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May 4, 2009

Deputy Attorney General David Ogden
Associate Deputy Attorney General David Margolis
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Judge Bybee's Response to OPR's Draft Report

Dear Sirs:

As you know, the Department's Office of Professional Responsibility (OPR) is in the final stages of an investigation regarding the drafting of certain memoranda by the Office of Legal Counsel (OLC) relating to the interrogation of detainees in U.S. custody. One of the targets of OPR's investigation is my client, Judge Jay S. Bybee, a highly respected Ninth Circuit judge, who formerly served as the Assistant Attorney General for OLC. After more than four years of investigation, OPR produced a draft report and permitted us access to review it on March 4, 2009, allowing just sixty days to respond. Please find enclosed our cover letter and response to the draft report. We have also submitted a separate response addressing the classified material in the draft report, which we have asked OPR to prepare, in a redacted form if necessary, for public release. A copy of our classified response is available for your review in the Command Center.

We are providing copies of the response to you because OPR is "subject to the general supervision and direction of the Attorney General, or whenever appropriate, the Deputy Attorney General." 28 C.F.R. § 0.39. Further, we understand that Associate Deputy Attorney General David Margolis has also been responsible for reviewing OPR's findings for many years. Although we have asked OPR for assurances that we would be permitted to appeal any adverse finding, they have been decidedly noncommital. We urge you to review both the unclassified and classified responses in order to get a full understanding of the severe failings of the draft report. By way of example, OPR's own guidelines state that "[a]n attorney who makes a good faith attempt" to comply with the ethics rules "does not commit professional misconduct." U.S. Department of Justice, OPR, Analytical Framework ¶ B(4). Yet the draft report does not—indeed could not—make a finding of bad faith. As you will see from the length and tone of our response, we believe that the analysis and conclusions in OPR's draft report are indefensible, and if the Department proceeds with a finding that Judge Bybee engaged in ethical misconduct, the

reputation and effectiveness of the Department will be seriously injured. We accordingly urge your personal attention to this matter.

We are available to answer any questions you may have, and request the opportunity to meet with you if OPR decides to proceed with its preliminary recommendation. Thank you for your attention to this matter. We appreciate it.

Very truly yours,

Maureen Mahoney

Maureen E. Mahoney
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Enclosure

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LATHAM & WATKINS LLP

May 4, 2009

Mary Patrice Brown, Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 3266
Washington, D.C. 20530

Re: Response to OPR's Draft Report

Dear Ms. Brown:

Please find enclosed Judge Bybee's Unclassified Response to OPR's Draft Report. As of May 4, 2009, we have lodged a supplemental Classified Response with Christine Gunning, the Supervisor Security Specialist with the Litigation Securities Section of the Department's Security and Emergency Planning Staff, for delivery to your attention at the Justice Command Center.

We recognize that you have not had any involvement in the preparation of the Draft Report. And we hope it is not too late in the process to effect a significant change in course. We recognize the force of momentum and the congressional demands for immediate action, but we urge you to take the time necessary to delve deeply into the facts and law so that you can reach your own conclusions about this matter.

This level of personal review is necessary because the bias in OPR's draft report is apparent from its first words, focusing on ideological academics' and journalists' ill-informed criticisms of the interrogation memos. Consistent with this pervasive bias, the draft report concludes that Judge Bybee, a highly regarded Ninth Circuit Judge, engaged in ethical misconduct meriting referral to the bar association. OPR makes this tentative recommendation despite the fact that its own published standards require a finding of bad faith. These standards state that "[a]n attorney who makes a good faith attempt" to comply with the ethics rules "does not commit professional misconduct." U.S. Department of Justice, OPR, Analytical Framework ¶ B(4). Despite this clear requirement, the draft nowhere makes any such finding. Indeed, OPR ignores overwhelming evidence to the contrary. It nowhere acknowledges that every lawyer who participated in the process of drafting and reviewing the memos believes that they represented an honest and good faith attempt to provide an answer to an exceedingly difficult question. Instead, the draft gerrymanders a novel ethics standard designed to condemn advice it apparently finds abhorrent on policy grounds. Everything about the draft report—its content, timing, and refusal

to cite or disclose exculpatory materials—suggests that OPR has twisted the facts and law to a preordained conclusion, driven by the policy views of its drafters. With no apparent sense of irony, OPR's draft report does exactly what it wrongly criticizes the Office of Legal Counsel of doing.

We implore you to reconsider and request an opportunity to meet with you once you have had adequate time to review these serious issues. However, should you elect to distribute this report in any form (draft, final, or summary) to others outside or within the Department, we ask that you attach (1) this cover letter; (2) our responses; and (3) the January 19, 2009 letter to your predecessor, Mr. H. Marshall Jarrett, from former Attorney General Michael Mukasey and Deputy Attorney General Mark Filip. Moreover, in light of the release, on April 16, 2009, of the formerly classified OLC opinion entitled "Interrogation of al Qaeda Operative," dated August 1, 2002, we ask that you expedite review of the classified response by the necessary authorities so that it may be available for release, in a redacted form if necessary, as soon as possible.

We note that OPR is "subject to the general supervision and direction of the Attorney General, or whenever appropriate, the Deputy Attorney General." 28 C.F.R. § 0.39. We understand that Associate Deputy Attorney General David Margolis has also been responsible for appellate review of OPR's findings for many years. Despite our request, OPR previously declined to give us any assurances that we would be given an opportunity for appellate review in the event OPR ultimately adopts adverse findings. We have accordingly sent copies of this response to Associate Deputy Attorney General Margolis and to Deputy Attorney General David Ogden to ensure that they are aware of our concerns. In the event you decide to adopt the Draft Report or any negative findings regarding Judge Bybee, we ask that you follow the traditional DOJ practice and provide us with an opportunity for an appeal.

Finally, prior to the release of any final report, we request both the opportunity to meet in person with the final arbiter of any negative findings and "the opportunity to make written comments and objections to the proposed disclosure on grounds of privacy." *See* U.S. Department of Justice, Office of Professional Responsibility, Policies and Procedures, ¶ 12 (2008). Thank you for your consideration.

Very truly yours,

Maureen Mahoney

Maureen E. Mahoney
of LATHAM & WATKINS LLP

Enclosure

cc: Deputy Attorney General David Ogden
Associate Deputy Attorney General David Margolis

BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE,
OFFICE OF PROFESSIONAL RESPONSIBILITY

In the Matter of	)
	)
Certain Former Officials of the Department of Justice Office of Legal Counsel	)

RESPONSE TO DRAFT REPORT ON BEHALF OF JUDGE JAY S. BYBEE

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I. EXECUTIVE SUMMARY

Six months after the September 11, 2001 attacks, United States forces captured top al Qaeda leader Abu Zubaydah. Because Zubaydah had assumed the role of chief military planner for al Qaeda, he possessed critical imminent threat information. In particular, the Central Intelligence Agency ("CIA") determined that Zubaydah had information about a "second wave" of devastating attacks targeting, among other things, the tallest building in Los Angeles. After Zubaydah resisted traditional interrogation methods, the CIA developed an enhanced strategy for Zubaydah and asked the attorneys at the Department of Justice's Office of Legal Counsel (OLC) for its opinion on the legality of using ten specific interrogation techniques to interrogate him. The request required OLC to interpret the federal criminal anti-torture statute found at 18 U.S.C. §§ 2340-2340A—a statute that had never before been interpreted by any court. The statute defines torture as an act "specifically intended to inflict severe physical or mental pain."

In 2002, OLC attorneys, including the head of the office, Judge Jay S. Bybee, his deputy, John Yoo, and the "second deputy" Patrick Philbin, prepared two memoranda in tandem answering the CIA's inquiries. The first memo ("Standards Memo" or "Memo") was addressed to White House Counsel Alberto Gonzales and set forth OLC's interpretation of the statute, attempting to draw a concrete and understandable line between those extreme activities that constitute torture and other lesser forms of cruel, inhuman, and degrading conduct. The memo listed various activities that would constitute torture—including, among others, burning, electric shocks, hanging by the hands or feet, and severe beatings—and noted that the development of post-traumatic stress disorder and chronic depression could satisfy the prolonged harm requirement for mental pain and suffering under the statute. It also included a discussion of the Commander-in-Chief powers and analysis concerning the potential availability of the common law defenses of necessity and self defense.

The second memo ("Techniques Memo"), classified Top Secret, was addressed to John Rizzo, the Acting General Counsel of the CIA, and it provided an assessment of the legality of using the ten specific techniques in the interrogation of Zubaydah. It concluded that use of the techniques for that interrogation, subject to specific procedural safeguards and factual limitations, would not meet the statutory definition of torture either separately or in combination. OLC made clear that its advice was "limited to these facts" and that "[i]f these facts were to change, this advice would not necessarily apply." In 2003, John Yoo signed another memo ("2003 Memo") that incorporated much of the Standards Memo.

After the Standards Memo was leaked to the Washington Post in 2004, the Department of Justice's Office of Professional Responsibility (OPR) began an investigation to determine whether Judge Bybee and Professor Yoo committed ethical misconduct in expressing their legal opinions. After a four and a half year investigation, OPR completed its Draft Report, which contends that Judge Bybee and Professor Yoo violated D.C. Rules of Professional Conduct 1.1 and 2.1, by failing to provide competent and candid legal advice with respect to the 2002 and 2003 memos.

OPR's Draft Report is unprecedented. Under the rubric of "professional responsibility," OPR seeks to punish government attorneys for rendering a controversial opinion on an extraordinarily complex and novel legal matter. It does so without citing a *single case*

finding professional misconduct under even remotely comparable circumstances, and does not bother to cite a *single case* from the applicable jurisdiction. Furthermore, OPR ignores the applicable evidentiary standard, ignores its *own pre-existing standard* for judging professional misconduct that requires a finding of *recklessness* and *bad faith* (neither of which OPR actually finds), and fabricates a standard that does not conform to the case law and in support of which OPR cites nothing. Finally, OPR's own annual reports indicate that it has never found misconduct in similar circumstances and has never before assumed the authority to evaluate the soundness of legal opinions prepared by other executive branch officials. OPR's Draft Report blazes a new trail with precious little foundational support.

OLC took a reasonable approach. Under the governing standards, the conduct at issue was ethical even if the OLC memos were unreasonable so long as the authors issued them in good faith. But it bears emphasis that the OLC memos in fact were prepared in accordance with customary procedures and reached conclusions that were eminently reasonable. The memos reflected weeks of extensive research and analysis, were approved by two deputies, and provided answers in a form appropriate for the intended audience. Significantly, OLC's analysis was reviewed, adopted, and approved by numerous top government lawyers and officials. Various drafts of the memos were reviewed by the Attorney General, the White House Counsel, the Deputy White House Counsel, the CIA General Counsel, the NSC General Counsel, the Attorney General's legal advisor, the Head of DOJ's Criminal Division, and the Vice President's Legal Counsel. If the conclusions were untenable, surely some of these sophisticated lawyers would have counseled Judge Bybee not to issue these opinions in 2002. As OPR's own Draft Report implicitly concedes, they did not. Indeed, Timothy Flanigan, the Deputy White House Counsel in August of 2002 and a former head of OLC has confirmed that he believes the overall analysis in the memos is "generally sound." Declaration of Timothy Flanigan ¶ 3 (May 2, 2009) ("Flanigan Decl.").

Even though subsequent OLC attorneys in the Bush Administration criticized some of the reasoning, their interpretation of the statute was not materially different and they never withdrew the opinion authorizing use of the specific techniques. To the contrary, were later authorized under a slightly different interpretation of the statute. And Daniel Levin, the author of the revised standard, has confirmed by declaration that the interpretive issue was difficult and that his criticisms were not intended to suggest that Judge Bybee or John Yoo committed professional misconduct. Declaration of Daniel Levin ¶ 6 (Apr. 29, 2009) ("Levin Decl."). In essence, OPR's central complaint is simply that in some instances OLC should have said *more*—a criticism that could be leveled at *any* memo, opinion, or report—and in some instances OLC should have said *less*—a judgment call. However, none of the purported errors in the 2002 and 2003 memos identified by OPR—individually or collectively—rise to the level of an ethical violation. Indeed, Professor Ronald D. Rotunda, who has written treatises on legal ethics and professional responsibility, has harshly criticized OPR's Draft Report and has concluded that Judge Bybee and Professor Yoo did not commit professional misconduct.

It is undisputed that the law draws a distinction between torture and lesser forms of "cruel, inhuman, and degrading" treatment. OLC was asked to draw the amorphous line between these two categories of harsh treatment with regard to specific techniques. Doing so was an exercise in judgment, and no case law put the techniques at issue on the torture side of the line. As Daniel Levin testified, "at the time many of these issues were being addressed following the

events of 9/11 there was very little case law to guide the analysis." *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part II): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 7 (June 18, 2008). In fact, OPR has not cited a single case, from any jurisdiction, contradicting OLC's bottom-line conclusion that the techniques at issue were lawful. Quite the contrary, the available caselaw provides ample support for OLC's statutory interpretation. *See, e.g., Pierre v. Attorney General*, 528 F.3d 180, 189-91 (3d Cir. 2008) (en banc); *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92-93 (D.C. Cir. 2002).

Regarding waterboarding, the most controversial technique under consideration, controversy rages to this day. *Compare The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12 (Jan. 15, 2009) ("waterboarding is torture") (testimony of Eric Holder), *with From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part V): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 23 (July 17, 2008) ("I believe that a report of waterboarding would be serious, but I do not believe it would define torture.") (testimony of John Ashcroft). Yet it is unclear how Holder reached his conclusion *under the terms of the statute at issue* in light of CIA evidence that waterboarding does not cause severe physical pain or "prolonged mental harm" when administered in prescribed ways. Indeed, it is difficult to believe that our military has routinely tortured thousands of our own servicemen and women by subjecting them to this and other enhanced interrogation techniques in the course of training. But we surely do not question Attorney General Holder's good faith merely because his analysis may well be wrong and because his judgment conforms to the policy preferences of the current president. Even if, in the comfort of seven years' hindsight, one might reach a different legal or policy judgment, this is simply a realm in which the rules of professional responsibility have no role to play. As Senator Hatch has opined, "[r]egardless of whether you agree or disagree with its legal conclusion," the memo is a "scholarly," "thoughtful[,] and thorough analysis." *Nomination of Alberto Gonzales to be Attorney General*, 151 Cong. S705 (daily ed. Feb. 1, 2005) (statement of Sen. Hatch).

OLC did not license U.S. personnel to use unauthorized interrogation tactics. OLC's 2002 memos approving particular techniques were given with reference to a specific detainee and were limited to his specific interrogation. They were addressed to the White House Counsel and CIA General Counsel, shared with very few individuals, and were not even released publicly until 2004 and 2009 respectively—years after they were written. As such, they were plainly not meant for interrogators to use as a field manual. The Techniques Memo discussed the psychological profile of Abu Zubaydah, a detainee who "wrote al Qaeda's manual on resistance techniques" and was "well-versed in such techniques." Significantly, the Techniques Memo mandated limits on the intensity, duration, and repetition of the interrogation techniques. For instance, facial slaps were to "typically involve at most two slaps," stress positions and wall-standing were to involve "no aspect of violence," and cramped confinement was to last no more than two or eighteen hours depending on the size of the container. The CIA confirmed that "these acts will not be used with substantial repetition, so there is no possibility that severe physical pain could arise from such repetition." Thus, instances where interrogators went

beyond the parameters of the Techniques Memo, such as adopting an aggressive form of waterboarding, were unauthorized and fell outside the parameters of OLC's legal advice.

OPR's Draft Report cannot withstand even superficial scrutiny. OPR should not issue this Draft Report in light of its basic and pervasive errors as to the applicable misconduct standards, the underlying substantive legal analysis, the additional evidence submitted herein that OPR either withheld or failed to elicit, and the proper and permissible role of OLC.

First, even after four and a half years to research, write, edit, and Shepardize the Draft Report, it contains glaring errors of the sort that OPR itself identifies as being part of basic legal competence. OPR failed, *inter alia*, to cite relevant authorities (not even a *single* D.C. case), failed to conduct independent research to discover the proper professional standards, and failed to cite relevant Supreme Court and lower court case law. Indeed, most of OPR's research on ethical standards can be traced to a single Suffolk University Law Review article. Moreover, OPR failed to address or even acknowledge counter-arguments and failed to cite public testimony that directly refutes its factual findings. Fortunately for OPR, the "standard" it conjures is not the law; otherwise, OPR would be required to self-report.

Second, OPR's attempt to critique OLC's legal reasoning does not fare any better. For example:

- OPR claims that it is professionally incompetent or improper to interpret "severe pain" by drawing guidance from other statutes that use the phrase "severe pain." **Wrong.** *See, e.g., Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008) (interpreting a term by looking to the use of the same term in wholly unrelated statute); 2B Sutherland Statutory Construction § 53:3 (7th ed. 2008) (noting it is appropriate to interpret one statute "by analogy" to "unrelated statutes" and citing over 100 state and federal cases).

- OPR claims that it is professionally incompetent or improper to interpret "severe pain" by citing to the Reagan Administration's understanding that the term means "excruciating and agonizing" pain. **Wrong.** *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citing to President Reagan's understanding that "severe pain" means "excruciating and agonizing" pain).

- OPR claims that it is professionally incompetent or improper to interpret "specific intent" as requiring the actor to "expressly intend to achieve the forbidden act." **Wrong.** *See Pierre v. Attorney General*, 528 F.3d 180, 189-91 (3d Cir. 2008) (en banc) (holding that specific intent requires a showing that a capturer had the motive or purpose to cause pain or suffering).

- OPR claims that it is professionally incompetent or improper to cite an appellate decision without discussing the views of the *dissenting* judges and the holding of the *overruled* lower court opinion. **Wrong.** *See Association of Bituminous Contrs. v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) ("dissenting votes have

no precedential authority"); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 56 (7th Cir. 1980) (reversed case is "no longer the law").

- OPR claims that it is professionally incompetent or improper to omit reference to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) when determining whether a statute must give way to the President's Commander-in-Chief power. **Wrong.** *See*, *e.g.*, Memorandum from Walter Dellinger, Assistant Attorney General, OLC to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Sercurity Council, *Re: Placing of United States Armed Forces Under United Nations Operations or Tactical Control* (May 8, 1996) (concluding that legislation that would limit 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," but nowhere citing *Youngstown*).

- OPR claims that it is professionally incompetent or improper to omit reference to the Take Care clause in determining that a statute is unconstitutional. **Wrong.** *See, e.g.*, *id.* (finding provision unconstitutional under Commander-in-Chief clause without mentioning Take Care clause).

- OPR claims that it is professionally incompetent or improper to discuss whether a federal statute could give way to the common law defense of necessity without citing dicta from *United States v. Oakland Cannabis Buyers' Corp*., 532 U.S. 483 (2001). **Wrong.** *See United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001) (discussing the availability of the necessity defense but failing to cite *Oakland*).

- OPR claims that it is professionally incompetent or improper to cite too many "secondary sources," such as LaFave & Scott's leading treatise on criminal law. **Wrong.** OPR cites secondary sources countless times, and the Supreme Court has cited LaFave over 130 times.

