurist or attorney could agree with the Bybee Memo. The Bybee Memo reasonably applies well-established principles.

- *Finally*, OPR criticizes OLC for not including a discussion of *Youngstown* (in particular, Justice Jackson's concurrence), for choosing to incorporate by reference OLC's past discussions of Congress's constitutional powers rather than rehashing them in this memo, and for leaving unsaid the long-established executive branch position that the President cannot "take care" to enforce an unconstitutional law. Report at 202, 204. In doing so, OPR ignores the fact that this was the latest chapter in a continuing dialogue among sophisticated executive branch attorneys. Moreover, OPR has inexplicably failed to examine *any* of OLC's prior opinions from prior administrations, which is clearly the most appropriate way to judge whether OLC attorneys' performance is "commensurate" with "other lawyers in similar matters" (D.C. Rule 1.1).

In short, properly interpreted and viewed in context, OLC made reasonable judgments and nothing OPR proffers supports its findings of reckless misconduct.

1. OLC appropriately included a Commander-in-Chief discussion

As a threshold matter, it is perfectly appropriate for OLC to give such legal advice upon request or even just to "'give the full scope of advice'" (Report at 50) if it is in the client's interest—and there is ample evidence that it was requested or, at the very least, welcomed by the client. *See id.* at 50-52; *supra* Section II. Indeed, Addington testified under oath that Yoo included the sections on defenses and Commander-in-Chief authority because it was "what his

client asked him to do." DOJ Hearing, Part III at 42 (testimony of David Addington).[81] Similarly, in response to a question from Philbin regarding inclusion of the sections, Yoo stated that "they want it in there." Report at 51, 197. And the Bybee Memo itself refers to "your request for advice" on the Commander-in-Chief issue. Bybee Memo at 31. This is consistent with the fact that, although Yoo had affirmatively made the decision *not* to address the issue, after a July 16, 2002 meeting with White House officials, including Gonzales, Addington, and Flanigan, Yoo did an about-face and asked [redacted] to begin drafting the new sections on the Commander-in-Chief authority and possible defenses. Report at 49-50; *see also* Email from Yoo to [redacted] (July 18, 2002) (stating that, after discussing it with others, he has "a good idea about how we are going to do it now"). The most natural reading of these events is, as Addington confirmed, that the client wanted those topics included. *See* Report at 52 (someone at the July 16 meeting "requested the additions").

There is nothing remotely improper about answering such requests. That is OLC's role. Indeed, the ethics rules *encourage* OLC to provide whatever information the client wants. Rule 1.4 cmt. [2] ("A client is entitled to *whatever information the client wishes about all aspects of the subject matter* of the representation unless the client expressly consents not to have certain information passed on.").[82] Also, if the client wants to know about an issue it is of no moment that someone else, such as Yoo, brought the issue to the table. *See id.*; *see also* Report at 199 (stating that Yoo "may have added the discussion in response to a question from the CIA."). But even if it had not been requested or desired—indeed, even if affirmatively *unwanted*—OLC could *still* offer the advice if, in its opinion, OLC believed it was in the client's best interest. *See* Rule 2.1 cmt. [5] ("A lawyer ordinarily has no duty to ... give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest."); *see also, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 199 ("I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and *I have a few thoughts to share with you.*"). Here, there is plainly a rational connection between the interpretation of a criminal statute and possible defenses to that same statute and OPR has not attempted to show that OLC did not believe inclusion of those sections was in the client's interest. In short, regardless of who raised the issues or requested their inclusion, it is in no way improper for OLC to address them in the Bybee Memo.

Nonetheless, OPR maintains that it was somehow professionally irresponsible to address such questions, intuiting based on the "sequence of events" that OLC improperly added such sections simply to "to achieve indirectly the result desired by the client"—immunity—and thereby circumvent the Criminal Division's refusal to provide advance declinations. Report at 197-99, 205-06, 228.

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[81] In its Draft Report, OPR did not even acknowledge this highly relevant testimony. *See* Draft Report at 31, 156 (noting only that Addington told Yoo that he was "glad you're addressing these issue").

[82] Although Gonzales and others later called the sections "unnecessary," *see Press Briefing by White House Counsel Judge Alberto Gonzales et al.* (June 22, 2004); *Confirmation Hearing on the Nomination of Alberto Gonzales to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 109 133 (Jan. 6, 2005) (testimony of Gonzales), this does not contradict the evidence that someone else encouraged or welcomed their inclusion. *See* Report at 51, 198 (Gonzales did not remember how the sections came to be in the memo but "mentioned that David Addington" might have been involved).

First, this is pure speculation, devoid of any compelling evidence whatsoever, dependent on reading the facts in the most negative light and jumping to unsupported conclusions. OPR has not come close to demonstrating by a preponderance of evidence (let alone "clear and convincing" evidence) that OLC included the new sections for any reason other than that the client wanted an answer and that it provided more complete advice. *See supra* Section II. Moreover, Judge Bybee has categorically denied writing the Bybee Memo to give the CIA carte blanche to do whatever it wished, Bybee Tr. at 112-13, and Philbin has emphatically concurred, [redacted] (stating that there was "no evidence" that Bybee or Yoo "intended the analysis in the Bybee Memo to provide, in effect, an immunity to CIA operatives" and Philbin "believes that this accusation is unjust"); Report at 199. Had OLC so intended, the Classified Bybee Memo, which was strictly limited to the facts presented and nowhere mentioned OLC's Commander-in-Chief holding, would have been superfluous.

Second, OPR misunderstands the basic functional differences between advance declinations (meaning a commitment not to bring a prosecution) and the issues addressed in the Bybee Memo. The Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the Standards Memo explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "*he* believes necessary to prevent attacks upon the United States." Bybee Memo at 39. Even with this significant qualification (that may have excluded everyone), no one was or could be assured that DOJ would refuse to prosecute based upon the opinion. OLC did not (*and could not*) purport to bind future Justice Departments, juries, or courts, any one of which could (as DOJ subsequently *did*) reject OLC's analyses on these issues. Assuring CIA agents that if they acted pursuant to a Presidential order that they would not be prosecuted as long as future DOJ officials agreed with the OLC opinion is a far cry from blanket "immunity" or a reliable "shield." Report at 197, 199; *see supra* Section II.F.

Also, OPR offers no evidence whatsoever that the CIA misinterpreted the Bybee Memo or that any agent ever conducted an interrogation based on the belief that OLC had assured him that he would be immune from prosecution. Indeed, the White House, Rizzo, and others have confirmed that they *only* relied on the narrower Bybee Classified Memo, not on the Bybee Memo's Commander-in-Chief discussion. *See supra* Section II.[83] For example, Rizzo recently confirmed that, as a client, he in no way viewed the Commander-in-Chief discussion as attempting to "give the CIA carte blanche to inflict torture" or to confer "a form of 'immunity.'" Rizzo Letter ¶ 5. Moreover, he believes that the Bybee Memos did not "create[] any such risk." *Id.* Indeed, as Philbin noted, "there was *no reasonable basis* for thinking that the Bybee Memo would be independently used for anything outside the corners of the Classified Bybee Memo." [redacted] The implicit effort to link Judge Bybee's good faith work product

[83] *See also Press Briefing by White House Counsel Judge Alberto Gonzales et al.* (June 22, 2004) (confirming that the section was "not relied upon by decision-makers"); Letter to senator Patrick Leahy from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, at 3 (July 1, 2004) ("unnecessary for any specific advice provided by the Department"); Draft Report at 180 n.169 (conceding Rizzo believed the Bybee Memo was not "essential" for CIA's purposes); Rizzo Letter ¶ 5.

with unauthorized abuses that may have occurred somewhere in the world is thus extraordinarily unfair.[84]

2. The Bybee Memo clearly only addresses Presidential orders made pursuant to the Commander-in-Chief Power

OPR argues that the Bybee Memo concludes that the statute "could not be constitutionally applied to the CIA interrogation program" and does not "condition" that conclusion "on the issuance of a direct order from the president." Report at 205; *see id.* at 232. OPR seizes (at 200, 202, 203, 232 n.190) on one sentence in the Bybee Memo that, viewed in isolation, could be read to suggest that Congress has no power to criminalize *any* interrogations. *See* Bybee Memo at 39 ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."), *language withdrawn*, Bradbury 2009 Memo at 3 (Jan. 15, 2009) (withdrawing two "specific assertions").[85]

Properly viewed as a whole, however, the memo's holding is much more narrowly confined to a power that the President invokes personally and only when it is pursuant to his proper Commander-in-Chief Authority; a field agent could hardly deign to speak on his behalf. Although Yoo has indicated that this point could have been made more clearly, DOJ Hearing, Part III at 10-17 (testimony of Yoo), a point with which Judge Bybee agrees, it was nonetheless the underlying intent of the authors. Moreover, and most importantly, a key client, Rizzo, "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President." Rizzo Letter ¶ 5. The text of the memo firmly supports this common understanding. *See* Bybee Memo at 31 (stating that "*the President* has the constitutional authority to order interrogations of enemy combatants"); *id.* at 35 (stating that the statute applies to officials "carrying out *the President's* Commander-in-Chief powers" and "aiding the President in exercising *his* exclusive constitutional authorities"); *id.* at 39 ("Congress can no more interfere with *the President's* conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield"). Indeed, the Bybee Memo emphatically describes the scope of its conclusion on this issue in the following terms: "Section 2340A, as applied to interrogations of enemy combatants *ordered by the President* pursuant to his Commander-in-Chief power would be unconstitutional." *Id. Cf.* Report at 206 (incorrectly asserting that there is only a "single reference" to the President's personal involvement); *id.* at 232 n.190 ("sole reference").

In addition, the Bybee Memo analogizes to a 1984 opinion in which OLC determined that a criminal contempt statute cannot constitutionally apply to an official asserting a claim of

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[84] Although OPR cites Goldsmith's criticisms, his concerns about a "blank check" were initially prompted by the Yoo Memo, which was issued *to the Defense Department* and without an accompanying narrowly-tailored memo, such as the Bybee Classified Memo, to make clear the metes and bounds of the advice. *See* Report at 112 (Goldsmith "saw *the Yoo Memo* as a 'blank check' [for DoD] to create new interrogation procedures without further DOJ review or approval"); *see also* Report at 111-113, 117-20, 205, 233; *cf.* Report at 227.

[85] Tellingly, Bradbury did not withdraw the *entire* Commander-in-Chief discussion, but only certain "specific assertions." Bradbury 2009 Memo at 3; *see id.* ("I do not find *that statement* persuasive."); *id.* at 4 (disagreeing with "the *assertions excerpted above*"); *id.* at 11 (disagreeing with "the *propositions highlighted*"). Goldsmith's criticisms also focused on that same statement. Goldsmith, *The Terror Presidency* at 148-49.

Executive Privilege. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 129, 134-35 (May 30, 1984) ("*Olson 1984 Opinion*") (holding that the criminal contempt of Congress statute cannot constitutionally apply to "an Executive official who asserts, *on direct orders of the President*, the President's claim of executive privilege" (capitalization omitted)); *see also id.* at 135 ("*Presidential* assertions of executive privilege"); *id.* at 137 ("*Presidential* command"). This analogy further demonstrates that, as with the executive privilege opinion, the Bybee Memo primarily concerned with an assertion of executive authority invoked personally by the President.[86]

Furthermore, Judge Bybee confirmed that the best reading of the memo is more narrow than OPR contemplates when he stated that the memo did not hold the statute was unconstitutional "on its face"—or even as to all interrogations—but merely that it "might be unconstitutional as applied ... in certain applications on the battlefield." Bybee Tr. at 83. Also, he acknowledged that, relevant to the analysis of such an as-applied challenge was whether it is "a direct order from the president" or instead "somebody way, way, way down the chain of command." Bybee Tr. at 86. To be sure, Judge Bybee stated that the memo does not fully address (or foreclose) the possibility that the statute might be unconstitutional in circumstances *other* than a direct order from the President, Bybee Tr. at 88-89 ("Q: Would this require a direct order from the president? A: Well, we haven't explored that in this memorandum. ... We haven't reached that level of specificity."); *see* Report at 205-06, 232. The point is simply that, on its face, the memo only *clearly* covers the scenario in which the President is directly involved in ordering the interrogation and in which the interrogation is in furtherance of his Commander-in-Chief authority. Put differently: it is highly unlikely anyone reading the memo would have tested the limits of the theory and risked criminal sanctions without a direct order from the President.

OPR contends that the Bybee Memo "was inadequate to make it clear to the reader that such an order was required." Report at 232 n.190. Although a hypothetical "reader" (say, an academic or a commentator) could interpret the memo in any number of ways (much as one can deconstruct any legal opinion), as a practical matter, it was "'perfectly clear for people who work in this area.'" *Id.* at 206 n.159 (quoting Yoo). Indeed, as noted, Rizzo confirmed to us that he interpreted the Commander-in-Chief discussion as referring to interrogations personally ordered by the President. *See* Rizzo Letter ¶ 5; *supra* at Sections II.F, IV.F.1. And, even were the Bybee Memo intended as some sort of field manual (it was not),[87] no rational line interrogator could view it as an "advance declination" or a blanket "immunity" that individuals could invoke on

[86] In past memos, the Bybee and Yoo have made clear that the President cannot wantonly ignore statutes. *See, e.g., Transfer Opinion* at 25 (Section 2340A "could apply to [presidential] transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad"); Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, *Authority of the President to Suspend Certain Provisions of the ABM Treaty* 20 (Nov. 15, 2001) (The President cannot "wholly terminate ... a statute.").

[87] And, of course, Judge Bybee did not intend or expect the Bybee Memo to be widely distributed to CIA agents in the field at all. *See* Bybee Tr. at 89 ("It was very, very closely held, even inside my office. I would be very, very surprised, very disappointed if it was distributed outside of the narrow range for which it was intended."); *supra* Section II. He could not purport to control what the client (i.e., the CIA) does with the advice, so it is of no moment that the[redacted]

their own accord. *See supra* Section II.E-F. As even OPR's lead attorney (at the time) [redacted] recognized, that would "obviously" be "a gross distortion" of the Bybee Memo. Bybee Tr. at 90.

3. The Bybee Memo adopts a reasonable view on unsettled questions of law

OPR apparently concedes that the Bybee Memo's ultimate conclusion is reasonable, but instead faults OLC for being "wrong," for not being "mainstream," and for not being "thorough, objective, and candid." Report at 122, 199, 201. Although Judge Bybee agrees that the Bybee Memo's Commander-in-Chief discussion was not as clear or as complete as it could have been, that shortcoming hardly rises to an ethical violation.[88] As discussed below, its conclusions, *even if* "wrong" or not "mainstream," were nonetheless reasonable.

Initially, OPR did not contend that OLC's Commander-in-Chief conclusion is wrong (let alone recklessly so), unreasonable, or made in bad faith, only that the memo should have said more: it was "not adequately supported by authority." Draft Report at 157; *see also id.* at 159 ("*[w]hatever the merits*" of OLC's position, "it was not based on a thorough discussion of all relevant provisions of the Constitution"). Now, in a fit of *ipse dixit*, OPR has in the last three months decided that the Bybee Memo's conclusion that the anti-torture statute "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" was, after all, "wrong" and, in any event, "most certainly did not constitute thorough, objective, and candid legal advice." Report at 201.[89] OPR breezily resolves this weighty issue (on which no court has passed) in a mere three sentences and a handful of citations to a foreign court and two scholarly works:

> Torture 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. The Bybee Memo cited no authority to suggest that the drafters of the Constitution (or anyone else) believed or intended that the President's Commander-in-Chief powers would include the power to torture prisoners during times of war to obtain information. *Thus*, the Bybee Memo's conclusion 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* and most certainly did not constitute thorough, objective, and candid legal advice.

Id. (citations omitted).

This is not a serious analysis. *First*, it is clearly not OPR's role to substitute its preferred (truncated) analysis and constitutional conclusions, and thereby "put [itself] in the position of a

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[88] In any case, it is undisputed that this potential power was not the basis for OLC's advice in the Classified Bybee Memo (and indeed was not mentioned in that memo) and *was never relied upon* by the prior administration. Moreover, had it been intended as a sweeping immunity from the statute, the remainder of the Bybee Memo would have been irrelevant, and the Classified Bybee Memo unnecessary.

[89] Elsewhere in the Final Report, OPR disclaims that it evaluated OLC's conclusions on the merits.

sort of court of appeals from lawyers' judgments," *In re Stanton*, 470 A.2d at 287. Indeed, absent a showing of "*total inattention or incompetence*" (which OPR does not even attempt to make), a disciplinary body must "*[n]ever* be in the business of assessing the correctness of the lawyer's advice to the client." *Id.* at 287.[90] *Second*, OPR proceeds from the faulty premise that the Commander-in-Chief discussion authorizes "torture." Report at 201.[91] Insofar as OPR is referring to the statutory definition, it is simply mistaken. If the statute is unconstitutional as applied to certain actions then, by definition, those actions *are not* statutory torture. (If a defendant is acquitted of murder because a state statute is held to be unconstitutional, the defendant did not commit statutory murder.) Insofar as OPR is referring to general notions of torture (international *jus cogens* or otherwise), it is irrelevant, as the Bybee Memo only addresses the statutory definition. *See* Bybee Tr. at 105.[92]

OPR also criticizes OLC for not adopting a "widely-held view[]" as to the scope of executive power. Report at 228; *accord id.* at 122, 199; Draft Report at 157 (arguing OLC takes "a minority view, one that does not acknowledge or address more widely-held, mainstream views as to the scope of executive power"). Even accepting that OLC took a minority view, it is nonetheless defensible in its conclusions and has garnered support. Professors Posner and Vermeule, for example, recognize that OLC's analysis "falls well within the bounds of professionally respectable argument" and Professor Paulsen, a former OLC attorney and a widely-published expert on war powers,[93] has argued that the Bybee Memo "is almost certainly correct" in concluding that the President has "constitutional powers to make orders concerning the capture, detention, and interrogation of enemy prisoners, irrespective of any arguably inconsistent congressional enactment." Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807, 830 (2006) ("Paulsen Article"); *see also, e.g.*, Flanigan Decl. ¶ 6. Even more recently, in testimony submitted to the Senate Judiciary Committee, Paulsen stated that the Commander-in-Chief discussion is "*unquestionably correct.*" Michael Stokes Paulsen, *The Lawfulness of the Interrogation Memos* at 4 (May 13, 2009) (written testimony before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary) ("Paulsen Testimony") (Appendix 6) (emphasis in

[90] OPR has no answer to *In re Stanton*, instead nakedly asserting that it "reject[s]" this constraint. Report at 14 n.14. Whatever authority OPR has to address "allegations of misconduct involving Department attorneys that relate to the exercise of their authority to ... provide legal advice," binding DOJ regulations prohibit OPR from holding attorneys to a higher standard than the applicable state or local bar (here, D.C.) rules of professional conduct. *See supra* Section III. OPR simply cannot impose its own preferred legal and policy judgments. *Id.*; *infra* Section VI.D.

[91] Contrary to OPR's contention, OLC never assumed "that enforcing the statutory prohibition against torture *would* interfere with the interrogation of prisoners during wartime." Report at 201. OLC merely held that, insofar as the President determined a particular interrogation was necessary to the discharge of his Commander-in-Chief duties (e.g., a need to obtain information to avert an imminent catastrophic threat to the nation), the anti-torture statute must yield to the constitution.

[92] Naturally, then, "the word 'torture' does not appear" in OLC's Commander-in-Chief discussion. Report at 201. OPR's confusion on this point is yet another example of the ideological preconceptions that pervade OPR's Report. *See supra* Section IV.E.

[93] Professor Hazard stated, "[Paulsen] has worked through the field of Executive Authority more thoroughly than any other scholar of whom I am aware." Hazard Letter ¶ 8.

original).[94] He also stressed that the "quality of the analysis ... is clearly well within professional standards"—"[t]his is not even a close question." Paulsen Testimony at 6.

The Bybee Memo ultimately concludes that the statute could not constitutionally be applied to the President's interrogation of terrorists overseas insofar as it was an integral and necessary component of the ongoing war effort, pursuant to his Commander-in-Chief authority. OLC prefaces its analysis with a discussion of the September 11 attacks and the resulting "effort at home and abroad to counter terrorism," to which Congress lent its support. Bybee Memo at 32. Indeed, Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." S.J.Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see* Bybee Memo at 32.

The Bybee Memo first explains that, in keeping with past OLC opinions and judicial precedent, in order to avoid constitutional difficulties, a statute of general applicability should not be interpreted to reach the conduct of the President, unless the statute specifically so provides. Bybee Memo at 33-35, *citing, inter alia, Olson 1984 Opinion*, 8 Op. O.L.C. at 134; *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that *textual silence is not enough* to subject the President to the provisions of the [Administrative Procedure Act]. We would require an *express* statement by Congress[.]"). Thus, as the anti-torture statute nowhere specifically applied to the President, OLC concludes it should not be read to reach his power to successfully prosecute the war and protect the nation from further attacks. *Id.* The Bybee Memo then concludes that, insofar as the statute is read to inhibit the President's ability to order an interrogation pursuant to his Commander-in-Chief authority, it would be unconstitutional.

In reaching these conclusions, the Bybee Memo explains that there are certain "core" Article II powers that Congress cannot impinge upon, including those powers necessary for the President to successfully prosecute a conflict. *Id.* at 38. The Bybee Memo reasons that, where the President believes a "battlefield combatant" has actionable intelligence necessary to successfully defend the country from attack, it is squarely within his Commander-in-Chief duties to obtain that information. As the memo points out, in the modern struggle with terrorist organizations, as opposed to traditional nation states, there is a heightened role for intelligence gathering, which might be the only means to thwart "covert terrorist attacks upon the United States." *Id.* at 39. Accordingly, the Bybee Memo explains, interrogations necessary to preventing such attacks are thus part and parcel of the President's "strategic and tactical decisions on the battlefield." *Id.* The Bybee Memo's Commander-in-Chief conclusion is reasonable when considered against the backdrop of other widely-accepted opinions.

The prevailing view is that there is *some* measure of core Commander-in-Chief and Article II war-making authority that the President can invoke to protect the country and that Congress cannot encroach upon. The Supreme Court, for example, recently stated that Congress cannot "'intrude ... upon the proper authority of the President'" and "'cannot direct the conduct

[94] *Cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1258 (2004) (explaining that "the Constitution either creates or recognizes a constitutional law of necessity, and appears to charge the President with the primary duty of applying it and judging the degree of necessity in the press of circumstances").

of campaigns.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring)); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them *in the manner he may deem most effectual* to harass and conquer and subdue the enemy."). Similarly, Walter Dellinger, Assistant Attorney General of OLC under President Clinton, has explained 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." *Placing of United States Armed Forces Under United Nations Operations or Tactical Control*, 20 Op. O.L.C. 182, 1996 WL 942457, at *2 (May 8, 1996) ("*Dellinger 1996 Opinion*") (citing *Fleming*, 50 U.S. at 615).[95]

Current OLC attorneys Acting Assistant Attorney General David Barron and Deputy Assistant Attorney General Martin Lederman recently acknowledged that "[t]here is a venerable scholarly consensus that Congress is constitutionally disabled from using its Article I war powers to limit the President's 'tactical' options in wartime [or] to 'interfere[] with the command of the forces and the conduct of campaigns.'" David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 945 (2008) (quoting *Milligan*, 71 U.S. at 139 (Chase, C.J., concurring)); *see also id.* at 1025 & n.334 (collecting commentary describing the majority view). As they further explained, "the Bush Administration's striking assertions of preclusive powers are ultimately predicated on a *basic proposition that even its critics have generally taken for granted.*" *Id.* at 945; *see generally* David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 691 (2008).

Once we recognize that there is a core Commander-in-Chief power, the only question is how far it extends. At the time the memos were written that was an open question, and many believe it remains so today. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (plurality) ("We do not reach the question whether Article II provides such [plenary detention] authority ...."); *id.* at 587 (Thomas, J., dissenting) ("[W]e need not decide that question because Congress has authorized the President."); *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from denial of certiorari) (arguing that the Court should address the

[95] *See also, e.g.*, Barack Obama, The White House, *Signing Statement on Omnibus Appropriations Act, 2009* (Mar. 11, 2009) (arguing statutory provisions impinge on Commander-in-Chief authority); *The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 28 (Jan. 15, 2009) (President's authority can sometimes override Congress); *Nomination of David Ogden to be Deputy Attorney General: Response to Written Questions for David Ogden from Senator Specter*, 111st Cong. 3 (2009) (same); Flanigan Decl. ¶ 6 ("[M]ost who have lead [OLC] would agree ... the President's powers are particularly strong in certain aspects of his role as Commander-in-Chief and the area of foreign affairs."); Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1239 (2005) (noting that the "conventional academic view holds that to some extent these powers are beyond the power of Congress to restrict"); William Howard Taft, *The Boundaries Between the Executive, the Legislature, and the Judicial Branches of the Government*, 25 Yale L.J. 599, 610 (1916) ("When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles be fought on a certain plan, and could not direct parts of the army to be moved from part of the country to another.").

extent of executive authority to detain indefinitely).[96] As then-Judge Mukasey remarked, around the time the memos were written: "[I]t would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. *There isn't.*" *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002) (Mukasey, C.J.), *rev'd*, 352 F.3d 695 (2d Cir. 2003) (2-1 decision), *rev'd*, 542 U.S. 426 (2004) (5-4 decision).

Nearly all agree that the Commander-in-Chief power must extend (to the exclusion of congressional power) at least to tactical commands on the battlefield and the conduct of campaigns. *See, e.g., Hamdan*, 548 U.S. at 592; *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring) (Congressional power extends to warmaking "except such as interferes with the command of the forces and conduct of campaigns," which "power and duty belong[s] to the President as commander-in-chief"); Memorandum from William Rehnquist, Assistant Attorney General, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 21 (May 22, 1970). As one scholar explains this "robust core of exclusivity," "[o]nly the President can direct troop movements, form military strategies, order a battlefield attack, and so on." David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. Rev. 1791, 1855 (1998); *see also* Barron & Lederman, 121 Harv. L. Rev. at 750-51 & n.191 (explaining that "most war powers scholars" have "embraced some variant" of this preclusive core) (citing John Hart Ely and several others). Further, many accept that the battlefield can extend to U.S. territory. *See, e.g., The Nomination of Elena Kagan: Hearing Before S. Comm. on the Judiciary*, 111th Cong. (2009).[97] Still others see the constitutional authority as extending even beyond the battlefield proper. *See Bancoult v. McNamara*, 445 F.3d 427, 437 n.5 (D.C. Cir. 2006) ("While the current case does not involve battlefield decisions, the tactical and logistical details of establishing an overseas base are as much a matter of executive discretion [as Commander-in-Chief] as are strategic decisions."). The authority, it is understood, must be sufficient in a given context to "'protect the security and effectuate the defense of the United States'" and thus includes "'such supreme and undivided command as would be necessary to the prosecution of a successful war.'" *Shiffrin 1995 Opinion* at 1 (quoting *United States v. Sweeny*, 157 U.S. 281, 284 (1895); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61-62 (1941) (Jackson, AG) ("*British Flying Students*")).[98]

Significantly, most also agree that it also includes some measure of intelligence

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[96] *But see Hamdan*, 548 U.S. at 593 n.23 (apparently rejecting the argument that Article II permits military commissions in the face of congressional enactment); *Hamdi*, 542 U.S. at 568-69 (Scalia, J., dissenting) (rejecting the argument that Article II permits indefinite wartime detention of citizens).