Third, OPR either ignores or misrepresents critical evidence. For example, OPR assails the memos for including sections discussing the Commander-in-Chief power and possible common law defenses, while utterly ignoring *sworn* congressional testimony that the client specifically requested OLC to include such a discussion. Outrageously, OPR implies that subsequent OLC officials, such as Levin, Goldsmith, or Bradbury, would agree with OPR's misconduct findings. But OPR does not cite any statement from any of those officials indicating that they believed the memos constituted misconduct. OPR either presumes to speak on their behalf or, worse, is actually suppressing the true views of those officials.

Fourth, OPR distorts OLC's traditional role and engages in revisionist history to recast OLC as a wholly disinterested office akin to a court. While OLC is certainly charged with giving good faith legal advice, it "*must* take account of the administration's goals and assist their accomplishment within the law." Walter E. Dellinger, Dawn Johnsen et al., *Principles to Guide the Office of Legal Counsel* 5 (Dec. 21, 2004) (*2004 Principles to Guide OLC*) (emphasis added). Inferring misconduct solely by virtue of OLC's knowledge of its client's policy goals is not only nonsensical but directly contrary to the views of past OLC heads of both parties. *See*, *e.g.*, *id.*;

("Flanigan Decl.") ("OLC is an executive branch agency and, in crafting its legal advice, its *attorneys are almost always aware of the course of action the client wishes to take*. 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." (emphasis added)); Declaration of Daniel Levin ¶8 (Apr. 29, 2009) ("Levin Decl.") ("In my opinion, it is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons.").

OPR denied fundamental fairness in its proceedings. Furthermore, OPR has prolonged this investigation for over four and a half years and only now, after a new administration has taken charge, has decided to rush it to completion at the expense of the targets of its investigation. Such timing certainly suggests an exercise designed to support a pre-ordained outcome. Also, despite defense counsel's numerous, eminently reasonable, and narrowly tailored requests, OPR has failed to disclose whatever exculpatory evidence it has collected and has refused access to the relevant documents and transcripts of the witness interviews that it conducted. Such a refusal is particularly egregious in light of the recent allegations of prosecutorial misconduct (specifically, the withholding of exculpatory evidence) that embarrassed the Department and led the Attorney General to abandon the prosecution of former Senator Ted Stevens and to reaffirm that the Department "must always ensure that any case in which it is involved is handled fairly and consistent with its commitment to justice." *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.

OPR's Draft Report will irreparably damage the Executive Branch. Adoption of OPR's approach creates far too great a risk that government attorneys will duck hard questions or avoid public service all together. As former Attorney General Mukasey recently wrote of the potential for political retribution, "[i]t is hard to see how that will promote candor either from those who should be encouraged to ask for advice before they act, or from those who must give it." *The President Ties His Own Hands on Terror*, Wall St. J., Apr. 17, 2009, at A13 (with Michael Hayden). Similarly, Congressman Lamar Smith, the Ranking Member on the House Judiciary Committee, pointed out that if attorneys are punished on the basis of "legal advice provided while serving in the administration," then "no good lawyer in their right mind would join the administration…. [L]awyers must be free to provide legal advice and counsel without fear of retribution from politicians." Dan Levine, *G.O.P. Backing Bybee, or Backing Away?*, Legal Pad: a Cal Law blog, Apr. 20, 2009, http://legalpad.typepad.com/my_weblog/2009/04/defending-bybee-or-not-from-inside-the-beltway.html. Indeed, such ill effects are already being felt even during the course of OPR's investigation. A veteran prosecutor with two decades of experience under presidents of both parties recently declined to participate in a roundtable meeting on the President's Task Force on Detention Policy for fear that it would expose him to liability. In declining the Attorney General's request, he noted that "any prudent lawyer would have to hesitate before offering advice to the government" since "it is dismayingly clear that … the Justice Department takes the position 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." Letter from Andrew McCarthy to Attorney General Holder (May 1, 2009) (on file with author).

Bar complaints based on disagreements over legal judgment will surely abound from all sides of the ideological spectrum. OPR is neither equipped nor charged to engage in this "worst sort of second-guessing or Monday morning quarterbacking." *In re Stanton*, 470 A.2d 281, 287 (D.C. 1983). As Senator Kyl recently stated, "[t]hese are policy differences, not legal differences, and reasonable lawyers can disagree about the advice that was given." Trish Turner, *Senate Democrats Praise Obama for Possible Prosecution of Bush Officials*, Fox News, Apr. 21, 2009, http://www.foxnews.com/politics/2009/04/21/senate-democrats-praise-obama-possible-prosecution-bush-officials/. Furthermore, "[i]f 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." *Id.*

OPR does not even purport to find that the criticisms at issue here were the product of bad faith. Nor could they. Indeed, we have contacted the lawyers who worked closely with Judge Bybee on his opinion and they have uniformly expressed their view that he acted in good faith and that he believed the advice that he gave. They are instead part and parcel of a political dispute that was resolved at the polls last November. Enough harm has been done already. OPR should reverse course and conclude that the conduct at issue, even if subject to criticism in some respects, does not warrant a finding of ethical misconduct.

In sum, OPR's conclusions, unguided by any standard and unsupported by any law are and will be seen by the public as little more than political retaliation, and will commence a dangerous cascade of accusations and retaliations that will ruin the careers of courageous public servants and cause the Department as a whole to be viewed as a purely political body.[1]

II. BACKGROUND[2]

A. Judge Bybee's Legal Career

Judge Bybee's career is reflective of his formidable intellect, unimpeachable character, and devotion to legal education and public service. He attended Brigham Young University Law School and received his Juris Doctor degree in 1980. Upon graduating, he clerked for Judge Donald Russell on the Fourth Circuit and thereafter practiced law for several years with Sidley Austin in its Washington, D.C. office. In 1984, Judge Bybee began his career in public service at the Department of Justice ("DOJ"), spending two years in the Office of Legal Policy, and another three on the Appellate Staff at the Civil Division. In 1989, Judge Bybee was designated Associate Counsel to the President by President George H.W. Bush.

In 1991, Judge Bybee left government service to teach. He became the Harry S. Redmon Professor of Law at the Paul M. Herbert Law Center at Louisiana State University ("LSU")

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[1] We hereby adopt and incorporate all applicable arguments made by John Yoo in his responsive submission.

[2] The facts provided are drawn from OPR's draft report, Senator Rockefeller's U.S. Senate Select Committee on Intelligence Narrative (April 17, 2009), John C. Yoo's June 26, 2008 Testimony before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Judge Bybee's personal knowledge. There are additional relevant facts that we cannot include in this submission because OPR has refused to declassify its draft report despite the declassification of its contents. Accordingly, we have prepared a separate, stand-alone classified submission.

where he taught constitutional law, administrative law, and civil procedure for eight years. Judge Bybee was tenured at LSU and received an early promotion to full professor. In 1999, Judge Bybee became a founding faculty member of the William S. Boyd School of Law at the University of Nevada, Las Vegas, where he taught as a tenured professor from 1999 to 2001.

In 2001, Judge Bybee returned to the government to serve as the Assistant Attorney General (AAG) at the Office of Legal Counsel. On May 22, 2002, he was nominated to a seat on the United States Court of Appeals for the Ninth Circuit. On March 13, 2003, the Senate confirmed Judge Bybee to the Federal Bench, where he still serves with distinction.

Over the course of his legal career, Judge Bybee has exemplified excellence in the legal profession. He was voted Professor of the Year in 2000 and received the College Honored Alumni Award from the J. Reuben Clark Law School at Brigham Young University in 2003. Judge Bybee has also been published extensively. He has co-authored two books, *Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments* (2006) (with Thomas B. McAffee and A. Christopher Bryant) and *Religious Liberty Under the Free Exercise Clause* (U.S. Dep't of Justice, Office of Legal Policy 1986) (with Lowell V. Sturgill), and has written more than twenty law review articles, notes, comments, and book chapters.

B. Judge Bybee's Tenure at OLC

Judge Bybee was confirmed as the Assistant Attorney General ("AAG") of OLC in October 2001, and was sworn in the following month. During Judge Bybee's tenure as AAG, OLC issued numerous opinions ranging in topics from the proper role of legal guardians or proxies in naturalization proceedings (March 13, 2002) to the delegation authority of the chemical safety and hazard investigation board (April 19, 2002).

1. OLC was frequently consulted concerning the war effort.

The OPR Draft fails to address the context of the memos. In the wake of the worst attack on the homeland in our nation's history, OLC was also asked to address a myriad of difficult, unsettled questions of law under unprecedented circumstances. The Office did so in a series of opinions, the first of which was issued two weeks after September 11, 2001. *See*, *e.g.*, Memorandum Op. for Associate Deputy Attorney General, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 2001 WL 34726560 (Sept. 25, 2001); Memorandum Op. for Associate Deputy Attorney General, *Authority of the Deputy Attorney General Under Executive Order 12333* (Nov. 5, 2001); *Memorandum Op. for Counsel for the President*, *The Legality of the Use of Military Commissions to Try Terrorists*, (Nov. 6, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Justice, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, (Jan. 22, 2002); *The Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, (Feb. 7, 2002); Memorandum for William J. Haynes, II, General Counsel, Department of Defense, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002); *Centralizing Border Control Policy Under the Supervision of the Attorney General* (Mar. 20, 2002); Memorandum Op. for Chief Counsel Drug Enforcement Administration, The *Authority of Federal Judges and Magistrates to Issue "No-*

Knock" Warrants (June 12, 2002); Memorandum for Alberto Gonzales, Counsel to the President, *Re: The Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, (Oct. 23, 2002); Memorandum Op. for the Counsel to the President, *Effect of a Recent United Nations Security Council Resolution 1441 on the Authority of the President Under International Law to Use Military Force Against Iraq*,. This series of opinions was viewed by all involved as an on-going dialogue among extremely sophisticated attorneys, and each subsequent opinion assumed a basic familiarity with those that preceded it.

2. The initial request for legal advice related to a single captured terrorist.

On March 28, 2002, American and Pakistani intelligence agents captured Abu Zubaydah, a top al Qaeda leader. After the death of Mohammed Atef during the American invasion of Afghanistan in November 2001, Zubaydah had assumed the role of chief military planner for al Qaeda, ranking in importance only behind Osama bin Laden and Ayman Zawahiri. Shortly after Zubaydah's capture, in early April 2002, the CIA's Office of General Counsel began discussions with the Legal Advisor to the National Security Council ("NSC") and OLC concerning the CIA's proposed interrogation plan for Zubaydah. OPR gives no weight to and even fails to acknowledge that the Techniques Memo related only to Zubaydah, a known, hardened terrorist, trained in resistance whose mental and physical conditions were known to the CIA. The CIA asked OLC to evaluate the legality of ten specific interrogation methods proposed for use with Zubaydah.[3] In particular, OLC was requested to provide an opinion on the interpretation and application of the federal criminal anti-torture statute, 18 U.S.C. §§ 2340-2340A. To assist with OLC's review, the CIA provided descriptions of the proposed techniques and relayed information derived from consultation with interrogation experts, medical health experts, and outside psychologists. Techniques Memo at 6. In addition, the CIA also provided OLC with information and medical data derived from the Department of Defense's Survival, Evasion, Resistance and Escape ("SERE") School, a military training program that has prepared thousands of U.S. military personnel considered to be at high risk for capture by hostile forces. *Id.* at 4-6.

3. Despite the exigent circumstances, OLC followed its standard procedures and the memo was reviewed by numerous attorneys at the highest levels of government.

The matter was recorded in an OLC log sheet on April 11, 2002. Deputy AAG John Yoo and [redacted] an OLC line attorney, were designated as the assigned attorneys and John Rizzo—then the Acting General Counsel of the CIA—was listed as the client. Deputy AAG Patrick Philbin was the "Second Deputy" assigned to review the work product. The offices of the CIA General Counsel and of the NSC Legal Advisor set the classification level of the work and dictated which agencies and personnel were permitted to know about the subject of the memo. The NSC ordered OLC not to discuss work on the matter with either the State or Defense Departments and the Attorney General decided which divisions of the Justice Department were to review the memos.

[3] The proposed techniques included (1) the attention grasp, (2) walling, (3) the facial hold, (4) the facial slap (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.

During April 2002, Yoo and [redacted] worked together to write a first draft of a memo addressed to Rizzo, which was completed on April 30, 2002. Yoo and [redacted] continued to revise the memo, creating additional drafts dated May 17, 2002, June 26, 2002, and July 8, 2002. Although the subject matter of the memo was certainly extraordinary and demanded particularly tight controls because of its sensitivity, the process that governed the research and writing of the memo was handled in the same manner as every other classified OLC opinion. While it was not as broadly disseminated within the government as an unclassified memo would have been, on July 8, 2002, Yoo and [redacted] circulated a draft of the memo for review to the White House Counsel's Office, the CIA General Counsel's Office, and the NSC General Counsel's Office. Around this time, Philbin—the Second Deputy—began his review of the draft as well. His review consisted of editing for content and reading the memo to ensure that it made logical sense. Philbin did not double-check the memo's citations or conduct any original research.

On July 12, 2002, Yoo and [redacted] met with White House Counsel Alberto Gonzales, White House Deputy Counsel Timothy Flanigan, and Counsel to the Vice President David Addington to review the memo. On July 13, 2002, Yoo and [redacted] met to discuss the memos further with AAG of the Criminal Division Michael Chertoff, the Legal Advisor to the National Security Council, the chief of staff to the Director of the Federal Bureau of Investigation ("FBI"), White House Counsel Gonzales, and attorneys from the CIA's Office of General Counsel. OLC eventually sent a draft of the memo to DOJ's Criminal Division for comments, which were subsequently incorporated into the memo. In particular, Yoo and Philbin were interested in receiving feedback from AAG Chertoff about the specific intent section of the memo. In addition to these meetings, Yoo provided regular briefings about the memo to Attorney General John Ashcroft and his legal advisor, Adam Ciongoli. Judge Bybee also personally briefed the Attorney General in his private office, and attorneys from the Attorney General's Office made substantive edits to the memo and worked on it with OLC staff in the OLC's offices. OPR offers no explanation for how so many highly qualified attorneys missed such alleged incompetence.

4. OLC added the Commander-in-Chief and defenses analysis at the client's request.

On July 15, 2002, Yoo instructed [redacted] to include a footnote in the memo explaining that OLC would not address defenses or the effect of the Commander-in-Chief power on the statute because OLC had not been asked about those issues. Later that day, Yoo met again with Gonzales, Addington, and possibly Flanigan. Addington confirmed that around this time he requested that Yoo include in the memo's analysis a discussion of the Commander-in-Chief power and other possible defenses to a prosecution under the statute. *See From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 110th Cong. 38-42 (2008) (testimony of David Addington, Chief of Staff, Vice President of United States) ("2008 Addington Testimony"). On July 16, 2002, after receiving Addington's request, Yoo asked [redacted] to begin work on the additional sections. She completed a revised draft on July 23, 2002.[4] Plainly, OPR's criticism that the

[4] While the OLC attorneys were working on the memo, on or around July 16, 2002, the CIA contacted AAG Chertoff and requested a letter providing an advance declination of prosecution for the interrogation of

Commander-in-Chief and defenses sections were not necessary is just flat wrong if the client requested the analysis.

5. Judge Bybee responsibly fulfilled the oversight role of the AAG in the formulation of the memos

Judge Bybee's role in reviewing the memos began in earnest around mid-July, roughly two weeks before he signed them.[5] He provided [redacted] with substantive comments over several days. In accord with OLC procedure, Judge Bybee, as the AAG with managerial responsibility over an office of over twenty highly trained attorneys, reviewed the memos for logical consistency. Like Philbin, he did not double check the memo's citations or conduct original research. Judge Bybee played no role in initially drafting the memo and did not attend any of the meetings described above with the exception of a briefing he held with the Attorney General. Indeed, Rizzo has stated that he "couldn't pick [Bybee] out in a lineup."

On July 24, 2002, OLC orally advised the CIA that the Attorney General had concluded that nine of the ten proposed interrogation techniques—all but use of the waterboard—could lawfully be used in the interrogation of Abu Zubaydah. On July 26, 2002, OLC orally approved the use of the waterboard in his interrogation. That day, [redacted] received a request from the CIA for OLC to put its oral conclusions with regard to the techniques in writing. After receiving that request, Yoo and [redacted] began drafting a second memo limited to an evaluation of the legality of the ten techniques in the context of this interrogation. Accordingly, at the end of July 2002, OLC was working on two opinions. The first was written to White House Counsel Gonzales ("Standards Memo") and the second was written to Acting General Counsel Rizzo ("Techniques Memo").[6] On the same day, Yoo informed [redacted] that the White House had set an August 1, 2002 deadline for the memos. The OLC attorneys thus had a mere six days in which to draft the Techniques Memo and edit the new Commander-in-Chief and defenses section in the Standards

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Zubaydah. The Criminal Division turned down the request, explaining that it was not DOJ policy to issue pre-activity declination letters. OPR seems to suggest from the timing of DOJ's denial of the advance declination and the addition of the Commander-in-Chief and defense sections that Yoo somehow improperly sought to circumvent the declination by including these sections in the memo. Draft Report at 31. As explained *infra*, this conjecture is refuted by Addington's uncontradicted congressional testimony and rests on the mistaken premise that identification of possible defenses somehow immunized CIA agents from prosecution.

[5] During the summer of 2002, in addition to his work on national security issues, Judge Bybee, as head of OLC, was also heavily involved in a number of other difficult and pressing legal matters. Of particular note, Judge Bybee was engaged in the district court litigation in *Walker v. Cheney*, No. 02-340 (D.D.C.). The attorneys in that case were working closely with the Department's Civil Division and the Solicitor General's Office. The legal issues involved in the case were peculiarly within Judge Bybee's expertise because his scholarly research had been cited as authority by both sides. *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994).

[6] *See* 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) ("Standards Memo" or "Memo"); Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002) ("Techniques Memo"). Philbin confirmed that as soon as OLC received the CIA's request, the OLC attorneys focused their attention on the Techniques Memo, which all considered to be the "advice" for the client because it directly answered the CIA's immediate question regarding the legality of the potential techniques.

Memo. Judge Bybee had received the first draft of the Standards Memo a week before the White House announced the deadline, which significantly increased the time pressure on all of the OLC attorneys.

By August 1, 2002, OLC had finalized both memos. Judge Bybee met in his office with Yoo, [redacted], Philbin, and Ciongoli. Philbin advised Bybee to sign the memos, which he did around 10 p.m. By the time Judge Bybee signed the memos, they had been reviewed by the Attorney General of the United States, the White House Counsel, the Deputy White House Counsel, the CIA General Counsel, the NSC General Counsel, the Attorney General's Legal Advisor, the Head of DOJ's Criminal Division, and the Vice President's Legal Counsel.

6. The 2002 memos, read together, are narrow in scope and strictly limited to the facts set forth.

Together, the two memos constitute OLC's response to the question whether the use of the ten specific interrogation techniques identified by the CIA for use on Zubaydah would violate §§ 2340-2340A. The Standards Memo set forth OLC's interpretation of the statute, 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. The Standards Memo listed various activities that *would* constitute torture—including, among others, burning, electric shocks, hanging by the hands or feet, and severe beatings—and noted that development of post-traumatic stress disorder and chronic depression could satisfy the prolonged harm requirement for mental pain and suffering under the statute. It also summarized various defenses that might be available if an interrogator went beyond the memo's limiting parameters. The Techniques Memo (memorializing OLC's prior oral advice) examined the ten specific interrogation techniques and concluded that, subject to specific procedural safeguards and factual limitations, the techniques did not meet the statutory definition of torture. OLC made clear that its advice was "limited to these facts" and that "[i]f these facts were to change, this advice would not necessarily apply." Techniques Memo at 1. The Techniques Memo ended with another note of caution: "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." *Id.* at 18.