[97] *See also, e.g.*, Letter to Salmon P. Chase from Lincoln (Sept. 2, 1863) *in Lincoln: Speeches And Writings 1859-1865* 501 (Library of America 1989) ("The original [emancipation] proclamation has no constitutional or legal justification, except as a military measure.").

[98] *See also, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) ("The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying those powers into execution.") (citation omitted); *Request of the Senate for an Opinion as to the Powers of the President In Emergency or State of War*, 39 Op. Att'y Gen. 343, 347-48 (1939) ("It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers [cannot be] specifically defined [because] their extent and limitations are largely dependent upon conditions and circumstances. ... The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.").

gathering. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intell. Surveil. Ct. Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information .... We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.").[99] For example, subsequent to the Bybee Memos, an OLC White Paper espoused a broad view of Article II authority to collect foreign intelligence information using warrantless wiretaps, notwithstanding any statutory strictures. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 2006 WL 6179901, at *3 (O.L.C. Jan. 19, 2006) (Statutes would be unconstitutional if they "impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States ...."). Similarly, it is well-established that the President is charged with intelligence protection. As the Obama administration recently argued, "[t]he [state secrets] privilege has a firm foundation in the constitutional authority of the President under Article II to protect national security information." Motion to Dismiss at 12 n.9, *Jewel v. NSA*, No. 08-cv-4373 (N.D. Cal. Apr. 3, 2009) (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), and *United States v. Nixon*, 418 U.S. 683, 710-11 (1974)) (recognizing the President's constitutional authority to protect national security information).

In short, in light of the uncontroversial view that the President has at least *some* measure of inherent, inviolable authority, the only question remaining is whether an interrogation of a suspected terrorist believed to have knowledge of imminent catastrophic attacks could be within the Commander-in-Chief's power. *See* Paulsen Article at 813 ("[T]here is legitimate room for disagreement as to its full scope, and fair-minded men and women can dispute the executive branch's assertions as to its understanding of that scope and its relationship to other legislative powers."). As shown above, the President must be able both to direct his forces in combating the enemy and to collect foreign intelligence. It is not unreasonable to conclude that a statute that purported to regulate the President's authority to obtain intelligence in connection with the nation's immediate defense violates Article II. This is a reasonable reading of the Constitution, on a question that no court has squarely confronted, and OPR cannot (and does not) seriously contend otherwise.

More generally, OPR's criticism that OLC has not taken a "widely-held" or "majority"

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[99] *See also El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007) ("'Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces.'") (citation omitted); *Warrantless Foreign Intelligence Surveillance – Use of Television – Beepers*, 2 Op. O.L.C. 14, 15 (1978) (The President has the "constitutional power to gather foreign intelligence."); *Presidential Discretion to Delay Making Determinations Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991*, 19 Op. O.L.C. 306 (Nov. 16, 1995) ("As a constitutional matter, the President, as Commander in Chief, has the inherent authority to employ sources for gathering intelligence needed to protect the national security of the United States."); *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103d Cong. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes ...."); *but see ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

view is, as a matter of professional misconduct, irrelevant in light of past executive branch practice. Executive branch attorneys (OLC and the AG) have long taken a robust view of Executive Authority, without regard to whether it was the majority view. The Clinton administration, for example, was "excoriated" for its "'absolutist pretensions' in military affairs" and "Clinton's OLC wrote several opinions arguing that the President could disregard congressional statutes that impinged on the Commander in Chief or related presidential powers." Goldsmith, *The Terror Presidency* at 36. Numerous administrations have either explicitly or implicitly found the War Powers Resolution ("WPR") unconstitutional and ignored it. In fact, as of early 2009, "every President has taken the position" that the WPR—which purports to place conditions on the President's ability to send troops into combat—"is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief." Richard F. Grimmett, Congressional Research Service, Library of Congress, *War Powers Resolution: Presidential Compliance* 1 (2009); *see also Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 281-83 (Oct. 30, 1984) (Olson) (instances of Presidents Nixon, Ford, Carter and Reagan moving troops into actual or imminent hostilities without complying with WPR). Consistent with this trend, President Obama continues to issue signing statements, jealously guarding his Article II powers against legislative encroachment,[100] even though it "riles Congress." Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, *N.Y. Times*, Aug. 8, 2009.

Especially where national security and international relations are at play, there is a well-established history of the Department flexibly interpreting statutes to avoid conflict with President's Article II powers, or of outright asserting Article II authority to justify actions otherwise contrary to statutes. For example, analyzing a bill that "seeks to compel the President to build and to open a United States Embassy to Israel at a site of extraordinary international concern and sensitivity," OLC opined that "Congress cannot constitutionally constrain the President in such a manner." *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 1995 WL 1767996, at *3 (May 16, 1995) (Dellinger). Along the same lines, OLC declared unconstitutional bills proposing to limit the President's ability to place United States armed forces under the UN operational or tactical control. *Dellinger 1996 Opinion*; *Shiffrin 1995 Opinion*; *see also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C. Nov. 28, 2001) (provision restricting funds for use of troops in UN peacekeeping missions is unconstitutional). As to intelligence gathering in particular, OLC has explained that "'the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of

[100] *See, e.g.*, Barack Obama, White House, *Signing Statement for H.R. 1105, the "Omnibus Appropriations Act, 2009"* (P.L. 111-8) (Mar. 11, 2009) (arguing statutory provisions impinge on Commander-in-Chief authority); see also Barack Obama, White House, *Signing Statements for H.R. 2346, the "Supplemental Appropriations Act, 2009"* (P.L. 111-32) (June 26, 2009) (stating President's intent to ignore provisions that "would interfere with [his] constitutional authority to conduct foreign relations"); Barack Obama, White House, *Signing Statement for H.R. 131, an act establishing the Ronald Reagan Centennial Commission* (P.L. 111-25) (June 2, 2009) (asserting separation of powers and Appointments Clause authority); Barack Obama, White House, *Signing Statement for S. 386, the "Fraud Enforcement and Recovery Act of 2009"* (P.L. 111-21) (May 20, 2009) (construing provisions so as "not to abrogate any constitutional privilege"); *see also* Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, *N.Y. Times*, Aug. 8, 2009 ("President Obama has issued signing statements claiming the authority to bypass dozens of provisions of bills enacted into law since he took office ....").

intelligence and other national security information in the Executive Branch.'" *Access to Classified Information*, 20 Op. O.L.C. 402 (Nov. 26, 1996) (quoting Brief for the Appellees at 42, *Am. Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)).[101] OLC has similarly advanced the President's Article II authority in other contexts,[102] including asserting that criminal statutes of general applicability do not apply to the executive unless they specifically so state.[103]

And when the Congress encroaches on the President's authority, it is not only his right but his "enhanced *responsibility* to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 201 (Dellinger). In particular, if the President believes that an enactment unconstitutionally limits his powers, "he has the authority to defend his office and decline to abide by it, unless he is *convinced* that the [Supreme] Court would disagree with his assessment." *Id.* OPR has not examined *any* of these executive branch precedents or practices. *Cf.* Report at 202 (charging OLC with not providing a "thorough discussion").

This discussion demonstrates that even if the memos represent a step beyond[104] anything OLC has been presented with previously, OLC's defense of the President's powers is consistent with the principles on which these discussions were based. It is wholly appropriate for OLC to jealously guard executive authority from encroachment by the other branches, and to independently arrive at those positions. Judge Bybee has confirmed that it was his

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[101] *See also, e.g., Whether the President May Have Access to Grand Jury Material In the Course of Exercising His Discretion to Grant Pardons*, 2000 WL 34474450 (O.L.C. Dec. 22, 2000) (reading Fed. Draft Report Crim. P. 6(e) to avoid impinging on Article II authority); Memorandum for the Counsel Office of Intelligence Policy and Review, *Sharing Title III Electronic Surveillance Material With the Intelligence Community* (Oct. 17, 2000) (interpolating exception in deference to presidential powers); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (May 20, 1998) (Moss written testimony before House committee) (The bill "is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress"); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (Feb. 16, 1990) (bill impinges on President's "broad" Article II authority over nation's diplomatic affairs, "flow[ing] from his position as head of the unitary Executive and as Commander in Chief").

[102] *See, e.g., Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 O.L.C. 350 (Dec. 18, 1995) (reading statute not to apply to presidential appointment of judges); *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 361 (Sept. 28, 1989) (construing Anti-Lobbying Act not to apply fully to president so as not to interfere with Recommendations Clause power); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (Feb. 22, 1984) (legislation requiring an Executive Branch officer to submit budget proposals and bill comments directly to Congress would be an "unconstitutional intrusion by the Legislative Branch into the President's exclusive domain"); *Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388, 389 (Oct. 3, 1979) (President not subject to Age Discrimination in Employment Act in selecting judges); *see also Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 2008 WL 4753234 (O.L.C. Jan. 29, 2008) (surveying past decisions reading reporting statutes to avoid constitutional problems).

[103] *Olson 1984 Opinion*, 8 Op. O.L.C. at 127 (interpreting criminal contempt statute not to apply to President and subordinates asserting executive privilege lest it impinge on Executive authority).

[104] In fact, going a "step beyond" prior decisions is exactly how Constitutional interpretation and the common law operate—even while maintaining the benign fiction of continuity in the law.

"responsibility as head of the office of legal counsel ... to be a vigorous defender of the president's prerogative." Bybee Tr. at 54. OLC's views are reasonable, persuasive, and in no way reckless. *See Safeco*, 551 U.S. at 70 n.20 (it would "defy history and current thinking" to find a legal interpretation to be reckless where the text and relevant precedent "allow for more than one reasonable interpretation."); *see also* Posner & Vermeule (OLC's analysis "falls well within the bounds of professionally respectable argument"); John Hagan, Gabrielle Ferrales & Guillermina Jasso, *How Law Rules: Torture, Terror, and the Normative Judgments*, 42 Law & Soc'y Rev. 605, 610 (2008) (acknowledging the view that, although most would disagree, "a number of well-recognized scholars such as Posner (2004), Ignatieff (2005), and Dershowitz (2002) have argued that there is merit in the reasoning" of the Commander-in-Chief discussion).

The arguments do not suddenly become less reasonable—let alone unethical—if successor attorneys decline to adopt the analysis as unnecessary, *see* Levin Memo at 2 ("Because the discussion in [the Bybee Memo] concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows."), or even eventually withdraw them, *see* Bradbury 2009 Memo at 3 (withdrawing particular statements regarding Commander-in-Chief discussion).[105] Although OPR cites Goldsmith, Bradbury, and Levin as taking issue with the Commander-in-Chief analysis, *see, e.g.*, Report at 124, 196-99, 203-04, mere disagreement is not evidence of ethical failings. This no more proves professional misconduct than does Attorney General Holder's recent abrupt and unceremonious reversal of an OLC opinion on another significant constitutional issue that cuts to the heart of our structure of government. *See* Carrie Johnson, *A Split at Justice on D.C. Vote Bill: Holder Overrode Ruling that Measure is Unconstitutional*, Wash. Post, Apr. 1, 2009, at A1.[106] Disagreements among attorneys on difficult questions are the foundation of the legal profession—not the stuff of ethics complains.

Indeed, Goldsmith has emphatically stated: "I am confident, based on what I know, that Jay Bybee acted in good faith (i.e. did not think he was violated the law) and satisfied his

[105] Moreover, the administration had otherwise continued to espouse a broad view of executive power even after withdrawing certain opinions. *See, e.g., Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 2006 WL 6179901, at *3; George Bush, The White House, *Signing Statement on the Detainee Treatment Act*, H.R. 2863 (Dec. 30, 2005). Tellingly, Bradbury withdrew only "specific assertions" in prior memos, but nonetheless stressed that the President has "broad authority as Commander in Chief to take military actions in defense of the country," such as "deploy[ing] military and intelligence capabilities," and has "no doubt" that "necessarily includes authority to effectuate the capture, detention, interrogation, and, where appropriate, trial of enemy forces, as well as their transfer to other nations." Bradbury 2009 Memo at 4.

[106] OLC has reversed its prior opinions on several occasions. *See, e.g.*, Memorandum Op. for the Deputy Attorney General from Theodore B. Olson, *War Powers Resolution: Detailing of Military Personnel to the CIA* (Oct. 26, 1983) (reversing OLC's prior conclusion that the War Powers Resolution did not apply to CIA military personnel). In fact, Justice Jackson once repudiated his own prior opinion (as Attorney General), acknowledging that the opinion's "lack of precision with generalities ... gave off overtones of assurance" that might have "misled" some readers. *McGrath v. Kristensen*, 340 U.S. 162, 176-77 (1950) (Jackson, J., concurring) (addressing *Registration of Aliens Under Selective Training and Service Act*, 39 Op. Att'y Gen. 504, 505 (Oct. 11, 1940)). He also pointed out that it is hardly uncommon for jurists to reverse themselves. *See id.* at 178 (quoting Lord Westbury, who stated, "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion."); *id.* at 177-78 (citing *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847) (Chief Justice Taney, recanting his prior views as Attorney General of Maryland); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478 (1827) (Story, J.) (noting that his "own [prior] error ... can furnish no ground for its being adopted by this Court")).

professional responsibilities." Goldsmith Submission at 4 n.7. Also, Bradbury specifically noted that his memo was not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." *Id.* at 1 n.1.[107] And Levin stated that his disagreements with the Bybee Memo were never "intended to suggest that [he] believed the authors had committed professional misconduct." Levin Decl. ¶ 6.

4. The Bybee Memo Relied on Prior OLC Opinions and Reasonably Declined to Reiterate Unnecessary Discussions

The bulk of OPR's specific criticisms revolve around OPR's view that OLC simply did not say *enough* to justify its conclusions. OPR is wrong on the facts and the law. OPR first refuses to acknowledge that, as this opinion was merely the latest in an ongoing dialogue between sophisticated executive branch attorneys, OLC need not (and, as a practical matter, *could not*) rehash its entire jurisprudence. Instead, OPR severs the Bybee Memo from the underlying body of case law upon which OLC explicitly relies and incorporates. OPR then quibbles with OLC's professional judgment on whether to include unnecessary background information in order to keep the opinion to a manageable length and to ensure that it is completed by the hard deadline OLC was given. Even so, OPR nowhere asserts that adopting its proposed edits would necessarily change OLC's conclusion or that OLC's conclusions are an unreasonable constitutional interpretation. We first address OPR's failure to appreciate the background jurisprudence and the target audience of the Bybee Memo. We then turn to OPR's specific arguments that OLC failed to discuss *Youngstown*, Congress's enumerated powers, or the Take Care Clause—none of which support its conclusion as to the thoroughness, objectivity, and candor of OLC's legal advice.

a. The Bybee Memo appropriately incorporated prior decisions and tailored its advice to its intended audience

OPR looks at the Bybee memo in isolation, severing it from the jurisprudential backdrop against which it was written. OPR also discounts the fact that the recipients of the Bybee Memo consisted of sophisticated executive branch attorneys who did not need a primer on the separation of powers. But it is incoherent to find OLC did not say enough without factoring in everything OLC did say as well as the intended audience.

All of the OLC memos—including the ones at issue here—were part of an ongoing dialogue, a fact the memo explicitly highlighted: "In a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power. We ***briefly summarize*** the findings of those opinions here." Bybee Memo at 36 (citing examples); *see also* Gonzales Press Conference June 2004 (stating that this was a conversation that was ongoing and the public walked into the middle of the conversation); Bybee Tr. at 87. OLC thus candidly—indeed, transparently—disclosed that it was providing a *summary*, as opposed to an exhaustive rendition, of the constitutional issues at stake.

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[107] Unlike in its Draft Report, OPR now belatedly concedes, as it must, that these officials believe Judge Bybee did not engage in unethical conduct. *See, e.g.*, Report at 29 n.29 (Bradbury), 197 n.151 (Goldsmith).

The first known memo in that dialogue came just two weeks after September 11th. *See* Memorandum Opinion for the Deputy White House Counsel from John Yoo, Deputy Assistant Attorney General, OLC, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("*Military Operations Opinion*") (cited in Bybee Memo at 36). In that memo, OLC acknowledges, for example, the general relevance of Justice Jackson's *Youngstown* concurrence and acknowledged that "the Framers unbundled some plenary powers that had traditionally been regarded as 'executive,' assigning elements of those powers to Congress in Article I." *Id.* Other opinions, such as the *Military Commissions Opinion*,[108] the *Transfer Opinion*,[109] and the *Swift Justice Opinion*,[110] discuss whether Congress's enumerated powers impact the Commander-in-Chief power. These opinions, and numerous others, are all part of the continuing post-9/11 conversation and are all incorporated by reference into the Bybee Memo's Commander-in-Chief analysis. *See, e.g.*, Bybee Memo at 32, 35, 38.

To force OLC to reiterate basic constitutional law principles, to exhaustively detail every possible argument and counter-argument, and to reiterate and reanalyze all analysis in past memos, would result in unworkably long opinions, with no value added for the client. The idea that these highly-skilled executive branch attorneys—who had already received numerous prior OLC opinions on the topic—would not know about *Youngstown*, Congress's enumerated powers, and the Take Care clause is preposterous, as discussed further below. It is no answer to point out, as OPR does, that Goldsmith thought the Commander-in-Chief section was flawed. Report at 205 (deciding, based on Goldsmith criticisms, to "reject Bybee's assertion that the memorandum ... was sufficient for the audience for which it was intended"). Although Goldsmith might disagree with some of the judgments OLC made (including the decision not to cite *Youngstown*), that does not mean that the "audience for which it was intended" (i.e., those officials with whom OLC had been conducting an ongoing dialogue, prior to Goldsmith's arrival) actually felt the same way. In any event, OLC made the reasonable judgment that reviewing such matters would add nothing, except length, to the discussion.

b. The decision not to reiterate *Youngstown* is appropriate

OPR uses OLC's failure to cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as support for its professional misconduct findings. Report at 204 ("[A] thorough, objective, and candid discussion would have acknowledged its relevance to the debate."); *id.* at 205. Describing *Youngstown* as "the leading Supreme Court case on the distribution of governmental powers between the executive and the legislative branches," OPR appears particularly concerned about the omission of Justice Jackson's concurring opinion. *Id.* at 204;

[108] Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[109] Memorandum for William J. Haynes, II, General Counsel, Department of Defense from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander-in-Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 5-7 (Mar. 13, 2002).

[110] Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* 10 (Apr. 8, 2002).

see id. at 117-20, 205. As an argument about thoroughness, objectivity, and candor, this contention lacks merit. Although *Youngstown* (in particular Justice Jackson's concurrence) can provide a useful framework, it is moot once it is determined (as OLC did) that a given action falls within the core executive power. OPR utterly ignores the scores of judicial and OLC opinions (under both political parties) that, like the Bybee Memo, make no explicit mention of this supposedly-indispensable framework. *See* Appendix 17.

In *Youngstown*, the Supreme Court held that President Truman was not constitutionally empowered to seize domestic steel mills, in derogation of congressional enactments, even with the purpose of averting a strike in service of the war effort. 343 U.S. at 586-89. The President, the Court explained, does not have "the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Id.* at 587. In the oft-cited concurrence by Justice Jackson, he pointed out that, in ascertaining the President's authority to take a given action, there are three possible scenarios: Congress has approved that action, Congress has remained silent on such action, or Congress has purported to forbid such action. *Id.* at 635-38. In the first, the President can depend on all of his own power, plus all that Congress can add; in the second, the President can act on his own authority in the "zone of twilight" where Congress might have concurrent authority; and, in the third, the President can only act if the authority is within the core, exclusive executive authority. *Id.* at 637. In the third category, although congressional action leaves Presidential power "most vulnerable to attack and in the least favorable of possible constitutional postures," the President may act when it "is within his domain and *beyond control by Congress*." *Id.* at 640.

Justice Jackson's *Youngstown* concurrence lays out a tripartite analytical framework for assessing Executive power that is commonly used as a pedagogical tool. In the Supreme Court, however, that tripartite framework is more often ignored than followed. In *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981), the Court, for the first time, used Jackson's tripartite formula for analyzing the case, although it altered the formulation. *See also Hamdan*, 548 U.S. at 593 n.23 (citing the tripartite formula in a footnote, but altering it). Since *Dames & Moore*, the Court has occasionally used Jackson's formula, *e.g.*, *Medellin v. Texas*, 128 U.S. 1346, 1368 (2008), although more frequently, it has omitted it. For example, the Court simply failed to cite *Youngstown* at all in *Clinton v. New York*, 524 U.S. 417 (1998), and *Department of the Navy v. Egan*, 484 U.S. 518 (1988), and it has cited *Youngstown*—but without relying on Jackson's tripartite formula—in a host of other important separation of powers cases. *See, e.g., Mistretta v. United States,* 488 U.S. 361, 386, 400, 408 (1989); *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1984). This is not to say that the Court's decisions were not consistent with, or even influenced, by Justice Jackson's tripartite formula. But in these cases, the Court did not recite the framework, and it did not cite *Youngstown* for that purpose.

Youngstown can be a useful framework—although it has not always had the status that OPR projects on it—but it is only a framework; it does not provide an answer to the question of the scope of executive power. Once the dispositive question that a given power is within the core of the President's Article II powers is affirmatively determined, then the framework is moot. Indeed, Judge Bybee stated during his interview with OPR that the memo implicitly contemplated falling under Jackson's third category. He explained to OPR that citing *Youngstown* would not have altered the ultimate analysis. *See* Bybee Tr. at 93 (stating that

Jackson's *Youngstown* concurrence is a "mode of analysis," that "it doesn't answer the question," and that the memo is "quite consistent" with Jackson's mode of analysis). And, the Bybee Memo cites a prior opinion, by Yoo, that recognizes *Youngstown*. Bybee Memo at 32 (citing *Military Operations Opinion*). Indeed, one commentator has noted that "*Youngstown* is consistent with both the academic theory of executive power and with the memoranda's view of its specific application to the war on terror. In fact, *Youngstown* seems affirmatively to support the memoranda's position at this point." Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1221, 1244 (2005) (arguing that a "more modest approach to presidential power" would have yielded similar results).[111]

It is therefore not surprising that the Attorney General and OLC have frequently seen fit to omit a discussion of *Youngstown*. In 1956, for example, just four years after *Youngstown* was issued, Acting Attorney General J. Lee Rankin advised the President, in a short written opinion, that in certain cases he may "depart from the statutory procedures and ... rely on constitutional authority to appoint key military personnel." *Promotion of Marine Officer*, 41 Op. Att'y Gen. 291, 294 (Aug. 22, 1956). He did not cite *Youngstown*. Later, in 1984, also without citing *Youngstown*, OLC concluded that a criminal contempt statute must not be interpreted to apply to the President and his subordinates asserting executive privilege, as it would otherwise violate "the separation of powers by stripping the Executive of its proper constitutional authority." *Olson 1984 Opinion*, 8 Op. O.L.C. at 127. And yet again, in 1989, OLC held, without citing *Youngstown*, that Congress may not require prior notice for covert CIA operations without "unconstitutionally infring[ing] on the President's constitutional responsibilities, including his duty to safeguard the lives and interests of Americans abroad." *The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies*, 13 Op. O.L.C. 311 (July 31, 1989) (Barr).

More recently, in 1996, OLC nowhere cited *Youngstown* in concluding that legislation limiting the President's ability to place United States armed forces under the UN operational or tactical control "unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief." *Dellinger 1996 Opinion* at *2[112] Where the President determines that the purposes of a particular military operation require a particular action (there,

[111] In any event, *Youngstown* is distinguishable on its facts given that it involved fundamentally domestic economic activity—the seizure of steel plants—that the Court determined was insufficiently connected to the war effort to fall within the ambit of the President's core warmaking authority. Indeed, Justice Jackson found President Truman's actions to be outside of the core Presidential powers because the "military powers of the Commander in Chief were not to supersede representative government of *internal affairs*." 343 U.S. at 644; *see id.* at 642 (explaining that endorsing Truman's view would "vastly enlarge his mastery over the internal affairs of the country"). On the other hand, Justice Jackson stressed that he would "indulge the widest latitude of interpretation to sustain his executive function to command the instruments of national force" when "turned against the *outside world* for the security of our society." *Id.* at 645. Here, of course, we are dealing with the wartime interrogation of declared enemy combatants held outside of the U.S. proper, and the torture statute itself *only* applies outside the United States. 18 U.S.C. § 2340. *See also The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies*, 13 Op. O.L.C. 311 (July 31, 1989) (holding, without citing *Youngstown*, that Congress cannot require the President to disclose covert CIA operations, and noting the "'essential'" difference between "'external affairs'" and "'internal affairs'" (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))).

[112] *See also* Barron & Lederman, *A Constitutional History*, 121 Harv. L. Rev. at 1091 ("[T]he [Dellinger] opinion did not cite, let alone discuss, *Youngstown*.").

placing troops under UN control), "Congress may not prevent the President from acting on such a military judgment." *Id.* Dellinger did, however, quote Jackson's earlier statement as Attorney General that "'the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States.'" *Id.* (quoting *British Flying Students*, 40 Op. Att'y Gen. at 61-62); *see also Shiffrin 1995 Opinion* at 1-2 (reaching the same conclusion in a perfunctory, two-page analysis without citing *Youngstown*).

These are but a few examples. There are numerous other instances where OLC has concluded that a legislative measure is unconstitutional (or where it does the functional equivalent and "interprets" a blanket statute so as not to intrude upon executive authority) without addressing *Youngstown*. *See, e.g., Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253 (June 28, 1996) (Dellinger) (concluding that interpreting statute to allow Congress to "compel the President to disclose the contents of international negotiations of a highly sensitive and confidential nature" would be "an invalid intrusion into the President's [Commander-in-Chief and other] constitutional authority") (not citing *Youngstown*).[113]

There are also a number of opinions (including one by Philbin) that, while citing other

[113] *See also, e.g., Whether the President May Have Access to Grand Jury Material In the Course of Exercising His Discretion to Grant Pardons*, 2000 WL 34474450, at *1, 6 (O.L.C. Dec. 22, 2000) (reading Fed. R. Crim. P. 6(e) to avoid impinging on Article II authority) (not citing *Youngstown*); Memorandum for the Counsel Office of Intelligence Policy and Review, *Re: Sharing Title III Electronic Surveillance Material With the Intelligence Community*, at 9 (Oct. 17, 2000) ("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.'") (quoting *Rainbow Navigation, Inc. v. Dep't of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.), and not citing *Youngstown*); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 1998 WL 1180178, at *1 (May 20, 1998) (Moss written testimony before House committee) (The bill "is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress.") (not citing *Youngstown*); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (Dec. 18, 1995) ("well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives") (not citing *Youngstown*, but citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (Feb. 16, 1990) (bill impinges on President's "broad" Article II authority over nation's diplomatic affairs, "flow[ing] from his position as head of the unitary Executive and as Commander in Chief") (not citing *Youngstown*, instead citing *Haig v. Agee*, 453 U.S. 280, 291-92 (1981), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)); Memorandum from Will P. Barr, Assistant Attorney General, to General Counsel's Consultative Group, *Common Legislative Encroachments on Executive Branch Authority* (July 27, 1989) (providing "an overview of the ways Congress most often intrudes or attempts to intrude into the functions and responsibilities assigned by the Constitution to the executive branch") (not citing *Youngstown*) (superseded); Memorandum Opinion for Attorney General from John M. Harmon, *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 (Aug. 13, 1980) (Harmon) (proposed legislative veto "intrudes upon the constitutional prerogatives of the Executive") (not citing *Youngstown*); *Inspector General Legislation*, 1 Op. O.L.C. 16 (Feb. 21, 1977) (Harmon) (holding that inspector general bill unconstitutionally impinges on executive power) (not citing *Youngstown*); *see also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462, at *1 (Nov. 28, 2001) ("A provision prohibiting the use of appropriated funds for United Nations peacekeeping missions involving the use of United States Armed Forces under the command of a foreign national unconstitutionally constrains the President's authority as Commander in Chief and his authority over foreign affairs.") (not citing *Youngstown*).

passages of *Youngstown* that focus on and *support* strong executive power, do not apply the popular Jackson concurrence. *See, e.g.*, *Swift Justice Opinion* at 4 (citing *Youngstown* only for Justice Frankfurter's assertion that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress but never before questioned ... may be treated as a gloss on 'Executive Power' vested in the President").[114] In fact, the current OLC, in an opinion signed by Acting Assistant Attorney General David Barron, nowhere cited Justice Jackson's tripartite scheme in concluding that a provision prohibiting the State Department from using funds for sending a delegation to a U.N. body chaired by a terrorist-supporting government "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it." Memorandum Opinion for the Acting Legal Adviser, Department of State, from David S. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, at 1 (June 1, 2009) ("*Barron 2009 Opinion*"). OLC only indirectly referenced one of the *other Youngstown* concurrences to bolster its holding that the President's authority is exclusive in this area. *See id.* at 5 n.6 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), in turn citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). That this opinion was issued notwithstanding the public criticisms leveled against the Bybee Memo, suggests that, even now, OLC *still* does not afford *Youngstown* in general (or Justice Jackson's concurrence in particular) the exalted status that OPR and some other commentators attach.[115] Notably, OPR has not addressed a single one of these OLC precedents—past or present—even though Judge Bybee brought such examples to OPR's attention in his Draft Response (at 66-67 & n.41). Such willful blindness again highlights the one-sided nature of OPR's report.