In the fall of 2002, after using these interrogation techniques on Zubaydah, the CIA briefed leadership of the House and Senate Select Committees on Intelligence. John D. Rockefeller IV, *OLC Opinions on the CIA Detention and Interrogation Program* 7 (current through Jan. 22, 2009) ("*Intelligence Committee Timeline*"); Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, Wash. Post, Dec. 9, 2007, at A1. In October 2002, Democratic Senator Bob Graham cautioned that "we are not living in times in which lawyers can say no to an operation just to play it safe. We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes." *Nomination of Scott W. Muller to Be General Counsel of the Central Intelligence Agency: Hearing Before S. Select Comm. on Intelligence*, 107th Cong. 2 (2002) (emphasis added).

7. OLC followed standard procedures in producing the 2003 Memo

In 2003, a Department of Defense (DOD) Working Group considered the policy, operational, and legal issues involved in the interrogation of detainees in the war on terrorism. The DOD General Counsel's Office requested an opinion from OLC on certain of the legal standards that would govern the interrogation of al Qaeda terrorists held at Guantanamo Bay. OLC's inquiry was limited to the potential application of federal criminal law and did not analyze any issues that might arise in Guantanamo under military law, as DOD reserved analysis of those issues for itself.

Just as in 2002, the process of researching, drafting, and editing within OLC and within the Justice Department was the same as with the 2002 opinion, although much of the analysis from the Standards Memo was directly applicable and was incorporated verbatim. Yoo and [redacted] drafted the initial memo, which was subsequently circulated to the Offices of the Deputy Attorney General, the Attorney General, and DOJ's Criminal Division. Yoo met with the Working Group, composed of both military officers and DOD civilians, to discuss the legal issues. The final opinion (the "2003 Memo"), signed by Yoo, was delivered to DOD on March 14, 2003.[7] Judge Bybee did not sign this memo and had very limited involvement in preparing it. Indeed, the day before Yoo signed the 2003 Memo, the Senate confirmed Judge Bybee to the Federal bench by a vote of 74-19. He left OLC two weeks later, on March 28, 2003.

C. OLC Continues to Authorize The Techniques At Issue After Bybee's Departure and A New Review of the Statutory Text

After Judge Bybee left the Department, he was replaced by Jack Goldsmith. In 2004, Goldsmith, with advice from Philbin and James Comey, made the decision to withdraw the Standards Memo and the 2003 Memo. However, OLC did not withdraw the Techniques Memo, which was "narrower in scope" than the Standards Memo. *Intelligence Committee Timeline* at 8. Goldsmith wrote two draft opinions to replace the withdrawn memos but resigned before finalizing the documents. In addition, DOD eventually cancelled its request for a memo to replace the 2003 Memo. After Goldsmith resigned, Daniel Levin became Acting AAG for OLC. In the fall of 2004, he instructed Steven Bradbury, who was the Principal Deputy Assistant Attorney General at the time, to redraft the replacement opinion for the Standards Memo. Nearly all of OLC's attorneys participated in some way in the redraft.

At the end of 2004, Levin issued a replacement memo. 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* (Dec. 30, 2004) ("Levin Standards Memo"). The 2004 opinion followed the Standards Memo's distinction between torture and cruel, inhuman, and degrading treatment, and determined that §§ 2340-2340A prohibited only the former. It agreed that "torture" should be used to describe only "extreme and outrageous" acts that were unusually cruel, although it disapproved of the Standards Memo's reference to the phrase "excruciating or agonizing" pain as overly restrictive (even though this was not the verbal formulation of the standard that the memo purported to adopt or apply). Nonetheless, like the

[7] Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003). OPR has no independent analysis of this memo, yet finds it is an ethical violation based solely on Judge Bybee's role in the other memos.

Standards Memo, the 2004 opinion listed a host of activities that constitute torture under OLC's interpretation of the statute, such as burning, electric shocks, hanging by the hands and feet, and severe beatings. Although the 2004 opinion did not address the ten techniques approved in the Techniques Memo, it included a footnote stating that "we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Levin Standards Memo at 2 n.8. In other words, interrogation policy did not change after the withdrawal of the Standards Memo; indeed, the Techniques Memo was not withdrawn until the current administration took office in 2009.

Levin left OLC in 2005 and was replaced as Acting AAG by Bradbury. During his tenure as Acting AAG, Bradbury authored two memos dated May 10, 2005 that superseded (but did not withdraw) the Techniques Memo. The first memo (the "Bradbury Techniques Memo") concluded that the individual authorized use of each of the specific techniques at issue on a particular individual subject to specific limitations and safeguards described in the opinion would not violate §§ 2340-2340A. *See 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*. The second memo concluded that "the authorized combined use of these specific techniques by adequately trained interrogators would not violate sections 2340-2340A." *See Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*. The list of techniques analyzed in both 2005 memos were nearly the same as those approved in the Techniques Memo, including waterboarding.[8]

None of the techniques approved in the Techniques Memo were rendered unlawful by the 2004 and 2005 memos. *See Intelligence Committee Timeline* at 8; Bradbury Techniques Memo at 6 n.9 ("[T]his memorandum confirms the conclusion of [the Techniques Memo] that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate sections 2340-2340A."). As John Ashcroft testified in July 2008, "[t]he [2004] memo did not … call into question any of the actual interrogation practices that OLC had previously approved as legal." *From the Department of Justice to Guantanamo Bay (Part V)* at 5 (statement of John Ashcroft). Indeed, Ashcroft stated that "[t]he conclusions of all the memos were, I believe, accurate conclusions" and that the "limits" of the "broad advice" contained in the Standards Memo "were never tested." *Id.* In fact, those techniques were only recently repudiated, well after OPR had finished its investigation and reached its draft conclusions.

On May 30, 2005, Bradbury issued a third opinion, in which OLC considered whether the specific techniques were consistent with United States obligations under Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading, Treatment or Punishment ("CAT"). *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation*

[8] The memo did not address the use of placing a harmless insect in a box with a detainee because the CIA indicated that the technique had not been used and was no longer under consideration. *See* Bradbury Techniques Memo 9 n.13.

of High Value al Qaeda Detainees ("Bradbury Article 16 Memo"). The memo concluded that use of the techniques, subject to the CIA's careful screening criteria, limitations, and medical safeguards, was consistent with United States obligations under Article 16. Thus, OLC concluded in 2005, without any reliance on the 2002 and 2003 memos, that the techniques at issue did not even rise to the level of cruel, inhuman, or degrading treatment.

On January 20, 2009, shortly after taking office, President Obama ordered a halt to the various enhanced interrogation techniques, stating that officers, employees, and other agents of the United States could rely only on the Army Field Manual in conducting interrogations. *See* Exec. Order No. 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893 (Jan. 22, 2009). At the same time, however, the President reserved an option for reinstating certain techniques by including an exception to the general rule in instances where "the Attorney General with appropriate consultation provides further guidance." *Id.* Tellingly, while the president revoked use of the previously approved interrogation methods, he did not conclude that they were "torture" under §§ 2340-2340A. In fact, to this day, no executive branch official has disclosed any *legal* analysis explaining why these techniques satisfy the restrictive terms of the statutory definition of torture. *Cf. The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Jan. 15, 2009) (testimony of Eric Holder).[9]

D. OPR's Investigation

The Standards 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 Wolfe, OPR opened an investigation into alleged ethical violations involving OLC's issuance of the Standards Memos. Over the course of the next four and a half years, OPR reviewed documents, and contacted and interviewed numerous present and former Bush administration officials.

OPR contacted Judge Bybee in May 2005 to inform him about the investigation and schedule an interview with him.[10] On December 9, 2005, Judge Bybee voluntarily spoke with OPR about his role in reviewing the Standards Memos. He also offered to provide a written

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[9] At his confirmation hearing, Attorney General Holder stated that "[i]f you look at the history of the use of that technique used by the Khmer Rouge, used in the Inquisition, used by the Japanese … waterboarding is torture." But Holder offered no analysis under the statute and also relied on the uninformed assumption that "waterboarding" as it has been used throughout "history" is the same technique as that described in the Techniques Memo. In fact, they are quite different. In the Japanese version used on American soldiers, for example, "water was forced through [the victim's] mouth and nostrils into his lungs and stomach until he lost consciousness"; "[p]ressure was then applied, sometimes by jumping upon his abdomen to force the water out"; the victim was then revived and the process repeated. Judgment: IMTFE 1058, ch. VIII, *Conventional War Crimes (Atrocities)*, *available at* http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html; *see also* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 486-88 & nn.78-84 (2007) (two gallons of water poured directly into nose and mouth until victim loses consciousness); *id.* at 491-94 (prisoner forced to swallow and inhale the "vile concoction" of water containing human refuse and kerosene, often rendering him unconscious).

[10] 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.

submission though OPR informed him that such a document was unnecessary. In fact, OPR informed Judge Bybee that he was one of the last interviews that OPR was conducting as part of its investigation and that everyone else in the office had cooperated completely. Judge Bybee was not given access to any classified information because he was told that it was unnecessary. OPR also provided assurances to us that he would be given a full opportunity to submit a response if OPR reached any preliminary conclusions of misconduct.

After hearing virtually nothing from OPR for over a three-year period, in December 2008, we received a phone call from Associate Deputy Attorney General David Margolis, informing us that OPR had completed its Draft Report and was scheduled to make its findings public on January 12, 2009, just days before the new administration would take office. We requested an opportunity to prepare a written submission, as OPR had promised, and received assurances from Margolis that DOJ would permit Judge Bybee a reasonable period of time to do so.

On January 19, 2009, after reviewing OPR's 191-page draft report, then-Attorney General Michael Mukasey and Deputy Attorney General Mark Filip wrote a detailed letter to OPR expressing grave concerns about its conclusions.[11] The letter first addressed several procedural issues. The Attorney General expressed serious unease about the time in which he was permitted to review the draft report and respond to it. The Attorney General received a draft on December 23, 2008 and was requested to submit comments by January 2, 2009—notwithstanding the holidays. Moreover, the letter pointed out that OPR all but eliminated the possibility for review of its proposed findings. The letter next addressed an array of substantive comments and concerns, including surprise and dismay that the draft report proceeds without any consideration of the context in which the OLC opinions were prepared, fails to present the facts in an even-handed manner, fails to provide any evidence that either Judge Bybee or Professor Yoo believed that they were giving inaccurate advice; criticizes the memos for not discussing cases that are themselves not appropriate for citation or are inapposite; ignores relevant analysis in the OLC memos; relies on commentary from others without providing sufficient information to allow the reader to evaluate these sources readily; and dismisses innocuous explanations in favor of inferring more convoluted and nefarious motives on the part of the memo authors absent any evidence.

On February 16, 2009, Senators Durbin and Whitehouse wrote a letter to OPR demanding to know the status of the investigation. By that time, an unknown source with knowledge of classified material had leaked the preliminary results of the OPR draft report to the press, before Judge Bybee or his counsel had reviewed it. Counsel promptly sent OPR a letter highlighting the prejudice resulting from the leak and explaining why the disclosure violated established OPR and DOJ policy. Margolis informed counsel that he had forwarded the letter to the Department's Inspector General.

On March 4, we were finally permitted to view the Draft Report. We were given 60 days—until May 4, 2009—to prepare this response. Despite our repeated requests, OPR has

[11] Mukasey and Filip felt that it was necessary to memorialize their concerns in a letter after OPR informed them that it did not intend to determine its final position on professional misconduct referrals before the end of the Bush Administration.

steadfastly and categorically refused to turn over to Judge Bybee any exculpatory evidence in its possession or even to confirm the absence of any such evidence. Moreover, OPR denied Judge Bybee access to any of the transcripts of the interviews OPR conducted, documents OLC had reviewed to formulate the advice, and classified documents sent by or to Judge Bybee.

On March 25, 2009, DOJ's Office of Legislative Affairs (OLA) responded to Senators Durbin and Whitehouse. On March 31, 2009, the Senators replied that the OLA's letter "confirms" that "the OPR investigation was completed before the end of the Bush Administration," that "Attorney General Mukasey, then Deputy Attorney General Mark Filip and OLC provided comments," that OPR "revised the draft report to the extent it deemed appropriate based on those comments," and that the targets of OPR's investigation are being given a chance to comment. In the wake of charges of prosecutorial misconduct in Senator Ted Stevens's case, on April 8, 2009, Attorney General Holder replaced OPR Counsel Marshall Jarrett with Acting Counsel Mary Pat Brown. *See* Justin Blum & James Rowley, *Holder Replaces Head of Justice Agency's Ethics Units*, Bloomberg News (Apr. 8, 2009).

On April 16, 2009, the Department released the Techniques Memo, as well as the 2005 memos written by AAG Bradbury. The release of the memos was accompanied by a statement from Attorney General Holder that the CIA interrogators who utilized the specific interrogation techniques would not be prosecuted. *See* Jennifer Lovin & Devlin Barrett, *Obama Won't Charge CIA Officers for Rough Tactics*, The Associated Press, Apr. 17, 2009.

On that same day, in a private memo to his staff, President Obama's national intelligence director Dennis Blair stated that the enhanced interrogation techniques produced "' [h]igh value information'" and that he "do[es] not fault those who made the decisions at that time" to use the techniques. Peter Baker, *Banned Techniques Yielded "High Value Information," Memo Says*, N.Y. Times, Apr. 21, 2009. Indeed, a still-classified memo states that "the intelligence acquired from these interrogations has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001." Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [Redacted] OCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* (Mar. 2, 2005) (cited in Bradbury Article 16 Memo at 8). Also, still classified is nearly a full page of text in the Bradbury Article 16 Memo (at 10-11 & n.6) describing the "important intelligence CIA interrogators have obtained." The memo does, however, explain that "ordinary interrogation techniques had little effect on either KSM or Zubaydah," whereas "[u]se of enhanced techniques … led to critical, actionable intelligence such as the discovery of the Guraba Cell, which was tasked with executive KSM's planned Second Wave attacks against Los Angeles." Bradbury Article 16 Memo at 29. According to the CIA, "the interrogation of KSM—once enhanced techniques were employed—led to the discovery of a KSM plot, the 'Second Wave,' 'to use East Asian operatives to crash a hijacked airliner into' a building in Los Angeles." *Id.* at 10. At a hearing on April 23, 2009, Attorney General Holder stated that he was "not familiar" with the memos detailing the valuable information the CIA obtained via the enhanced interrogation program. *See The Department of Justice: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. of Appropriations*, 111th Cong. (2009) (testimony of Eric Holder, Att'y Gen. of the United States).

III. OPR DID NOT AND CANNOT MAKE THE FINDINGS OF BAD FAITH AND RECKLESSNESS REQUIRED BY D.C. LAW AND OPR'S OWN STANDARDS

D.C. Rules of Professional Conduct 1.1 and 2.1 require an attorney to give competent and candid advice. OPR's conclusion that Judge Bybee violated those rules starts from its inexplicable failure to identify or apply the controlling legal standards. OPR misstates its burden of proof, fails to cite a single case from the relevant jurisdiction, fails to cite and apply OPR's own published framework for assessing the requisite heightened scienter (intent or recklessness), fails to compare the memos to any prior OLC opinions, fails to compare the actual conclusions to those reached by subsequent OLC lawyers, fails to take into account the roles that the OLC attorneys at issue here played in researching and writing the memos, and ignores an entire body of case law under Rule 2.1. Moreover, OPR fails to acknowledge that its own annual reports reveal that it has never found professional misconduct in a remotely comparable case.

Evaluated under the proper standards, Judge Bybee fully satisfied all rules of professional conduct—whether measured under the proper standards or the standard DOJ has suddenly developed for former officials of an opposing political party who authorized a now-unpopular policy—and his conduct came nowhere close to the line of impropriety. To prove a breach of professional duty under the D.C. Rules, OPR must present clear and convincing evidence of misconduct.[12] Under D.C. Rule of Professional Conduct 1.1, misconduct cannot arise from correct legal advice absent total inattention. Indeed, even an incorrect or negligent legal conclusion is insufficient. The rule—and OPR's own analytical framework—requires a finding of recklessness or more. Under D.C. Rule of Professional Conduct 2.1, professional misconduct requires a finding of bad faith. OPR does not contend that the memos' conclusions were incorrect (let alone so wrong as to be reckless), it did not find that Judge Bybee possessed the requisite scienter, and all of the evidence uniformly supports the conclusion that Judge Bybee acted with the utmost good faith. Indeed, we have contacted the lawyers who worked closely with Judge Bybee on his opinion and they have uniformly expressed their view that he acted in good faith and that he believed the advice that he gave. Accordingly, as there is no basis whatsoever for a finding of professional misconduct, OPR has no warrant to refer this matter to the District of Columbia bar.

A. OPR Standards

OPR is not supposed to make up new standards to govern particular cases. Instead, its investigations have been guided by published policies designed to ensure that ethics inquiries do not threaten to impede the deliberative process, impair the proper functioning of the Executive Branch, and expose public servants to the risk of partisan retribution. In this report, OPR nonetheless fails to cite or apply the published standards of professional conduct as outlined in its July 2005 Analytical Framework and its July 2008 Policies and Procedures. OPR's own standards require *at least reckless behavior* in order to find professional misconduct: "A Department attorney engages in professional misconduct when he or she *intentionally* violates or

[12] Although OPR's Analytical Framework, which it does not cite, seems to reference a preponderance of the evidence standard with regard to the requisite intent, OPR has made no findings whatsoever regarding Judge Bybee's scienter. Moreover, referring Judge Bybee to the D.C. Bar absent sufficient proof under the D.C. Bar's own standards makes little sense.

acts in *reckless* disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy." *See* U.S. Dep't of Justice, Office of Prof'l Responsibility, *Analytical Framework* ¶ B(1) (2005) (*OPR Analytical Framework*) (emphasis added). The Analytical Framework explains 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, or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard unambiguously prohibits." It proceeds to clarify 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 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."

Under OPR's Analytical Framework, "the elements essential to a conclusion that an attorney committed professional misconduct, then, are that the attorney (1) violated or disregarded an applicable obligation or standard (2) with the requisite scienter." They also establish that an attorney who "*makes a good faith attempt*" to satisfy his obligations "*does not commit professional misconduct*. *See* , *OPR Analytical Framework* ¶ B(4) ("An attorney who makes a good faith attempt to … comply with [the obligations and standards imposed on the attorney] in a given situation does not commit professional misconduct.") (emphasis added). In turn, OPR refers the matter to bar authorities when it makes a finding of "professional misconduct (either intentional misconduct or conduct in reckless disregard of an applicable standard or obligation)." U.S. Dep't of Justice, Office of Prof'l Responsibility, *Policies and Procedures* ¶ 11 (2008).

As detailed below, OPR fails to demonstrate that Judge Bybee violated or disregarded either D.C. Rule of Professional Conduct 1.1 or 2.1. But even more fundamentally, OPR never makes any finding about Judge Bybee's scienter, let alone the findings required for its conclusion of misconduct: recklessness and bad faith. All the report says on this critical issue is that "Bybee failed to discuss or acknowledge significant adverse authority and did not present a candid, realistic assessment of the likelihood that a court would sustain the positions advocated in the memorandum. He provided the client with the legal justification to engage in conduct OLC knew the client wanted and intended to engage in." Draft Report at 187. OPR has offered no explanation for arbitrarily and capriciously ignoring its own standards. *See, e.g., Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) ("[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.").