In sum, nothing can be made of OLC's omission of *Youngstown*. The case addressed the President's wartime control of the domestic steel industry. Justice Jackson's tripartite methodology can be a useful framework, but has never been widely received by the Supreme Court or OLC as the sole framework for analyzing separation of powers. Indeed, in numerous opinions *Youngstown* is nowhere to be found. In any event, the Bybee Memo, though not expressly referring to *Youngstown*, was consistent with its methodology and nothing would have changed even with a mechanical reference to *Youngstown*.

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[114] *See also, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 201 (Dellinger) ("Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.") (citing *Youngstown* only for the proposition that President has "authority to act contrary to a statutory command"); Opinion of the Attorney General of the United States, Benjamin R. Civiletti, *Authority for the Continuance of Governmental Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5-6 (Jan. 16, 1981) (concluding, without employing the Jackson framework, that statute "should not be read as necessarily precluding exercises of executive power"); Memorandum from William Rehnquist, Assistant Attorney General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 6-7 (May 22, 1970) (citing *Youngstown* concurrence only to quote Justice Jackson stating he would "'indulge the widest latitude of interpretation to sustain his exclusive function to command'").

[115] Curtis Bradley, a Duke University law professor and former State Department lawyer, "said [this] new memorandum demonstrated that the Bush legal team's approach was not as aberrational from other administrations as some critics contended." Charlie Savage, *Ignoring a Law on Foreign Relations*, N.Y. Times, Sept. 16, 2009, at A16.

c. The decision not to reiterate Congress's enumerated powers is appropriate

OPR also criticizes OLC for limiting its discussion of Congress's enumerated powers. Report at 202. According to OPR, the Bybee Memo "should have addressed the significance of the enumerated powers of Congress before concluding that the President's powers were exclusive." *Id.* This, too, provides no basis for professional sanctions.

Although Judge Bybee has readily conceded, in retrospect, that this particular section could have been more fulsome, *see* Bybee Tr. at 83, it does not come close to a reckless violation of any duty of thoroughness, objectivity and candor. In fact, the Bybee Memo *did* examine the relationship between Article I and Article II powers (Bybee Memo at 34-38), and concluded that the powers at issue here were not "expressly assigned in the Constitution to Congress" and thus were "vested in the President." *Id.* at 37. Also, more importantly, the memo expressly incorporates by reference prior OLC opinions that give a more detailed discussion,[116] explaining that OLC "has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war." *Id.* at 35. OPR cannot seriously contend that relying on precedent—the stuff of any jurisprudential body—is grounds for professional sanctions.

For example, in stating that "[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy," the Bybee Memo (at 38) expressly incorporates a prior opinion, the *Transfer Opinion*, in which OLC held that the President has the Commander-in-Chief power to transfer terrorists detained outside the U.S. to other countries. In that opinion OLC extensively examined the text, structure, and history (including historical practice) of Articles I and II, *see Transfer Opinion* at 2-20, and determined that the Commander-in-Chief power includes "all powers related to the conduct of war" less those that were "*[e]xpressly* carved out and delegated to Congress," *Transfer Opinion* at 5. Furthermore, OLC determined that Congress's powers to "'make Rules concerning Captures on Land and Water,'" U.S. Const. art. I, § 8, cl. 11 ("Captures Clause"), applied only to property, not persons. *Id.* Also, OLC found that Congress's power to "'raise and support Armies'" and to "'make Rules for the Government and Regulation of the land and naval Forces,'" U.S. Const. art. I, § 8, cls. 12 & 14 ("Armies Clause" and "Land and Naval Forces Clause"), is "limited to the discipline of U.S. troops, and not to issues such as the rules of engagement and *treatment concerning enemy combatants*." *Id.* at 5-6 (dicta). Significantly, OLC made clear that it was proceeding cautiously given the "novelty of the question" and the "lack of any direct guidance from the opinions of this Department or decision by the federal judiciary." *Id.* at 8. Ultimately, after explicitly considering arguments to the contrary,[117] OLC concluded that the executive

[116] *See, e.g., Swift Justice Opinion* (Apr. 8, 2002) (cited in Bybee Memo at 35); *Transfer Opinion* at 5-7 (Mar. 13, 2002) (cited in Bybee Memo at 38); *Military Commissions Opinion* (Nov. 6, 2001) (cited in Bybee Memo at 36); *Shiffrin 1995 Opinion* (cited in Bybee Memo at 35); Memorandum from William Rehnquist, Assistant Attorney General, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 1-2 (May 22, 1970) ("Division of the War Power by the Framers of the Constitution") (cited in Bybee Memo at 37-38).

[117] OLC considers that "[i]t might be argued that" the Captures Clause addresses captured enemy soldiers and Congress's power to "raise and support Armies" (Armies Clause) or to "make Rules for the Government and

retains the "the power to handle captured enemy soldiers" because the Constitution does not "specifically commit[] the power to Congress." *Id.* at 4-5. Having once labored to this conclusion, which equally applies in the context of the Bybee Memo, OLC is under no obligation to reinvent the wheel.

Similarly, in OLC's *Swift Justice Opinion*, Philbin reiterated that "any ambiguity in the allocation of a power that is executive in nature, such as the prosecution of war, must be resolved in favor of the Executive Branch." *Swift Justice Opinion* at 10 (cited in Bybee Memo at 35). Also, OLC reached several conclusions that are readily applicable to the lack of congressional power to detract from the Commander-in-Chief's authority in this area. *See id.* at 16-19. In particular, OLC held that there is "*no doubt* that Congress's power to 'make Rules concerning Captures on Land and Water' applies only to captured property," *id.* at 17 (relying in part on 3 Joseph Story, *Commentaries of the United States* § 1172, at 64 (reprinted 1991) (1833)); that the Define and Punish Clause (granting power to "define and punish ... Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10) was not "intended to confer a war-related power upon Congress at the expense of the President's power as Commander in Chief"; and that the Land and Naval Forces Clause "refers solely to rules for the regulation of the forces of the United States," *id.* at 19 n.12. *See also Military Commissions Opinion* at 5-6 (explaining that Congress can invoke the Armies Clause and Land and Naval Forces Clause "so long as any congressional regulations do not interfere with the President's authority as Commander in Chief").

Although the Report nowhere mentions the Philbin *Swift Justice Opinion*, the Report acknowledges that the *Transfer Opinion* had concluded that "'captures' were limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons." Report at 202 n.156. But then OPR simply proceeds on its own authority to take issue with this prior OLC legal judgment. *Id.* It is not OPR's role, even were it able to do so competently, to sit as some sort of Constitutional Court of Review over OLC's legal conclusions, past or present. *See Stanton*, 470 A.2d at 287. It is true that, just before the end of the last administration, OLC, in a memorandum from Bradbury, withdrew OLC's prior conclusion regarding the Captures Clause. Memorandum for the Files from Steven G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 3 (Jan. 15, 2009). But, in 2002 and 2003, OLC was wholly justified in relying on what was then good law. It is also of no moment that the precedent was, as OPR dismissively notes, "an OLC opinion that [Bybee] himself signed five months earlier." Report at 202 n.156.

The point, which OPR still fails to grasp, is that OLC, like a court, has developed a body of case law and OLC no more has to justify (on pain of ethical sanctions) its reliance on prior (even recent) opinions than does the Supreme Court. It is not for OPR to decide that "the Bybee Memo's brief reference to the [*Transfer Opinion*] did not constitute an adequate consideration of the relevance of the Captures Clause." *Id.* n.156. OLC cited the *Transfer Opinion* for the proposition that "[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy." Bybee Memo at 38. The *Transfer Opinion* had already determined that the Captures Clause *was not relevant* in this context and, under

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Regulations of the land and naval Forces" (Land and Naval Forces Clause) "might also be thought to confer on Congress the power to promulgate prisoner of war policy." *Transfer Opinion* at 5.

familiar principles of *stare decisis*, the matter was, at that time, settled. As Goldsmith has acknowledged, there is a "superstrong stare decisis presumption" because "[c]onstant reevaluation of prior OLC decisions" would be unworkable. Goldsmith, *The Terror Presidency* at 146. Indeed, "OLC has a powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong." *Id.* at 145. That OPR (and even a future OLC opinion) disagrees with this conclusion is utterly irrelevant.

OPR's criticism elevates disagreements over constitutional text and history to an ethics violation—any reading other than OPR's becomes unethical. That is the function of reply briefs and healthy internal debates, not ethics inquiries.

d. The decision not to reiterate Take Care Clause jurisprudence is appropriate

Finally, OPR criticizes the Bybee Memo for failing to "reconcile[]" the "Take Care" Clause (U.S. Const. art. II, § 3) with the Commander-in-Chief Clause. Draft Report at 204. This argument is unavailing as well.

Once again, OPR did not bother to consult OLC precedent, which has already settled the matter and does not necessarily cite the Take Care Clause. For example, in 1993, OLC explained, without mentioning the Take Care Clause, that "the President may resist laws that encroach upon his powers by 'disregard[ing] them when they are unconstitutional.'" *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 (Nov. 3, 1993) (citation omitted); *see also, e.g., Dellinger 1996 Opinion* (finding provision unconstitutional under Commander-in-Chief Clause without mentioning Take Care Clause); *Shiffrin 1995 Opinion* at 1-2 (same). Indeed, without considering whether the Take Care Clause counseled a different result, the current OLC recently issued an opinion holding that the administration "may disregard" a statutory provision that "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy." *Barron 2009 Opinion* at 1. In fact, OLC cited the Take Care Clause in *support* of its conclusion upholding presidential authority in the face of a contrary statute. *Id.* at 4-5.

OLC has long taken the position that "the Take Care Clause does not compel the President to execute unconstitutional statutes" because "[a]n unconstitutional statute is not a law." *Issues Raised By Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 47 (Feb. 16, 1990) (Barr) (citing Hamilton). In fact, "[t]he President's authority to refuse to enforce a law that he believes is unconstitutional derives from his duty to 'take Care that the Laws be faithfully executed,' U.S. Const. art. II, § 3 and the obligation to 'preserve, protect and defend the Constitution of the United States' contained in the President's oath of office. U.S. Const. art. II, § 1." *Id.* at 46. As OLC explained, "the Constitution is a law within the meaning of the Take Care Clause"; thus, "[w]here a statute enacted by Congress conflicts with the Constitution, ... [t]he resolution of this conflict is clear: the President must heed the Constitution." *Id.* at 46-47; *see also* Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, at 16 (Sept. 17, 1977) ("[T]he President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes."), *quoted in* Memorandum Op. for the Counsel to the President from Timothy Flanigan, *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports* (Jan. 17,

1992).[118] The same hierarchy holds true as to treaties.[119] In other words, OLC has already "reconciled the Commander-in-Chief clause with the Take Care clause." Report at 204.

There is an obvious tension in OPR's suggestion that the President would have to "take care" to execute a statute that is an unconstitutional abrogation of his powers as Commander-in-Chief. As Chief Justice Chase long ago pondered, "[h]ow can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress sincerely believed by him to have been passed in violation of it?" Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, *quoted in* J. W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 578 (1874). But prior OLC opinions have already resolved the tension. Indeed, the executive's existing understanding is borne out by the prevalence of signing statements, in which Presidents announce their opposition without citing, or running afoul of, the Take Care Clause.

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[118] *See also, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 203-11 (Dellinger) (collecting sources); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 50 (Feb. 16, 1990) ("[I]n the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws."); *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 ("The Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the acts of Congress, and cases arise in which the duty to the one precludes the duty to the other."); *Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution* 418, 445-46 (1836) ("[T]he President of the United States could ... refuse to carry into effect an act that *violates* the Constitution.") (emphasis in original), *quoted in Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 208.

[119] *See The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."); *see also Shiffrin 1995 Opinion* at 3 ("The Constitution reserves execution of the law, including treaties, to the Executive Branch."); *Transfer Opinion* at 2 n.1 ("To the extent that ... treaties [such as the Convention Against Torture] would cabin presidential freedom to transfer detainees, they could not constrain his constitutional authority.").

That said, it is unclear why OPR stresses that international treaties (like statutes) are the law of the land (Report at 204), given that that the only law at issue in the Bybee Memos is the statutory criminal law. Bybee Tr. 105 ("We weren't asked to interpret the treaty; we were asked to interpret the [statutory] law here."). And, to the extent OPR states or implies that norms of *jus cogens* somehow affect the analysis of Article II authority, OPR is simply imposing its own policy preferences, contrary to OLC precedent. *See supra* Section III.A.3. In fact, OLC has previously explained at length that "customary international law would not bind the President." Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 32 (Jan. 22, 2002) (citing, *inter alia, Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (June 21, 1989)); *see generally id.* at 32-37. Indeed, "[i]mporting customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field." *Id.* at 36. As Chief Justice Marshall stated, customary international law "'is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet *it may be disregarded*.'" *Id.* at 34 (quoting *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814)).

Consistent with this well-established understanding, the Bybee Memo itself *did* reconcile the Take Care Clause, stating that it "cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority" because otherwise Congress "could control the President's authority through the manipulation of federal criminal law." Bybee Memo at 36. OPR apparently just prefers a different result—a judgment that, of course, is outside its purview. *In re Stanton*, 470 A.2d at 287. OPR gets it precisely backwards: the Take Care Clause, in OLC's view, does not constrict the scope of the President's inherent authority—if anything gives the President *more* discretion (akin to prosecutorial discretion) as to how to enforce the laws, and it directs the President to adhere to the constitution (the higher law) in the face of a conflicting treaty or statute (an inferior law).

In any event, the debates over the President's Take Care duty and his other powers (such as the Commander-in-Chief authority) are at the heart of separation of powers. A full-length discussion of such fundamental arguments, sweeping in nearly all of the discussions of executive power, would have been an endless exercise.

In sum, properly judged against the backdrop of OLC precedent (which OPR studiously ignores), not one of OPR's supposed omissions in its Commander-in-Chief analysis constitutes an error, let alone rises to a reckless breach of professional duty. Instead, they merely reflect OPR's misguided attempt impose its own legal and policy judgments where they emphatically do not belong.

G. Common Law Criminal Defenses

The final section of the Bybee Memo discussed two possible defenses to violations of the anti-torture statute: the necessity defense and self-defense. As detailed above, *supra* Section IV.F, the evidence indicates that the client requested the addition of this section around July 16, 2002, just over two weeks prior to the eventual deadline. Report at 52. During that same period, OLC also had to complete the requested analysis of the Commander-in-Chief power as well as draft the Classified Bybee Memo. In its critique of the defenses section, OPR raises a laundry list of complaints, most of which are irrelevant to Judge Bybee in his supervisory capacity. "At various points," OPR elaborates, the defenses section "advanced novel legal theories, ignored relevant authority, failed to adequately support its conclusions, and relied on questionable interpretations of case law." *Id.* at 207. Upon closer review, however, it becomes apparent that OPR is distorting the evidence to sustain its unsupported contention that OLC intended these defenses to provide a "readily available" immunity from prosecution. *Id.* at 231. To the contrary, the section provided a general overview of the two defenses and used entirely conditional, cautious, and equivocal language throughout. *See supra* Section II.E; Exhibit 18. At no point does the Bybee Memo ever conclude that either defense *will* negate liability under the anti-torture statute. As Judge Bybee made clear to OPR, "all we've said is that a necessity defense might be available; we didn't say that it is available; we've just said it might be available." Bybee Tr. at 96. Put in the proper context, the defenses section provides a careful assessment of a difficult area of law that to Judge Bybee's eye was adequately supported with case law, treatises, and academic commentary.

1. The Necessity Defense

OPR levels a number of petty and groundless criticisms at OLC's analysis of the necessity defense. We address each in turn.

First, OPR faults the Bybee Memo for citing *United States v. Bailey*, 444 U.S. 394, 410 (1980), for the proposition that "the Supreme Court has recognized the [necessity] defense," but not citing the majority opinion in *United States v. Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483, 490 n.3 (2001), which opined that it was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute." Report at 208-09. This criticism is unfounded for a number of reasons.

As a preliminary matter, OPR acknowledges that "Judge Bybee was unaware of the *Oakland* decision when the memorandum was drafted." Report at 209 n.163. It necessarily follows, then, that Judge Bybee was not in a position to "accurately and objectively" discuss the effect of supposedly "adverse authority" like *Oakland* on OLC's analysis. *Id.* at 228. As discussed at length above, *see supra* Section II, Judge Bybee carried out his supervisory duties with great care, but lacked the time to review all the applicable case law. OPR itself concedes that Judge Bybee "did not conduct the basic research that went into the memoranda" and was not "responsible for checking the accuracy and completeness of every citation." Report at 255. OPR goes on to contend that Judge Bybee "assumed the responsibility for investigating problems that were apparent in the analysis or that were brought to his attention by others" (*id.*), but neither condition applies in this instance. To all appearances *Bailey* remained good law, and there is no evidence that Yoo, [redacted] or Philbin were aware of *Oakland* either.[120] *Id.* at 209 & n.163. In short, although Judge Bybee told OPR he "hope[d] that [his staff] would have seen [*Oakland*]" (Bybee Tr. at 97), he cannot be held responsible for their apparent failure to do so.

In any event, *Oakland* is hardly the bombshell that OPR makes it out to be. As Judge Bybee told OPR, *Oakland* "does not have any impact on th[e] analysis" because the Bybee Memo only "said ... that a necessity defense *might* be available." *Id.* at 95-96. In *Oakland*, Judge Bybee noted, "Justice Thomas ... calls into question the necessity defense, comes right to the brink of overruling [*Bailey*], does not overrule [*Bailey*], and then spends the next three pages telling us why the necessity defense wasn't applicable in that case." *Id.* at 95. If *Oakland* had held that "there was no necessity defense," Judge Bybee reasoned, the Court majority "could have stopped the opinion right there and saved themselves about three or four pages." *Id.* at 96. Rather, the necessity defense remained a *possibility* both before and after *Oakland*, and thus the memo is "perfectly consistent" with that case. *Id.* This conclusion finds support in post-*Oakland* case law, where a number of lower courts have permitted defendants to raise the

[120] This was an understandable oversight. Even the Supreme Court and the Solicitor General's Office have on occasion overlooked relevant or even potentially dispositive material. For example, last year in *Kennedy v. Louisiana*, 127 S. Ct. 2641 (2008), in holding unconstitutional the death penalty for the crime of child rape, the Court relied in part on its observation that it was a capital offense in only six states, and in no other state or federal jurisdiction. But none of the Court's opinions (majority or dissent) and none of the parties' briefs (ten of them) took into account the fact that in 2006 Congress had prescribed capital punishment as a penalty available for the rape of a child by someone in the military. Notably, the Solicitor General's Office sent the Court a formal apology for its oversight. No attorneys or jurists were referred to the bar for failing to identify the provision.

necessity defense in prosecutions under a federal statute.[121] *See, e.g.*, *United States v. Tokash*, 282 F.3d 962, 969 (7th Cir. 2002) (allowing defendant to raise defense of necessity but rejecting claim); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (same); *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001) (same); *United States v. Kpomassie*, 323 F. Supp. 2d 894, 899-900 (W.D. Tenn. 2004) (denying government's motion to prohibit use of necessity defense and holding that defendant made a prima facie showing to support the defense). Most important, the Supreme Court vindicated the Bybee Memo's assessment of *Bailey* a mere six months after Judge Bybee's interview with OPR. In *Dixon v. United States*, 548 U.S. 1, 6 (2006), the Court stated that "the defense of necessity that we considered in [*Bailey*] may excuse conduct that would otherwise be punishable."[122] *Dixon* was authored by Justice Stevens and, critically, joined by Justice Thomas who authored the majority opinion—and the controversial *dicta*—in *Oakland*. Indeed, *Dixon* cites precisely the same pages of *Bailey* as did the Bybee Memo. *Compare Dixon*, 548 U.S. at 6, *with* Bybee Memo at 40. *Oakland*'s *dicta* regarding *Bailey*'s assessment of the necessity defense has been put to rest.

Second, OPR accuses the Bybee Memo of failing to include "an element-by-element analysis of how the [necessity] defense would be applied to a government interrogator accused of violating the torture statute." Report at 211. This criticism is utterly baffling given that the Bybee Memo contained a standard definition from the Model Penal Code and provided a thorough discussion of the black letter law on necessity—including a list of "[a]dditional *elements* of the necessity defense"—citing extensively to the leading treatise on criminal law: La Fave & Scott's *Substantive Criminal Law*.[123] Bybee Memo at 39-41 (citing LaFave & Scott nine times). OPR insinuates that these sources are inadequate (Report at 207) and instead of citing additional or different treatises, elects to cobble together its own list of "elements" from a review of court of appeals cases "and other judicial opinions." *Id.* at 210-11. With respect, OPR's list of elements (which "most" courts have supposedly endorsed) is hardly authoritative, as even

[121] With regard to federal case law more generally, OPR mischaracterizes Judge Bybee's interview, claiming that he "stated that a discussion of existing federal case law on the necessity defense was not needed in the Bybee Memo because the reported cases were 'far afield' from a 'ticking time bomb' situation." Report at 210. While it is true that the cases OPR cites are factually distinguishable—and thus there was no need for OLC to note that courts often reject the necessity defense (Report at 220)—Judge Bybee's comment was in response to a question that focused on "the context of abortion clinic cases," which are indeed, as Judge Bybee stated, "pretty far afield." Bybee Tr. at 97; *id.* at 97-98 ("I would hate to have to [parse] through abortion cases to figure out whether a ticking time bomb was [analogous] to abortion cases."). The primary reason OLC omitted the cases is that they were redundant: they simply re-affirmed the common understanding that *Bailey* recognized the necessity defense. *See, e.g.*, *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990) (citing *Bailey* as holding that "prosecution for escape from a federal prison, despite the statute's absolute language and lack of a *mens rea* requirement, remained subject to the common law justification defenses of duress and necessity"); *United States v. Gant*, 691 F.2d 1159, 1161 (5th Cir. 1982) (rejecting the government's argument that duress and necessity should be considered, if at all, only in mitigating the penalty assessed after conviction because "[t]he teachings of the Supreme Court in [*Bailey*] ... indicate otherwise" and stating that "[i]n *Bailey* the Court determined that the justification defenses of duress and necessity are generally available ... despite the statute's absolute language and lack of a mens rea requirement"). Whether to exclude such extraneous citations in the substantive analysis to avoid overwhelming the client is exactly the type of judgment call that should not be second-guessed. *See In re Stanton*, 470 A.2d at 287.

[122] OPR's description of *Dixon* (Report at 208 n.162) conveniently neglects to mention the Court's plain reference to the necessity defense along with the defense of duress.

[123] A Westlaw search reveals that the Supreme Court itself has cited LaFave & Scott in its opinions over 130 times.

OPR concedes that "the defense varies slightly among the circuits." *Id.* at 210. Regardless, OPR's assertion that these elements "differ" from those set forth in the Bybee Memo (*id.*) is shameless flyspecking. As outlined below, every element identified by OPR was addressed adequately in the Bybee Memo. *Compare id.* at 211-215, *with* Bybee Memo at 31 n.17, 40-41.

Element One: "*[T]he 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.*" Report at 210. OPR admits that the Bybee Memos "briefly acknowledged this issue," but contends that OLC "did not explain how a government interrogator with a prisoner in physical custody would make such a showing." *Id.* at 211. Yet the Bybee Memo noted two key factors in its analysis: the government's level of certainty that "a particular individual has information needed to prevent an attack" and the probability "that a terrorist attack is likely to occur." Bybee Memo at 41. While perhaps not speaking directly to the element of timing, this passage certainly mandates a "well-grounded threat of death or serious injury." Report at 211. Indeed, this discussion demonstrates the conditional nature of OLC's assessment of the availability of the necessity defense; an agent with tenuous information about an uncertain attack could not "appropriately" invoke the necessity defense. Bybee Memo at 41.

In addition, OLC raised the issue of imminence more explicitly in an earlier section, describing it as a "requirement" of the necessity defense. Bybee Memo at 31 n.17. Specifically, this passage addressed the "ticking time bomb hypothetical" raised by the Court in *Israel*. OPR attempts to challenge this hypothetical by citing scholars who have "argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world." Report at 212 n.168. The likelihood of such a scenario, however—and, with respect, we are doubtful how much legal scholars (let alone OPR) know about "intelligence gathering in the real world"—is beside the point. The phrase "ticking time bomb" is a figure of speech meant to illustrate a range of hypothetical situations and as such is not meant to be taken literally—such as requiring an attack "within hours or minutes." *Id.* Even though reasonable minds can disagree on this issue, leading scholars, jurists, and politicians from across the political spectrum have opined that the ticking time bomb scenario is a legitimate concern that might justify extreme measures.[124]

[124] *See, e.g.*, **Former President Clinton** ("[If] we get the number three guy in al-Qaeda, and we know there's a big bomb going off in America in three days, we know this guy knows where it is, we have the right and the responsibility to beat it out of him."). (Transcript, Meet the Press, Sept. 30, 2007, *available at* http://www.msnbc.msn.com/id/21065954/ns/meet_the-press_online_at_msnbc/); **Supreme Court Justice Antonin Scalia** ("There are no easy answers involved, in either direction, but I certainly know you can't come in smugly and with great satisfaction and say, 'Oh, this is torture, and therefore it's no good.'" "You would not apply that in some real-life situations.") (Jan Crawford Greenburg, *Does Terror Trump Torture?*, ABC News, Feb. 12, 2008, *available at* http://blogs.abcnews.com/legalities/2008/02/does-terror-tru.html); **Seventh Circuit Judge Richard Posner** ("If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used" "No one who doubts that this is the case should be in a position of responsibility."), *available at* http://www.tnr.com/article/the-best-offense. *The Best Offense*, The New Republic, Sept. 5, 2002 (book review of *Why Terrorism Works*, by Alan Dershowitz). **Senator Charles Schumer** ("[T]here are probably very few people ... in America who would say that torture should never ever be used, particularly if thousands of lives are at stake. Take the hypothetical. If we knew that there was a nuclear bomb hidden in an American city, and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most Senators, maybe all, would do what you have to

OPR also claims that "none of the information presented to OLC [about the CIA detainees] approached the level of imminence and certainty associated with the 'ticking time bomb' scenario." *Id.* "Although the OLC attorneys had good reasons to believe that the detainees possessed valuable intelligence about terrorist operations in general," OPR continued, "there is no indication that they had any basis to believe the CIA had specific information about terrorist operations that were underway, or that posed immediate threats." *Id.* While we have not been made privy to any of the CIA's communications with OLC, Philbin's submission to OPR flatly contradicts its claim. As discussed above, *supra* Section II.C, Philbin noted that [redacted] Philbin Submission at 3-4. Nor was this a distant threat, but one "intended to coincide roughly with the first anniversary of September 11, 2001," a matter of weeks away. Philbin Submission at 3. [redacted] Philbin Submission [redacted] OPR either overlooked these facts or consciously withheld them.

Finally, OPR asserts that "any reliance upon the 'ticking time bomb' scenario to satisfy the imminence prong of the necessity defense would be unwarranted in this instance, as the EITs under consideration were not expected or intended to produce immediate results. Rather, the goal of the CIA interrogation program was to condition the detainee gradually in order to break down his resistance to interrogation." Report at 212 n.168. This too is a mischaracterization of the facts and is shockingly presumptuous regarding OPR's awareness of the intricacies of the CIA's interrogation program. The CIA's program may have been based on the theory of "learned helplessness" (*id.* at 40), but we are aware of no evidence indicating how "gradual[]" that learning process had to be. The Classified Bybee Memo, after all, stated (at 1) that use of the EITs would "likely last no more than several days," and [redacted] If time were of the essence, moreover, presumably the CIA could accelerate or skip techniques, resorting to the waterboard which was known to be [redacted] In other words, just because the necessity defense might not pertain to the *typical* CIA interrogation does not mean that it would be unavailable in all cases.

Element Two: "*[T]he 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.*" Report at 211. This issue is irrelevant and OPR did not discuss it further.

Element Three: "*[T]he 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.*" Report at 211. In its own list of elements, however, the Bybee Memo stated that a "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. OPR concedes that the Bybee Memo identified this element (Report at 213 n.169), but objects to OLC's "distill[ation]" of the point, concluding that

do. So it is easy to sit back in the armchair and say that torture can never be used, but when you are in the foxhole it is a very different deal."). *Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (June 8, 2004).

it "merited a more complete discussion." Report at 213, 212. One begins to wonder what would satisfy OPR on this score. OLC noted in this section that "the strength of the necessity defense depends on the circumstances that prevail, *and the knowledge of the government actors involved,* when the interrogation is conducted." Bybee Memo at 41. It follows that if the interrogator *knew* the extreme techniques were unnecessary, his necessity defense would fail. The Model Penal Code definition included in the Bybee Memo likewise described the defense as "[c]onduct that the actor *believes to be necessary* to avoid a harm or evil to himself or to another." Bybee Memo at 39. In light of these passages, there was no need for OLC to spell out precisely "how an interrogator could prove this element." Report at 214. After all, the entire basis for the CIA's request to use EITs was that traditional interrogation methods were insufficient. As National Security Advisor John Bellinger informed OLC, "without the interrogation program and the use of specific interrogation techniques, the CIA did not believe that they could get the information necessary to prevent the attacks and save American lives." *Id.* at 38. In other words, the absence of a legal alternative to acquire the needed information was implicit in the CIA's request for advice and did not need further explication.

Element Four: "*[A] direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.*" Report at 211. OLC addressed this issue too. It noted that the necessity defense is more likely to succeed "the more certain that government officials are that a particular individual has information needed to prevent an attack." Bybee Memo at 41. It should go without saying that one could "reasonably anticipate[]" that "a direct causal relationship" exists between acquiring information "needed to prevent an attack" and actually preventing the attack and thereby "avoid[ing] ... the threatened harm." Notwithstanding this, OPR appears to doubt the existence of a "real-world situation" involving "an immediate, impending attack." Report at 214. As mentioned with regard to element one, however, Philbin told OPR that the existence of an impending attack was not only plausible, but actually existed at the time OLC drafted the Bybee Memos.[125] OPR must be wearing blinders.

Third, OPR claims (*id.* at 214-220) that OLC gave an intentionally one-sided account of what the Bybee Memo described as "an important exception" to the necessity defense: that it is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." Bybee Memo at 41 (citation omitted). In brief, the Bybee Memo flagged this issue but concluded that Congress had *not* "made a determination of values" with regard to the availability of common law defenses. *Id.* at 41 n.23. The memo reasoned that the CAT included an express provision "bar[ring] a necessity or wartime defense" but that Congress elected to omit this section when it incorporated other provisions of the CAT into domestic law. *Id.*

[125] The truth regarding the precise nature of the threat posed by Jose Padilla may never be known. OPR quotes former Attorney General Ashcroft's press statement that Padilla was merely "*exploring a plan* to build and explode" a dirty bomb as proof that the threat was quite distant. Report at 214 n.171 (emphasis added by OPR).

[redacted]

Even if this were not the best reading of the legislative history in its entirety, as OPR contends, this has nothing to do with Judge Bybee. He did not review the legislative history. The passage in question is logical on its face and Judge Bybee would have no reason to question its accuracy. Nor is there any evidence that the issue was raised with him. OPR puts great weight on the fact that "the *drafters* of the Bybee Memo knew" about contradictory facts in the historical record, but they rely solely on an email exchange between Yoo and [redacted] Report at 217-19.

In any event, OLC drew a perfectly reasonable conclusion from the relevant ratification and legislative history. OPR falsely asserts that "the memoranda did not refer to or discuss the relevance of article 2(2) of the Convention Against Torture, which explicitly states that no exceptional circumstances can be invoked to justify torture." *Id.* at 229. Quite the contrary, the Bybee Memo specifically quoted article 2(2) and noted the key fact that Congress *did not incorporate* it into the anti-torture statute. Bybee Memo at 41 n.23. As Judge Bybee explained to OPR, "CAT was not self-executing, which is why Congress ... was obligated to enact separate domestic legislation." Bybee Tr. at 104. Consequently, Judge Bybee reasoned, where a "treaty specifically says there will be no necessity defense," and Congress fails to adopt that provision, it "is a permissible inference that the defense is still available."[126] *Id.* The same holds true for article 1(1), which the Bybee Memo also quoted in relevant part.[127] Bybee Memo at 41 n.23. OPR tries to refute this basic logic by arguing that "if Congress had intended to allow the necessity defense to apply to the torture statute, it could have made an explicit statement to that effect." Report at 216. But that gets the standard backward. The necessity defense is presumptively available *unless* Congress makes a determination of values, not *until* Congress does so. In other words, if Congress had intended to *prohibit* the availability of the necessity defense, it should have done so with an explicit statement to that effect—such as incorporating article 2(2) of the CAT.[128] It did not.

OPR also claims that the CAT ratification history "undermined or negated" the Bybee Memo's position regarding the necessity defense. Report at 217. Not so. OPR's argument rests

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[126] OPR contends that this argument is flawed because it assumes "that Congress intended to enact implementing legislation for one section of CAT that was inconsistent with the clear terms of another section." Report at 216. But the supposed inconsistency is of OPR's own making. It would be nonsensical for a court to construe the anti-torture statute in light of the very provision that Congress omitted. OPR's point would make more sense, as the Bybee Memo argued (Bybee Memo at 31), in the context of a country that had not reached a decision regarding article 2(2).

[127] OPR's argument that the Bybee Memo's interpretation of article 1(1) is unwarranted in light of article 2(2) (Report at 216) erroneously presumes that two provisions of the same treaty could never be mutually reinforcing. Indeed, it is possible that Congress elected to omit both provisions for similar or identical purposes.

[128] OPR claims that the Bybee Memo "failed to point out ...that the fact that Congress has not specifically prohibited a necessity defense does not mean that it is available." Report at 216 (quoting *Oakland*, 532 U.S. at 491 n.4) ("We reject the Cooperative's intimation that elimination of the defense requires an explicit statement."). But that principle is implicit in the Bybee Memo's analysis. The memo makes clear that even though "Congress has not explicitly made a determination of values vis-à-vis torture," it remains an open question whether the necessity defense is available. Bybee Memo at 41. The Bybee Memo only argues that in light of Congress's omission of article 2(2) from the anti-torture statute, it "read[s] Section 2340 as permitting the defense." *Id.* at 41 n.23. There is no argument that the statute *must* be read in such a fashion, so courts would be free to conclude, consistent with *Oakland*, that the defense is unavailable despite Congress's omission.

on the decision of the first Bush administration to delete the CAT understanding originally proposed by the Reagan administration, which stated: "The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others." Senate Report at 16. By abandoning this Reagan administration understanding, OPR infers that the Bush administration determined that CAT article 2(2) *did* "preclude the availability" of common law defenses. That is a debatable inference because there is some evidence that the Bush administration merely determined that the Reagan reservation was "no longer necessary." *Id.* at 37. But even if OPR's inference is correct, this conclusion does not "undermine[] or negate[]" the Bybee Memo's conclusion. It would simply lend greater significance to Congress's ultimate decision not to incorporate article 2(2) in the anti-torture statute. Given that the outcome was the same, there was no need for the Bybee Memo to reprise such a lengthy and complex ratification history. And even if there were such a duty, OPR cannot fault Judge Bybee in any way for this failure.

2. Self-defense

OPR repeats a number of the same criticisms in its critique of the Bybee Memo's analysis of self-defense. They fare no better.

First, OPR asserts that the Bybee Memo's "description of the doctrines of self-defense and defense of others was based on secondary authorities—La Fave & Scott and the Model Penal Code." Report at 220. "There was no analysis or discussion," OPR continues, "of how the defense has been applied in federal court, and no review of federal jury instructions for the defense." *Id.* Yet OPR notably does not contend that the memo omitted any precedent that would undermine its explanation of the elements of the offense or that this analysis was incorrect. The Bybee Memo actually relies not only on La Fave & Scott and the Model Penal Code, but also repeatedly cites a third eminent source on the subject that OPR apparently overlooked: Paul Robinson's *Criminal Law Defenses*. Combining these sources, the Bybee Memo sets forth in detail the key elements of the doctrine of self-defense. There is no need to cite cases when the leading treatises establish the key elements. This is particularly true in light of the memo's observation that success of the claim will "depend on the specific context within which the interrogation decision is made." Bybee Memo at 43. The Bybee Memo had no need to recount cases involving "the usual self-defense justification" because, as it noted, "this situation is different." *Id.* at 44. It is unreasonable for OPR to demand cumulative citations, particularly given the limited period available for OLC to draft the defenses section.

Second, OPR contends that the Bybee Memo misrepresented the level of support for the "position that torture could be justified under U.S. law by the common law doctrine of self-defense." Report at 228. Specifically, OPR argues that a law review article by Professor Michael Moore referenced in the Bybee Memo provided *no support* for this argument.[129] *Id.*

[129] OPR vigorously objects to the Yoo Memo's inclusion of an article by Alan Dershowitz, which OPR contends "does not address the doctrine of self-defense." Report at 222. OPR believes that Yoo "knew he was exaggerating the legal authority for this argument and consciously chose to conceal that fact." Report at 221. This alleged error has nothing to do with Judge Bybee, who was the person that brought the inconsistency regarding the plural use of the word "commentators" to Yoo's attention in the first place. Report at 221. Judge Bybee's role in this exchange demonstrates that he was hardly seeking to misrepresent the secondary authority supporting OLC's arguments.

OPR justified this sweeping conclusion based on its view that the Moore article "represented Moore's personal views," "cited more scholarly and philosophical works than legal authorities, and made no attempt to summarize or analyze United States law." *Id.* at 222-23; *see also id.* at 223 n.179 (noting that Moore introduced his conclusions with the phrases "to my mind" and "[m]y own answer to this question is...."). But OLC never claimed to use Moore for any other purpose than his "personal views." The Bybee Memo makes clear that it is only discussing what "scholarly commentators *believe* ... would be justified under the doctrine of self-defense." Bybee Memo at 44. The passage that the Bybee Memo quotes from the Moore article likewise states only that torture in certain circumstances "*should* be permissible," not that courts *would* find it permissible. *Id.*

Nor did the Bybee Memo utilize the Moore article to characterize its argument as a "standard" criminal law defense. Report at 223. Rather, it introduced the paragraph in question with the following disclaimer: "To be sure, this situation is *different from the usual* self-defense justification."[130] Bybee Memo at 44. OPR tries to marginalize this sentence as "only one qualification," claiming that "[t]he Bybee Memo did not make clear that extension of these defenses to prosecutions for torture would be novel." Report at 231. OPR, in fact, takes its argument one step further and asserts that the self-defense section "gave the impression that the defense would be readily available." *Id.* If by "readily available" OPR means available as a matter of law, OLC properly assumed that self-defense can be an appropriate defense given the "absence of any textual provision to the contrary." Bybee Memo at 42; *see also supra* Section IV.G.1 (noting that Congress omitted the CAT provision foreclosing common law defenses when passing the anti-torture statute). But OLC never implied that courts would readily grant a self-defense claim. Indeed, the very two sentences that OPR quotes from the Bybee Memo (Report at 231) suffice to prove this point. Bybee Memo at 42 ("a defendant *could* still appropriately *raise* a claim of self-defense"); *id.* at 43 ("a defendant ... *could have*, in certain circumstances, grounds to properly claim the defense of another."). "Whether such a defense will be upheld," OLC concluded, "depends on the specific context within which the interrogation decision is made." *Id.*

Third, OPR argues that the Bybee Memo's citation to *In re Neagle*, 135 U.S. 1 (1890), did not "provide adequate support for the statement that 'the right to defend the national government can be raised as a defense in an individual prosecution' for torture." Report at 228. To be sure, *Neagle* involves an "unusual factual background" (*id.* at 224 n.183) and is not a direct precedent given that it involved consideration of the federal *habeas corpus* statute. *Id.* at 223. But the Bybee Memo never claimed otherwise. OLC presented *Neagle* in a very cautious manner, noting that it was relevant only "*[i]f* the right to defend the national government can be raised as a defense." Bybee Memo at 45. Moreover, while *Neagle* may have dealt with a more limited use of inherent executive power to protect the domestic interests of the United States (the

[130] This sentence is more than adequate to "make[] clear to the client that the advice is an extension of existing law." Report at 231. Further, as discussed in Section III.B.2, *supra*, there is no corresponding duty to present the client with "countervailing arguments against such a position." Report at 231. Regardless, the Bybee Memo did so, noting that "[i]n the current circumstances ... an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization." Bybee Memo at 44. This is clearly a counterargument that any prosecutor would raise in response to a self-defense claim.

life of Justice Field, traveling in California), it has frequently been cited for broader purposes. Indeed, OLC opinions repeatedly rely on it when addressing national security interests abroad.[131] *See, e.g.*, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 177 (June 21, 1989) (Barr) (noting, in opinion authorizing the FBI to arrest suspects abroad, that "[t]he Neagle Court pointed particularly to the President's power in the area of foreign affairs as an area in which there exists considerable inherent presidential power to authorize action independent of any statutory provision"); *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. O.L.C. 242, 245 (Aug. 11, 1981) (Olson) (noting, in opinion authorizing the Coast Guard to intercept Haitian vessels that may contain refugees, that 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*"); *see also* Peter M. Shane & Harold H. Bruff, *Separation of Powers: Cases and Materials* 53 (2d ed. 2005) ("*Neagle* is invariably cited in Department of Justice legal memoranda as legitimating a broad implied power to take all steps necessary and proper for the enforcement of federal law.").

OPR's efforts (Report at 224 n.183) to distinguish these opinions by noting that they cited authority other than *Neagle* or involved a different fact pattern to the one presented in the Bybee Memo are lame. The fact remains that *Neagle* has not been limited to its obscure origins as OPR appears to prefer. Regardless, even if the Bybee Memo's assessment of *Neagle* is incorrect, it was reasonable for Judge Bybee to rely on the accuracy of this particular citation in the absence of contrary evidence.

Fourth, OPR identifies what it believes to be a double standard regarding how OLC characterizes the term "imminent." Report at 229-30. On the one hand, the Bybee Memo describes "threat[s] of imminent death" for purposes of constituting a predicate act under 18 U.S.C. § 2340(2) as requiring "the threat to be almost immediately forthcoming." Bybee Memo at 12. On the other hand, in the self-defense section, the Bybee Memo states that "[i]t would be a mistake ... to equate imminence necessarily with timing—that an attack is immediately to occur." Bybee Memo at 43. OPR asserts that the Bybee Memo adopted these apparently contradictory definitions "to advance a permissive view of the torture statute." Report at 229.

To the contrary, there are key differences between the two contexts that justify this distinction and demonstrate that OLC was taking great care in how it defined the relevant terms. The first definition of imminence, for example, relates to a predicate act under the anti-torture statute, or conduct that would constitute torture if it resulted in prolonged mental harm. This definition requires temporal immediacy because threats to carry out acts in the future—even very

[131] OPR objects to the Bybee Memo's inclusion of authorities suggesting that the United States was acting in self-defense under international law in its response to the September 11 attacks. Report at 225. OPR faults OLC for not "explain[ing] how those authorities would apply to a criminal prosecution, or how they would 'bolster' an individual's claim to self-defense in federal court." *Id.* But the connection is fairly straightforward. The Bybee Memo makes clear that an individual's defense under *Neagle* depends on his conduct being "properly authorized" and "justified on the basis of protecting the nation from attack." Bybee Memo at 45. The final paragraph of the self-defense section is only establishing the predicate fact that the United States is indeed acting in self-defense and is justified in doing so. Likewise, the Bybee Memo's citation to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), was not meant to speak to self-defense in particular (Report at 225 n.184), but was meant to demonstrate the frequency with which the President carried out his power to use the armed forces to protect the country.

serious threats—do not have the same likelihood of taking place and thus are less likely to cause severe mental pain or suffering to the threatened person. *See* Bybee Memo at 12 ("[T]iming is an indicator of certainty that the harm *will* befall the defendant.") (emphasis in original).

By contrast, the second definition of imminence relates not to the timing of *threats* but to the timing of necessary *responses* to threats. *See* Bybee Memo at 43 (referencing the Model Penal Code for the proposition that "the defensive *response* must be 'immediately necessary.'") (emphasis in original). That is why, *for the purposes of self-defense*, the Bybee Memo stated that imminence does not necessarily require that an attack be "immediately about to occur." Bybee Memo at 43. One can envision hypotheticals, as OLC provided (*id.*) ("[I]f A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed.") (citations omitted), that would justify an immediate defensive response even if the threatened harm was not so imminent as to constitute a predicate act with the potential to cause severe mental pain.[132] As the Bybee Memo explained, "[i]n this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A." *Id.* In other words, OPR creates its own inconsistency by assuming that the word "imminent" has to mean the same thing in all situations. OLC properly appreciated the different use of this term in the anti-torture statute as compared to the common law of self-defense.

H. The Classified Bybee Memo

OPR concludes that the Classified Bybee Memo also "did not constitute thorough, objective, and candid legal advice" and that Judge Bybee bears responsibility because he "reviewed and signed" it. Report at 234, 255. OPR predicates that finding on three alleged shortcomings in the memo: (1) 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"; (2) it relied on data and reports derived from the SERE training of U.S. military personnel, which would not necessarily replicate the experience [redacted] and (3) it did not adequately analyze how the CIA would carry out the sleep deprivation and stress position interrogation techniques. *Id.* at 234-37.

OPR contends that Judge Bybee is responsible for these alleged deficiencies even though it offers no evidence that anyone ever raised these issues with him. Indeed, it is undisputed that *no one ever raised doubts of any kind* about the analysis in the Classified Bybee Memo. As discussed, *supra* Section IV.D, Patrick Philbin informed OPR, "[t]here was 100% agreement among officials in the Department who had been briefed (including the Attorney General, the Deputy Attorney General and the AAG for the Criminal Division) that even the harshest of the practices (waterboarding) did not constitute torture as defined in the statute." Yet OPR somehow expects Judge Bybee to have discovered obscure military history overlooked by numerous other lawyers—including Levin, Bradbury, DOD counsel, and OPR investigators. OPR also expected

[132] In this sense, OPR's proposed hypothetical (Report at 230) is not as outlandish as it may seem. It is *true* that "a threat that would be sufficiently imminent to justify killing a person in self-defense could nevertheless be insufficiently imminent or certain to qualify as a 'threat of imminent death' under the torture statute." *Id.* Put another way, there could be a terrorist threat that is not so immediate as to constitute a "threat of imminent death" to its intended victims (and thereby potentially cause severe mental pain), but the nature of the threat is such that the only chance to stop it is to acquire information from a detainee immediately.

Judge Bybee to second-guess the CIA's factual representations on the SERE program (including sleep deprivation and stress positions) despite explicit warnings—which the CIA understood—that OLC's advice was dependent upon the accuracy of the information provided. [redacted]

OPR not only fails to cite any contemporaneous objections, it also fails to cite any criticisms of the Classified Bybee Memo by the OLC lawyers who subsequently reviewed the issues. OPR "found the withdrawal of certain arguments and conclusions of law by the Department to be significant." *Id.* at 159. Yet OPR does not find it "significant" that those very same lawyers declined to withdraw the Classified Bybee Memo even in the aftermath of substantial public criticism of the interrogation program. Similarly, OPR trumpets the views of Goldsmith, Levin, and Bradbury when discussing the Bybee Memo, but when it comes time to critique the Classified Bybee Memo (*id.* at 234-37), OPR is utterly mute about their views. Little wonder. Levin and Bradbury affirmatively advised the CIA that they concurred in the view that every one of the techniques at issue did not constitute torture under the Act. Goldsmith, in light of the CIA IG Report, asked the CIA to abide by the "assumptions and limitations set forth in the Classified Bybee Memo," but otherwise approved nine of the ten EITs and recommended that use of the waterboard be suspended only on a temporary basis.[133] *Id.* at 115. And Goldsmith told OPR that he viewed the Classified Bybee Memo as "hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question." *Id.* at 122. OPR gives no persuasive basis for refusing to embrace that conclusion.

1. The Failure to Discuss Military Prosecutions for the Use of Water Torture Was Not Even Negligent

OPR asserts that a review of U.S. legal history would have revealed that the United States "has historically condemned the use of various forms of water torture and has punished those who applied it."[134] Report at 234. OPR concedes that its handful of examples did not arise

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[133] As explained *supra* Section II.F, Goldsmith's decision to temporarily suspend the use of waterboarding was based on his concern that the CIA's "actual practice may not have been congruent with all of [the] assumptions and limitations" in the Classified Bybee Memo. Jack Goldsmith, Letter to Scott Muller (May 27, 2004). Goldsmith did not say that he had concerns about the legal analysis in that memo. *Id.* Indeed, Goldsmith supervised the initial revisions of a replacement for the Yoo Memo, a draft of which concluded that all of the techniques "are fully consistent with all treaty obligations of the United States, including the Geneva Conventions and the CAT." Report at 120 (citing June 24, 2004 draft at 37 n.38).

[134] It is worth noting at the outset that even today there is no consensus that the limited form of waterboarding authorized for use on Abu Zubaydah constitutes torture. *Compare The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12 (2009) ("[W]aterboarding is torture") (testimony of Eric Holder), *with* DOJ Hearing, Part V at 43 ("I believe that a report of waterboarding would be serious, but I do not believe it would define torture.") (Statement of John Ashcroft) *and Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 101 (2007) (declining to say whether waterboarding is torture without additional facts). *See also* Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, Wash. Post, Dec. 9, 2007 (reporting that the CIA gave approximately thirty briefings to members of Congress on interrogation techniques, including waterboarding, and "[w]ith one known exception, no formal objections were raised by the lawmakers briefed"); Interview by Greta Van Susteren with Sen. Joe Lieberman, *On the Record: A Bad Idea* (Fox News television broadcast Apr. 21, 2009) (transcript available at

under laws using the statutory definitions at issue and that they lack adequate factual descriptions, but nevertheless suggests that a "thorough and balanced examination of the technique of waterboarding" would have included them. *Id.* at 235. This conclusion is unfounded for several reasons.

First, OPR has no answer to the point made in Judge Bybee's initial classified response that as head of OLC "it was reasonable for him, as Attorney General John Ashcroft did in turn, to rely on the work of his extremely experienced staff: [redacted] John Yoo, and Patrick Philbin." Bybee Classified Response at 4. None of those extremely experienced attorneys uncovered the obscure historical examples OPR references, and without pre-existing knowledge there would be no reason for Judge Bybee to suspect that such legal precedent existed.[135] OPR likewise ignores the argument that discovering such cases was complicated by the use of different terminology to describe the techniques at issue. *Id.* at 7. Until fairly recently, the term "waterboard" existed exclusively in classified materials. A search of the term "waterboard" within federal case law, in fact, yields only one result prior to 2002: *Int'l Bank of Commerce v. Union Nat'l Bank*, 653 S.W.2d 539, 541, 543 (Tex. Ct. App. 1983), a contract dispute case where one of the individuals involved was "an officer of the Waterboard"—the Board of Trustees of a company called Laredo Water.

The difficulty of uncovering the legal history cited by OPR is compounded by the fact that the alternative term "water torture" generally describes a completely different form of coercion. *See, e.g., Jones v. Wittenberg*, 323 F. Supp. 93, 99 (N.D. Ohio 1971) ("The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel."); *Mullins v. Mullins*, 485 P.2d 663, 663 (Utah 1971) ("The deluge of questionable reading material in this case suggests a similarity to the Chinese water torture ...."); *Gorman v. Sabo*, 122 A.2d 475, 477 (Md. 1956) ("A musical instrument played loud and long enough has been held to be a nuisance comparable to the water torture of the Chinese."). Use of the term "water cure" is also subject to confusion. As the Supreme Court has observed, the "water cure" was once an ancient treatment for mental illness involving dousing and dunking of the patient. *See Robinson v. California*, 370 U.S. 660, 669 (1962); *see also Brown v. Watson*, 156 So. 327, 330 (Fla. 1934) (describing water cures as a cosmetic technique of beauty specialists); *Ill. Cent. R.R. Co. v. Sutton*, 53 Ill. 397, 400 (1870) (describing a "water cure" establishment as a place for the treatment of disease). OPR ignores these distinctions and simply "disagree[s]" with the notion that an OLC attorney might fail to successfully navigate the

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http://www.foxnews.com/story/0,2933,517260,00.html) ("I take a minority position on [waterboarding]. Most people think it's definitely torture. The truth is, it has mostly a psychological impact on people."). Congress itself refused to pass an amendment that would have made waterboarding a punishable offense under common Article 3 of the Geneva Conventions. *See* 152 Cong. Rec. S10378, S10398 (daily ed. Sept. 28, 2006) (Amendment No. 5088 to Senate bill 3930 offered by Senator Kennedy and defeated 46-53).