Indeed, whatever OPR's true motives, the most reasonable view of this unexplained departure from the standards is a damning one. As detailed below, it is obvious that OPR could not possibly find recklessness or bad faith—so it chose to ignore these settled standards in order to find misconduct.

B. The Appropriate Jurisdiction

Department of Justice regulations state that "attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engaged in that attorney's duties." 28 C.F.R § 77.3. Given that Judge Bybee, a member of the District of Columbia Bar, engaged in his duties in the District of Columbia, the District of Columbia Rules of Professional Conduct (the "D.C. Rules") are applicable to this matter. Accordingly, bar disciplinary proceedings from the District of Columbia courts set the standard to which Judge Bybee must be held.

C. The Burden of Proof

In D.C. and other jurisdictions, ethical violations must be proven by clear and convincing evidence. *See, e.g., In re Douglass*, 859 A.2d 1069, 1071 (D.C. 2004); *In re Discipline of Schaefer*, 25 P.3d 191, 204 (Nev. 2001); *Noojin v. Alabama State Bar*, 577 So. 2d 420, 423 (Ala. 1990). OPR utterly fails to set out—let alone meet—its burden of proof under either Rule 1.1 or Rule 2.1. Instead, it erroneously refers in passing, without citation, to a "preponderance of the evidence" standard. *See* Draft Report at 132 ("We then considered whether the evidence, taken as a whole, established by a *preponderance of the evidence* that the attorney violated his duty to provide a straightforward, candid, realistic assessment of the law, without regard to the outcome desired by the client." (emphasis added)). Given the stakes, the clear and convincing evidence standard is warranted to prevent cavalier accusations from ripening into punishment. And it is hardly appropriate to refer an attorney (or here an active judge) to the Bar when nearly five years of investigation has failed to uncover proof sufficient to meet the evidentiary standards that the D.C. Bar and reviewing court would be bound to apply.

D. Proper Application of D.C. Rule of Professional Conduct 1.1

D.C. Rule of Professional Conduct 1.1 obligates every lawyer to provide competent representation to a client. The rule provides that: "(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." D.C. Rule 1.1.

1. Errors in OPR's Draft Report

There are numerous errors in OPR's recitation of the Rule 1.1 standard. We focus on the three primary mistakes. First, the Draft Report cites absolutely no D.C. case law to set the standard under Rule 1.1. This is an egregious error given that OPR agrees the D.C. Rules of Professional Conduct apply. Second, the Draft Report makes no effort to compare the work on the memos at issue to those of past OLC attorneys (let alone past *heads* of OLC) upon whose experience Judge Bybee could properly draw, even though Rule 1.1 makes clear that the competence standard is a comparative one which requires reference to "other lawyers *in similar matters*." (emphasis added). Nor does OPR make the relevant comparisons to the conclusions reached by Judge Bybee's successors. Third, the case law that OPR does cite ranges from inapplicable to irrelevant. For reasons explained below, we think it is important to discuss each of the cases cited by OPR so that DOJ officials reviewing this report will understand that these cases have no bearing on the issues presented and their citation raises fundamental questions

about the quality and reliability of this draft report.

To start, OPR cites only *one case* involving bar disciplinary proceedings. *See* Draft Report at 127 (citing *In re Shepperson*, 674 A.2d 1273 (Vt. 1996)). In fact, that case supports Judge Bybee, not OPR's conclusions. In *Shepperson*, the Vermont Supreme Court concluded that an attorney violated the professional conduct rules because, over a seven-year period, he "repeatedly submitted legal briefs … that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantiated legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric." *Id.* at 1274. Even in the face of such egregious incompetence over such a lengthy period of time, the Vermont Supreme Court held "there is no indication that [his] conduct was *intentional* or based on *corrupt motives*." *Id.* at 1275 (declining to disbar the attorney).

In addition to *Shepperson*, OPR cites three Rule 11 sanctions cases. *See* Draft Report at 127-28. Federal Rule of Civil Procedure 11 provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support. Rule 11 sanctions do not establish the standard for incompetence under D.C. Rule of Professional Conduct 1.1. Indeed, one of the Rule 11 cases cited by OPR distinguishes between Rule 11 sanctions and violations of the Rules of Professional Conduct and *declines to apply* the professional rules. *See Cont'l Air Lines, Inc. v. Group Sys. Int'l Far East*, 109 F.R.D. 594, 598 (C.D. Cal. 1986) (stating that "[w]hile lack of candor may be a problem, violations of the rules of professional conduct are … a matter for the appropriate disciplinary authority" and "'Rule 11 is not a panacea intended to remedy all manner of attorney misconduct'" and therefore "I decline to apply the rule to enforce a duty of candor.") (citation omitted).

Even if the standard under D.C. Rule 1.1 could be informed by Rule 11 sanctions cases, the cases actually cited by OPR provide no support for their conclusions. *See* Draft Report at 128. In *Wallace Computers Services, Inc. v. David Noyes & Co.*, the court declined to impose Rule 11 sanctions, stating that "[t]he purpose of the Rule to Show Cause was not to punish the Defendants for misconduct, but rather to draw their attention to our requirement that authority not be cited for propositions that it does not support …. With that mission accomplished, our zest to sanction them has faded, and we discharge the Rule to Show Cause." No. 93 C 6005,1994 WL 75201, at *1 (N.D. Ill. Mar. 9, 1994). In *Borowski v. DePuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988), the Seventh Circuit imposed Rule 11 sanctions on an attorney who "pretend[ed]" that dispositive authority against plaintiff's contention did not exist. Specifically, the attorney at issue failed to cite the dispositive case on which the district court had relied in dismissing the case. The court determined that Rule 11 sanctions were warranted in a case with such an intentional and transparent attempt to deceive the court. No such affirmative deception is alleged—let alone found—by OPR here.

In further support of its Rule 1.1 standard, OPR cites a case in which a court considered but declined to impose sanctions under Federal Rule of Appellate Procedure 46(c). *See* Draft Report at 128 (citing *Jones v. Hamelman*, 869 F.2d 1023, 1032 (7th Cir. 1989) (considering sanctions in a case "replete with a lack of respect for procedural rules and ambiguous and imprecise argument," but ultimately declining to impose sanctions under Federal Rule of Appellate Procedure 46(c) on attorneys for both parties who failed to abide by the briefing

schedule set by the court)). Again, given that the court elected not to impose sanctions in this case it provides little insight to the applicable standard for D.C. Rule 1.1.

OPR then turns to one ineffective assistance of counsel case. *See* Draft Report at 128 (citing *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000)). Just as Rule 11 sanctions do not establish the standard for a violation of D.C. Rule 1.1, neither do ineffective assistance of counsel cases. And even though ineffective assistance of counsel cases may shed light on the standard for incompetence under D.C. Rule 1.1, *Russell* is inapt. There the attorney for a defendant indicted on drug possession charges failed to confirm the status of two of his client's three prior convictions. Despite his client's efforts to inform him that two of his prior felony convictions had been vacated, the attorney refused to verify those representations and introduced the two tainted convictions during his client's direct examination, thereby permitting the government to impeach the defendant who was the sole witness testifying on his own behalf. The court held that the deficiency was exacerbated by the ease with which the relevant information could have been obtained and because, in the context of the case, it was critical for the defendant to accurately portray his criminal record. *Id.* at 621. The failure to take a simple and routine procedural step performed regularly in most criminal cases which egregiously prejudiced the client does not compare to the task of interpreting and applying a complex, unprecedented, and novel statute.

Finally, OPR cites five additional cases with absolutely no relevance to the allegations leveled against Judge Bybee. *See* Draft Report 127-29. *Randall v. Salvation Army*, 686 P.2d 241 (Nev. 1984), is a Nevada Supreme Court decision in which the court considered a challenge to a holographic will. *Randall* provides no insight into the applicable standard that should be used in determining whether an attorney's work product rises to the level of an ethics violation. In *Cimino v. Yale University*, 638 F. Supp. 952 (D. Conn. 1986), the district court considered the claims of the parents of a spectator who was injured at the conclusion of a college football game. *Cimino* mentions Model Rule of Professional Conduct 3.3(a)(3), dealing with candor to the tribunal, a rule that is not at issue in the current investigation. *Id.* at 959 n.7. The case does not mention either Rule 1.1 or Rule 2.1, let alone purport to establish a standard under either of those rules. Likewise, *Northwestern National Insurance Co. v. Guthrie*, No. 90 C 04050, 1990 WL 205945, at *2 (N.D. Ill. Dec. 3,1990), mentions Illinois Rules of Professional Conduct 3.3(a)(3) but does not cite or discuss either Rule 1.1 or 2.1. In *Taylor v. Belger Cartage Service*, *Inc.*, 102 F.R.D. 172, 180-81 (W.D. Mo. 1984), the court ordered the plaintiff's attorney to pay the defendant's attorneys' fees after finding that the plaintiff's attorney filed a frivolous lawsuit. Again, the decision does not mention the rules of professional conduct or establish a standard for determining a violation of the rules. In *Smith v. Town of Eaton*, 910 F.2d 1469, 1471 (7th Cir. 1990), the Seventh Circuit admonished an attorney and fined him $300 for submitting a brief that contained one "shallow, incoherent 'argument' that spans twenty-five pages." Although the court determined that the attorney's performance was substandard in this case, it did not refer the attorney to the appropriate attorney disciplinary board—even though the brief at issue was "rambling" and "almost totally incomprehensible." *Id.* at 1470. Moreover, one of the panel judges wrote separately stating that he would forego any punishment whatsoever. *Id.* at 1473-74.

When all is said and done, not a single one of the cases OPR cites concerns the standards that govern violations of D.C. Rule of Professional Conduct 1.1. And OPR's curious selection of inapposite authorities raises concerns over its general diligence that warrants further scrutiny.

Perhaps it is pure coincidence, but OPR cites a law review article that mentions—with only three exceptions—every case cited in OPR's attempted recitation of the ethics standards. *See* Draft Report at 126 n.107 (citing Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyer's Papers*, 31 Suffolk Univ. L. Rev. 1 (1997)). It seems apparent that outside of reading a single law review article, OPR did little to no independent research to establish the applicable legal standards for determining a violation of the D.C. Rules of Professional Conduct. Such a deficiency is particularly galling given that OPR had four and a half years in which to discover the appropriate legal standard for judging incompetence—and inexplicably failed to do so.

2. Application of the Proper Standard under Rule 1.1 in D.C.

Judged under the proper standard, Judge Bybee did not violate Rule 1.1. To prove a violation of Rule 1.1, one must "not only show that the attorney failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in the representation." *In re Evans*, 902 A.2d 56, 69 (D.C. 2006); *see also In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002). The D.C. courts have held that the determination of what constitutes a serious deficiency is fact specific, but five principles firmly rooted in the case law guide the analysis here. First, correct legal advice without total inattention to the case can never be the basis of professional misconduct because it does not prejudice the client. Second, even if OLC's conclusions are erroneous, an incorrect legal conclusion does not itself violate the rules of professional conduct or warrant disciplinary action. Third, only reckless or intentional errors warrant disciplinary action. Fourth, courts do not permit findings of recklessness when attorneys have incorrectly answered unsettled questions of law. Fifth, the ineffective assistance of counsel and legal malpractice cases—which adopt a lower standard of care than the disciplinary cases—still require far greater "deficiencies" than those identified by OPR (even if OPR's recitation of supposed failings were accurate, which they are not).

First, correct legal advice, absent "*total* inattention," can never form the basis of professional misconduct because it does not prejudice the client in any way. *See*, *e.g., In re Stanton*, 470 A.2d 281, 287 (D.C. 1983) (emphasis added). For example, the D.C. high court has explained:

> A lawyer is duty-bound to exercise his best professional judgment on behalf of his client. Only where total inattention … is made out on the part of the lawyer in reaching the decision should we ever be in the business of assessing the correctness of the lawyer's advice to his client. Otherwise, we put ourselves in the position of a sort of court of appeals from lawyers' judgments. Any attempt on our part to do so would be the *worst sort of second-guessing or Monday morning quarterbacking*.

Id. (emphasis added). OPR, however, makes no effort whatsoever to show that OLC's ultimate conclusions are wrong as a matter of law. OPR declines to reach its own independent conclusions as to the merits, instead taking at face value the second-hand opinions of various ideological critics, philosophers, academics, and political activists. *See*, *e.g.*, Draft Report at 2 ("Commentators, law professors and other members of the legal community were highly critical of the [Standards Memo]."); *id.* at 1-3; *id.* at 161 ("Commentators and legal scholars have also

criticized"); 162 n.144 (citing Professor David Luban).[13] Moreover, while identifying and emphasizing the memos' critics in the body of the Draft Report, OPR relegates the memos' defenders to a footnote. *See id.* at 3 n.2.

In fact, the bottom-line advice regarding the legality of the ten techniques was not repudiated in the succeeding memos and the government's conduct did not materially change. *See* Bradbury Techniques Memo (approving nearly the same set of techniques). *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).

Second, even if OLC's conclusions are erroneous, errors do not establish disciplinary violations. 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." *Barrett v. Va. State Bar ex. rel. Second Dist. Comm.*, 634 S.E.2d 341, 347 (Va. 2006) (emphasis added). 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. Thus, even if the memos' conclusions were deemed incorrect, just as error was found in *Barrett*, Judge Bybee did not commit professional misconduct, particularly where, unlike with the mechanical rules at issue in *Barrett*, the merits of the legal question require such difficult line-drawing on which reasonable attorneys have disagreed.

Nor is it of any moment that two of memos in question were later withdrawn. Reasonable and competent attorneys often disagree with one another. OPR makes much of the fact that the Standards Memo and the 2003 Memo were superseded. *See*, *e.g.*, Draft Report at 132 (noting that it "focused … particularly [on] the sections that were set aside or modified"). But OLC has previously seen fit to modify—and even withdraw—its prior advice on numerous occasions. *See*, *e.g.*, *War Powers Resolution: Detailing of Military Personnel to the CIA* (Oct. 26, 1983) (Theodore Olson) (reversing a prior conclusion from February 1980 that the War

[13] Throughout its criticism of the memos, the Draft Report relies on commentary from other sources but fails to provide sufficient information to allow the reader to evaluate these sources. For example, the Draft Report relies heavily on the 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. Indeed, Professor Luban is not an attorney but rather a trained philosopher and vocal critic of the Bush Administration—hardly a neutral source. For example, Professor Luban has opined that "[o]ne way to understand the [2002 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).

Powers Resolution did not apply to CIA military personnel); Memorandum Op. for the General Counsel from John Harrison, *Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices* (Aug. 17, 1992) (withdrawing an earlier opinion of May 1990 concluding that the Special Counsel for Immigration Related Unfair Employment Practices could investigate and prosecute charges of employment discrimination by federal agencies because the earlier opinion "did not adequately address the sovereign immunity implications of a 'plain meaning' interpretation of the phrase and, in particular, on the settled rules of statutory construction that have evolved to preserve sovereign immunity"); Memorandum for Steven D. Potts, Director, Office of Government Ethics from Daniel L. Koffsky, *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) (withdrawing OLC's advice of just eight months earlier during the same administration and stating "we 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."); Memorandum for Cary H. Copeland, Director and Chief Counsel Executive Office for Asset Forfeiture from Walter Dellinger, *Liability of the United States for State and Local Taxes on Seized and Forfeited Property* (Oct. 18, 1993) (partially reversing an opinion regarding the state and local tax consequences for federally seized property); Memorandum for Thomas S. Williams, Jr., Solicitor, Dep't of Labor from Walter Dellinger, *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities* (May 23, 1994) (concluding that its 1988 Opinion "erred in concluding that the plain language of the Davis-Bacon Act bars its application to any lease contract, whether or not the lease contract also calls for construction of a public work or public building"); Memorandum for the Deputy General Counsel, Dep't of Treasury from Daniel Koffsky, *Applicability of 18 U.S.C. § 219 to Representative Members of Federal Advisory Committees* (Sept. 15, 1999) (concluding that representative members of federal advisory committees are not "public officials" subject to 18 U.S.C. § 219, "reject[ing] the contrary view expressed in the 1991 OLC memorandum"). In general, replacing opinions is a salutary process; indeed, OPR should not discourage the Office and the Department from engaging in such a corrective practice.

OPR also calls it "unprecedented" for an opinion to be withdrawn by the same administration, Draft Report at 132, but that is also not the case. Indeed, the current OLC was recently unceremoniously overruled by the Attorney General on a hotly-debated constitutional issue—mere weeks after OLC issued its opinion. *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 (quoting Holder's spokesman as saying that "[t]he attorney general weighed the advice of different people inside the department, as well as the opinions of legal scholars, and made his own determination that the D.C. voting rights bill is constitutional."). Even if, as it seems, the Attorney General took an "unprecedented" step in disregarding OLC's considered judgment without any explanation or analysis, it is hardly dispositive of whether the initial views were incorrect at the time written—let alone professionally incompetent.[14]

[14] Conversely, it carries little weight—from a legal ethics perspective—that a host of ideologically diverse individuals apparently disagree with Attorney General Holder (who presumably is subject to the same ethical standards as OLC when he steps into OLC's role), including individuals across the ideological and political divide, the neutral Congressional Research Service, and the Chief Justice of the United States. *See, e.g.*, *Banner v. United*

Moreover, we note that jurists and courts withdraw, replace, amend, and overrule decisions all the time. Supreme Court Justices, for example, have recanted earlier views. *See*, *e.g*., *Apprendi v. New Jersey*, 530 U.S. 466, 520-21 (Thomas, J. concurring) (describing how he had "succumbed" to one of the "chief errors" of *Almendarez-Torres* and explaining his current disagreement with his previous position); *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackman, J., dissenting) (stating that, although he had spent 20 years endeavoring to develop rules that would ensure fairness in the death penalty, he would "no longer … tinker with the machinery of death"); *see also* John C. Jeffries, Jr., *Justice Lewis F. Powell and the Jurisprudence of Centrism* (1994) (describing as "well-known" Justice Powell's repudiation of his crucial vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

Of particular note, in 1940, then-Attorney General Jackson, issued an opinion interpreting a selective service statute, the analysis of which consisted of a *single conclusory sentence*. 39 Op. Atty Gen. 504, 505 (Oct. 11, 1940) (concluding statute required even temporary aliens to register). No contrary views were presented. Not a single court case was cited. Later, as a Justice, he thoroughly repudiated his opinion, acknowledging that the opinion's "lack of precision with generalities … gave off overtones of assurance that the Act applied to nearly every alien from a neutral country caught in the United States under almost any circumstances which required him to stay overnight." *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J., concurring). Moreover, he acknowledged that the opinion might have "misled" some readers and that "[t]he opinion did not at all consider aspects of our diplomatic history, which . . . ought to be considered in applying any conscription Act to aliens"—even though he was aware of that history at the time of his Attorney General opinion. *Id.* at 177. He also pointed out other jurists have similarly reversed themselves. *See id.* (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.*, *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").

Panels replace—even reverse—their own opinions, sometimes within mere days or weeks. *Chamber of Commerce v. Brown*, 463 F.3d 1076 (9th Cir. 2006), *rev'd and remanded by* 128 S. Ct. 2408 (2008), *vacated and remanded by* 543 F.3d 1117 (9th Cir. 2008). If a lower court issued the Standards Memo as an opinion, even if the Supreme Court later unanimously reversed, it would still be preposterous to suggest that the lower court judges were professionally incompetent. When lower courts get it wrong, even grievously wrong, the only sanction is reversal.[15] *See, e.g*., *Miller-El v. Dretke*, 545 U.S. 231, 265f (2005) (describing the Fifth

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States, 428 F.3d 303, 309 (D.C. Cir. 2005) (Roberts, Circuit Justice, with Edwards and Rogers, JJ.) ("[T]he Constitution denies District residents voting representation in Congress."); *Ending Taxation Without Representation, The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 16 (2007) (testimony of John P. Elwood, Deputy Assistant Atty. Gen., Office of Legal Counsel); *id*. at 23 (testimony of Jonathan Turley, Professor, George Washington Univ.); *id*. at 27 (testimony of Kenneth R. Thomas, Congressional Research Service); *but see*, *e.g.*, *id.* at 8 (testimony of Delegate Eleanor Holmes Norton and others, taking a contrary view).

[15] Indeed, some are promoted. *See* Michael A. Fletcher, *Obama Praises David Hamilton of Indiana as a Moderate*, Wash. Post., Mar. 18, 2009, at A04 (discussing reversals of District Court Judge David Hamilton, nominated to the Seventh Circuit Nominee); Gerard E. Lynch, United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees, at 52 (District Court Judge Lynch, nominated to the Second Circuit, discussing

Circuit's decision below as absolutely "unsupportable"); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (vacating judgment of the court of appeals because it "improperly concluded" that a state court decision was "contrary to or an unreasonable application of clearly established federal law as determined by [the Supreme Court]"); *Richlin Security Serv. Co v. Chertoff*, 128 S. Ct. 2007, 2018-19 (2008) (awarding attorneys fees under EAJA because government's position was not substantially justified). If it is professionally incompetent for an attorney to give views that are later withdrawn—even harshly criticized by a successor—how much higher must the standard be for federal judges?

If OPR's view were the law, there would scarcely be any judges left on the bench. Fortunately, the legal profession is subject to no such incoherence. In fact, the legal tradition in this country permits disagreement—sometimes vigorous disagreement—without the threat of sanctions or disbarment.[16] Judge Bybee once wrote in a dissent: "My view of the majority's analysis of the evidence can perhaps best be described by paraphrasing author Mary McCarthy: I disagree with nearly every word the majority has written, including 'and' and 'the.'" *Smith v. Baldwin*, 466 F.3d 805, 829 (9th Cir. 2006) (Bybee, J., dissenting), *reh'g granted*, 482 F.3d 1156 (9th Cir. 2007). On rehearing en banc, Judge Bybee's view was vindicated in a 13-2 vote. 510 F.3d 1127 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 37 (2008). It would be ridiculous, however, to assert that a federal judge should be reported to the judicial commission or to the local bar simply because he or she came up on the short end of a contested issue. Indeed, the Supreme Court, frequently decides cases by a five-to-four margin. Jurists applying the same facts and same law, reach opposite conclusions. But we do not presume the four in dissent are incompetent; rather, we recognize that the questions they consider are difficult and subject to debate.

Third, OPR fails to acknowledge it, but disciplinary violations require proof of recklessness or intentional misconduct. Negligence does not suffice. "Negligence is a want of due care in performing a specific task. It is a standard for determining fault as to a specific action or incident. Legal competence is a general condition of performance over and above specific actions or incidents. The stresses, complexities, and uncertainties of law practice are such that from time to time the most competent attorneys will commit individual acts of professional negligence." ALI-ABA Comm. On Continuing Professional Education, *A Model Peer Review System* (1980). According to a treatise on legal ethics, "[t]o date, the enforcement of competence standards has been generally limited to relatively exotic, blatant, or repeated cases of lawyer bungling. Lawyers who make some showing of effort, and who do nothing other than perform badly, rarely appear in the appellate reports in discipline cases. The lawyers who are disciplined for incompetence have usually aggravated their situation. For example, several cases involve lawyers who, after their incompetent work, concocted elaborate schemes or lies to deceive a client whose case was mishandled." Charles W. Wolfram, *Modern Legal Ethics* § 5.1, at 190 (1986).

Most jurisdictions, including D.C., confirm that negligence is not a disciplinary violation.

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his reversals: "[the Second Circuit] was right; I jumped the gun on summary judgment" and "[o]n reflection, I now think the Court of Appeals had the better of the argument").

[16] The Supreme Court once wryly noted, "courts have been known to make rulings thought by counsel to be erroneous." *Crane v. Hahlo*, 258 U.S. 142, 148 (1922).

See, e.g., In re Chisholm, 679 A.2d 495, 504 (D.C. 1996) (sanctioning an attorney under Rule 1.1 because the record "demonstrate[d] 'persistent' and 'intentional' dishonesty" on the lawyer's part); *In re Willis*, 505 A.2d 50, 50 (D.C. 1985) (finding an attorney incompetent after the lawyer filed pleadings that were "'sloppy, incoherent, incomplete and misleading on their face … [and] prepared … without any meaningful investigation'") (citation omitted); *Barrett v. Va. State Bar ex. rel. Second Dist. Comm.*, 634 S.E.2d 341, 347 (Va. 2006) ("Disciplining an attorney on the basis of incompetent representation under Rule 1.1, as reflected in the commentary, involves attorney performance that extends significantly beyond mere attorney error."); *Attorney Grievance Comm'n of Md. v. Kemp*, 641 A.2d 510, 514 (Md. 1994) (distinguishing between incompetence subject to discipline and mere carelessness or negligence); *In re Complaint as to Conduct of Gygi*, 541 P.2d 1392, 1396 (Or. 1975) (stating "we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action"); *see also* 1 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 1.9, at 45 (5th ed. 2000) (stating "[o]rdinary negligence should not warrant discipline").[17]

Fourth, erroneous answers to unsettled questions of law are not reckless if there is any legitimate basis for disagreement. OPR never cites the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 127 S. Ct. 2201 (2007), yet it squarely forecloses any finding of recklessness on the facts at issue here. In *Safeco*, consumers brought a class action lawsuit against two insurers—GEICO and Safeco—in connection with automobile and homeowners policies, alleging reckless violations of the Fair Credit Reporting Act (FCRA). The FCRA requires insurers to notify a consumer if the insurer has based an adverse action on information in the consumer's credit report. Safeco did not send notices to new applicants for insurance based on an erroneous interpretation of the statute. *Id.* at 2207. The Court unanimously held that Safeco's interpretation was wrong but found no recklessness as a matter of law despite allegations of bad faith. *Id.* at 2216. 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 2216 & n.20.[18]

OPR undoubtedly recognizes that no court had interpreted the torture statute OLC was

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[17] *See also*, *e.g.*, *The Fla. Bar v. Rose*, 823 So. 2d 727, 730 (Fla. 2002) ("[A]n attorney's conduct must be … egregious to be considered incompetent …."); *In re Member of State Bar of Ariz. (Curtis)*, 908 P.2d 472, 478 (Ariz. 1995) (stating that disciplinary proceedings should not be used as a substitute for a malpractice action, adding that although not every negligent act violates an ethical rule, neglect in investigating the facts and law necessary to present a client's claim crosses the fine line between simple neglect and conduct warranting discipline); *Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Nadler*, 467 N.W.2d 250, 253 (Iowa 1991) ("While an honest mistake made by a lawyer in handling a client's legal matter does not ordinarily afford a basis for disciplinary action, . . . incompetence is grounds for disciplinary action."); *The Fla. Bar v. Neale*, 384 So. 2d 1264, 1265 (Fla. 1980) (stating the "rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action … as a substitute for what is essentially a malpractice action").

[18] 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." Br. of 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 SG 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.*

asked to construe so the answer to the question presented could not constitute recklessness under the holding in *Safeco*. Yet OPR does not acknowledge—or failed to find—this plainly-relevant case. *Cf*. Draft Report at 127 ("Legal research must be sufficiently thorough to identify all current, relevant primary authority."). It is also illustrative that the panel of the lower court in *Safeco* replaced or amended the panel's opinion on the issue of scienter no fewer than three times—before finally being reversed by the Supreme Court. *See Reynolds v. Hartford Fin. Servs. Group, Inc*., 416 F.3d 1097 (9th Cir. 2005), *replaced*, 426 F.3d 1020 (9th Cir. 2005), *amended*, 2005 U.S. App. LEXIS 22950 (9th Cir. Oct. 24, 2005), *replaced*, 435 F.3d 1081 (9th Cir. Jan. 25, 2006), *rev'd sub nom. Safeco Ins. v. Geico*, 551 U.S. 47 (2007). Despite the multiple course corrections and ultimate rebuff by the Supreme Court, no one would suggest that the opinions' author or the other panel members were somehow reckless enough to have committed professional misconduct. Yet that is precisely where OPR's logic leads.

Fifth, precedents assessing attorney performance in other contexts further confirm that OPR has set the bar for findings of incompetence far, far too low. In the seminal ineffective assistance of counsel case, *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the Supreme Court warned that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Courts have confirmed that these forgiving standards—which are rooted in professional norms of competence—apply even when the client's life is at stake. *See, e.g., Cornwell v. Bradshaw*, 559 F.3d 398, 415 (6th Cir. 2009) (finding an attorney not deficient in a death penalty case even though the attorney failed to conduct a thorough mitigation investigation); *Smith v. Workman*, 550 F.3d 1258, 1270 (10th Cir. 2008) (finding counsel's failure, during mitigation stage of death penalty murder trial, to present evidence of defendant's abuse as a child, history of drug abuse, evidence of brain damage, and diagnoses of schizophrenia not deficient); *DeLozier v. Sirmons*, 531 F.3d 1306, 1323 (10th Cir. 2008) (finding an attorney not deficient for failing to use peremptory strikes on two prospective jurors who equivocated on the question of whether they could give fair consideration to life in prison without parole if they found defendant guilty of first degree murder), *cert. denied*, 2009 U.S. LEXIS 3169 (Apr. 27, 2009); *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (stating that "a mere inaccurate prediction, standing alone" by counsel as to the likely outcome of pleading or of a failure to plead does not constitute ineffective assistance of counsel). These cases demonstrate that even when an individual's life is on the line, courts do not hastily second-guess an attorney's efforts.

The prohibition on second-guessing is at its height where, as here, counsel is required to resolve unsettled questions of law. Under the judgmental immunity doctrine, a lawyer is immune from malpractice liability "[i]f 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, 667-68 (D.C. 2009); *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*, 254 Neb. 697, 578 N.W.2d 446, 451-52 (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); 7 Am. Jur. 2d *Attorneys at Law* § 208 ("[A]n attorney is not liable for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers."). Here, the questions posed were among the most difficult a lawyer can be asked to resolve and in a context where the security of the nation was at risk. Section 2340A uses words rarely in the federal code, no prosecutions had ever been brought under the statute at the time the memos were authored, and the statute had never been interpreted by any court.

In light of these governing principles, it is hardly surprising that OPR was unable to cite a single Rule 1.1 case in support of its finding of misconduct. No ethics opinions that we have reviewed have found a violation of Rule 1.1 in even remotely analogous circumstances. (Nor are we aware of any analogous finding of misconduct in any other jurisdiction.) 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).

As addressed more fully below, the vast majority of OPR's criticisms regarding the substance of the memos relate to researching, Shepardizing, and checking citations—in short, the work of the line attorneys at OLC. Even if there were errors in some of that work (and they were actually quite limited in scope) Judge Bybee, who was overseeing an office of over twenty attorneys simultaneously responding to multiple requests for advice, is not reckless by failing to conduct independent research or read the cases cited. The AAG of OLC must be able to delegate these types of tasks or the office would cease to function.[19] Judge Bybee certainly had responsibility to prevent the issuance of an opinion that he thought was wrong or obviously unsupported, but he did not have responsibility to identify most of the (supposed) errors in OPR's bill of particulars.

Indeed, OPR's finding of misconduct on the basis of errors of this character is irreconcilable with its conclusions that Patrick Philbin did not engage in misconduct. As the Second Deputy in charge of reviewing and editing the Standards Memos, Philbin informed OPR that he did not conduct independent research, cite check the memos, or Shepardize the cases. Yet OPR specifically "concluded that Patrick Philbin did not commit professional misconduct in

[19] Indeed, John Ashcroft has made a similar point at the cabinet level. *See From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part V): Hearing of the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (July 17, 2008) (statement of John Ashcroft) ("I did what every Attorney General and Cabinet official must: I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staff the Department.").

this matter because he did not participate in the drafting and did not sign the memoranda." Draft Report at 188. Under OPR's logic, although the AAG is responsible for re-performing all of the line attorney's leg work before signing an opinion, the Deputy AAG is not. Such a conclusion is nonsensical and divorced from any sense of how an efficient government office runs.[20]

E. Proper Application of D.C. Rule of Professional Conduct 2.1

D.C. Rule of Professional Conduct 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[21] We have found no decisions whatsoever in D.C. finding an attorney violated Rule 2.1. It is nevertheless apparent from the language of the comments and interpretive authorities in other jurisdictions that OPR's unprecedented finding is based on a misinterpretation of the rule and its decision to ignore the most salient facts.

1. OPR's recitation of the standard.

OPR fails to acknowledge that D.C. courts have never found a violation of Rule 2.1. It merely asserts that "the reported decisions and professional literature provided *little guidance for application of the standard* in this context." Draft Report at 131; *see also id.*, at 126 ("We reviewed specific examples … [and] consulted textbooks and treatises …," but failing to cite even a single example). OPR accordingly deems it appropriate to make up its own standard without including a single citation to any source, primary or secondary. *Cf*. Draft Report at 127 ("Conclusions of law should be supported by relevant authority."). That standard apparently proceeds from the premise that no finding of bad faith is required when various "failures of scholarship" are coupled with "evidence that the client desired a particular result or outcome" and "the attorney was aware of the desired result." Draft Report at 131-32. The law says no such thing. OPR obviously invented its own standard to achieve its desired outcome because it knew that it could not make a finding of bad faith even on its mistaken view of the facts.

2. Rule 2.1 requires proof of bad faith—a finding which OPR did not and could not make

There are two relevant provisions of Rule 2.1. The first is the duty to exercise professional judgment and the second is the duty to render candid advice. OPR appears to rest its findings of misconduct principally on the duty of candor. *See, e.g.*, Draft Report at 132 (violation of duty to provide a "candid and realistic assessment of the law"). But it elsewhere references the duty of independence (*e.g.* Draft Report at 180) so we discuss both.

First, under Rule 2.1, an attorney has an affirmative duty to exercise independent

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[20] Of course, also under OPR's logic, Mary Pat Brown—the head of OPR—is now professionally responsible for conducting independent research and cite checking each case cited in every OPR report—including this one—notwithstanding the competence of her senior counsel, [redacted] and any other line attorneys responsible for research and writing.

[21] The second sentence of Rule 2.1 states that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." OPR concedes that the rule's language regarding extra-legal considerations is permissive and that a lawyer's decision not to provide such advice is not subject to disciplinary review. Draft Report at 130.

judgment. But that does not mean there is ground for suspicion when attorneys agree with their clients, or are simply aware of the outcome desired by the client. That is especially true in the context of political appointments in the Executive Branch where every White House seeks to appoint officials with similar ideological views. (Should Dawn Johnsen's independence be called into question because she shares the views of the President and Attorney General on important issues?) 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 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. A lawyer who attempts to engage in a sexual relationship with a client … is clearly not interested in that kind of relationship …."). OPR cites nothing inappropriate about OLC's relationship with its Executive Branch. This duty is irrelevant to the analysis.

In order to prove a violation of the duty of candor, Rule 2.1 requires proof of deceitfulness or bad faith in rendering the advice. OPR simply fails to address the most relevant language in the comments to D.C. Rule of Professional Conduct 2.1 which explains that the rule requires "straightforward advice expressing the lawyer's *honest assessment*." Rule 2.1, cmt [1] (emphasis added). The touchstone is "honest[y]" which is a synonym for good faith. As the rule makes clear, telling a client what they want to hear is never a violation of the rule if it is based on the lawyer's "honest" views. Criticism of a lawyer's "scholarship" is not a substitute for proof that Judge Bybee did not believe the advice he gave.

The case law confirms 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 and candid 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's pre-existing Analytical Framework also establishes that an attorney who acts in good faith does not commit professional misconduct. *See OPR Analytical Framework* ¶ B(4) ¶ B(4) ("An attorney who makes a *good faith* attempt to … comply with the[] [obligations and standards imposed on the attorney] in a given situation does not commit professional misconduct.") (emphasis added).

Yet OPR has absolutely no evidence—let alone clear and convincing proof—that Judge

Bybee gave advice in bad faith and did not honestly believe the advice he rendered. Judge Bybee would sharpen and clarify the analysis in certain respects but has unequivocally confirmed that the advice reflected his best judgment at the time, and to this day disagrees with most of OPR's criticisms of the substantive analysis. The Draft Report implicitly acknowledges this evidence (Draft Report at 180), but never finds that he is lying. *See also* Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. Times, Apr. 29, 2009 (quoting Judge Bybee's statement that he continues to believe that the memorandums represented "'a good-faith analysis of the law'"). Indeed, in a December 31, 2008 meeting with the former Attorney General, OPR *conceded* that it found no direct evidence that the opinions in question reflected anything other than Judge Bybee or Mr. Yoo's best legal judgment at the time—a fact that the draft report does not once mention. Letter from Michael Mukasey & Mark Filip to H. Marshall Jarrett (Jan. 19, 2009).

Presumably for this reason, OPR does not even purport to make a finding that Judge Bybee acted in bad faith or lied to the client. Instead, it tries to rest on its view that the memos were drafted "to provide the client with a legal justification to engage in its planned course of conduct," as if that could suffice for proof of a violation. Draft Report at 180. There is nothing wrong with providing clients with "a legal justification" for their "planned course of conduct" if the justification is based on a good faith interpretation of the law. Indeed, that is a hallmark of good lawyering and is required under D.C. Rule of Professional Conduct 1.3 ("A lawyer shall represent a client zealously and diligently within the bounds of the law" and "[a] lawyer shall not intentionally fail to seek the lawful objectives of a client though reasonably available means permitted by law[.]").

Former heads of OLC of both political parties have confirmed that it is perfectly permissible to take the clients' policy objectives into account when formulating advice. *See* Walter E. Dellinger, Dawn Johnsen et al., *Principles to Guide the Office of Legal Counsel* 5 (Dec. 21, 2004) ("OLC *must* take account of the administration's goals and assist their accomplishment within the law."(emphasis added)); Jack L. Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 35 (2007) ("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."); Flanigan Decl. ¶ 5 (May 2, 2009) ("Flanigan Decl.") ("OLC is an executive branch agency and, in crafting its legal advice, its *attorneys are almost always aware of the course of action the client wishes to take*. 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." (emphasis added)); Levin Decl. ¶8 (Apr. 29, 2009) ("In my opinion, it is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons.").