[135] Nor did the CIA inform Judge Bybee that the U.S. military had historically condemned this interrogation technique as torture—a fact he would expect to be told if it were true. To the contrary, Judge Bybee was instead told that our military had used waterboarding as part of its SERE training for thousands of our own military personnel and continued to do so. Classified Bybee Memo at 6. *See also* Bradbury Techniques Memo at 13 (noting that waterboarding had been used "many thousands of times" in SERE training). It stands to reason that if the technique is allowable in the U.S. military, it does not constitute torture. Although Judge Bybee was unaware of any relevant legal history at the time, he would have included it in the Classified Bybee Memo even though it was by no means ethically required. As OPR concedes, the history it relies upon had no precedential weight. Report at 235.

complex etymology of the practice and discover that the "water cure" is another name for a crude form of waterboarding. Report at 237 n.195.

Significantly, Judge Bybee and his staff were not alone in overlooking variants of waterboarding that bore different names and were used as long as century ago. There is certainly no discussion of this military history in the memos that Levin and Bradbury provided to the CIA in support of their conclusion that waterboarding did not violate the anti-torture statute. There is also no mention of such history in the Beaver Memo referenced by OPR (Report at 74), which considered the legality of waterboarding as well as a range of other techniques in a legal brief drafted for a DOD Joint Task Force at Guantanamo Bay. *See* Memorandum for Commander, Joint Task Force 170, from Diane E. Beaver, *Re: Legal Brief on Proposed Counter-Resistance Strategies* 6 (Oct. 11, 2002) ("Beaver Memo") (Appendix 16), *available at* http://www.usdoj.gov/olc/docs/memo-muller2004.pdf. Yet OPR does not suggest that any of these attorneys engaged in misconduct by failing to discover or discuss this history. In fact, the 2007 article that OPR relies upon to document its historical record of supposedly similar practices proves just how obscure this history was. The author notes that there had been a "good deal" of discussion of water torture within the legal and academic community after the interrogation policy became public in 2004, but that *as of 2007* "[t]here ha[d] been *no mention* ... of past American government pursuit and prosecution of individuals who inflicted such treatment on U.S. military personnel." Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in United States Courts*, 45 Colum. J. Transnat'l L. 468, 472 n.18 (2007); *see also* Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009 ("[N]o one involved—not the top two C.I.A. officials who were pushing the program, not the senior aides to President George W. Bush, not the leaders of the Senate and House Intelligence Committees—investigated the gruesome origins of the techniques they were approving with little debate."). Tellingly, in 2005 OPR did not refer to any of the legal history mentioned in its report when it questioned Judge Bybee extensively on topics relating to the adequacy of OLC's research. OPR does not even contend that its staff was aware of this authority prior to reading Wallach's article in 2007. Thus, if Judge Bybee is responsible for failing to unearth this legal history (even though he had no responsibility for original research), he shares that distinction with numerous other government lawyers, the academics cited in Wallach's article, and apparently OPR itself.

Second, OPR asserts that the Classified Bybee Memo "did not consider" the legal history of waterboarding (Report at 234), but the Bybee Memo, which was repeatedly cross-referenced, did include the most relevant legal history. The Bybee Memo explained that the TVPA "contains a definition similar in some key respects to the one set forth in Section 2340" and that it had "set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture." Bybee Memo at 24. That appendix (*id.* at 48-49) included a detailed discussion of the fact patterns presented in 13 cases, including *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996)—one of the cases that OPR identifies as relevant history that was supposedly omitted. Report at 235.[136]

[136] OPR cites to the district court opinion, *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460 (D. Hawaii 1995), but it is the same case.

OPR nonetheless concludes that this reference to *Hilao* was deficient because it "do[es] not agree that listing a case in the Appendix without discussion satisfied the attorneys' professional obligations in this matter." *Id.* at 237 n.195. But OLC certainly did include a "discussion" of the case. The memo devotes 16 lines of text to its detailed recitation of the facts and explains that the guards "poured water down [plaintiff's] nostrils ... for six hours," while threatening him with "death and electric shock." Bybee Memo at 48-49. In light of the fact that the CIA was not proposing to use a remotely similar technique, there was certainly no need to highlight this decision in the Classified Bybee Memo. Thus, the fact that the district court decision, which is referenced in the Ninth Circuit's opinion, described this "water cure" as a "form[] of torture" should not have been cause for alarm. Report at 235.[137] Indeed, the Bradbury Techniques Memo later explained that there were "*obvious differences* between the technique in *Hilao* and the CIA's use of the waterboard subject to the careful limits described" and that "the court reached no conclusion that the technique by itself constituted torture." Bradbury Techniques Memo at 44 n.57. There was accordingly nothing inappropriate about placing the discussion in an appendix that was used to catalogue a substantial group of decisions. *See supra* Section IV.D (including examples of the Supreme Court's use of appendices to list relevant case law). And the decision hardly supports OPR's bald assertion that "[t]he general view that waterboarding is torture has ... been adopted in the United States judicial system." Report at 235.

Third, OPR's own descriptions of the historical examples at issue demonstrate just how far removed they are from the question posed by the CIA. Report at 234 & nn.192, 193. As OPR concedes, the military prosecutions it identifies arose under different laws that did not "involve[] the interpretation of the specific elements of the torture statute." *Id.* at 235. Nor could OPR actually conclude that the conduct at issue was "similar [to] the techniques ... proposed by the CIA." *Id.* To the contrary, the descriptions in the historical record show that they were in fact very, very different. The inclusion of this information was by no means essential to the delivery of ethical legal advice.

OPR nonetheless claims that it was essential for OLC to discuss the convictions of Japanese soldiers after World War II for use of "water torture." *Id.* at 234. Those prosecutions, however, were based on violations of "the Laws and Customs of War," which at the time prohibited conduct far beyond the acts of torture proscribed by the statute at issue here. Such laws, for instance, included a mandate that prisoners of war shall "at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity." *See, e.g.*, Convention of July 27, 1929 Relative to the Treatment of Prisoners of War, art. 2, 47 Stat. 2021, 2031. In addition, while many of the specifications against the Japanese soldiers referenced brutal mistreatment and torture, including acts that used water to cause fear of drowning, the description of those techniques leave no doubt that they used water in a manner that inflicted serious physical pain and combined it with a range of violent acts. *See* Report at 234 n.192 ("As the interrogation continued, he would be beaten and water poured down his throat 'until he could hold no more.'"; "[T]he subject was tied lengthways on a ladder, face

[137] The district court opinion featured by OPR (Report at 235) merely resolved a procedural question concerning the use of sampling to determine class compensatory damages. *In re Estate of Ferdinand E. Marcos*, 910 F. Supp. at 1464. The court's summary reference to the "water cure" was part of a list of fourteen human rights violations various plaintiffs experienced that the court described in passing as "forms of torture." *Id.* at 1463.

upwards. He was then slipped into a tub of water and held there until 'almost drowned.'") (citations omitted). *See also* Wallach, *Drop by Drop* at 484-89 & nn.73-76, 91 (specifications stated that defendants variously beat their prisoners, poured water into their mouths and nostrils, pressed lighted cigarettes against their bodies, forced them into a tank of water, and made them ingest a bucketful of sea water); Judgment of the International Military Tribunal for the Far East, Ch. VIII, *available at* http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html, at 1059 (defining the "water treatment" as follows: "[t]he victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was then to revive the victim and successively repeat the process.").

OPR also relies on the omission of the history of the "water cure" during the U.S. occupation of the Philippines following the Spanish-American War. Report at 234. Yet OPR acknowledges that the officer who was convicted for use of the "water cure" was "tried for conduct to the prejudice of good order and military discipline," which in no way illuminates the proper interpretation of the torture statute. *Id.* at 235 n.193. Moreover, the "water cure" was a far cry from the technique proposed by the CIA. U.S. Army Major Edwin Glenn was convicted based on use of a process whereby a "faucet was opened and a stream of water was forced or allowed to run down [the prisoner's] throat" and "[w]hen he was filled with water it was forced out of him by pressing a foot on his stomach or else with the hands." Wallach, *Drop by Drop* at 499-500 & nn.141, 144. *See also* Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int'l Crim. Just. 135, 143 (2003) (describing the water cure technique, as practiced by Major Glenn, as "consist[ing] 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").

Finally, OPR's claim that OLC was required to discuss *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984), which supposedly "adopted" the "general view that waterboarding is torture" is equally unfounded. Report at 235. The decision affirmed the conviction of a Texas sheriff and two deputies for civil rights abuses inflicted in the course of extracting confessions. The opinion includes a reference to the fact that the defendants used "water torture" as part of their abusive course of conduct. *Id.* Yet even OPR acknowledges in a footnote that "[t]he court did not describe what constituted the 'water torture.'" *Id.* at 235 n.194. As the discussion of the military history demonstrates, water can and has historically been used in ways that inflict severe physical pain. There is accordingly no reason to leap to the conclusion that *Lee's* unexplained reference to "water torture" reflects the judiciary's "adopt[ion]" of the "view that waterboarding is torture." *Id.* at 235. Moreover, the Fifth Circuit had no occasion to consider the legal meaning of "torture" in any event. Civil rights abuse claims do not require proof of torture. As former Attorney General Mukasey told the Senate Judiciary Committee on July 9, 2008, it is doubtful that the *Lee* case belonged in the Classified Bybee Memo because it "was not a case that dealt with whether a technique is or isn't torture under the torture statutes." *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Michael Mukasey). *See also* Daphne Eviatar, *Torture By Any Other Name*, The Washington Independent, Oct. 17, 2008 (quoting a Justice Department spokesman that the *Lee* prosecution

was "fully consistent with the legal advice OLC provided to the CIA"). The court's unexplained and colloquial use of the term "water torture" carries no legal significance whatsoever. OPR is grasping at straws.

2. The Classified Bybee Memo Properly Relied on Evidence That the CIA Psychologists Derived From SERE Training

OPR claims that the Classified Bybee Memo erred by relying "almost exclusively" on data and reports derived from the SERE training of U.S. military personnel. Report at 235. According to OPR, that was inappropriate because OLC failed to address possible differences in the impact of these techniques on hardened terrorists like Abu Zubaydah and SERE trainees. *Id.* at 235-36. OPR's analysis ignores the facts and contravenes the governing rules of ethics.

First, although OPR has compromised Judge Bybee's ability to respond to this allegation by denying him access to the CIA documents at issue, the Classified Bybee Memo on its face indicates that OLC's advice was not based "almost exclusively" on SERE training. The Classified Bybee Memo states, for instance, that the CIA "reviewed the relevant literature" and consulted "with a number of mental health experts" and "outside psychologists." Classified Bybee Memo at 6. Notably, the memo contrasts "studies of lengthy sleep deprivation" with results of the technique's use "in military training." *Id.* at 6. These examples, and perhaps many more of which we are unaware, all demonstrate that the factual investigation conducted by the CIA, and relied upon by OLC, went beyond SERE training.

Second, even if the Classified Bybee Memo relied "almost exclusively" on data derived from SERE training, this would not constitute misconduct. As a practical matter, OLC's advice depended on the facts provided to it by the CIA, with the understanding that the CIA "d[id] not have any facts in [its] possession contrary to the facts outlined" in the Classified Bybee Memo. *Id.* at 1. It would therefore have been wholly inappropriate for OLC lawyers to substitute their understanding of the facts and presume greater knowledge about the psychological effects of interrogation than CIA experts who had studied the issues extensively. As a legal matter, OLC was "'entitled to rely in good faith upon the statement of facts made to him by [the CIA]'" and was "'not under a duty to institute an inquiry for the purpose of verifying [its] statement[s] before giving advice thereon.'" *Meiksin v. Howard Hanna Co.*, 590 A.2d 1303, 1306 (Pa. Super. Ct. 1991) (citation omitted). *See also Kent v. State*, 699 S.W.2d 767, 768 (Mo. Ct. App. 1985) ("'In the preparation of a case a lawyer is not required to be clairvoyant, and he must of necessity rely on information furnished him by his client.'") (citation omitted). Yet OPR faults OLC for failing to second guess multiple expert opinions that the interrogation techniques would not cause long-term harm.

Third, the information available did not provide OLC with cause to doubt the soundness of the CIA's determination that it could rely on data and reports derived from SERE training. The Classified Bybee Memo explicitly proceeded on the premise that the CIA would be using the "same techniques" that "have been used and continue to be used" in the SERE program. Classified Bybee Memo at 4, 17 ("You have informed us that your proposed interrogation methods have been used and continue to be used in SERE training."). OPR nevertheless seems to believe that it was obvious that these training interrogations could not provide reliable information about the pain that would result because the CIA's interrogation program was not

"identical to what a SERE trainee would experience." Report at 55. But the CIA represented to OLC that the SERE techniques were "not used one by one in isolation, but as a full course of conduct *to resemble a real interrogation*." Classified Bybee Memo at 17; *see also* Jack Goldsmith, Letter to Scott Muller (May 27, 2004) ("As you know, the use of the waterboard in SERE training was a significant factor in this Office's legal analysis."). Consequently, it was OLC's understanding that "the information derived from SERE training bears both upon the impact of the use of the individual techniques and upon their use as a course of conduct." Classified Bybee Memo at 17. And OPR's own report concedes that the interrogation techniques were "similar to" the SERE techniques, which included "slapping, shaking, stress positions, isolation, forced nudity, body cavity searches, sleep deprivation, exposure to extreme heat or cold, confinement in cramped spaces, dietary manipulation, and waterboarding." Report at 34. Indeed, OLC continued to credit the relevance of this experience even after the issue was subjected to further study in the aftermath of the CIA IG investigation. The Bradbury Techniques Memo (at 6) observed that "[i]ndividuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation," yet went on to reach virtually the same conclusions regarding the techniques at issue.

OPR never offers any reason why the SERE experience was not directly relevant to the CIA's assessment of the potential for severe *physical* pain. The CIA never provided any information, and OPR cites none, suggesting that Abu Zubaydah's physical response to the techniques would be any different than the response of the SERE trainees. A facial slap does not hurt more when it is administered by the enemy. The same is true for the waterboard. That technique produces "an automatic physiological sensation" of drowning even when the individual knows for certain that the interrogators are not going to drown him. Classified Bybee Memo at 4.

Moreover, the CIA also provided facts supporting its view that the SERE exercises produced levels of *fear* commensurate with enemy interrogations—which demonstrated the relevance of SERE training to the potential for severe mental pain or suffering. It explained that use of the waterboard had been "almost 100 percent effective in producing cooperation among the trainees" despite their knowledge that it was just a training exercise. *Id.* at 6. That statistic can only be explained by the authenticity of the training. The training induced a "real" fear of death among trainees, yet the due diligence provided by the CIA included a report from a "psychologist who served in the Air Force's SERE training program" confirming that the "long-term psychological effects of [waterboard] use were minimal." Report at 56.

In addition, the CIA emphasized that it would follow numerous precautionary measures similar to those used in the SERE program in order to ensure the safety and health of the person subjected to interrogation. Along with other restrictions, the Classified Bybee Memo required the presence of "a medical expert with SERE experience" throughout use of the waterboard and that "the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah." Classified Bybee Memo at 4. OLC was also assured that the interrogation phase would likely last no more than "several days" and in any event would not exceed thirty days. *Id.* at 1.[138] [redacted]

[redacted]

[redacted]

[redacted] There is absolutely no evidence, however, that Judge Bybee was even aware of the concept of "learned helplessness." Judge Bybee told OPR that he could not recall reviewing any written material from the CIA regarding the techniques. Bybee Tr. at 44. Judge Bybee later reiterated that he "had very little interaction with the CIA," and that most contact would have been through Yoo. *Id.* at 111. [redacted]

In any event, the July 24, 2002 fax sent by the CIA to Yoo and [redacted] that OPR relies upon (Report at 235-36) by no means established that the potential for "learned helplessness" made the CIA's reliance on the SERE experience improper even for an assessment of mental pain, let alone physical pain. [redacted] the CIA still represented to OLC that the information it gathered from all relevant sources as well as the "psychological assessment" of Zubaydah led it to conclude that "the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm." Classified Bybee Memo at 18. [redacted] but never retracted its good faith view that the SERE experiences were a highly relevant benchmark and that the techniques would not cause severe physical pain or prolonged mental

[139] Confusion on this score exists due to uncertainty regarding CIA terminology. A CIA official explained that the 83 times referred to the number of "short pours" of water involved in five sessions of waterboarding. Joseph Abrams, *Despite Reports, Khalid Sheikh Mohammed Was Not Waterboarded 183 Times*, Fox News, Apr. 28, 2009. The CIA Inspector General confirmed this. CIA IG Report at 36 n.41 ("For the purpose of this Review, a waterboard application constituted each discrete instance in which water was applied for any period of time during a session."). The absurd consequences of this calculation method are shown by the number of times the CIA could have "waterboarded" a detainee pursuant to Levin's August 2, 2004 authorization letter. [redacted]

harm. *Id.* The CIA's acknowledgement of "some level of risk" does not change the legal analysis. The statute only requires a good faith belief, not certainty.

Moreover, OPR simply ignores the fact that the CIA provided *other* information supporting its conclusion that "learned helplessness" would not cause "severe mental pain or suffering" within the meaning of the statute. This other information made the potential difference in the psychological impact on SERE trainees and enemy combatants utterly immaterial to the legal analysis. There was no evidence that "learned helplessness," which reportedly "creates a psychological dependence and instills a sense that, because resistance is futile, cooperation is inevitable," rose to the level of severe mental pain even on a temporary basis. Report at 40. Even if it did, the available information indicated that it would not cause "prolonged mental harm" as required by the statutory definition. [redacted] *Id.* at 42. In light of the 30-day limitation on the interrogation period, there was good reason to accept the CIA's conclusion that use of the procedures, even in combination, "would not result in prolonged mental harm."[140] Classified Bybee Memo at 18. As the Bybee Memo explained (at 29), the European Court of Human Rights held in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (sec. A) (1978) that a course of techniques that caused detainees "psychiatric disturbances during interrogation," that could "break[] their physical and moral resistance," did not constitute torture. OPR simply declines to respond to any of this evidence, which was set forth in Judge Bybee's initial classified response. Bybee Classified Response at 10. It obviously has no answer because there is none.

At bottom, OLC was not ethically required to reject the CIA's reasonable inference that the SERE data was relevant to its assessment of the potential for severe pain because enemy combatants were more likely to develop a temporary psychological condition that would not meet the statutory definition of mental pain in any event. OLC was fully entitled to rely on the CIA's representation that it did "not have any facts in [its] possession contrary to the facts outlined [in the Classified Bybee Memo]." Classified Bybee Memo at 1. It is simply not OLC's role to substitute OPR's intuition for the CIA's expert findings, and it would be unreasonable to expect OLC to discuss and resolve every possible difference between SERE training and CIA interrogations in a memorandum written under exigent circumstances. OLC was entitled, as it made clear on the first page of the Classified Bybee Memo, to give advice based on the facts provided to it.

3. Analysis of Sleep Deprivation and Stress Positions

OPR determined that the Classified Bybee Memo failed to provide a "thorough, objective, and candid analysis" in concluding that sleep deprivation and stress positions would not result in severe physical pain or suffering because OLC did not "inquir[e] ... how the subject would be kept awake" or "how prisoners would be forced to maintain stress positions." Report

[140] The Bradbury Techniques Memo confirmed that despite the CIA's use of the waterboard "on three high level al Qaeda detainees, two of whom were subjected to the technique numerous times, ... none of these three individuals has shown any evidence of physical pain or suffering or mental harm in the more than 25 months since the technique was used on them." Bradbury Techniques Memo at 15.

at 236. OPR criticizes OLC for failing to consider whether "subjects would be shackled, threatened, or beaten by the interrogators." *Id.* at 237. This is nonsense. OLC was entitled to rely on the view that the CIA was disclosing the relevant information.

The CIA informed OLC that these "same techniques" were being used on our own SERE trainees without infliction of severe pain. Classified Bybee Memo at 4. The memo also details OLC's "understand[ing]" of each of the techniques "[b]ased on the facts [the CIA] ha[d] given," and cautioned the CIA on both the first and last pages of the memo that its conclusions were "based on" and "limited to" those facts. *Id.* at 1, 2, 18. OLC added that "[i]f these facts were to change, [its] advice would not necessarily apply." *Id.* at 1. [redacted] OLC accordingly had no responsibility to opine on an endless variety of undisclosed ways that the CIA might try to keep a detainee awake or in a stress position. The SERE experience was enough to suggest that they could be used without severe pain. And the CIA had its own experience with these interrogation methods as well. *See* William Ranney Levi, *Interrogation's Law*, 118 Yale L.J. 1434, 1480 (2009) ("At least until 1988, the CIA interpreted the law to allow stress positions ..., disrupted sleep, solitary confinement, sensory deprivation, threats of violence, examination of body cavities, and temperature manipulation.").[142]

There was no reason for OLC to conclude that the CIA was hiding the relevant facts. The CIA had a general responsibility to follow OLC's legal advice in good faith, and could not escape application of the anti-torture statute by devising ways to inflict severe pain that had not be disclosed to OLC. Indeed, it was in the CIA's interest to share as much information as possible. Otherwise its activities would fall outside the express scope of OLC's opinion. If a particular means of achieving sleep deprivation constitutes torture, the Classified Bybee Memo would not protect the CIA interrogators who employed it. By OPR's logic, CIA interrogators who gave detainees repeated electric shocks to keep them awake would be immunized under OLC's Classified Bybee Memo, even though the Bybee Memo repeatedly described electric shock as a form of torture. Bybee Memo at 16, 20 nn.10, 24. To the contrary, it is reasonable to assume OLC's advice included restrictions on the range of activities available to the CIA. OPR offers no support for a contrary conclusion.

[redacted]

[142] OPR is flat wrong to assert that the CIA "had no institutional experience or expertise" regarding interrogations prior to September 11, 2001. Report at 31. Along with the Levi article referenced above and the McCoy volume cited by OPR itself, Report at 31 n.30, the CIA Inspector General noted that "[t]he Agency has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States," dating back to before the Vietnam War. CIA IG Report at 9. Notably, OLC only authorized a more restrictive version of sleep deprivation and stress positions than what the U.S. military had employed in the past. Levi, *Interrogation's Law*, 118 Yale L.J. at 1440 ("Several techniques (for example, sleep deprivation, and standing as a stress position) that were understood at times before 9/11 as lawful by the military for use on protected prisoners of war were more coercive by degree than the same techniques authorized for use on unlawful combatants post-9/11.").

[redacted]

OPR also faults OLC for neglecting to disclose that a 1930 Bar Association report, cited in a footnote of a Supreme Court case from 1944, supposedly condemned sleep deprivation as "torture." Report at 236 (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 150 n.6 (1944)). This was not cited in the Bradbury Techniques Memo either because it was not remotely relevant. Both *Ashcraft* and the accompanying Bar Association report concerned the admissibility of coerced confessions, not the definition of torture. They referred to "torture" in a colloquial sense and made no finding that the interrogators should be liable. In fact, the only case of which we are aware that assessed whether sleep deprivation constituted torture under a human rights convention—and which, notably, OPR failed to reference in this section—held that it did not. *See Filartiga v. Pena-Irala*, 630 F.2d at 885 n.2 (noting that in *Ireland v. United Kingdom*, the European Court of Human Rights held "that Britain's subjection of prisoners to sleep deprivation ... was 'inhuman and degrading,' but not 'torture' within the meaning of the European Convention on Human Rights"). Since the Classified Bybee Memo, moreover, the U.S. government has affirmed the use of sleep deprivation on multiple occasions. *See* Department of Defense, Working Group Report at 65, 70 (April 4, 2003); Jack Goldsmith, [redacted] John Ashcroft, Letter to John McLaughlin (July 22, 2004) (confirming that [redacted] complied with U.S. law); Bradbury Techniques Memo at 40 ("[W]e conclude that the authorized use of sleep deprivation by adequately trained interrogators, subject to the limitations and monitoring in place, could not reasonably be considered specifically intended to cause severe mental pain or suffering.").

Second, OPR offers no reason why OLC should have assumed that the CIA would use shackling and beatings to "ensure that [the enemy combatants] maintained those positions." Report at 237. To the contrary, the Classified Bybee Memo included an explicit understanding that "there is no aspect of violence" to either stress positions or wall standing. Classified Bybee Memo at 13. Both positions would be "used only to induce temporary muscle fatigue," *id.* at 9, casting doubt on the use of methods to sustain the stress positions for extended periods of time. The Classified Bybee Memo likewise states that any repetition of the techniques "will not be substantial" (*id.* at 2), indicating the expected constrained use of stress positions. A fair presumption, then, is that the CIA had certain non-violent means (or was limited to the use of non-violent means) for sustaining the stress positions. *See also* Bradbury Techniques Memo at 33, 34 (noting that the techniques are "self-limited by the individual detainee's ability to sustain the position," suggesting a limited role on the part of the interrogator.) This was certainly the same presumption underlying the Beaver Memo when it concluded that "the use of stress

positions such as the proposed standing for four hours ... [is] legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended." Beaver Memo at 6. In any case, the explicit assumptions set forth in the Classified Bybee Memo made it reasonable for Judge Bybee to conclude that any methods employed by the CIA would not involve severe pain or suffering.

I. OPR's Laundry List of Supposed Errors and Omissions Falls Far Short of Violating Any Rule of Professional Conduct

As detailed above, OPR spends nearly one hundred pages dissecting every last phrase and footnote of the Bybee Memos, critiquing even what it admits to be "relatively minor omission[s]." Report at 187. Taken as a whole, OPR's petty criticisms amount to a comedy of "errors." OPR seeks to justify its microscopic approach on the basis that "[a]lthough some ... flaws were more serious than others, ... their cumulative effect compromised the thoroughness, objectivity, and candor of OLC's legal advice." Report at 159-60. This kitchen sink strategy, however, assumes that OPR's individual allegations have adequate merit to accumulate beyond a de minimus level. They do not. It likewise assumes that what errors do exist are attributable to Judge Bybee. They are not. OPR somehow thinks that selectively citing a handful of critical remarks from DOJ officials (*id.* at 160) will substantiate its claim. In fact, none of these officials shares OPR's view that the memos violated professional standards of candor or competence. Moreover, legal ethics experts, including two of the leading scholars in the field, confirm that Judge Bybee acted in accordance with relevant rules of conduct. As Professor Geoffrey Hazard concluded: "Discipline could not properly be imposed on Judge Bybee under the D.C. Rules of Professional Conduct or elsewhere." Hazard Letter ¶ 2. Even the undisputed facts establish that the memos were prepared in conformity with the relevant D.C. rules—Rule 1.1's duty of competence, Rule 1.4(b)'s duty of communication, and Rule 2.1's duty of candor.

First, most of OPR's claims, regardless of their underlying merit, are not attributable to Judge Bybee. The undisputed facts, *see supra* Section II, show that Judge Bybee carried out his Rule 1.1 responsibilities as supervisor with care, working diligently up until the last moments before the CIA deadline. Yet OPR insists on including a slew of picayune citation complaints against Judge Bybee even while acknowledging that he "should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument." Report at 255. OPR attempts to square this circle by finding Judge Bybee responsible for "problems ... that were brought to his attention by others" (*id.* at 255), but neglects to mention that the only concerns brought to Judge Bybee's attention were by Patrick Philbin on the evening the opinions were signed. And OPR concedes that Philbin did not regard those concerns to be significant enough to warrant delaying the memos. *Id.* at 63.