This has long been the practice by executive branch attorneys. Indeed, during World War II, President Roosevelt desperately wanted to transfer old destroyers to Britain to aid in its defense against the Nazis, although the Neutrality Act seemed to bar such actions. *See* David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—A Constitutional History,* 121 Harv. L. Rev. 941, 1044 (2008). President Roosevelt asked Attorney General Robert Jackson for his legal opinion and the resulting "creative statutory construction" allowed

Roosevelt to pursue his desired course. *See Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 Op. Att'y Gen. 484 (1940). Without question, Jackson knew the President's preferred outcome. In fact, "Roosevelt himself *engaged in an extensive line-edit of Jackson's draft opinion*." David J. Barron & Martin S. Lederman, *supra* at 1045 (emphasis added). Although commentators were critical at the time, *see*, *e.g.*, Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. Times, Oct. 13, 1940, at 6-7 ("No such dangerous opinion was every before penned by an Attorney General of the United States."), then, as now, it was commonplace, and entirely proper, for the views of the President and the attorneys in the executive branch to converge.

In short, the idea that knowing the preferred course of conduct—even working to permit that conduct—is an ethical violation is absurd. And OPR's support for its irrelevant proposition derives from its assertion that the CIA "was not looking for just an objective, neutral explanation of the meaning of the torture statute." *Id.* Whatever the CIA's objectives may have been (there is no compelling evidence one way or the other), they provide no insight into the subjective beliefs of Judge Bybee or the other OLC attorneys who worked on these memos and shared his views. *No one* involved in this process ever said that they knew the advice was wrong but gave it anyway.

Indeed, all of the individuals with knowledge of the relevant events, confirm Judge Bybee's personal affirmation that he offered good faith answers to extremely difficult questions. Professor Yoo has testified under oath and on the congressional record that everyone at OLC, including Judge Bybee, was determined to interpret the law in good faith as best they could under the circumstances. *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. of the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 42 (June 26, 2008) (testimony of John C. Yoo). Timothy Flanigan has stated that "I have no doubt that Judge Bybee, Professor Yoo, Attorney General Ashcroft and the other senior DOJ attorneys who reviewed and contributed to it intended only to provide an honest, good faith assessment of these very difficult and challenging questions of law." Flanigan Decl. ¶3. Likewise, Daniel Levin has confirmed that, "[i]n [his] view, the authors believed what they wrote." Levin Decl. ¶7. Goldsmith also corroborated that while "[a]ll of these men wanted to push the law as far as it would allow," "none, I believe, thought he was violating the law." Goldsmith, *The Terror Presidency* 167. Moreover, the past two Attorneys General both stated publicly that the OLC attorneys made a good faith effort in rendering these opinions. *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) (testimony of Alberto Gonzales) ("[T]he people at the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress."); Transcript of Reporters Roundtable Discussion With Attorney General Michael B. Mukasey (Dec. 3, 2008), *available at* http://in.sys-con.com/node/767568 ("[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."). We interviewed numerous witnesses and are unaware of anyone who believes that Judge Bybee acted in bad faith.

That evidence is more than enough, but any inference of bad faith is further foreclosed by the fact that the OLC attorneys did not simply rubber stamp the CIA's requests. As set forth,

above, the advice was prepared with extensive analysis over a course of many weeks with input from numerous lawyers and officials. And OLC made it clear that a variety of practices, including severe beatings, would constitute torture under the statute. *See e.g.*, Standards Memo at 24.

Nor could bad faith possibly be inferred from the quality of the legal analysis. As set forth below, most of the "failures of scholarship" cited by OPR are actually a product of OPR's own "failures of scholarship," excessive reliance on critics of the policies, and fundamental misconceptions about the proper approach to the legal analysis. But even if some of OPR's criticisms are well founded, many lawyers, public officials, and academics familiar with the analysis have expressed the opinion that the memos reveal more than a good faith basis for the views expressed. *See, e.g.*, *Democrats Call for Impeachment of Judge Who Justified Interrogation Tactics*, Fox News, Apr. 24, 2009; Posner & Vermeule, *A "Torture" Memo and its Tortuous Critics*, Wall St. J., July 6, 2004, at A22.

IV. OPR'S UNSUPPORTED "FINDINGS" OF "FAILURES OF SCHOLARSHIP" IN OLC'S INTERPRETATION OF THE ANTI-TORTURE STATUTE

OPR never actually finds that OLC's specific advice was wrong but claims to have discovered "errors, omissions, misstatements, and illogical conclusions" in the analysis. Draft Report at 134. In reviewing the precise criticisms it is useful to start with an overview of the language of the statute that Judge Bybee was asked to interpret and what the memos actually concluded. It readily becomes apparent that there is—at the very minimum—fair ground for debate about the correct interpretation of the statute. Indeed, there was no substantial difference between the interpretation Judge Bybee advanced and the one that replaced it in the wake of the public controversy that began when the Standards Memo was leaked in 2004.

The federal anti-torture statute criminalizes "torture," defined as an act "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. Congress enacted this law in 1994 to fulfill the United States' obligation under the CAT, which requires signatories to criminalize torture, defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted." CAT art. 1. The United States chose to implement its obligations under the CAT by imposing criminal penalties for "torture" but not for lesser forms of cruel, inhuman, or degrading treatment.[22] The Standards Memo interpreted the statutory definition of torture by looking to the text of the statute, the statute's legislative history, the CAT, U.S. judicial interpretations of torture under similar statutes, and international conceptions of torture. The Memo determined that torture includes only acts of an "extreme nature" that inflict, and are specifically intended to inflict, severe pain. Standards Memo at 1; *see also id.* at 2 (torture is "only the most egregious conduct"). In order to respect the lines drawn by the President and Congress, the Memo concluded that there is "a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture." *Id.* at 46. *Accord* Goldsmith: *The Terror Presidency* 143.

[22] The CAT does not require criminalization of "other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture," but rather calls upon state parties to "undertake to prevent" such acts. CAT Article 16. OLC was not asked to interpret this provision in either of the 2002 memos.

There has been much distortion about the standard of pain that the memos supposedly adopted. The authors' intent, however, is clear. The Techniques Memo explains that the Standards Memo "concluded that [severe physical pain] means pain that is difficult to endure and is of an intensity *akin to* the pain accompanying serious physical injury." Techniques Memo at 10 (emphasis added). *See also* Standards Memo at 27 ("pain that is of an intensity often accompanying serious physical injury"). The level of pain associated with "serious physical injury" was merely used as an objective benchmark for "severe" pain. Given the D.C. Circuit's view that torture involves pain that is "excruciating and agonizing," *see Price*, 294 F.3d at 93, the standard Judge Bybee endorsed hardly seems far-fetched. With respect to severe *mental* pain, the statute requires that it cause "prolonged mental harm," which the Memo interpreted as harm that lasts for months or years, such as post traumatic stress disorder or chronic depression. Standards Memo at 7.[23] Judge Bybee did not limit the definition to extreme forms of psychosis. And the Memo explained that the mental pain/harm must stem from one of the predicate acts listed in the statute: 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. *See* 18 U.S.C. § 2340(2); Standards Memo at 1.

Pursuant to these interpretations, in attempting to draw a reasonable line, the two 2002 memos jointly determined that several extreme techniques (such as severe beatings, shocking the genitals, hanging, and burning) would be torture, while, under specific factual circumstances, other harsh techniques (such as walling, forced standing, sleep deprivation, and waterboarding) would not rise to that level. Standards Memo at 16, 19-20 & n.10, 24-25; Techniques Memo at 10-11. With respect to waterboarding, the Techniques Memo stated that this procedure, administered in the manner described, did not meet the definition of severe physical pain based on the CIA's representations. The CIA represented that the technique had been used on thousands of U.S. military personnel in realistic training interrogations and had never been found to cause physical pain. Techniques Memo at 11. Although the technique is designed to create a "threat of imminent death," the Techniques Memo explained that the statute only bars such conduct if it also causes "prolonged mental harm." Techniques Memo at 15. The CIA experts believed that it would not.[24] While Congress might have decided to classify all interrogation techniques that create this level of fear as torture, the statutory text plainly established that it chose not to do so.

In turn, the Standards Memo interpreted the requirement that the defendant act with "specific[] inten[t] to inflict severe . . . pain" to mean what it says: the defendant must "expressly intend to achieve [this] forbidden act." Standards Memo at 3. The Memo explained that under the "theoretical" meaning of "specific intent" it was not enough for a defendant to act knowing that severe pain or suffering was "reasonably likely" to result; rather, the "infliction of such pain must be the defendant's precise objective." *Id.* at 3-4. This meant that the statute would not penalize individuals who acted with a "good faith belief" that their conduct would not produce severe pain and suffering. *Id.* at 4. And it also excluded individuals who knew their actions would cause severe pain, but did not specifically intend to cause such harm. (The Memo never

[23] Notably, the phrase "prolonged mental harm" appeared nowhere in the U.S. Code, relevant medical literature, or international human rights reports.

[24] These issues are discussed in greater detail in Judge Bybee's classified submission.

asserted or suggested, however, that a "motive" to get information would absolve an individual who intended to inflict severe pain as the means to that end. The interrogator's "objective" would still be the infliction of severe pain.) The Third Circuit recently confirmed the Standard Memo's interpretation of specific intent in *Pierre v. Attorney General*, 528 F.3d 180, 189-91 (3d Cir. 2008) (en banc), and held that the Haitian government lacked the specific intent necessary for a torture claim even though it knew that sending certain individuals to prison would result in severe pain because the government did not intend to cause such harm.

Despite the recitation of this *correct* interpretation of specific intent, OLC explicitly warned its clients that they should not proceed in the absence of a good faith, reasonable belief that the techniques would not cause severe pain. Standards Memo at 4-5. The Standards Memo concluded that acquittal would be "highly unlikely" if the individual held an "unreasonable" belief that the techniques would not cause severe pain. *Id.* at 5. And the centrality of this advice was underscored by the Techniques Memo. That memo's analysis of specific intent rested *solely* on the analysis of the CIA's good faith and made no mention whatsoever of the CIA's "objectives." Techniques Memo at 16-18.

In the face of those plainly reasonably interpretations of statutory terms that had never been construed by any court, we turn to OPR's critique of Judge Bybee's scholarship.

A. "Severe Pain"

OPR levels multiple criticisms against the Standards Memo's inquiry into the meaning of "severe pain." As explained below, none have merit and so they provide no basis for the Draft Report's conclusion that the Standards Memo violated Rule 1.1 or 2.1.

With the Standards Memo, OLC attempted to provide a concrete, understandable interpretation of "severe pain" as that phrase is used in §§ 2340-2340A. As noted, the task is one of line-drawing, between the extreme conduct constituting torture, and less severe forms of cruel, inhuman and degrading treatment. Collectively, the Standards Memos found 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 do not (including controlled sleep deprivation, stress positions, and waterboarding). These are reasonable lines to draw.

The Standards Memo examined the plain text, dictionary definitions, and the legislative history of the torture statute. After an exhaustive review of these sources—the same sources of statutory interpretation relied upon by Supreme Court justices—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* Standards Memo at 5 (noting that dictionary definitions of severe include "unsparing in exaction, punishment, or censure"; "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"). In an attempt to shed more light on an amorphous phrase, OLC also examined the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders to determine whether the phrase "severe pain" had a particular medical or diagnostic meaning. After discovering that "severe pain" was not a term of art, OLC reviewed the U.S. Code for other

instances of the term "severe pain." OLC 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, OLC determined that "severe pain" is the type that is "equivalent in intensity to the pain accompanying serious physical injury." *Id.* at 1; Techniques Memo at 10.

This high bar is entirely consistent with the text and ratification history of CAT, which distinguishes between torture and other cruel, inhuman and degrading acts, reserving for the former category only the most "extreme" conduct. This distinction also resonates with a host of judicial opinions, which the Standards Memo discussed in its text and in a substantial appendix. Indeed, around the time of the Standards Memo, the D.C. Circuit held that "torture" entailed "extreme and outrageous conduct" and that "severe pain" entailed "excruciating and agonizing" pain that is "intense, lasting, or heinous." *Price*, 294 F.3d at 92-93 (finding plaintiffs' beatings insufficient to meet the "rigorous definition of torture" under the Torture Victims Protection Act).[25] In short, the Standards Memo thoroughly analyzed the meaning of the term "severe pain" and arrived at an eminently reasonable interpretation.

1. It is Uncontroversial to Examine Statutes with Similar Phrasing

First, OPR criticizes the Standards Memo for interpreting "severe pain" in part by analogy to terms used in a collection of health care statutes. This is a standard analytical practice and certainly not evidence of ethical misconduct.

After the Memo examined the text of the statute and several dictionary definitions, it looked for other statutes using the same term. 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 the absence of immediate medical attention could reasonably be expected 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.*, 8 U.S.C. § 1369. Therefore, to "shed more light" on the common meaning of the term, the Standards Memo considered those statutes and determined 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." Standards Memo at 1; *see id.* at 5 (quoting *West 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.").

OPR nevertheless makes much of the rather stunning argument that OLC is precluded, on pain of professional punishment, from considering these admittedly unrelated statutes that use precisely the same phrase. OPR states: "We know of no authority, and the Standards Memo

[25] Torture, in other contexts, has been described 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").

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.

This is patent nonsense. 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. *See*, *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); *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); *see also Hart v. Commonwealth*, 441 S.E.2d 706, 707 (Va. Ct. App. 1994) ("'The Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed.'") (citations omitted). As Sutherland's treatise makes perfectly clear, it is wholly appropriate to interpret one statute "by analogy" to "unrelated statutes." 2B Sutherland Statutory Construction § 53:3 (7th ed. 2008) (citing over 100 state and federal cases) ("Sutherland"); *id.* § 53:4 (citing over twenty additional examples). Sutherland's 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 (emphasis added).[26] Sutherland's 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*. (emphasis added).

This is a particularly relevant exercise here because the term "severe pain" appeared nowhere else in the U.S. Code at the time. It is entirely appropriate when discerning congressional intent to examine how Congress has previously used the same or similar phrasing. The Standards Memo treated the phrase "severe pain" in other contexts as *illustrative*, not dispositive. And it stressed in no uncertain terms that the health care statutes "address a substantially different subject." Standards Memo at 6. Although there is certainly "no effectively irrebuttable presumption" that the same terms—even within a single statute—*must* be interpreted identically, *see Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 575-76 (2007) (quotation marks and citation omitted), the Standards Memo makes no such assertion. It surely cannot constitute professional misconduct to explore all available sources of insight when attempting to discern the meaning of a statutory phrase. *See* Sutherland §§ 53:3-53:4.

OPR supports its argument with a straw man. OPR finds that *West Virginia University Hospitals*, which OLC had quoted for the general principle that courts "construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the

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[26] Given that OPR managed to find a separate, irrelevant section in Sutherland's addressing the interpretation of statutes dealing with "the same subject matter," Sutherland at § 51:3, it is puzzling why OPR was unable to locate, a mere two sections later, the parts relevant to cases, such as this one, where the subject matter is admittedly *different*, *id.* at § 53:3. A quick perusal of the table of contents would have sufficed. *Id.* at iv ("§ 53:3 Interpretive relevance of unrelated statutes"). *Cf*. Draft Report at 137 n.121 ("Sutherland … was available in the main DOJ library").

body of both previously and subsequently enacted law," was an *in pari materia* case.[27] OPR then proceeds to explain why an *in pari materia* approach is wrong. Draft Report at 137-38. But the Standards Memo, on its face, nowhere mentioned the *in pari materia* principle and did not consider the health care statutes to be "relating to the same matter." Black's Law Dictionary 794 (7th ed. 1999) (defining "in pari material"). To the contrary, the memo specifically stated that those statutes used "severe pain" in a "substantially different" context. Standards Memo at 6. Moreover, Judge Bybee explicitly confirmed in his interview with OPR that "we haven't made an *in pari materia* argument here, we aren't arguing that Congress … incorporated that deliberately here." Tr. at 73. Judge Bybee further explained that he thought that they "ought to look to any tools we can to try and understand *by analogy* what the term 'severe pain' means." *Id.* at 72-73 (emphasis added). *See* Sutherland §§ 53:3-53:4.

OPR's argument that OLC must first show that the term is ambiguous is equally odd. Draft Report at 135 n.119 (OLC "should have demonstrated that the term 'severe pain' was ambiguous before turning to other statutory sources"). Even the Levin Standards Memo (at 8) recognized that "[d]rawing distinctions among gradations of pain . . . is obviously not an easy task," and the Bradbury Techniques Memo (at 2) similarly noted that "severe" is an "imprecise" term imbued with a "degree of uncertainty." The simple fact that the Standards Memo went well beyond the face of the statute should make plain that it obviously recognized that there was some ambiguity in the phrase at issue.

2. The Memo Never Stated that Torture Requires Organ Failure, Death, or Serious Physical Injury

Second, OPR criticizes the memo because its "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." Draft Report at 139 (emphasis added). Contrary to OPR's suggestion, no rational interrogator, concerned for his or her own liability, would read the memo that way and Judge Bybee confirmed that such an interpretation is "a gross misreading of the memorandum." Tr. at 70.

The memo 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." Standards Memo at 6 (emphasis added). 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." 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.* 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 systematic beatings. Standards Memo at 16, 19-20 & nn.10, 24-25. Consistent with that, the memo agrees that "'although conduct resulting in permanent impairment of physical or mental faculties is *indicative* of torture, it is *not an essential element* of the offence.'" Standards Memo at 21

[27] *West Virginia* nowhere referenced "in pari materia."

(emphasis added) (citation omitted). Fairly read, the Standards Memo is plain on its face. Moreover, there is no better evidence that organ failure itself is not the relevant test than the Techniques Memo, which *nowhere* mentions "organ failure" as a necessary criteria (or pain analogue) in analyzing particular techniques.

Had the CIA read the Standards Memo in the way OPR has, the CIA would have been wrong. And 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* Techniques Memo at 1 ("If these facts were to change, this advice would not necessarily apply."). 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, shared with very few individuals, and were not even released publicly until 2004—years after they were written. Again, Judge Bybee explained that "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." Tr. at 75. Judge Bybee cannot be held liable for a hypothetical interrogator who "erroneous[ly]" interprets the memo, in the face of its plain language and specific examples.

3. The Standard Memo's "Severe Pain" Interpretation is Similar to that in Later Memos

Third, OPR places great weight on the fact that subsequent OLC officials disagreed with how the Standards Memos drew the line. Draft Report at 132. OPR states that "Goldsmith and Levin explicitly rejected" the Standards Memo's "formulation of 'severe pain' and 'characterized the reasoning behind it as illogical or irrelevant.'" Draft Report at 134.

However, the Standards Memo's definition of "severe pain" is not so different from the subsequent definition in the Levin Standards Memo. Both distinguish between torture and other acts of "cruel, inhuman or degrading treatment" that do not amount to torture. *See* Standards Memo at 15-16, 27; Levin Standards Memo at 6 & n.14. Torture is the "gravest form." Levin Standards Memo at 6 & n.14. "[D]istinguishing torture from lesser forms of cruel, inhuman, or degrading treatment … is consistent with other international law sources." *Id.* Both describe torture and severe pain using words like "extreme," "extremely violent," "intense," "grievous," and "hard to sustain or endure." *E.g.*, Standards Memo at 5, 16; Levin Standards Memo at 5; *accord* Bradbury Techniques Memo at 19. Both mention specific examples, including shocks, hanging by hands and feet, burns, beatings, etc. *E.g.*, Standards Memo at 16, 19-20 & n.10, 24-25; Levin Standards Memo at 10; *accord* Bradbury Techniques Memo at 20; *see also id.* at 19 (also mentioning the "boot," thumscrews, and the rack).

To be sure, the Levin Standards Memo stated "that Congress [did not] intend[] to reach only conduct involving 'excruciating and agonizing' pain or suffering." *Id.* at 8. But it is not clear what this even means, since Levin later approvingly quotes a case indicating that conduct must be "'sufficiently extreme and outrageous'" to constitute torture, *id.* at 10 (quoting *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003)), and another case indicating that the more "'heinous the *agony*, the more likely it is to be torture,'" *id.* (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002)) (emphasis added). Moreover, in *Price*, the D.C. Circuit cites approvingly the very language that

the Levin Standards Memo purports to disavow. *Price*, 294 F.3d at 95 ("'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.'" (citation omitted) (emphasis added)).

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* (synonyms of "excruciating" include "agonizing" and "severe"). Courts and individual jurists have often used "severe" pain and "excruciating" pain apparently interchangeably. *See 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").

In any event, the Standards Memo never used "excruciating and agonizing" pain as an *exclusive* definition of severe pain. Quite the contrary; the memo made clear that it cited the "excruciating and agonizing" language 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 act[s]" qualify as torture. Standards Memo at 15, 21; *see id*. at 21 ("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*. at 22 (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").

Furthermore, Levin has specifically clarified that he never intended his criticism—in the Levin Standards Memo or otherwise—to suggest that Judge Bybee committed professional misconduct. *See* Levin Decl ¶ 6. Similarly, Goldsmith made a point to note that the memos were written "in good faith." Goldsmith*, The Terror Presidency* 167.

4. Congress Later Endorsed the 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 Standards Memo's definition of torture.

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).[28] This is remarkably similar to the language the Standards 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. Accordingly, the Standards Memo's definition can hardly be considered so irrational as to warrant ethical sanctions.

B. "Specific Intent"

OPR levels multiple criticisms against the Standards Memo's treatment of the specific intent element of the torture statute. As explained below, none have merit and so they provide no basis for the Draft Report's conclusion that the Standards Memo violated Rule 1.1 or 2.1. Before responding to OPR's particular charges, however, it is worth emphasizing that OPR nowhere contends that the Standards Memo's interpretation of specific intent is wrong. AAG Chertoff, in fact, agreed that the specific intent section was correct as a legal matter, even though he believed certain aspects would be problematic as a practical matter to argue before a jury. Draft Report at 37. Indeed, the Standards Memo's ultimate legal standard is substantially similar to those put forth by the subsequent Levin and Bradbury memos in 2004 and 2005, respectively. *Compare* Standards Memo at 3 ("[B]ecause Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective"); *with* Levin Standards Memo at 17 ("It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and 'consciously desire[d]' that act to inflict severe physical or mental pain or suffering.") (citation omitted); *and* Bradbury Techniques Memo at 28 (same). Although both the Levin Standards Memo and the Bradbury Techniques Memo declined to ascertain the "precise meaning" of specific intent under the torture statute, *see* Levin Standards Memo at 16; Bradbury Techniques Memo at 28, the Standards Memo made a good faith attempt to do so. *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 …." (emphasis added)). Moreover, the Third Circuit sitting en banc recently adopted the Standards Memo's interpretation of specific intent in a case not cited by OPR. The idea that OLC's interpretation does not meet the standards of professional competence is thus absurd.

First, OPR states that the Standards Memo "failed to adequately analyze the legal complexities of the issue of specific intent, and thus failed to adequately advise the client on the availability of the defense." Draft Report at 139. Specifically, OPR faults the Standards Memo for not emphasizing the "uncertainty and ambiguity" of the federal case law concerning specific intent. Draft Report at 142. But it is doubtful that OLC fields many questions where the case

[28] 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.

law is certain and unambiguous. OLC attorneys are asked to answer difficult issues in a direct and succinct manner, and it is unreasonable to expect them to survey the case law in a manner more appropriate for a law review article. In addition, OLC wrote the Standards Memo to a sophisticated audience — the White House Counsel's Office — and so may presume the client's appreciation of the issue's complexity. *Cf. City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71-72 (Tex. 2000) (Justice Gonzales, delivering the opinion for a unanimous Texas Supreme Court, considering whether a government worker possessed the intent to cause substantial harm under the State Whistleblower Act).

Second, OPR suggests that the Standards Memo erred by making "broad assertions about the anti-torture statute's specific intent requirement" based only on "brief excerpts from a limited number of cases, or, more commonly, on secondary sources." Draft Report at 142. In fact, the Standards Memo's section on specific intent cited eleven different cases and the sole secondary source it cited directly was Black's Law Dictionary. Standards Memo at 3-5. For comparison's sake, the parallel section of the Levin Standards Memo cited only five cases, the LaFave treatise, and the Model Penal Code. Levin Standards Memo at 16-17. Significantly, as the Bradbury Techniques Memo notes, interpretation of the torture statute is complicated in part by the "lack of relevant case law." Bradbury Techniques Memo at 2. The Standards Memo made the best of this limited universe of material, citing the key Supreme Court cases involving specific intent (*United States v. Carter*, 530 U.S. 255, 269 (2000) and *United States v. Bailey*, 444 U.S. 394, 405 (1980), and OPR identifies no cases that are directly on point that the Memo failed to cite. Regardless, failing to cite any given case is hardly an ethics violation. Were it otherwise, OPR itself would be at fault for failing to cite highly-relevant precedent. *See Pierre v. Attorney General*, 528 F.3d 180, 189-90 (3d Cir. 2008) (en banc) (holding that, for purposes of the CAT, "specific intent" requires "deliberate and conscious purpose of accomplishing a specific and prohibited result" and that "[m]ere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture"); *id.* at 193 (concurring opinion) ("In an August 1, 2002 memo to the White House Counsel, Jay Bybee, Assistant Attorney General, set forth an interpretation of 'specific intent' that is similar to that espoused by the majority.").

Third, OPR claims that the Standards Memo failed to "accurately present relevant authority," specifically *Ratzlaf v. United States*, 510 U.S. 135 (1994). Draft Report at 142. The Standards Memo cited *Ratzlaf* and stated that "[i]n *Ratzlaf* the statute at issue was construed to require that the defendant act with the specific intent to commit the crime. As a result the defendant had to act with the express purpose to disobey the law in order for the mens rea element to be satisfied." Standards Memo at 3. OPR asserts that *Ratzlaf* did not address the meaning of specific intent, but OPR is wrong.

In *Ratzlaf*, the defendant was convicted of willfully breaking up a single cash transaction exceeding $10,000 into separate transactions to evade financial institution reporting requirements, in violation of 31 U.S.C. § 5322, a currency structuring statute. 510 U.S. at 137. The defendant had brought $100,000 in cash to a casino to pay a gambling debt, and was notified by the casino that a cash transaction in that amount would have to be reported to the U.S. government. *Id.* He inquired about purchasing a cashier's check at a local bank and was informed that any cash transaction exceeding $10,000 would have to be reported to the government. The defendant went to several banks, purchasing cashier's checks under $10,000

and used them to pay the casino. At trial, he argued that although he had knowledge of the bank's reporting obligation and had attempted to evade that obligation, he did not know that structuring a financial transaction was illegal. The Supreme Court reversed the defendant's conviction, holding that to give effect to § 5322(a)'s "willfulness" requirement, the Government must prove that the defendant acted *with knowledge that the structuring he undertook was unlawful*, *not simply that the defendant's purpose was to circumvent a bank's reporting obligation*. *Id*. at 141. In other words, the Court focused on whether the defendant's actions evinced a specific intent to violate the currency structuring law. And, in fact, the Court specifically stated that the term "willful" included a specific intent requirement.[29] *Id.* Not only is the Standards Memo's assessment of *Ratzlaf* correct, but OPR's inability to characterize the case properly is at odds with OPR's self-proclaimed competence to second-guess OLC attorneys.

In addition to misreading *Ratzlaf*, OPR also misrepresents the Standards Memo's citation to the case. The Standards Memo did not "summarize[]" *Ratzlaf*, Draft Report at 142, but rather devoted just *two sentences* to the case in order to illustrate the principle, outlined earlier in the paragraph, that specific intent requires the express intent to achieve the act forbidden by statute. Standards Memo at 3. The Standards Memo explained how the Court in *Ratzlaf* construed "the statute *at issue*," noting—accurately—that the Bank Secrecy Act required specific intent to disobey the law. Standards Memo at 3 (emphasis added). Nowhere does the Standards Memo seek to extend *Ratzlaf* to other statutory regimes. In fact, in the very next sentence the Standards Memo confirms that under the torture statute, what matters is the specific intent to inflict severe pain—*not* the specific intent to violate the statute. Standards Memo at 3. Judge Bybee tried to make this very point in his interview with OPR. Tr. 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."). The Techniques Memo also illuminates OPR's mistake. That memo analyzes specific intent solely with reference to an intent to inflict severe pain and never suggests that CIA interrogators must act with an intent to violate the law. Techniques Memo at 16-18.

Fourth, OPR objects to the Standards Memo's supposed "suggest[ion] that under certain circumstances, it would be difficult for the government to prove that a government interrogator acted with the requisite intent to violate the torture statute." Draft Report at 139. Specifically, OPR notes that the Standards Memo "has been criticized for implying that an interrogator who knowingly inflicted severe pain with some other objective, or goal, in mind (such as obtaining information) would not violate the torture statute." *Id.* at 143. To the contrary, the Standards Memo never states, or implies, that having a secondary intent — or, more properly understood, a motive — to obtain information forecloses a finding of specific intent to inflict severe pain to reach that goal. Rather, the Standards Memo notes that, as a "theoretical matter," it is possible for a defendant to know that severe pain will result from his actions, yet not intend to cause such harm. Standards Memo at 4. This theoretical matter had a real-world application in *Pierre*, 528 F.3d at 189, where the Third Circuit sitting en banc held that "[m]ere knowledge that a result is

[29] And there are numerous authorities that recognize that statutes requiring the government to prove a "willful" state of mind are ordinarily specific intent statutes. *See, e,.g. United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002) (describing 50 U.S.C. § 1705, which prohibits the willful violation of certain export regulations, as a specific intent statute).

substantially certain to follow from one's actions is not sufficient to form the specific intent to torture." The court determined that even though the Haitian government knew its prisons lacked adequate medical care, so that imprisoning Pierre was likely to lead to severe pain and suffering, such an "unintended consequence is not the type of proscribed purpose contemplated by the CAT." *Id.* In this regard, the Standards Memo properly places the emphasis on *intent*, not knowledge or motive. Should an interrogator intend to cause severe pain, he or she is liable regardless of the existence of other objectives. The Standards Memo confirms this. Standards Memo at 4 ("[A] defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control."). Further, the Standards Memo in no way implies that these "theoretical" issues would upend the government's ability to bring suit under the torture statute. To the contrary, the Standards Memo concluded: "[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." Standards Memo at 4. Ultimately, any uncertainty regarding the propriety of raising potential defenses should be resolved in Judge Bybee's favor in light of the extreme complexity of the underlying subject. As OPR emphasized so heavily, the Supreme Court remarked that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime," Draft Report at 140 (citing *Bailey*, 444 U.S. at 403), making the standard for demonstrating incompetent legal advice on this subject high indeed.

Fifth, OPR characterizes the Standards Memo's discussion of a potential good faith defense as "overly simplistic." Draft Report at 143. At root, however, the point is rather simple: if an individual acts with an honest belief that his or her actions would not inflict severe pain or suffering, that individual did not act with specific intent under the torture statute. Standards Memo at 4. There is little more elaboration needed, as reflected by the Levin Standards Memo (at 17) and the Bradbury Techniques Memo (at 28), which each dispensed with the subject in a mere two sentences. OPR further critiques the Standards Memo for not stating that "the good faith defense is generally applied only in fraud or tax prosecutions." Draft Report at 144. However, the Standards Memo openly disclosed that most of its cited cases were "in the context of mail fraud." Standards Memo at 4. In any case, it is not clear that OPR's generalization is warranted. In fact, two of OPR's own citations on this subject, *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) and *United States v. Goings*, 313 F.3d 423 (8th Cir. 2002), considered good faith in prosecutions involving the unlawful export of firearms and theft, respectively. *See also* 61 A.L.R. Fed. 7 (collecting cases involving defense of good faith in actions for damages against law enforcement officials under 42 U.S.C. § 1983). OPR also grossly mischaracterizes *Wilson* itself. *Wilson* did not remotely establish an exception to the good faith defense for crimes of violence. Draft Report at 144. The district court denied appellant's requested good faith instruction in that case only because "there was insufficient evidence to justify it." 721 F.2d at 974-75. Finally, OPR claims that the Standards Memo "failed to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness, or conscious or deliberate ignorance or avoidance of knowledge that would negate a claim of good faith." Draft Report at 144. It was reasonable for OLC to assume that the White House Counsel was aware of this counter-instruction, since it is a standard doctrine in the law. In any event, it adds nothing substantial because the Standards Memo already warned that "it is highly unlikely that a jury would acquit" the interrogator if his belief turned out to be "unreasonable." Standards Memo at 5. If anything, when compared to subsequent OLC memos, *see* Levin Standards Memo at 17; Bradbury Techniques Memo at 28, the Standards Memo gave

far more attention to counter-arguments available to prosecutors in response to a good faith defense.

Regarding Rule 2.1 and the duty of candor, there is no indication that Judge Bybee sought a pre-determined result concerning the specific intent section. The Standards Memo includes numerous qualifications that would be counterproductive if the objective was to obtain the most robust defense for interrogators possible. *E.g.*, Standards Memo at 4 ("[W]hen a defendant knows that his action will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent."); Standards Memo at 5 ("Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute … as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation."). In addition, the Draft Report indicates that Yoo spent a good deal of time discussing the section with AAG Chertoff and even made revisions based on his comments, which would be pointless if the conclusion was preordained. Judge Bybee repeatedly stated in his deposition that he was simply giving his best reading of the law. *See, e.g.,* Tr. 73, 80-81, 101, 109, 114. As set forth above, none of the individuals we interviewed (and, we suspect, none of those OPR interviewed) believe Judge Bybee acted in anything other than good faith.

C. CAT Ratification History

OPR claims that the Standards Memo's analysis of the CAT's ratification history was "incomplete and misleading." Draft Report at 145. In particular, OPR faults the Standards Memo for finding that the Reagan administration's understanding ("excruciating and agonizing" pain) regarding the definition of torture under Article 1 of the CAT was in substance the same as the Bush administration's understanding that the Senate ultimately ratified. *Id.* OPR may be correct that there was some difference in the views of the two administrations, but a D.C. Circuit opinion issued while the 2002 Standards Memo was in progress provides strong support for the memo's inclusion of the Reagan Administration's understanding as part of the relevant history. In *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 94 (D.C. Cir. 2002), the court held that, although the plaintiff pleaded certain "abuse," it was insufficient to sustain allegations of torture. The court stressed that "[t]he drafters of the Convention, as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that 'only acts of a certain gravity shall be considered to constitute torture.'" *Id.* at 92 (emphasis added). As if tailor-made to drive a stake through OPR's argument, the court later cites approvingly the very Reagan understanding that OPR claims constitutes professional misconduct. *Id.* 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)) (emphasis added)). The judges on the *Price* panel, Judges Edwards, Sentelle, and Silberman, would be surprised, to say the least, at OPR's audacious claim that it is somehow improper to rely on the Reagan understanding. Surely lawyers at OLC should not be held to a higher standard of care than judges entrusted with the interpretation of laws against torture. And it is surely fair to ask why OPR fails to cite *Price* anywhere in its draft report. Should we conclude that the oversight is a product of a pre-ordained result, or just sloppy research?

In addition, the Standards Memo makes clear that the point was of no consequence to the conclusions reached. The memo emphasizes that "[u]ltimately, whether the Reagan standard would have been even higher *is a purely academic question* because the Bush understanding clearly established a very high standard." Standards Memo at 19 (emphasis added). Perhaps for this reason, the standard articulated in the opening and conclusion of the Standards Memo, as well as the standard applied in the Techniques Memo, does not rest solely on the "excruciating and agonizing" language. Rather, they make clear that the statute "prohibits only extreme acts." Standards Memo at 1; *see also* Standards Memo at 46 (statute "covers only extreme acts"); Techniques Memo at 9 (statute "reaches only extreme acts"). These statements were fully consonant with the Bush Administration's understanding.

Nonetheless, this is one aspect of the memorandum that Judge Bybee would potentially clarify because OLC may have unwittingly overstated the degree of unity between the two Administrations' views. But this is not probative evidence of an ethics violation under any fair evaluation. The possible differences in views were discussed extensively—not hidden from view. And the Standards Memo correctly identifies certain key areas of common ground between the two administrations. Indeed, one could argue that it is OPR that mischaracterizes the Standards Memo and exaggerates the degree of *difference* between the Reagan and Bush understandings. Regardless, the memo reflects a genuine effort to wrestle with competing ratification history—hardly the stuff of ethical misconduct.

In truth, OPR's complaint is not that the Standards Memo was incomplete, but that it provided an *overly complete* account of the CAT's ratification history. OPR criticizes the Standards Memo's inclusion of the Reagan administration's proposed conditions, dismissing them as irrelevant because they were never ratified by the Senate and therefore "have no effect on the United States' obligations under the CAT." Draft Report at 146. Yet 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, 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 Draft 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) ("CAT Hearing"); S. Exec. Rep. No. 101-30 at 2, 4, 5, 7-8. In addition, it is simply not true that the Standards Memo relied "almost exclusive[ly]" on the Reagan administration's proposed conditions. Draft Report at 146. The Standards Memo quoted the relevant portion of the Bush administration's understanding in its entirety and devoted over six pages to a discussion of the ratification and negotiation history — covering both administrations.

OPR erroneously states that the Standards Memo failed to fully disclose the reasons why the Reagan understandings were never ratified by the Senate. Draft Report at 145. To the contrary, the Standards Memo was straightforward in its explanation: "The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture." Standards Memo at 18. This is an accurate statement, and OPR's additional quotations, *see* Draft Report at 145, are merely reformulations of the same basic point.

Nor did the Standards Memo mislead by minimizing the importance of the Bush administration's revision. *Id.* The fact is that the Bush administration's changes *were* arguably more cosmetic than substantive in nature. The flaw in OPR's analysis is the assumption that because the Reagan administration's proposal was criticized for "*possibly* setting a higher, more difficult evidentiary standard than the Convention required," CAT Hearing at 10 (emphasis added), it actually did so. Judge Abraham D. Sofaer, the Legal Adviser to the Department of State at the time of ratification, recognized the concern of such critics, but confirmed that "no higher standard was intended." *Id.* And even though the Levin Standards Memo disagreed with this conclusion, Levin Standards Memo at 8 n.17, it noted that there was "some support for this formulation in the ratification history of the CAT," *id*. at 8 & n.15 (quoting Deputy Assistant Attorney General Mark Richard's testimony during the CAT Hearing that "the essence of torture" is treatment that inflicts "excruciating and agonizing physical pain.") In its zeal to brand the Standards Memo as one-sided, OPR failed to include either of these key quotations by Sofaer and Richard in its Draft Report.