Second, several leading ethics experts firmly reject OPR's conclusions. Contrary to OPR's assertions regarding the Bybee Memos' lack of thoroughness, Hazard noted that "[t]he opinions at issue are extensive, detailed, careful and sober." Hazard Letter ¶ 4. Indeed, Hazard found the analysis "fulsome to the point of being tedious." *Id.* Contrary to OPR's obsession with the omission of counterarguments, Hazard emphasized that "*[a]n opinion is not required to embrace all possibilities and qualifications, nor include a brief for the opposing view.*" *Id.* ¶ 11. Hazard explained that "the CIA already knew from its own study that there were risks and uncertainties" such that "Judge Bybee did not have to tell them anything more about risks or

counter-arguments." *Id.* ¶ 15. And contrary to OPR's expansive vision of D.C. Rule 2.1, Hazard clarified that the "critical concept" underlying the duty of candor is the lawyer's "honest assessment," which OPR never even challenges. *Id.* Hazard also rejected OPR's vision of "independence" and noted that independent judgment "is not compromised by the lawyer's awareness of the result desired by the client," given that "[m]ost legal advice" involves a "course of action the client hopes to pursue." *Id.* ¶ 16. Ultimately, Hazard recognized that "[t]here may have been some errors in the analysis in route to reaching plausible conclusions on unsettled questions; the memos may have included some unnecessary discussion of possible defenses; and they may include some ambiguous sentences that could possibly be misinterpreted," but "[i]n [his] opinion, these do not constitute serious deficiencies." *Id.* ¶ 18. After reviewing the memos, Professor Hazard concluded that "there is no basis for charging Judge Bybee with failure to conform to recognized standards of professional conduct." *Id.*

Ronald Rotunda, a Distinguished Professor of Jurisprudence at Chapman University, reached similar conclusions. Rotunda noted that D.C. Rule 1.1 requires a "serious deficiency" in representation. Letter from Ronald D. Rotunda to Miguel Estrada 3 (Oct. 7, 2009) ("Rotunda Letter") (Appendix 5). There was "no evidence" of such incompetence, in Rotunda's view, largely because the arguments put forward in the Bybee Memos were eventually vindicated in cases like *Price* and *Pierre*, and even cited by the Department of Justice. *Id.* Rotunda also confirmed that an attorney cannot violate D.C. Rule 2.1 "so long as he gives his 'honest assessment.'" *Id.* (quoting Rule 2.1 cmt. [1]). In addition, Rotunda noted that "[t]here 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." *Id.* at 4 (emphasis in original). Rotunda found "no basis for finding that [the Bybee Memos'] authors violated any rules of professional conduct." *Id.*

Many other experts, from across the political spectrum, have expressed the same views as Hazard and Rotunda. Alan Morrison, for example, stated that he finds the Bybee Memos "troubling" and "erroneous," but that there is no basis for bar disciplinary action because (1) there is "no such evidence" of bad faith and (2) "*there is no doubt*" that the lawyers who wrote the memos "met [the professional] requirements" of competence under Rule 1.1. Alan B. Morrison, *Alas, No Disciplinary Action*, National L. J., Aug. 17, 2009, at 38 (Appendix 7). And Stuart Taylor, known for his moderate views, stated that there is "nothing remotely" like proof that Judge Bybee was incompetent or acted in bad faith. Stuart Taylor, Jr., *Torture: Stop Harassing the Lawyers*, National Journal, Sept. 12, 2009 (Appendix 8).[143]

Third, numerous officials with knowledge of the relevant events confirm the view of these ethics experts. Timothy Flanigan, a former head of OLC, stated that "any criticisms of the [Bybee] memorandum that I have made in the past were never intended to suggest in any way that the authors of the memo committed professional misconduct." Flanigan Decl. ¶ 4. "Quite to

[143] Saul J. Singer, the Senior Legal Ethics Counsel for the D.C. Bar, has similarly stated that "there is, at the very least, a good-faith argument to be made" that waterboarding is not torture and that "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: Don't Kill All the Lawyers*, Wash. Post, May 11, 2009 (Appendix 9).

the contrary," Flanigan continued, "based on my own personal knowledge I very strongly believe that the authors of the memo acted in a manner consistent with their professional responsibilities." *Id.* Dan Levin likewise stated that his "disagreements with aspects of the authors' analysis were not intended to suggest that [he] believed the authors committed professional misconduct." Levin Decl. ¶ 6. On those areas of disagreement, Levin added that "[r]easonable attorneys can disagree" and that "the authors might be right and I might be wrong." *Id.* ¶ 5. In his submission to OPR, former Attorney General Michael Mukasey stated that although some aspects of the Bybee Memos were "incorrect or inadequately supported," OPR was not taking into account the "real-world context" that involved "enormous time pressure" on those preparing them. Mukasey Letter at 4, 5. Mukasey ultimately warned that "the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* at 14.

And then there is Goldsmith. In his submission to OPR, Goldsmith stated that he "never believed ... that the analysis in these opinions implicated any professional misconduct." Goldsmith Submission at 1. Finally, there is the client representative, John Rizzo. He has expressed the view that the "OLC lawyers worked diligently on the issues, raised questions, sought out relevant factual information, and solicited input from a number of Executive Branch lawyers." Rizzo Letter ¶ 2. Rizzo believes that "the memos adequately informed [him] about the relevant risks and provided [him] with the information that [he] needed to advise the CIA." *Id.* ¶ 4. Rizzo concluded that he was "satisfied" that Judge Bybee "met the standard of care." *Id.* ¶ 6.

Yet OPR lists every one of these officials as support for its view that the Bybee Memos were "seriously deficient," noting only that they "would not necessarily agree with some of our findings in this matter." Report at 160. With respect, such an understatement is hardly a fair characterization of these officials' view on the matter. OPR seeks to issue its report despite the contrary opinions of *all* these experts and government officials. Their arguments provide no basis for doing so.

V. THE UNDISUTED FACTS ESTABLISH THAT JUDGE BYBEE PERFORMED HIS DUTIES IN CONFORMANCE WITH THE RULES OF ETHICS AND DID NOT ENGAGE IN MISCONDUCT

As set forth, OPR's analysis falls far short of establishing that the advice reflected in the Bybee Memos failed to satisfy the requisite standard of care. That is enough to end this inquiry. But even if those deficiencies were serious enough to establish that John Yoo violated his duties of competence or candor, OPR's findings against Judge Bybee still could not stand. OPR has not established that Judge Bybee engaged in intentional or reckless violations of his ethical duties, which OPR (at last) concedes is a prerequisite for a finding of misconduct under its own standards. Report at 18-19.

OPR recognizes the hurdle and concedes that Judge Bybee "did not conduct the basic research" or "draft any sections" of the memos, and did not know that the advice was "incomplete or one-sided." *Id.* at 255-56. It nonetheless concludes that he "should have known"

that there was a "substantial likelihood" that the memos were not "thorough, objective, and candid" and that his decision to sign them on August 1, 2002 was "objectively unreasonable" and therefore "reckless." Report at 257. As explained in Section III, *supra*, proof of recklessness requires proof that Judge Bybee not only "acted imprudently or incompetently" by signing the memos, but that he engaged in "blatant wrongdoing ... with deliberate malice or conscious disregard of his clients' rights." *Hendry v. Pelland*, 73 F.3d 397, 400 (D.C. Cir. 1996) (denying punitive damages despite proof that the defendant violated disciplinary rules for insufficient evidence of recklessness). Or, as the OPR Analytical Framework puts it, an attorney who "makes a good faith attempt" to satisfy his ethical duties "does not commit professional misconduct." OPR Analytical Framework ¶ B(4). The undisputed facts foreclose any finding of recklessness.

A. Judge Bybee Did Not Violate His Duty of Candor Because He Honestly Believed The Advice, As OPR Concedes

Judge Bybee owed his clients a duty of candor, but he satisfied it by issuing memos that reflected his "honest assessment" of the issues presented. As set forth, OPR concedes, and the evidence unquestionably establishes, that the memos reflected his good faith, honest advice. And Professor Hazard has confirmed (Hazard Letter ¶ 15) that such evidence is dispositive of the question here under the governing law. Professor Paulsen, another expert in the field of ethics, shares that view. As he recently concluded,"[i]n the absence of smoking-gun evidence that the lawyers had concluded that a proposed course of conduct was illegal, but that they then agreed to provide a 'cover' memo whose advice was contrary to that conclusion, there is no ethical problem here at all." Michael Stokes Paulsen, *Obama's Injustice Department*, The Weekly Standard (May 25, 2009). OPR, of course, found no such thing.

OPR nonetheless proceeds to find that Judge Bybee violated his duty of candor because he "should have known" that other attorneys had not prepared the memos with adequate candor. Report at 256. This is a puzzling theory. Judge Bybee signed the opinion. If it reflected his honest assessment of the issues, then it does not matter whether other attorneys also believed it was correct advice. By signing the opinion, Judge Bybee was not vouching for the views of other attorneys. He was exercising the statutory authority that had been delegated to him by the Attorney General to provide "his" own "opinion." 28 U.S.C. § 511. When he did so, he satisfied his personal duty of candor. Whether the opinion was right or wrong, it was honest, and therefore candid advice.

Even if there were some type of vicarious duty of candor of the sort OPR relies upon, it was not violated here. OPR never finds that John Yoo did not honestly believe the advice he gave, just that he knew it was "one-sided." Report at 256. For the reasons discussed, that is not a violation of the duty of "candor." Moreover, there is no evidence that Judge Bybee was ever put on notice that Yoo was violating a duty of candor even if it prohibited "one-sided" advice. OPR places substantial reliance on Patrick Philbin's discussion with Judge Bybee on the evening the opinions were signed to establish notice (*id.* at 257), but Philbin said nothing to suggest that he doubted Yoo's candor. *See supra* Section II.B. Expressing concerns that the defenses sections were "dicta" and went beyond prior opinions on Executive Power is a far cry from alerting Judge Bybee to an "obvious" and "high" risk that Yoo was violating a duty of candor.

To our knowledge, there has never been a disciplinary finding based on a violation of Rule 2.1 in the history of the D.C. Bar. This surely should not be the first.

B. The Issuance of the Memos Could Not Support a Finding of Recklessness Based on the Quality or Competence of the Analysis Because the Conclusions Were Not Unquestionably Wrong

As set forth, the issuance of the Bybee Memos did not violate the duty of care and competence imposed by Rule 1.1 and OPR never actually found that it did. But even if it had, there could be no finding of recklessness here.

As Judge Bybee demonstrated to OPR in response to the Draft Report (Bybee Draft Response at 28-29), the Supreme Court squarely held that the adoption of a plausible but erroneous interpretation of an unsettled question of law could not constitute recklessness as a matter of law. And the Court reached that determination with the express support of the United States, which appeared as an amicus to advance that view of the law governing civil recklessness. The implications of that holding for this investigation are obvious, because OPR has never contended that any of the conclusions in the Memos were unquestionably wrong (or that anyone ever alerted Judge Bybee to that possibility.) *See* Report at 160 (confirming that OPR has not evaluated whether the conclusions were correct). As a consequence, the advice at issue here was not reckless. Indeed, the judgmental immunity cases demonstrate that counsel's adoption of an opinion on an unsettled question of law has never formed the basis for liability and cannot even be negligent as a matter of law.

OPR's response to *Safeco* is damning. It does not even try to contest that application of the scienter standard used in *Safeco* would require a different outcome here. To the contrary, it says one thing, and only one thing, in response to Judge Bybee's assertion that *Safeco* forecloses any finding of recklessness against Judge Bybee. OPR merely contends that the standards for proof of scienter are not the same because the Supreme Court relied on a "willfulness" standard. *Id.* at 19 n.19. As explained (*supra* Section III), that dodge is not artful. It is patently wrong. OPR's standards require proof of recklessness and the Supreme Court has determined what recklessness means when someone adopts legal views on unsettled questions of law.

Without saying so, OPR might be trying to steer clear of the holding in *Safeco* by disclaiming any attack on the quality of the *conclusions* in the memos. *Id.* at 160. But OPR nonetheless devotes nearly 100 pages to its assessment of the quality of the analysis by identifying alleged "errors, omissions, misstatements, and illogical conclusions" (*id.* at 159), and rests its findings on a determination that the analysis was "incomplete," "one-sided," and not sufficiently "thorough." *Id.* at 258. By any name, this is an attack on the quality of the analysis, which is precisely what was at issue in *Safeco*. There the allegation was that the analysis was so bad as to be rejected by every Supreme Court justice who reached the issue. Here, the allegation is the analysis was bad but good enough to be accepted by a unanimous panel of the D.C. Circuit (*Price*) and a ten judge majority of the Third Circuit (*Pierre*). This advice obviously cannot represent a reckless departure from the standards governing competent advice.

OPR's Report represents a complete repudiation of DOJ's advocacy and the Supreme Court's holding in *Safeco*. Surely lawyers who work for insurance companies should not be

entitled to greater protection from sanctions associated with the legal positions they adopt than public servants who act in good faith.

C. The Issuance of the Memos Could Not Support A Finding Of Recklessness Because Judge Bybee Did Not Disregard An Obvious and High Risk That His Decision Would Violate His Clients' Rights

While *Safeco* addresses recklessness as applied to the quality of a legal interpretation, it does not address the adequacy of counsel's communications with his client. OLC's clients did have a right to be informed in accordance with the duties imposed by Rule 1.4(b) and a reckless violation of that duty would constitute misconduct under OPR's standards. Of course OPR never addresses that theory because it never even acknowledges the existence of the rule. But no matter which ethical duty is at issue, none of the facts recited by OPR demonstrates that Judge Bybee recklessly disregarded any of his client's rights. There was no obvious, high risk that the client had not been given the information that it needed to make its decision or that the advice would be used to justify unlawful conduct, or that the analysis fell below the governing standard of care. To the contrary, no one involved at the time perceived any such risk, and precedents governing proof of recklessness utterly foreclose OPR's conclusion on the facts at issue here.

OPR relies on a sum total of three facts that it deems sufficient to support a finding of recklessness (Report at 255-57). Based on his experience and/or Philbin's statements on the evening the memos were due, Judge Bybee should have (1) recognized the "unprecedented nature" of the conclusion that "acts of outright torture could not be prosecuted" or subject to "common law defenses"; (2) questioned the "logic and utility" of relying on the medical benefits statutes; and (3) recognized the "potentially misleading nature" of statements concerning the definition of specific intent. None of those facts, considered individually or collectively, disclosed an "obvious risk that was so great as to make it highly probable" that [an ethics violation] would follow." W. Keeton *et al.*, *Prosser and Keeton on Law of Torts* § 34 at 213 (5th ed. 1984) (quoted with approval in *Safeco*, 551 U.S. at 69) or that any risk posed by issuing the memos was "objectively unreasonable under all the circumstances." Report at 256.

First, no one who reviewed the memos at the time, including Philbin, concluded that these features of the memos created a "high degree" of risk that OLC would violate its ethical duties. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Judge Bybee was aware of the extraordinary effort that had been devoted to the preparation of the memos, had reviewed the memos with care in the time available, and was entitled to rely on Yoo's acknowledged "expert[ise] in presidential war powers." Report at 256. Judge Bybee also knew that there had been extensive communications with the CIA and that no one would be under the illusion that these issues were free from doubt. Nor did Philbin express any concerns that would have required Judge Bybee to reject the views and judgment of the principal deputy who prepared the opinions. Philbin could not have advised Judge Bybee to sign the memos if he thought the memos violated OLC's ethical duties. Indeed, there were five highly-able lawyers in the room when Judge Bybee signed the memos. No one there advised him not to issue them. And many more outside the room had reviewed the memos and did not object when they were issued. *See supra* Section II.D. Any risk of an ethical violation was certainly not sufficiently "obvious" to be reckless.

Courts have repeatedly held that an individual's decision to proceed with a course of action after concerns have been raised is not reckless where, as here, experts in the field concurred in the issuance of the memos. In the vernacular of the cases, Judge Bybee was entitled to proceed because he encountered "green flags." *See, e.g.*, *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004) ("rather than red flags," the defendant "encountered green ones, as outside and inside counsel approved [the challenged] transactions"); *Ash v. McCall*, No. 17132, 2000 Del. Ch. LEXIS 144, at *29-34, *52 (Del. Ch. Sept. 15, 2000) (allegations that directors ignored "red flags" signaling accounting defects were insufficient to establish recklessness because directors relied in good faith on experts' "green flags"). In addition, the concerns that Philbin expressed fell far short of the stark warnings that are required to support an inference of recklessness. As the D.C. Circuit emphasized in *Hendry*, 73 F.3d at 400, proof that a lawyer recklessly disregarded his duties requires a showing of "blatant wrongdoing." It then held that allegations that the lawyer ignored advice when representing the client were insufficient as a matter of law. *Id*; *see also PR Diamonds v. Chandler*, 364 F.3d 671, 686-687 (6th Cir. 2004) (a defendant must ignore "*multiple, obvious* red flags" to support an inference of recklessness); *In re SCB Computer Technology, Inc. Securities Litig.*, 149 F.Supp.2d 334, 363 (W.D.Tenn. 2001) (granting motion to dismiss because "'red flags' must be closer to 'smoking guns' than to mere warning signs" to establish recklessness).

Second, OPR improperly refuses to consider the context in which the Bybee Memos were issued. As discussed *supra* Section II.C, Philbin explained to OPR that it would have been irresponsible to withhold the memos when the CIA was urgently waiting for authorization to proceed with the interrogation of Abu Zubaydah. And OPR's response consists of this: "situations of great stress, danger, and fear do not relieve department attorneys of their duty to provide [ethical] advice." Report at 254. In other words, OPR declines to take the deadline and the exigencies of the situation into account whatsoever. Unlike OPR, however, courts uniformly assess culpability through reference to the context in which decisions were made and require proof that the decision was "unjustifiabl[e]" in light of surrounding circumstances. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Judge Bybee believed that the advice was sound and that the White House and the CIA were entitled to receive it by the deadline they set even if the advisory sections on possible defenses were not as refined as they could have been. Exigencies properly trump perfection.

OPR ignores all this. As Jack Goldsmith observed in his submission, OPR "is looking at the OLC opinions not in the context of threat and danger in which they were written," but rather with "'the perfect, and brutally unfair, vision of hindsight.'" Goldsmith Submission at 4 (quoting Comey). Goldsmith recounted a series of historical examples where opinions issued in times of danger were criticized in later years. He explained that these examples demonstrated why it was so essential for OPR to "exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis." *Id.* Indeed, Goldsmith concluded that "*[i]t is especially inappropriate* ... for OPR to infer misconduct or bad faith from legal errors, even clear legal errors committed in this context." Goldsmith Submission at 4. As Goldsmith explained: "Any standard that would have landed Robert Jackson in trouble cannot be the right standard." *Id.* Yet there can be no doubt that Robert Jackson, along with a host of other distinguished Executive Branch lawyers, would surely have been in trouble under the unprecedented standards OPR adopts here. The Department should reject OPR's irresponsible conclusions.

VI. THE NUMEROUS IRREGULARITIES PERVADING OPR'S INVESTIGATION DEMONSTRATE THAT JUDGE BYBEE HAS NOT RECEIVED A FAIR HEARING

There is no way to know for sure why the OPR investigators who pursued this inquiry for the past five years have been so dead-set on finding Judge Bybee guilty of ethical misconduct. Perhaps it is due to their moral condemnation of any lawyer who would participate in the authorization of harsh interrogation techniques even within the bounds of the law. Or perhaps it is due to nothing more than a fundamental misunderstanding of the law of ethics and OPR's proper role within the Executive Branch. Either way, the procedural history leaves no doubt that OPR has not allowed the facts or the law to stand in the way of a misconduct finding. Rather than adhere to the credo that the government attorney wins whenever "justice [is] done," *Berger v. United States*, 295 U.S. 78, 88 (1935), OPR has consistently taken a partisan approach at every turn—often wrong but never in doubt.

In the latter stages of its five-year investigation, OPR has demonstrated a disappointing disregard for the fair process that should be the hallmark of any DOJ investigation. In particular, OPR's report is tainted by (1) the sheer length of its investigation followed by a sudden rush to completion with arbitrarily-imposed and unreasonably short deadlines; (2) OPR's steadfast refusal to provide exculpatory evidence and other documents essential to Judge Bybee's defense or even confirm the absence of any such exculpatory material; and (3) an egregious series of leaks that unfairly tainted public opinion and the press before Judge Bybee had any opportunity to review OPR's conclusions—let alone respond to those conclusions—and made it exceedingly difficult for the Department to fairly and impartially review OPR's findings. OPR's Final Report refuses even to acknowledge the bulk of these procedural shortcomings, notwithstanding repeated warnings from Judge Bybee and others, including Attorney General Mukasey and former Assistant Attorney General Goldsmith. *See* Mukasey Letter; Goldsmith Submission.

Furthermore, the substance of OPR's report betrays a results-oriented process that resolved every doubt or uncertainty against Judge Bybee. In particular, OPR repeatedly ignores or misconstrues the facts and the law to advance its own conclusions, steadfastly refusing to correct significant errors despite numerous opportunities to revise its report. Such drafting decisions make clear that OPR's report is driven less by ethical concerns then by policy disagreements regarding the CIA's interrogation program and the scope of executive power.

A. OPR's Investigation Languished For Years Before Being Rushed to Completion in Anticipation of a New Administration Taking Office

First, OPR's investigation has now dragged on for over five years for no discernable reason, even though Judge Bybee has fully cooperated along the way. Only after a new administration that had denounced the CIA interrogation program was set to take office did OPR develop a sense of urgency to finalize its report.

The Bybee Memo was leaked to the public in mid-2004, a few months before the presidential election. Later in 2004, in response to a letter from Congressman Frank Wolf, OPR opened an investigation into alleged ethical violations involving OLC's issuance of the Bybee Memos. Report at 4. OPR contacted Judge Bybee in May 2005 to inform him about the

investigation and schedule an interview with him.[144] On December 9, 2005, Judge Bybee voluntarily spoke with OPR about his role in reviewing the Bybee Memo. At that time, OPR informed Judge Bybee that he would have an opportunity to make a written submission before OPR publicly released adverse findings (if any) and that it would not be necessary to delve into classified matters. After three years with virtually no word from OPR, during the 2008 holiday season we were surprised to learn from David Margolis that OPR was set to release a draft report with adverse findings—including adverse findings on the Classified Bybee Memo as to which OPR never asked him a single question—that would jeopardize Judge Bybee's professional career. In fact, OPR had already scheduled January 12, 2009, as the date on which it planned to release the report to Congress and the public. Mukasey Letter at 1. If the Office of the Deputy Attorney General had not intervened and contacted us, Judge Bybee would not have had any opportunity to submit a response despite OPR's previous assurances.

At the same time, OPR was communicating with Members (and staff) on the Senate Judiciary Committee. For example, in October 2008, OPR informed Senator Durbin's Chief Counsel that the investigation "[s]hould be done in 4-5 weeks."[145] Although OPR's rules permit it to inform complainants of the "progress ... of OPR's review of their complaints," U.S. Dep't of Justice, Office of Prof'l Responsibility, *Policies and Procedures* ¶ 13 (2008) ("OPR Policies and Procedures") (Appendix 12), surely the subjects deserve no less.

In addition, OPR utterly failed to keep the prior administration "apprised of the progress and substance" of its investigation, even though Attorney General Mukasey's office had been asking about it for several months. Mukasey Letter at 3. Instead, OPR strategically waited until the waning days of the Bush Administration to share the Draft Report with Department leadership, giving them an "unacceptably" short review period. *Id.* at 2; *see id.* ("[B]ecause OPR waited until the closing days of this Administration to share its Draft Report for comment, you have informed us that it will not be able to revise the report ... in potential response to the issues that we have identified before the Administration ends."). On December 23, 2008, OPR permitted Mukasey and former Deputy Attorney General Filip to review the preliminary draft, informing those officials that they had less than three weeks to communicate any concerns to OPR. On December 31, 2008, Mukasey and Filip met with officials from OPR to express their preliminary concerns. In the wake of the meeting, OPR informed Mukasey and Filip that it would neither finalize the report nor determine its final position regarding professional misconduct referrals before the end of the Bush Administration. In doing so, it effectively blocked any opportunity they might have had for full review and input.

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[144] Judge Bybee and his counsel also entered into a confidentiality agreement with OPR, agreeing to keep the investigation confidential. However, on February 12, 2008, Senators Dick Durbin and Sheldon Whitehouse wrote to OPR demanding an investigation into the memos, prompting OPR to reveal that such an investigation was already ongoing.

[145] Email from Keith B. Nelson, Deputy Assistant Attorney General, Office of Legislative Affairs to Chief Counsel to Senator Durbin (Oct. 1, 2009), *quoted in* Letter from Senators Durbin and Whitehouse to H. Marshall Jarrett, Counsel, OPR, (Feb. 16, 2009). Earlier, on February 12, 2008, Senators Dick Durbin and Sheldon Whitehouse wrote to OPR demanding an investigation into the memos, prompting OPR to reveal that one was ongoing. *See* Letter to from Senators Durbin and Whitehouse Glenn A. Fine, Inspector General, Department of Justice, and H. Marshall Jarrett, Counsel, OPR (Feb. 12, 2008); Letter from H. Marshall Jarrett, Counsel, OPR to Senators Durbin and Whitehouse (Feb. 18, 2008).

On January 19, 2009, Mukasey and Filip submitted a fourteen-page letter brief critical of OPR's conduct of its investigation and its conclusions. They found that "OPR bases its conclusions concerning putative professional incompetence on a collection of facts and findings, a number of which do not survive close scrutiny or are not presented in an even-handed manner." *Id.* at 5. And they warned that "the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* at 14.

OPR spent nearly two months revising its report in light of Mukasey's and Filip's comments, leaving its original conclusions intact and ignoring much of the analysis they specifically criticized.[146] On March 4, 2009, OPR granted us access to the resulting 200-page Draft Report and gave us a mere 60 days to respond[147]—a shorter time frame than that routinely afforded a petitioner seeking review in the Supreme Court. *See* S. Ct. R. 13 (providing 90 days to file cert petition). We pointed out that such a deadline was unrealistic and unacceptably short, particularly given the length of OPR's own investigation (at that point, over four-and-a-half years) and the length and classification level of the Draft Report itself.[148] OPR thrice refused our request to adjust the timeframe, declining to stay the deadline pending completion of our lead associate's security clearance, and even declining to provide a "short extension" of a "few days" after the Classified Bybee Memo was declassified in mid-April (at which point it appeared that OPR's Classified Draft Report would likewise be declassified).[149] After taking nearly five years to produce its Draft Report, time was suddenly of the essence, almost as if OPR was rushing to meet some unspecified external deadline.

Faced with this surprising and unreasonable refusal to budge an inch, Judge Bybee and his legal team complied with OPR's 60-day deadline and submitted a response on May 4, 2009. On August 1, 2009, after spending an additional three months revising the Draft Report ostensibly to address the numerous pervasive errors highlighted by Judge Bybee's initial submission (*but see infra* Section VI.D), OPR informed us that it had completed its final report, which runs 261 pages. The Final Report is classified in its entirety (even though the lion's share of the Draft Report was unclassified and the Classified Bybee Memo, Bradbury Memos, and CIA IG Report are now public). We were given one month to submit a classified appeal to Margolis who, to his credit, extended the deadline by an additional 37 days, to October 9, 2009, in light of the restrictive conditions in which the appeal was prepared.[150] Nonetheless, we note that the

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[146] Email from David Margolis, Associate Deputy Attorney General to Maureen Mahoney, *Re: Judge Bybee* (Feb. 25, 2009) ("OPR has revised its draft, but its conclusions regarding your client have not changed.").

[147] Email from H. Marshall Jarrett, Counsel, OPR to Maureen Mahoney, *Re: Draft OPR Report* (Mar. 5, 2009).

[148] Letter to H. Marshall Jarrett, Counsel, OPR, from Maureen E. Mahoney, *Re: Deadline for Responding to Draft OPR Report* 2 (Mar. 10, 2009).

[149] *See* Letter to H. Marshall Jarrett, Counsel, OPR, *Re: Deadline for Responding to Draft OPR Report* (Mar. 10, 2009); Letter to Maureen E. Mahoney from H. Marshall Jarrett, Counsel, OPR (Mar. 11, 2009); Email to Maureen Mahoney from [redacted], OPR, *Re: Reclassification of Draft Report* (Apr. 21, 2009); Email to Maureen Mahoney from [redacted], OPR, *Re: Declassified Version of OPR Draft Report*; (Apr. 24, 2009).

[150] Our work could only be completed in a sensitive compartmented information facility ("SCIF") with limited hours and no access to resources essential to the efficient preparation of legal work product, such as

time period afforded Judge Bybee to respond to OPR's draft and final reports combined (roughly four months) pales in comparison to the more that five years that OPR has taken to complete its process.

In its Final Report, OPR claims that the investigation was "long and difficult" and "hampered" by the loss of or "limited access to ... key underlying documents"; the "need to seek voluntary cooperation" (often not forthcoming) of many witnesses; "time spent obtaining the necessary security clearances"; "limited OPR resources"; and an "unprecedented number of complex investigations of high-level officials occurring during this same time period." Report at 14-15. We do not doubt the obstacles OPR faced in this process. But they obviously do not begin to explain why this investigation took more than five years. And many of these same constraints applied to Judge Bybee's response to OPR's report and yet little consideration was forthcoming.

B. OPR Refused to Disclose Exculpatory Evidence

OPR has refused to provide Judge Bybee with exculpatory and other highly relevant evidence necessary to prepare his response to OPR's Report.[151] Despite our numerous requests,[152] OPR categorically denied access to "any non-public documents" that OPR "considered in preparing the report" (including, e.g., "any underlying classified source materials" and records of witness interviews), except for Judge Bybee's own interview transcript and the Classified Bybee Memo.[153] OPR even rebuffed our narrowly-tailored compromise request for

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electronic research, paralegal support, and email. (We hasten to add that the SCIF staff, a neutral party, made every effort to accommodate us, notwithstanding the severe constraints of time and space.)

[151] Early on, in advance of Judge Bybee's 2005 interview, OPR accommodated certain reasonable requests to obtain a copy (albeit subject to a confidentiality agreement) of some of the email traffic between the OLC attorneys during the time period in question. It also allowed Judge Bybee to view certain classified materials, *accord* Report at 6 n.4, although counsel did not have access as they were not cleared by the time of the interview, Bybee Tr. at 7. OPR informed counsel that they would not need to address or respond to classified material and suspended the clearance process. OPR's lead investigator assured counsel that it was unlikely that classified materials would prove relevant. *See* Bybee Tr. at 8 ("I don't think we'll be discussing [the Classified Bybee Memo] in great detail.").

However, over time OPR adopted a more adversarial stance on providing access to relevant materials. For example, in late 2007, in light of recent press reports, we asked OPR for permission to view the 2005 Bradbury Memos (which were then still classified) because they would bear on Judge Bybee's defense. OPR responded: "I don't think it really will be relevant to any of the issues involved with respect to your client. And furthermore, I think it's very unlikely that you would be allowed to look at them at this point." Voice Message to Everett Johnson from [redacted] (Oct. 17, 2007). OPR itself had viewed the Bradbury memos (Report at 7) along with a host of other documents (*see* Barron Decl. in FOIA case).

[152] *E.g.*, Letter from Maureen E. Mahoney to H. Marshall Jarrett, Counsel, OPR, *Re: Deadline for Responding to Draft OPR Report* (Mar. 10, 2009) ("Mahoney Mar. 10 Letter") (requesting all non-public documents, including transcripts of all witness interviews and all exculpatory evidence, that OPR reviewed in the courts of its lengthy investigation and/or relied upon in making the allegations in the Draft Report); Letter from Maureen E. Mahoney to Mary Patrice Brown, Acting Counsel, OPR, *Re: Response to Draft OPR Report* 1 (Apr. 15, 2009) (requesting access to "any exculpatory statements, interview transcripts, and supporting documents that OPR collected in the course of its lengthy investigation").

[153] Mahoney Mar. 10 Letter; Letter to Maureen E. Mahoney from H. Marshall Jarrett, Counsel, OPR (Mar. 11, 2009) ("[N]either OPR nor the Department provides access to such materials in a review or appeal context, and we decline to do so in this case.").

the Bradbury Memos (which was made and rejected prior to DOJ's disclosure of the Classified Bybee and Bradbury Memos to the ACLU). OPR also opaquely avoided answering counsel's request for exculpatory evidence, refusing to confirm the absence of any such evidence, and instead stating that OPR "decline[s] to provide additional documents ... at this time" because it "would not be consistent with the purpose of the review and comment process." OPR suggested we could apprise it whether "facts in the report are inaccurate or misleading," but, of course, that was not fully possible without viewing the underlying evidence. We were instead forced to rely on OPR's characterization of that evidence—which has repeatedly proven wanting. *See supra* Section II; *infra* Section VI.D.

Despite these limitations, we have learned that OPR had access to, but failed to disclose, a host of exculpatory statements from witnesses (such as Jack Goldsmith and Patrick Philbin), who do not share OPR's view that Judge Bybee committed professional misconduct, *see id.*, as well as evidence revealing that additional executive branch attorneys (such as Larry Thompson and John Bellinger), concurred in the Bybee Memos, *supra* Section II.D. OLC also refused to permit Judge Bybee access to critical documents demonstrating that subsequent OLC and DOJ attorneys (Levin, Bradbury, and Comey) reaffirmed the Classified Bybee Memo techniques and substantially agreed with many of the Bybee Memo's conclusions. But for the fortuity of the declassification of additional OLC memoranda and the CIA IG Report in the last few months, Judge Bybee would have been deprived of such highly relevant evidence showing, for example, the following:

- In the fall of 2004, Levin re-approved the CIA's use of waterboarding (as well as the other techniques in the Classified Bybee Memo and three additional techniques) in a series of two-page letters (with legal reasoning to be supplied "at a later date"). And Levin, by approving the techniques under *all* applicable laws and treaties, went even further than the Bybee Memos.

- In 2005, Bradbury re-approved the same techniques under the anti-torture statute and *also* concluded that the techniques would not even be considered "cruel, inhumane, or degrading" under Article 16 of the CAT.

- In 2007, Bradbury also cleared the techniques under Common Article 3 of the Geneva Conventions, the War Crimes Act, and the Detainee Treatment Act; and that, in 2007, Bradbury routinely authorized the extension of one of the techniques (sleep deprivation) on particular individuals in a series of two-page letters.[154]

It is also plainly relevant that, in reaching similar—and often *broader*—conclusions, some of these documents contain markedly *less* analysis than the Bybee memos.

Ultimately, it was not until two months after Judge Bybee submitted his response to

[154] *See* Letters from Daniel B. Levin, Acting Assistant Attorney General, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (Aug. 6, Aug. 26, Sept. 6, and Sept. 20, 2004) (stating that OLC "will supply, at a later date, an opinion that explains the basis for this conclusion"); Letters to [Redacted], Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General (Aug. 23, Nov. 6, and Nov. 7, 2007).

OPR's Draft Report that the New York Times confirmed that many additional senior officials at the Department agreed that the techniques under consideration in the Classified Bybee Memo were legal. *See* Scott Shane & David Johnston, *U.S. Lawyers Agreed on Legality of Brutal Tactic*, N.Y. Times, June 6, 2009; *supra* Section II.D. Consequently, in July 2009, we again wrote to OPR expressing our dismay that such critical exculpatory had not been provided to Judge Bybee and renewing our earlier requests. In a brief rejection letter, OPR restated its belief that "subjects of an OPR investigation have no 'right' to discovery, and there is no 'obligation' to provide 'exculpatory' information to the subject of an OPR administrative investigation."[155] It also repeated that, after completion of the Final Report, Judge Bybee was "of course free to advise" it of any information not present in the Report. But, in repeatedly hiding behind this convenient Catch-22, OPR has it exactly backwards. Fairness here demands that the government *make* Judge Bybee aware of relevant information in its possession because he no longer has access to DOJ files—especially that which Judge Bybee has specifically requested. Given the long list of documents to which we were not given access, it is impossible to know what else OPR has withheld.

Such refusals are particularly troubling in the wake of Attorney General Holder's decision to abandon the case against former Senator Stevens, in large part due to the prosecutors' failure to turn over key evidence.[156] *Cf. Brady v. Maryland*, 373 U.S. 83 (1963). It is even more disheartening in light of comments made by Acting Counsel Mary Patrice Brown herself. As she aptly commented shortly after her appointment to OPR in the wake of the Stevens scandal:

> If your gut is telling you [that] you do not want the defense to have this, then that tells you [that] you must turn it over. That's how we were trained. People who don't do that, and hold things too close to the chest, those are the people who run into trouble .... In a white-collar case, the way I was trained, was for heaven's sakes, turn it all over. ***What are you hiding?*** It's easier that way.[157]

The refusal to take even this basic step calls into question the fundamental fairness of the whole process and suggests that OPR has not heeded the Attorney General's clarion call to uphold the Department's "commitment to justice." Press Release, DOJ, *Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens* (Apr. 1, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html.

C. Repeated Leaks of OPR's Draft "Results" Prejudiced Judge Bybee

Numerous high-level leaks of the "results" of OPR's Draft Report in early 2009—before

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[155] Letter from Mary Patrice Brown, Acting Counsel, OPR, to Maureen Mahoney (July 22, 2009).

[156] *See* Press Release, DOJ, *Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens* (Apr. 1, 2009), *at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html. In a similar vein, the White House, in firing the AmeriCorps Inspector General Gerald Walpin, cited an alleged "*fail[ure] to disclose exculpatory evidence.*" Letter from Norman L. Eisen, Special Counsel to the President, to Senators Joseph Lieberman and Susan Collins (June 16, 2009).

[157] Joe Palazzolo & Mike Scarcella, *New OPR Chief Predicts More Transparency in Attorney Investigations*, The Blog of Legal Times, May 06, 2009; *see also* Justin Blum & James Rowley, *Holder Replaces Head of Justice Agency's Ethics Units*, Bloomberg News (Apr. 8, 2009).

OPR had permitted Judge Bybee to review a copy let alone afford him an opportunity to respond—placed Judge Bybee in the untenable position of being prejudged by the public and the press without a concurrent ability to defend himself. The leaks also served to increase political pressure on the Department itself, making it very difficult for Judge Bybee to obtain an objective review of OPR's conclusions.

In early 2009, an unknown source with knowledge of highly classified material (suggesting a high-level official or someone within OPR) leaked the preliminary results of the OPR Draft Report to the press, before Judge Bybee or his counsel had reviewed it.[158] We promptly sent OPR a letter highlighting the prejudice resulting from the leak and explaining why the disclosure violated established DOJ and OPR policy. We pointed out that, as the Department had previously explained, it is "vital" to maintain confidentiality because "[t]he unauthorized public disclosure of information concerning ongoing investigations is particularly damaging." Memorandum from the Deputy Attorney General to Heads of Department Components, *Re: Public Disclosure of Information* 1-2 (May 7, 2002). Also, we noted that OPR's own rules provide for public disclosure only *after* "the matter is concluded" and "all available administrative reviews have been completed"; the subjects are permitted to object on privacy grounds; and the Attorney General has made the final decision to release the report. OPR Policies and Procedures ¶¶ 6, 12. Further, the leaks might well be a violation of the Privacy Act. *See* 5 U.S.C. § 552a.

Although OPR initially apparently took no steps to stem the tide of leaks, Margolis intervened and forwarded the matter to the Department's Inspector General. Nonetheless, the leaks continued,[159] with wholly predictable effects—fueling cries for impeachment and even criminal prosecution,[160] as well making it politically difficult for OPR to afford a full and fair review. Indeed, two Senators publicly issued what was in essence a warning to OPR not to change its previously-established findings regardless of the merits of Judge Bybee's response.[161] Two days after Judge Bybee's May 4, 2009 submission to OPR, the New York Times, apparently reflecting yet another leak, reported that government officials indicated that "they did

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[158] *See, e.g.*, Jason Leopold, *Obama Aides Dispute CIA Chief's Comments About Torture Probes*, The Public Record, Jan. 17, 2009 ("[T]here is a likelihood that the OPR investigation will recommend that Yoo and Bybee be 'rebuked', for the way in which they interpreted a law that formed the basis of the memo, according to people familiar with the OPR's probe."); Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, Newsweek, Feb. 23, 2009 (first internet publishing Feb. 14, 2009) ("According to two knowledgeable sources who asked not to be identified ..., [the draft completed at the end of the Bush administration] sharply criticized the legal work....").

[159] *See, e.g.*, Jason Leopold, *DOJ Investigation Into Yoo's Legal Work Reaches Damning* Conclusions, The Public Record, Mar. 4, 2009.

[160] *See, e.g.*, Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; Editorial, *The Torture Debate: The Lawyers*, N.Y. Times, May 7, 2009; Arthur Delaney, *Conyers, Nadler Call for Special Counsel to Investigate and Prosecute Torture*, Huffington Post, Apr. 28, 2009; Press Release, Eighth Congressional District of New York, *Nadler: Justice Department Report Shows Necessity of Special Counsel to Investigate Torture* (May 7, 2009).

[161] Letter to M. Faith Burton, Acting Assistant Attorney General, Office of Legislative Affairs, from Senators Durbin and Whitehouse (Mar. 31, 2009) (expressing "concern[]" that they would receive a final report "that has undergone significant revisions at the behest of the subjects of the investigation").

not expect major alterations in its main findings or recommendations."[162] Accordingly, we again "express[ed] our serious concern" about the ongoing leaks and requested a "public statement denouncing the leaks as inappropriate and stating unequivocally that the Department has not reached any conclusion."[163] No such statement was forthcoming, although Acting Counsel Mary Patrice Brown responded with a letter stating that she was "equally distressed" by the leaks.[164]

OPR is right to be concerned now but, unfortunately, the damage is done. As Goldsmith has forcefully argued:

> It is unfortunate that elements of the OPR investigation and report have leaked to the press over many years. These leaks have caused reputational harm to the people who are subject of the investigation. This is unfair because the people criticized in the press accounts have no way to respond to the substance of the accusations since only conclusions are leaked. Even if the leaks did not originate in OPR or DOJ, OPR and DOJ share responsibility for them, for the leaks are made possible by the fact that OPR's much-publicized investigation has lasted nearly five years. It is very disappointing, to say the least, that DOJ has allowed its former officials to be treated in this way. To my mind the length of the investigation and the regular stream of leaks over many years *undermine confidence in the OPR process.*

Goldsmith Submission at 2.

Overall, these numerous procedural irregularities call into question the degree to which Judge Bybee has received a fair hearing. OPR's arbitrary deadlines, its refusal to disclose exculpatory evidence, and its laxness toward damaging leaks all combine to cast doubt on the impartiality of its underlying work product. In addition, as discussed below, OPR's Report itself provides further evidence of an investigatory process committed to making adverse findings no matter where the facts or law led.

D. OPR Repeatedly Ignores or Misconstrues The Facts and The Law to Advance Its Own Conclusion

OPR's Report, now in its third iteration, has at every step reflected a one-sided and outcome-driven approach, consistently skewing the facts and the law to support OPR's findings. Attorney General Mukasey observed that OPR's preliminary draft was "not presented in an even-handed manner." Mukasey Letter at 5. And the subsequent drafts have fared no better. Notwithstanding multiple opportunities to correct course, OPR still ignores, misconstrues, or artfully-cites key facts, key testimony, and key judicial precedent; and utterly fails to cite *any* ethics precedents from the relevant jurisdiction (with one exception), *any* of OLC's or DOJ's pre-Bush administration precedent, or *any* of OPR's own precedents. Collectively, these

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[162] David Johnston & Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. Times, May 6, 2009.

[163] Letter from Maureen E. Mahoney to Mary Patrice Brown, Acting Counsel, OPR, *Re: Justice Department Leaks* (May 6, 2009).

[164] Letter to Maureen Mahoney, from Mary Patrice Brown, Acting Counsel, OPR, *Re: Judge Jay S. Bybee* (May 6, 2009).

omissions and distortions, always favoring OPR's ultimate finding of professional misconduct, suggest that OPR has long had a desired conclusion and is just in search of a supporting rationale.[165] Although these errors pervade OPR's Final Report, we highlight a handful of examples below.

- ***Safeco.*** OPR did not bother to cite *Safeco* in the Draft Report, even though it is the Supreme Court's most recent exposition of the recklessness requirement—the cornerstone of OPR's case against Judge Bybee. And *Safeco* conclusively demonstrates that no finding of recklessness is possible here. *See supra* Section III.C. Yet OPR dismisses *Safeco* in a footnote of its final report for reasons that are completely indefensible—not even colorable. Report at 19 n.19.

- ***Price.*** OPR's continuing refusal to cite *Price* is remarkable, as it is arguably the strongest precedent to date in support of OLC's interpretation and application of "severe pain," *see supra* Section IV.B, and it featured prominently in Judge Bybee's Draft Response (at 3, 4, 36, 38, 41, 47, 49, 51, 85). OPR's failure to acknowledge this case, decided one month before the Bybee Memo, is willful and inexplicable.[166]

- ***Pierre.*** OPR did not bother to cite *Pierre* in the Draft Report and now dismisses it out of hand as having "no bearing on whether its authors presented a thorough view of the law at that time." Report at 175 & n.132. With all respect, this is nonsense. *Of course* it is relevant that, against the same legal backdrop, ten highly-respected jurists in *Pierre* later conducted the same analysis and reached the same conclusion on specific intent as the Bybee Memo. *See supra* Section IV.A. Moreover, OPR has no hesitation citing subsequent authorities when it suits its purposes. *See, e.g.*, Report at 178-79 (relying on subsequent criticisms and withdrawals by Goldsmith, Levin, and Bradbury, from 2003 to 2009); *id.* at 16-18, 22 (relying on OLC Guiding Principles, written in 2004); *id.* at 22 (relying on OLC's Best Practices Memo, written in 2005); *id.* at 26 n.27 (relying on *Hamdan*, decided in 2006).

- ***Youngstown.*** OPR still makes no mention of the scores of prior OLC opinions that do not cite *Youngstown* (Appendix 17) yet continues, as it did in its Draft Report, to base its misconduct findings on the Bybee Memo's failure to cite *Youngstown*. *See supra* Section IV.F.4. This is, frankly, embarrassing.

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[165] Indeed, there is evidence that OPR reached a preordained conclusion years ago, long before completing its initial draft report. Jack Goldsmith, for example, expressed serious concern that, when he was interviewed by OPR in the initial stages of its investigation, OPR had apparently already formed "premature adverse conclusions." Goldsmith Submission at 2. Goldsmith remarked on the "relatively poor understanding" the OPR attorneys appeared to have of such "complex, esoteric, and contested" issues as the "domestic and international law of interrogation and the constitutional law of presidential power." *Id.* Similarly, OPR's questions to Judge Bybee in his 2005 interview were consistently couched in terms of how "critics" viewed the Bybee Memos (*e.g.*, Bybee Tr. at 61, 70, 78, 88), suggesting that OPR had already adopted a negative outlook toward OLC. And, indeed, the views OPR expressed at the interview reappeared in OPR's eventual Draft and Final Reports.

[166] Ironically, the Bybee Memo itself missed *Price*, as it was handed down only one month before the Bybee Memo was submitted. OPR has no such excuse. So, perhaps the Bybee Memo's most significant omission is a case that would only have lent *support* to the Bybee Memo's conclusions. So OPR ignores it.

- ***OLC precedent.*** In fact, OPR studiously ignores *all* prior OLC and DOJ opinions from past administrations, even though those would surely be the best barometer of what is required and expected of OLC attorneys. *See* D.C. Rule 1.1(b) (requiring attorneys to use "skill and care *commensurate with* that generally afforded to clients by other *lawyers in similar matters*").[167] To anyone familiar with OLC's precedent and longstanding Department practices—dating to the Judiciary Act of 1789—OPR's demands of form and substance are preposterous. *See supra* Section III.B-C; Goldsmith Submission at 2-4 (raising several historical examples in national security context).

- ***Ethics precedent.*** Even after Judge Bybee surveyed numerous D.C. cases and pointed out OPR's egregious error in failing to include any such cases, OPR continues to ignore all D.C. ethics decisions, save one case perfunctorily added to a footnote in OPR's final report. *Compare* Bybee Draft Response at 7, 20, 23, 28, 30, 56, 59, 72, 84, *with* Report at 23 n.25. OPR cites no decisions finding a disciplinary violation from *any* jurisdiction. And OPR does not cite a single Rule 2.1 case from any jurisdiction. Its conclusions are, literally, unprecedented.

- ***OPR's mistaken identity.*** OPR does not seem to realize that it must not "put [itself] in the position of a sort of court of appeals from lawyers' judgments." *In re Stanton*, 470 A.2d at 287; *see supra* Section III; Bybee Draft Response at 7, 23, 59, 84. Refusing to acknowledge this governing precedent, OPR simply proclaims that it "reject[s]" this constraint. Report at 14 n.14. But, as *In re Stanton* teaches, OPR cannot—no matter how much it would like to—arrogate the power to substitute its own legal and policy preferences for the judgment of the OLC attorneys. Indeed, it is the height of arbitrariness for bureaucrats to simply "reject" those rules that they find inconvenient.

- ***OPR's "unprecedented" investigation.*** OPR has apparently conceded that, as former Attorney General Mukasey stated, its crusade is "unprecedented." Mukasey Letter at 2. Remarkably, even after being confronted with this its own record, OPR is *still* unable to point to any OPR investigations in even remotely analogous circumstances, second-guessing OLC legal opinions or engaging in complex statutory and constitutional interpretation. *See* Bybee Draft Reponses at exh.3 (listing past investigations); Appendix 13 (same).[168]

- ***Legal ethics experts.*** OPR utterly dismisses Professor Ronald Rotunda's brutally frank assessment of OPR's investigative process and end results. That OPR would ignore the considered view of a renowned expert in professional responsibility and author of a

[167] In fact, it also cites just one Bush-era precedent (other than the opinions at issue), and only then to disagree with it on the merits and dismiss its precedential value because it was "an OLC opinion that [Bybee] himself signed five months earlier." Report at Report at 202 n.156 (discussing the *Transfer Opinion*).

[168] Judge Bybee did not, as OPR mistakenly asserts, claim that "OPR has never previously reviewed legal advice," Report at 14 n.14, merely that OPR's "traditional role" appears to be "investigating wrongdoing of *current* Department employees in actual *litigation*," Bybee Draft Response at 84. In response, OPR simply states: "That claim is incorrect." And cites: nothing. Report at 14 n.14.

leading legal profession textbook speaks volumes.[169]

- ***Government Officials.*** OPR relies heavily on subsequent government officials that disagreed with the Bybee Memo, but downplays, to the point of disguising, the fact that those (and other) officials overwhelmingly believe Judge Bybee acted in good faith. OPR has treated with contempt the thoughtful statement made by no less than three Attorneys General (Michael Mukasey, Alberto Gonzales, and John Ashcroft) and four heads of OLC (Jack Goldsmith, Daniel Levin, Steven Bradbury, Timothy Flanigan) in support of the Bybee Memo authors. *See supra* Section II.A.

- ***CIA.*** OPR inexplicably asserts that the CIA "had no institutional experience or expertise" in the field of interrogation (Report at 31), when in fact that was demonstrably false. *See infra* IV.H.3. OPR claims that there was "no indication" that the CIA "had specific information about terrorist operations that were *underway*, or that posed immediate threats," Report at 212 n.168, ignoring the evidence showing that an al Qaeda plot had "*gone operational*." *Supra* Section II.C, IV.G.1. The idea that OPR is equipped to second-guess the CIA—much less the OLC *for relying on* the CIA—is absurd.

E. OPR's Analysis is Improperly Influenced by Policy Disagreements Regarding the CIA's Interrogation Program

Finally, OPR's Report strongly suggests that this investigation is about core policy disagreements masked as ethical concerns. From its reliance on ideological critics (*e.g.*, Report at 3), to the slanted assumptions that underlie its flawed analysis (*e.g.*, *id.* at 25), OPR tips its hand that a finding of ethical misconduct was never in doubt.

First, from its opening pages and throughout its Report, OPR relies upon and takes at face value the opinions of various ideological critics, philosophers, academics, and political activists. *See id.* at 2 ("Some commentators, law professors, and other members of the legal community were highly critical of the Bybee Memo."); *see also, e.g.*, *id.* at 2-3, 176 n.133, 192 n.146, 204, 207 n.160, 212 n.168 (citing David Luban, Harold Koh, Kathleen Clark, Scott Horton, and others). OPR's hastily-added disclaimer that "although [it] refer[s] to works of legal commentary in this report, [it] did not base [its] conclusions on any of those sources" (Report at 10), is both dubious and late. *See* Mukasey Letter at 8 ("The Draft Report ... appears to rely substantially on others' analyses ....").

For example, in its attempt to refute the ticking time bomb scenario, OPR relies heavily on its belief that "scholars have argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world." Report at 212 n.168 (citations omitted). Similarly, OPR also bases its entire criticism of the Classified Bybee Memo's treatment of waterboarding on the historical evidence in a single law review article first published in 2007. *Id.* at 234 n.192 (citing Wallach, *Drop by Drop*). And, as Judge Bybee noted in his initial draft response (at 23), nearly all of the legal citations (what few there are) in OPR's discussion of the proper ethical standard are derived from a single article in the Suffolk Law

[169] Of course, we have no way of knowing whether OPR sought expert assistance (unlikely) but there is no doubt that OPR would have disclosed any *unfavorable* opinions it obtained.

Review. *See* Bybee Draft Response at 23 (citing Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyer's Papers*, 31 Suffolk Univ. L. Rev. 1 (1997)).

In addition, OPR's report, like its predecessor, relies on the criticisms and analysis of Professor David Luban, yet provides no explanation for why his work is remotely authoritative or why it should be credited over the work of other legal academics, commentators, and ethics experts who have defended the memos. *See* Report at 176 n.133, 204, 207 n.160. Indeed, Professor Luban is not an attorney but rather a trained philosopher and vocal critic of the Bush Administration—hardly a neutral source. *See* Mukasey Letter at 8. To illustrate, Professor Luban has opined that "[o]ne way to understand the Bybee Memo is that it represents an odd moment when several stars and planets fell into an unusual alignment and the moonshine threw the Office of Legal Counsel into a peculiarly aggressive mood." David Luban, *Liberalism, Torture, and the Ticking Bomb, in The Torture Debate in America* 72 (Karen J. Greenberg ed. 2005).

Many of OPR's other sources are equally one-sided. *See* Report at 2-3 (citing Scott Horton, Harold Koh, Kathleen Clark, and others). Harold Koh, cited at 2-3 for his opinion that the memos are "blatantly wrong," perhaps best embodies (unintentionally so) the tenor and tone of OPR's apparent fait accompli when he elsewhere stated that he would "rather have" a decision-maker "who uses the wrong reasoning ... to get right results, and let other people figure out the right reasoning." Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, The New Republic, May 2, 1994. Like OPR, Koh knows where he wants to go and is not too particular about how he gets there. Similarly predisposed is Scott Horton (cited at 3), who has elsewhere opined that "the period from late 2001-January 19, 2009, this country was a dictatorship" and has also called Guantanamo an "American GULAG." *See* Scott Horton, *George W. Bush's Disposable Constitution*, Harper's Magazine, Mar. 3, 2009; Scott Horton, *Less Than Human*, Harper's Magazine, Jan. 14, 2008. Also, the "group of more than 100 lawyers, law school professors, and retired judges" who criticized the Bybee Memos (Report at 3) includes ideological signatories such as the ACLU, Alliance for Justice, CCR, Human Rights Watch, and People for the American Way. It is inconceivable that an investigative body that was truly neutral about the merits of the CIA interrogation program would put any weight whatsoever on the views of these political activists. And it is quite telling that OPR gives only perfunctory treatment to favorable commentary. Report at 3-4 & n.1.[170]

Second, OPR's analytical approach is based on the skewed premise that the Bybee Memos authorize torture and thus abrogate a norm of *jus cogens*—a "principle[] of international law so fundamental that no nation may ignore [it]." *See, e.g., id.* at 24 (starting from the premise that "that 'the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*'"); *id.* at 25 ("Department

[170] For example, OPR now for the first time mentions (in a footnote) Professor Paulsen, who has previously written supportive material that OPR failed to include in its draft report. *See* Draft Bybee Response at 59-60, 62; *see also* Paulsen Testimony; Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762 (2009); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807 (2006). OPR also does not confront the serious criticisms in Professor Ronald Rotunda's submission.

attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standard of professional conduct."). For example, OPR repeatedly states that the Bybee Memo's Commander-in-Chief analysis justifies "acts of outright torture." *Id.* at 196; *see also, e.g., id.* at 196, 201, 204, 227, 256-57. This, of course, both begs the question and badly misconstrues OLC's analysis of whether Congress can interfere with the President's battlefield decisions.

Furthermore, even on its own terms, OPR's invocation of *jus cogens* norms is slanted. As discussed above, it is undisputed that the CIA's interrogation program was directed at preventing further terrorist attacks, deaths which would unquestionably be considered murder. *See supra* Section II.A-C. Yet, even though OPR concedes that "murder" is itself a *jus cogens* norm (Report at 25 n.26), OPR nowhere accounts for such countervailing factors. Instead, OPR apparently demands that OLC ignore such genuine security concerns and draft an opinion steering the CIA far away from interrogation techniques that might approach the line of severe mental or physical pain. OPR thereby puts OLC in an untenable position, and as Philbin noted, *supra* II.C, the *jus cogens* argument would likely be reversed if OLC had withheld its opinion and a second wave of attacks had occurred.

In sum, OPR has consistently stacked the deck throughout its investigation and in its successive draft and final reports. OPR strategically waited years for the right atmosphere to press forward, denied critical evidence, and permitted egregious leaks. OPR has now settled on a one-sided product—ignoring all warning signs, consistently ignoring controlling facts and law (to Judge Bybee's detriment) and instead relying on a bevy of ideological critics and its own ideas of what should and should not be permitted in a perfect world. At every turn, it became clearer and clearer that OPR is not, and was never, interested in the truth, but only marshalling that which advances its apparently predetermined course of action. This is no way to conduct an investigation.

VII. THE LONG-TERM COSTS OF PUNISHING DIFFERENCES IN OPINION

If DOJ adopts OPR's report it will be terribly damaging to the Office of Legal Counsel—and, indeed, to the Department of Justice, generally—in at least three ways: (1) it will necessarily discourage lawyers from offering candid legal opinions any time they involve politically-charged subjects in order to avoid ethics investigations by future administrations; (2) it will hinder OLC's efficiency by requiring supervisors to second-guess the research and analysis of their line attorneys; and (3) it will invite partisan rancor and a flurry of OPR complaints against government attorneys of all stripes. Judge Bybee raised all of these issues in his draft response (at 80-85) and Jack Goldsmith, Timothy Flanigan, and former Attorney General Mukasey each likewise took pains in their submissions to stress the severe consequences that are sure to flow from OPR's investigation (Goldsmith Submission at 5; Flanigan Decl. ¶ 9; Mukasey Letter at 14). In keeping with its generally dismissive posture, OPR has inexplicably failed even to acknowledge—let alone address—the weighty concerns of the individuals best-positioned to speak to such matters.

First, as Goldsmith has argued, allowing OPR to second-guess the merits of OLC opinions with the benefit of hindsight runs the risk of producing an "enormous chilling effect" as "lawyers will become excessively cautious in giving advice and will substitute predictions of

political palatability for careful legal judgment." Goldsmith Submission at 5. Indeed, "DOJ lawyers will now understandably worry that their deliberations might be picked over and used against them in an ethics investigation." *Id.* Goldsmith remarked that "OPR's investigation to date has contributed a great deal to this problem." *Id.*[171] Conversely, the specter of post hoc ethics investigations may skew all future opinions in a particular direction, to match the views of OPR or the halls of academia. Either way, such a process of running legal advice through a "political filter," Goldsmith warned, "is not good for DOJ, the executive branch, or the nation." *Id.* In fact, Goldsmith explained, many people believe such cautious legal advice "led to government structures and attitudes that precluded detection of the 9/11 plot." *Id.*

But OPR chose not to quote, explain, or even reference any of Goldsmith's concerns, noting only that he "sent ... a memorandum discussing the OPR investigation" and "never believed that the analysis in the opinions 'implicated any professional misconduct.'" Report at 10, 197 (quoting Goldsmith Submission at 1). Turning a blind eye to Goldsmith's serious misgivings is especially incongruous with the extent to which OPR elsewhere relies throughout its Report on Goldsmith's criticisms of the OLC memos. *See, e.g., id.* at 112, 117-20, 121-22, 179, 203, 205.

And Goldsmith is not alone in his misgivings. Former OLC head Timothy Flanigan, for example, has stated (Flanigan Decl. ¶ 9):

> [B]ased on my experience as a former Assistant Attorney General of OLC, I believe that adverse action by OPR against Judge Bybee or Professor Yoo would have a long-term chilling effect on the willingness of OLC attorneys to render opinions on difficult and sensitive areas of law. Such an action will be seen as a strong signal to OLC attorneys to avoid any legal conclusion or analysis that, although a reasonable application of relevant authority, may be controversial. This, in turn, will tend to artificially limit the range of legal opinions available to the President ....

Similarly, Attorney General Mukasey has also concluded that government lawyers will treat OPR's investigation 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." Mukasey Letter at 14; *see also* Michael Mukasey & Michael Hayden, *The President Ties His Own Hands on Terror*, Wall St. J., Apr. 17, 2009 ("It is hard to see how [exposing OLC's legal advice to "public and partisan criticism"] will promote candor either from those who should be encouraged to ask for advice before they act, or from those who must give it."); Roundtable with Attorney General Mukasey (noting the potential for creating an "incentive not to give an honest answer but to give an answer that may be acceptable in the future" and an "incentive in people not to ask in the first place"). OPR also ignored Mukasey's comments on this score. *See* Report at 9 (noting only that Mukasey was "highly critical of the draft report's findings").

[171] It is hard not to notice that the Levin and Bradbury Memos each took a far more abstract (and correspondingly less useful) approach—declining, for example, "to try to define the precise meaning of 'specific intent' in section 2340." Levin Memo at 16-17; Bradbury Techniques Memo at 28.

Furthermore, Professor Paulsen, a former OLC attorney, recently testified before Congress that second-guessing executive branch attorneys' legal analysis would "unquestionably" chill "the candor, quality, and vigor of the legal advice" and, in fact, would discourage "talented attorneys" from undertaking government service in the first place. Paulsen Testimony at 8. Paulsen elaborates:

> 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.

Id. The end 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," which, "over the long run," will be "harmful to the national security of the United States." *Id.* (emphasis in original). Paulsen thus unequivocally concludes that "investigat[ing], and seek[ing] 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." *Id.*[172]

In short, rather than promote the "thorough, objective, and candid" legal advice that OPR desires, OPR's investigation will produce the exact opposite: anodyne opinions protecting against ethics charges lest future political winds shift direction.[173]

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[172] Also, a 20-year veteran prosecutor who served in the Department of Justice under Presidents of both parties recently noted that in light of OPR's investigation, "any prudent lawyer would have to hesitate before offering advice to the government." Letter to Attorney General Holder from Andrew McCarthy (May 1, 2009). He further lamented that "a lawyer who in good faith offers legal advice to government policy makers—like the government lawyers who offered good faith advice on interrogation policy—may be subject to investigation and prosecution for the content of that advice, in addition to empty but professionally damaging accusations of ethical misconduct." *Id.*; *cf.* Richard N. Haass, *The Interrogation Memos and the Law*, Wall St. J., May 1, 2009 ("[P]rosecution of Justice Department officials would have a chilling effect on future U.S. government officials. Few would be brave or foolhardy enough to put forward daring proposals that one day could be judged illegal.... With the threat of prosecution, serious memos on controversial matters will increasingly become the exception rather than the rule."). Similarly, in defending John Yoo in a civil suit premised on his OLC writings, the government recognized (in pleadings subsequently adhered to by the Obama Justice Department) that imposing liability based on legal opinions would "impact[] the ability of Executive Branch and military officials to seek and obtain unfettered legal analyses and advice for their use in decision-making, thereby aiding our enemies and making the United States more vulnerable to terrorist attack." Motion to Dismiss at 23, *Padilla v. Yoo*, No. 08-00035 (N.D. Cal. Apr. 1, 2008); *see also id.* at 16-17 ("fear of personal liability" may interfere with Executive Branch's ability to receive "unfettered legal analyses and advice from individual OLC attorneys"); Jake Tapper, *Obama Seeks Dismissal of Case Against John Yoo, Author of 'Torture Memo'*, ABC News (Mar. 7, 2009), *available at* http://blogs.abcnews.com/political.punch/2009/03/obama-seeks-dis.html.

[173] And when political winds do shift direction, these fears will discourage OLC from correcting or reversing its opinions lest doing so trigger ethics investigations. Such reversals may be relatively infrequent, but they do happen. *See, e.g.*, OLC, *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities* (May 23, 1994); Daniel Koffsky, Memorandum for Stephen D. Potts,

Second, the standards of supervisory review implicit in OPR's Report would cripple efficiency among managing government attorneys. Under OPR's interpretation of the ethics rules, OLC heads like Judge Bybee will be hesitant to rely on the legal research of even the most credentialed staff attorneys. If there are any "problems ... apparent in the analysis," he or she will be compelled—on pain of professional reprimand—to return to the drawing board (even if vital national security operations are disrupted at the last minute), double-check every citation, and independently research every area of law to make sure no relevant cases or counterarguments are missing. Report at 255, 257. This is untenable as a practical matter. OLC is confronted with complicated and controversial issues on a daily basis, and someone in Judge Bybee's position, with constant demands on his time, is not in a position to duplicate the work of his line attorneys, especially when American lives are at stake. In addition, OPR's insistence on the inclusion of countervailing views and exhaustive citation of applicable case law will cause future OLC memoranda to balloon in size. This would be in sharp contrast to OLC's current and past practice, which is to avoid the overwrought style of law review articles and instead give succinct opinions appropriate for their sophisticated clientele.

Third, if allowed to stand, OPR's novel application of ethical rules to OLC legal memoranda, far afield from its traditional role of investigating wrongdoing of *current* Department employees in actual *litigation*,[174] will simply invite partisan rancor and retribution, and perhaps bring OPR's own attorneys under scrutiny for the contents of its Report. *See, e.g.*, Paulsen Testimony at 6 ("[T]he 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." (emphasis in original)); Rotunda Letter at 4 ("My assessment of the draft report leads me to believe that the lawyers at OPR may themselves be guilty of disciplinary violations. ... [T]hey are likely guilty of either gross incompetence or intentional deception."). Should OPR publish its Report, finalized in the early stages of a new administration and change in party, it would set a terrible precedent for presidential transitions and invite political retribution to settle past scores.[175] As Senator Kyl explained, "Last time I checked, as a lawyer, when you give legal advice to your client, you're not responsible for whether or not that advice is going to be disagreed with in some future administration.... If we get to the point where a lawyer cannot give, even if later people believe it to be incorrect, legal advice, then no administration is going to be safe in the future." Turner, *supra*; *see also* Joseph Williams, *Some Call for Bush*

Director, Office of Government Ethics, *Re: Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party* (Aug. 27, 1993) ("[W]e conclude that the January 1993 Memorandum was in error and instead return to the interpretation of section 207(c) that this Office took before that memorandum was written."). Particularly when, as in this instance, the author of one of the replacement OLC memos described the legal issues involved as "extremely difficult" and "among the most difficult [he had] ever tried to analyze," DOJ Hearing, Part II, at 7 (statement of Daniel Levin), OPR should tread cautiously in investigating and taking upon itself the review of previously-issued OLC opinions.

[174] *See* Appendix 13.

[175] The negative ramifications of OPR's decision would not be limited to the executive branch. Under OPR's view of D.C.'s rules of professional responsibility, attorneys for legislators could equally be at risk. For instance, the staff attorneys who prepared the recently-released Senate Armed Services Report on the treatment of detainees in U.S. custody failed, like OPR's Draft Report, to cite *Pierre*, the Third Circuit en banc case consistent with the Bybee Memo's view of specific intent. So, at the very least, the authors of that Report were misleading by failing to so much as acknowledge this significant authority.

Administration Trials, Boston Globe, Feb. 3, 2009 ("'If every administration started to reexamine what every prior administration did, there would be no end to it.'" (quoting Senator Arlen Specter)).

In sum, OPR has taken what is more properly a legal and policy debate and transformed it into a matter of professional performance. This will have, and already is having, grave consequences.

VIII. CONCLUSION

In reaching its conclusion, OPR did not consider the consequences of its decision to the Department, its employees (past, present, and future) or the country. Those issues may not be the primary concern for OPR. But they are no less real. And precisely because the improper use of ethics investigations to second guess the legal judgments of DOJ attorneys will have such prejudicial consequences for all involved, it is imperative that any review of OPR's findings focus not just on what they considered but what they failed to consider as well. We have, in OPR's Report, the poor execution of a bad idea. Judge Bybee served his country at a time of great need. And he did so honorably and ethically. But there will be other times of need. And others will be called upon to give difficult and perhaps even unpopular advice. As former Attorney Gneral Mukasey and Deputy Attorney General Filip concluded, rejection of OPR's flawed analysis is the right result not just for Judge Bybee, but for the Department of Justice and the country.

The Report's finding that Judge Bybee engaged in ethical misconduct is wrong as a matter of law and logic, questionable in its objectivity, and misguided as a matter of policy. But in order to find that Judge Bybee complied with his ethical obligations, DOJ need not resolve the myriad factual and legal issues presented. In fact, they are a distraction. Application of the proper ethical standard to the undisputed facts is all that is required. Under a proper interpretation of the relevant D.C. Rules of Professional Conduct, as confirmed by Professor Hazard, Judge Bybee was only required to:

- Provide his "honest assessment" of the law (Hazard Letter ¶ 15);
- Exercise sufficient diligence to provide answers to unsettled issues of law that were not "clearly outside the bounds of plausible legal judgment" (*Id.* ¶ 3); and
- Provide the client with information adequate to permit "an informed decision," which does not require an exposition of counter-arguments (*Id.* ¶¶ 10, 11).

In addition, OPR's own standards require proof of scienter. They establish that:

- "[A]n attorney who makes a good faith attempt to ... comply" with his obligations "does not commit professional misconduct." OPR Analytical Framework ¶ B(4).

OPR either concedes or does not contest the following operative facts:

1. Judge Bybee honestly believed the conclusions reached in the Bybee Memos (Report at 256);

2. OPR did not determine that the conclusions were wrong, let alone "implausible" (Report at 160);

3. John Rizzo, who served as a key client representative, fully recognized that the issues were difficult, the answers were uncertain, and that the CIA did not expect or need additional disclosures about risks to make its decision (Rizzo Letter ¶¶ 1, 4);

4. Judge Bybee's deputies concurred in his decision to issue the memos and no one involved in the review process urged him not to do so (Sections II.B, D, *supra*); and

5. Judge Bybee acted in good faith (Report at 256).

Thus, resolution of this case does not actually require you to agree or disagree with OPR's analysis of the memos. OPR's apparent conclusion that Judge Bybee violated D.C. Rule 2.1 can be reversed on the basis of facts that OPR does not dispute. Alternatively, even if you were to assume that some aspect of Judge Bybee's performance of his responsibilities fell below the standard of care, OPR's conclusion that he acted with the requisite scienter can also be reversed on the basis of facts that OPR does not dispute. We urge you to adopt either of these simple, unassailable conclusions and find that Judge Bybee did not engage in professional misconduct.

Respectfully submitted,

/s/

Maureen E. Mahoney
Everett C. Johnson
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Jay S. Bybee

October 9, 2009

APPENDICES

Statements

1. Letter from Maureen Mahoney to John Rizzo (Oct. 5, 2009) ("Rizzo Letter")
2. Declaration of Timothy Flanigan (May 2, 2009) ("Flanigan Decl.")
3. Declaration of Daniel Levin (Apr. 29, 2009) ("Levin Decl.")
4. Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney (Oct. 7, 2009) ("Hazard Letter")
5. Letter from Ronald D. Rotunda to Miguel Estrada (Oct. 7, 2009) ("Rotunda Letter")
6. Michael Stokes Paulsen, *The Lawfulness of the Interrogation Memos* at 4 (May 13, 2009) (written testimony before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary) ("Paulsen Testimony")
7. Alan B. Morrison, *Alas, No Disciplinary Action*, National L. J., Aug. 17, 2009
8. Stuart Taylor, Jr., *Torture: Stop Harassing the Lawyers*, National Journal, Sept. 12, 2009
9. Saul Jay Singer, *Letter to the Editor: Don't Kill All the Lawyers*, Wash. Post, May 11, 2009

Ethics Rules

10. D.C. Rules of Professional Conduct 1.1, 1.4, and 2.1
11. OPR Analytical Framework (2005) ("OPR Analytical Framework")
12. OPR Policies and Procedures (2008) ("OPR Policies and Procedures")
13. Examples of OPR Investigations, from OPR Annual Reports (1994 – 2006)

Opinions

14. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act*, at 1 (Sept. 15, 1995) ("*Shiffrin 1995 Opinion*")
15. Letters for John. A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Daniel B. Levin, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 6, Aug. 26, Sept. 6, and Sept. 20, 2004)
16. Memorandum for Commander, Joint Task Force, from Diane E. Beaver, Staff Judge Advocate, *Re: Legal Brief on Proposed Counter-Resistance Strategies* (Oct. 11, 2002) ("Beaver Memo").

Summaries

17. Examples of OLC Opinions Not Citing *Youngstown*
18. Examples of Language Qualifying and Narrowing the Bybee Memo
19. Examples of Officials Concurring in the Legality of Waterboarding

APPENDIX 18

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

QUALIFICATIONS/CAUTIONS IN BYBEE MEMO

INTRODUCTION	• "We conclude by examining **possible**[1] defenses that would negate any claim that certain interrogation methods violate the statute." (1) • "In Part III, we analyze the jurisprudence of the Torture Victims Protection Act ... to predict the standards that courts **might follow** in determining what actions reach the threshold of torture in the criminal context." (2) • "[T]hese cases demonstrate that **most often** torture involves cruel and extreme physical pain." (2) • "In Part V, we discuss whether Section 2340A **may** be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A **may** be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war." (2) • "We conclude that, under the current circumstances, necessity or self-defense **may** justify interrogation methods that might violate Section 2340A." (2)
SPECIFIC INTENT	• "**As a theoretical matter**, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent." (4) • "While **as a theoretical matter** such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present." (4) • "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." (4) • "Although a defendant **theoretically** could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is **highly unlikely** that a jury would acquit in such a situation." (5) • "As we explained above, a jury **will be permitted to infer** that the defendant held the requisite specific intent." (5)

[1] All emphases added unless noted otherwise.

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

SEVERE PAIN	• "Although these statutes address a **substantially different subject** from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain." (6) • "These statutes **suggest that** 'severe pain,' as used in Section 2340, must rise to a similarly high level." (6) • **"One might argue** that because the statute uses 'or' rather than 'and' in the phrase 'pain or suffering' that 'severe physical suffering' is a concept distinct from 'severe physical pain.'" (6 n.3) • "It **could be argued** that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm." (8) • "To be sure, **one could argue** that this phrase applies only to 'other procedures,' not the application of mind-altering substances." (10) • "The phrase 'disrupt profoundly the sense of personality' is not used in mental health literature nor is it derived from elsewhere in U.S. law." (11) • "These examples, of course, are **in no way intended to be an exhaustive list**. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that 'disrupt[s] profoundly the senses or the personality.'" (11-12) • "The **legislative history** of Sections 2340-2340A **is scant.**" (12)
RATIFICATION HISTORY	• "To be sure, the text of the treaty requires that an individual act 'intentionally.' This language **might be read** to require only general intent for violations of the Torture Convention." (15 n.7) • "To be sure, it **might be thought significant** that the Bush administration's language differs from the Reagan administration understanding." (18) • **"While it is true that there are rhetorical differences** between the understandings, both administrations consistently emphasize the extraordinary or extreme acts required to constitute torture." (18) • "Ultimately, whether the Reagan standard would have been even higher is a **purely academic question** because the Bush understanding clearly established a very high standard." (19)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

CASELAW	• "There are **no reported cases** of prosecutions under Section 2340A." (22) • "Given the highly contextual nature of whether a set of acts constitutes torture, we have set forth in the **attached appendix** the circumstances in which courts have determined that the plaintiff has suffered torture, which include the cases from which these seven acts are drawn. **While we cannot say with certainty** that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law." (24) (last emphasis in original) • "Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts **might** address this issue." (24) • "[*Mehinovic*] demonstrates that courts **may be willing** to find that a wide range of physical pain can rise to the necessary level of 'severe pain or suffering.'" (26) • "[*Mehinovic*] illustrates that a single incident can constitute torture." (26) • "Although decisions by foreign or international bodies are **in no way binding** authority upon the United States, they provide **guidance** about how other nations will **likely** react to our interpretation of the CAT and Section 2340." (27) • "[The *Israel* decision] is still **best read** as indicating that the acts at issue did not constitute torture." (30)
COMMANDER-IN-CHIEF	• On its face, the Memo does not apply to all interrogations, but was limited to interrogations of "battlefield combatants" that were "ordered" *by the President* in the exercise of *his* constitutional duties: o "Section 2340A, as applied to interrogations of enemy combatants **ordered by the President** pursuant to his Commander-in-Chief power would be unconstitutional." (39) o "**The President** has the constitutional authority to **order** interrogations of enemy combatants" and "Congress can no more interfere with **the President's conduct** of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." (31, 39) o "Any effort by Congress to regulate the interrogation of **battlefield combatants** would violate the Constitution's sole vesting of the Commander-in-Chief authority **in the President**." (39) o "Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional **if** it impermissibly encroached on **the President's** constitutional power to conduct a military campaign." (31)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

COMMANDER-IN-CHIEF – Continued	• The Memo provides a way to avoid the constitutional problem: "Accordingly, **we would construe** Section 2340A to **avoid this constitutional difficulty**, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority." (35) • The Memo also presents a contrary view: "**It could be argued** that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants." (36)
DEFENSES	• "Even if an interrogation method, however, **might arguably** cross the line drawn in Section 2340, and application of the statute was not held to be unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses **might be available** that would **potentially** eliminate criminal liability. 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." (39) • "Although **there is no federal statute** that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense." (40) • "The necessity defense **may** prove especially relevant in the current circumstances." (40) • "It appears that under the current circumstances the necessity defense **could** be successfully maintained in response to an allegation of a Section 2340A violation." (40) • "Of course, the strength of the necessity defense **depends on the circumstances** that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances **could** support such a defense." (41) • "Legal authorities identify an important **exception** to the necessity defense." (41) • "**One could argue** that [the CAT's definition of torture] represented an attempt to [] indicate that the good of [] obtaining information—no matter what the circumstances—could not justify an act of torture." (41 n.23)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

DEFENSES – Continued	• "Under the current circumstances, we believe that a defendant accused of violating Section 2340A **could have, in certain circumstances,** grounds to properly claim the defense of another.... Whether such a defense will be upheld **depends on the specific context** within which the interrogation decision is made." (43) • "**To be sure**, this situation is different from the usual self-defense justification ...."(44) • "[A]s *Neagle* **suggests**, ... a government defendant, acting in his official capacity, **should** be able to argue...." (45) • "[W]e conclude that a government defendant **may** also argue that his conduct of an interrogation, **if properly authorized**, is justified on the basis of protecting the nation from attack." (45) • "[W]e believe that [a government defendant] **could** argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense **could supplement and bolster** the government defendant's individual right." (46)
CONCLUSION	• "Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers **may be** unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense **could** provide justifications that would eliminate any criminal liability." (46)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

QUALIFICATIONS/CAUTIONS IN CLASSIFIED BYBEE MEMO

- "Our advice is based on 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, **and this opinion is limited to these facts.** If these facts were to change, this advice would not necessarily apply." (1)
- "Moreover, you have also orally informed us that although some of these techniques may be used [] more than once, that **repetition will not be substantial** because the techniques generally lose their effectiveness after several repetitions." (2)
- "We also understand that a **medical expert** with SERE experience **will be present** throughout this phase and that the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah." (4)
- "As we explained in the Section 2340A Memorandum, 'pain and suffering' as used in Section 2340 **is best understood** as a single concept, not distinct concepts of 'pain' as distinguished from 'suffering.'" (11)
- "Even when all of these methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort. You have indicated 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." (11)
- "**It may be argued** that, focusing in part on the fact that the boxes will be without light, placement in these boxes would constitute a procedure designed to disrupt profoundly the senses." (13)
- "When these acts are considered as a course of conduct, **we are unsure** whether these acts may constitute a threat of severe physical pain or suffering." (15)
- "Without more information, **we are uncertain** whether the course of conduct would constitute a predicate act under Section 2340(2)." (16)
- "Good faith **may be established** by, among other things, the reliance on the advice of experts." (16)
- "As we indicated above, a good faith belief **can** negate this element." (17)
- "Because you have conducted the **due diligence** to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent requirement necessary to violate Section 2340A." (18)
- "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." (18)

APPENDIX 19

Executive Branch Lawyers Who Concurred In The Conclusion That Waterboarding As Proposed By The CIA Is Not Torture Under 18 U.S.C. § 2340A*

2002 - 2008

- John Ashcroft, Attorney General
- Alberto Gonzales, White House Counsel & Attorney General
- Larry Thompson, Deputy Attorney General
- James B. Comey, Deputy Attorney General
- Jay Bybee, Assistant Attorney General, Office of Legal Counsel
- Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel
- Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel
- Michael Chertoff, Assistant Attorney General, Criminal Division
- Timothy Flanigan, Deputy White House Counsel
- David Addington, Legal Counsel to the Vice President
- Scott W. Muller, General Counsel, Central Intelligence Agency
- John Bellinger, Legal Adviser to the National Security Council
- John Rizzo, Acting General Counsel, Central Intelligence Agency
- John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel
- Patrick Philbin, Deputy Assistant Attorney General, Office of Legal Counsel
- [redacted]
- Adam Ciongoli, Counselor to the Attorney General

*Supporting citations are provided at Response Section II.D. This is a partial list.