The Standards Memo took heed of the differing language in the Bush administration's understanding, Standards Memo at 18, but put those differences in perspective given the shared purpose of both administrations to ensure "that the prohibition against torture reaches only the most extreme acts." *Id.* at 19. This was the theme of the Standards Memo's ratification history discussion, not the "excruciating and agonizing" language of the Reagan understanding. Indeed, the introduction to the Standards Memo confirms this to be the case, stating in its summary of the CAT that the memo "conclude[s] that the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for 'cruel, inhuman, or degrading treatment or punishment.'" Standards Memo at 1-2. This is a faithful characterization of the ratification history; there is no attempt to mislead by importing any language from the Reagan understanding. And the Foreign Relations Committee took up this theme by noting that Article 16 of CAT was drafted so as "to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind." S. Exec. Rep. No. 101-30 at 13. By focusing selectively on the Reagan understanding, OPR misses the forest for the trees and more important has no basis to charge an ethical violation. The Standards Memo may have provided more detail than suited OPR's taste, but it did not reach a *wrong* answer regarding the CAT's ratification history, let alone the proper interpretation of the statute.

D. U.S. Judicial Interpretation

While OPR criticizes certain aspects of the Standards Memo's discussion of applicable U.S. case law, it nowhere cites *any* case from a U.S. jurisdiction that contradicts the Memo's conclusions. In fact, the case law overwhelmingly supports the conclusions reached and the lines drawn in the Standards Memo. *See, e.g., Pierre v. Attorney Gen.*, 528 F.3d 180 (3d Cir. 2008) (en banc) (holding that proof of knowledge on the part of government officials that severe pain or suffering will be the practically certain result of an applicant's detention does not satisfy the specific intent requirement of the Convention Against Torture; rather, the specific intent requirement requires an applicant to show that his prospective torturer will have the motive or purpose to cause him pain or suffering); *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (holding that the term "torture" is "usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating,

application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain"); *Price v. Socialist People's Libyan Arab Jama-Hiriya*, 294 F.3d 82, 86 (D.C. Cir. 2002) (holding that allegations that American citizens were "kicked, clubbed and beaten" by prison guards were insufficient to rise to level of "torture" and that "[t]he more intense, lasting, or heinous the agony, the more likely [the conduct] is to be torture"); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1317 (N.D. Cal. 2004) (stating that a single instance of "garden variety" excessive force does not constitute torture, "sustained systematic beatings or use of particularly heinous acts such as electrical shock or other weapons or methods designed to inflict agony does constitute torture"); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 226-28 (D.D.C. 2002) (finding torture where plaintiff who was already being treated for a painful bowel obstruction when he was kidnapped from a hospital, was gashed in the head by a rifle butt, was repeatedly kicked and punched severely, which compounded his medical condition so that he could not stand, sit or even drink water, causing him to be near death from dehydration). The fact that OPR cites none of this relevant case law demonstrates (yet again) the one-sided, outcome-oriented nature of OPR's investigation and draft report.

1. Implementation of Article 3 of the UNCAT

OPR criticizes the Standards Memo authors for omitting a discussion of the regulations passed pursuant to Article 3 of the Convention Against Torture and the case law interpreting those regulations. OPR contends that a "thorough and competent discussion of the issue would have identified and discussed the regulations and the reported decisions." Draft Report 147. OPR cites three Ninth Circuit decisions that it contends should have been discussed (including one unpublished decision). As a preliminary matter, these citations would have been redundant and would not have changed the memo's conclusions. The memo already reviewed and discussed fourteen cases analyzing the Torture Victim Protection Act (TVPA). Those cases effectively showed the range of techniques that courts have considered to be torture and provided more than sufficient analysis of the distinction between torture and cruel, inhuman, and degrading treatment. Three additional citations would have added little to no additional value to the discussion. Indeed, OPR *concedes* that the additional case law and the regulations are consistent with the Standards Memo's distinction between torture and cruel, inhuman, and degrading treatment. Draft Report at 147. Accordingly, a discussion of these cases would not have changed the analysis. *Compare*, *e.g.*, *Al-Saher v.* INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (cigarette burns and severe beatings constitute torture), *with* Standards Memo (same).

It is also worth noting that the unpublished decision OPR asserts that Judge Bybee should have cited, *Khanuja v. INS*, 11 Fed. Appx. 824 (9th Cir. 2001), actually *could not* have been cited as precedent in the Ninth Circuit in 2002. Until the 2005 Amendments to the Federal Rules of Appellate Procedure, the Ninth Circuit Rules forbade litigants from citing unpublished opinions. In fact, former Attorney General Mukasey made precisely this point in his January 19, 2009 letter, which OPR apparently ignored. And according to Lexis and Westlaw cite checks, *Khanuja* has in fact never been cited by *any* court ever. *Cf.* Draft Report 164 n.147 (urging OLC to conduct a "simple cite check").

In short, while OPR's suggested discussion would certainly have made the memo longer, in no way could the decision not to include duplicative support be considered incompetent. Attorneys, especially under great time constraints, must be able to exercise judgment in deciding

whether additional citations will produce only diminishing returns.

2. Analysis of the Torture Victim Protection Act (TVPA)

OPR levels one criticism at the section of the Standards Memo that discusses the TVPA. It asserts that the statement that there are no TVPA cases that analyze the lowest boundary of what constitutes torture is misleading. OPR contends that instead of including a lengthy discussion of *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), the authors should have discussed *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), because the conduct in *Daliberti* was far less extreme than the conduct in *Mehinoviv*. OPR's criticism is absolutely preposterous and smacks of petty Monday-morning quarterbacking.

First, OPR concedes that the Standards Memo authors discussed *Daliberti* in the Memo's Appendix along with twelve other TVPA cases and OPR does not allege that the Memo misrepresents *Daliberti* in any way. Thus, distilled to its essence, OPR takes issue with the location of the discussion of *Daliberti*.

Second, OPR takes issue with the Standards Memo's statement that no TVPA case "analyze[s] the lowest boundary of what constitutes torture." Standards Memo at 27. But that statement is neither wrong nor misleading. OPR points to *Daliberti* as just such a case to discuss the lowest boundary of conduct that constitutes torture; yet *Daliberti* does not analyze the lowest boundary of what constitutes torture. The opinion does not engage in any analysis of the fine line between torture and legal but aggressive techniques that do not constitute torture. Moreover, the Standards Memo includes ample conditional language throughout the section detailing the TVPA cases and makes clear that the acts and circumstances that constitute torture vary greatly. *See, e.g.*, Standards Memo at 24 ("Given the highly contextual nature of whether a set of acts constitute torture we have set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture.").

Third, OPR's criticism ignores the fact that the Standards Memo authors cited and discussed *Mehinovic* at length for several reasons, not simply to demonstrate the kind of extreme conduct that rises to the level of torture. The memo authors cited *Mehinovic* to demonstrate that a single incident can constitute torture and that a course of conduct is unnecessary to establish that an individual engaged in torture. Standards Memo at 26. Furthermore, *Mehinovic* demonstrates that there is a wide range of conduct that can rise to the necessary level of severe physical pain or suffering. *Id.* The Standards Memo points out that *Mehinovic* found that a single beating in which one of the defendants delivered to one of the plaintiffs a blow in the stomach while he was on his knees sufficed to constitute torture. Other courts have found that this kind of conduct does not cross the line between aggressive tactics and torture. *See, e.g., Price*, 294 F.3d at 93 (stating that "not *all* police brutality, not *every* instance of excessive force … is torture"). Accordingly, *Mehinovic* makes the very point that OPR argues that *Daliberti* should have been cited to make.

At bottom, the strategic decision to discuss *Mehinovic* in more depth than *Daliberti* in no way violates Rule 1.1. Indeed, such a contention is patently absurd. The notion that an attorney is incompetent because others disagree about which precedent to emphasize would place the entire legal community in jeopardy of being reported for bar disciplinary procedures. Such

second-guessing of the substance of an attorney's work product should be avoided.

E. International Decisions

The Standards Memo contains a lengthy discussion of two relevant international decisions. First, it cites the European Court of Human Rights' opinion in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (sec. A) (1978) (Ireland), which considered the legality under Article 3 of the European Convention on Human Rights and Fundamental Freedoms of five specific interrogation techniques: wallstanding, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink. The decision concluded that even used in combination, none of these five techniques—some nearly identical to the specific methods of interrogation analyzed in the Techniques Memo—constituted torture.[30] Second, the Standards Memo cites the Supreme Court of Israel's decision in *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) (Israel), which examined the legality of five interrogation techniques, including shaking, the Shabach, the frog crouch, excessive tightening of handcuffs, and sleep deprivation. *Israel* was cited as support for the proposition that a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment do not rise to the level of torture.

1. Ireland

Ireland provides persuasive support for the conclusions in both Standards Memos. Thirteen members of the European Court of Human Rights came to precisely the same conclusion as the Techniques Memo in determining that these exceedingly similar techniques did not constitute torture. Moreover, *Ireland* also drew a distinction between torture and less severe forms of cruel, inhuman, and degrading treatment, just as the Standards Memo did. Instead of recognizing *Ireland*'s relevance, OPR resorts to petty criticisms and contends that the discussion of *Ireland* was not thorough enough for three reasons.

First, OPR contends that the Standards Memo should have mentioned some or all of the following facts: (a) The European Court reversed the finding of the Commission that the combined use of the five interrogation techniques constituted torture; (b) The U.K. did not contest the Commission's findings that the interrogation techniques constituted torture; (c) Prior to the Commission's investigation, the U.K. formed a committee to review the interrogation techniques. A majority of the Commission found that the techniques need not be ruled out on moral grounds, but they still found the techniques illegal under domestic law; (d) Four out of the seventeen judges on the European Court of Human Rights thought that the techniques constituted torture; (e) Although the majority found that the techniques were not torture, they still violated the European Convention. Draft Report at 150. OPR thus advances the bizarre notion that it is professionally incompetent to cite an appellate opinion without specifically citing the dissenting judges (whose view was the distinct minority in a 13-4 vote); the lower court opinion (*which was overruled*); and the various other holdings in the case that are not on point. *See Association of Bituminous Contrs. v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) ("dissenting votes have no precedential authority"); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 56 (7th

[30] The Court also determined that the techniques constituted inhuman and degrading punishment and were therefore illegal under the Convention. Of course, the 2002 Memo did not purport to opine on whether the ten specific techniques at issue constituted cruel, inhuman, or degrading treatment.

Cir. 1980) (reversed case is "no longer the law"). But not one of those facts would have altered the Standards Memo's analysis or conclusion in any way. Moreover, none of the facts are critical to *Ireland*'s outcome or to the purpose for which it was cited in the Standards Memo. The failure to provide superfluous details about a case does not violate Rule 1.1.

Second, OPR also argues that the Standards Memo should have included a discussion of post-*Ireland* case law even though OPR conceded that the case law *supports* the conclusion that the term "torture" applies to more severe forms of cruel, inhuman, and degrading treatment. Draft Report at 150 n.131. But there is no authority that requires citation to every single case that supports a single proposition. OPR states that the Standards Memo should have discussed *Selmouni v. France*, 66 Eur. Ct. H.R. (1999), because that case allegedly "raised questions about the continuing validity" of *Ireland.* Draft Report at 151. In support of this assertion, OPR cites the following statement: "Certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in the future …. The increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." *Id.* OPR's characterization of *Selmouni*'s statement is itself a stretch. *Selmouni* does not cite *Ireland* or question its conclusion and the statement is *dicta*.

2. Israel

With regard to *Israel*, OPR takes issue with the Standards Memo's statement that the case is "best read as indicating that the acts at issue did not constitute torture." Standards Memo at 30. OPR concludes that this analysis of *Israel* was based on speculation as to what the court may have intended to say, not the actual language and reasoning of the court's opinion, and that it therefore violated basic principles of legal reasoning and analysis. Draft Report 154. Characterizing prior case law is quintessentially the essence of legal judgment and reasonable attorneys can disagree about how far the reasoning and language in *Israel* extends. Such disagreement should not be elevated to the level of professional misconduct. Moreover, Judge Bybee, as a manager, was entitled to rely on his attorneys' representation and reading of *Israel*.

Moreover, the Standards Memo alerted the reader to the fact that there could be some question about its precedential value by stating that the decision is "best read" in a certain way. And its view that this was the better reading of *Israel* is not unreasonable. In describing the techniques and assessing their legality, *Israel* observed that some of the techniques caused "pain," "serious pain," "real pain," "particular pain and suffering;" that they were "harmful" or "harmed the suspect's body;" that they "impinge[d] upon the suspect's dignity" or "degraded" the suspect; or that they harmed the suspect's "health and potentially his dignity." Nowhere does Israel describe the techniques as "torture" or describe the pain associated with the techniques as "severe." Indeed, *Israel*'s use of language appears to draw a distinction between torture and "inhuman or degrading" treatment. Moreover, even if the Memo's characterization of *Israel* is debatable, it is absolutely true that the opinion nowhere concludes that the techniques at issue constitute torture. Finally, the discussion of *Israel* in no way impacted the Standards Memo's analysis or ultimate conclusion.

3. Citation to additional international decisions

OPR contends that a competent examination of what constitutes torture under international law would have required, at a minimum, a discussion of (1) all relevant international treaties, agreements, and declarations; (2) the doctrine of jus cogens; and (3) the laws, practices and judicial decisions of other States. Draft Report at 149 n.128. First, if OLC had included such an exhaustive summary of the international jurisprudence on torture the memo would have been absolutely unwieldy and entirely unworkable and largely irrelevant to the primary question to be answered. Second, OPR's contention is akin to saying that OPR's Draft Report is not competent because it failed to include a 50-state survey of every bar disciplinary proceeding case, Rule 11 sanction decisions, ineffective assistance of counsel cases, legal malpractice decisions, and ABA ethical opinion in its assessment of whether Judge Bybee and Professor Yoo committed professional misconduct. Given OPR's efforts at research over a four-and-a-half-year investigation, this criticism rings particularly hollow.

In any case, OLC merely examined these two international decisions as "guidance about how other nations will likely react to our interpretation" of the statute and pointed out that international decisions are "in no way binding authority upon the United States." Standards Memo at 27. The *Ireland* and *Israel* decisions simply "reinforce [OLC's] view that there is a clear distinction" between torture and other cruel, inhuman and degrading treatment and that torture is reserved for the most "extreme conduct." *Id.*

V. OPR'S UNSUPPORTED "FINDINGS' OF "FAILURES OF SCHOLARSHIP" IN THE DISCUSSION OF THE COMMANDER-IN-CHIEF POWERS AND POSSIBLE COMMON LAW DEFENSES

In addition to an analysis of the torture statute, OLC addressed two other issues: (1) the scope of the President's Commander-in-Chief powers to conduct interrogations of enemy combatants; and (2) common law defenses to criminal liability in the event a court should find that an interrogation crossed the statutory line. OLC determined that the Commander-in-Chief powers delegated by Article II vested the President with the "power to ensure the security of the United States in situations of grave and unforeseen emergencies," Standards Memo at 37, and this includes the "constitutional authority to order interrogations of enemy combatants." *Id.* at 31. OLC concluded that the statute, "as applied to interrogations of enemy combatants *ordered by the President* pursuant to this Commander-in-Chief power would be unconstitutional." Standards Memo at 39. It reasoned 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 (emphasis added). Second, OLC determined that a defendant accused of violating the torture statute "may" be able to raise the common law defenses of necessity and self-defense. *Id.* at 2. The Standards Memo cautioned, however, that a jury might well reject such attempts. Standards Memo at 41 (acknowledging that not "every interrogation that might violate Section 2340A" necessarily "trigger[s]" a defense). These are reasonable legal judgments and OPR has not—and could not—contend otherwise.

As a threshold matter, it is perfectly appropriate for OLC to give such legal advice upon request—and it was requested. *See* 2008 Addington Testimony at 42 (stating that Yoo included the sections on defenses and Commander-in-Chief authority because it is "what his client asked

him to do"). But even if it had not been requested, there is plainly a rational connection between the interpretation of a criminal statute and possible defenses to that same statute. Moreover, even if affirmatively *unwanted*, OLC could *still* offer the advice if, in its opinion, OLC believed it was in the client's best interest. Nonetheless, OPR maintains that it was somehow professionally irresponsible to address such questions. OPR also lobs a series of attacks, ranging from the petty to the irrelevant, at the substantive analysis. Judge Bybee recognizes that certain portions of the analysis would benefit from additional clarification, but that is true for most lawyers' work product. The core conclusions, however, reflect reasonable answers to difficult, unsettled questions of law. OPR did not—and cannot—find that no reasonable person could agree with the conclusions or that Judge Bybee somehow acted in bad faith..

OPR's criticisms of these sections also make no mention whatsoever of the context in which they had to be written. OPR asserts that the OLC attorneys were under no time pressure to complete the 2002 Standards Memos. But the Draft Report recounts facts that demonstrate beyond any doubt that the authors were under particularly immense pressure when drafting these sections. OLC received instructions to add these two additional issues to the analysis around July 16, 2002, and also received word that their deadline to provide the complete memo by August 1, 2002. During that same period, OLC also had to draft the Techniques Memo. As former Attorney General Mukasey noted in his January 19, 2009 letter to OPR, "it is one thing for people to evaluate in a period of relative calm whether the analysis in the OLC opinions is more sound than subsequent analysis (and criticisms) offered by OLC or other legal commentators. It is quite another to be asked to address such matters alone, and to begin writing without the benefit of extensive subsequent review and commentary for an executive branch and nation trying to formulate a plan to ensure that the September 11, 2001 attacks would not be repeated."

A. Inclusion of the Commander-in-Chief and Possible Common Law Defenses

OPR criticizes the inclusion of the Standards Memo's sections on defenses: Commander-in-Chief, necessity, and self-defense. Draft Report 155-78. OPR contends that these last sections "went beyond" the questions posed and, as such, imply that Judge Bybee acted improperly. OPR is wrong on both the facts and the law, and has not come close to showing professional misconduct.

1. OLC Appropriately Answered the Client's Question

OPR's assertion is factually incorrect, or at least is not supported by the evidence. In fact, there is sworn congressional testimony, which OPR has ignored, directly contradicting OPR's conclusion. In particular, on June 26, 2008, David Addington testified that John Yoo had included the sections on defenses and Commander-in-Chief authority because this is "*what his client asked him to do*" and that Addington himself had requested those sections. *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. of the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 42 (June 26, 2008) (testimony of Addington) (emphasis added). Moreover, Addington noted, "it is the professional obligation of the attorney to render advice on subjects that the client wants advice on." *Id.* It is

remarkable that OPR cites only a portion of this highly relevant testimony. *See* Draft Report at 31, 156 (noting that Addington told Yoo that he was "glad you're addressing these issue," but failing to note that Addington testified that he had specifically requested Yoo to draft those portions of the Memo). Either OPR failed to read the entire transcript of Addington's congressional testimony or it purposefully omitted reference to Addington's statement. *Cf*. Draft Report at 129 ("Selective quotations that omit relevant information are at worst, misrepresentations, and at best, reflect sloppy research and writing."). Furthermore, Addington's testimony is bolstered by the facts that OPR does deign to include. Although Yoo had previously made the decision *not* to include the sections, 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 two new sections. Furthermore, in response to a question from Philbin regarding inclusion of the sections, Yoo once stated that "they want it in there." Draft Report at 155-56. And the Standards Memo itself refers to "your request for advice" on the Commander-in-Chief issue. Standards Memo at 31. The most natural reading of these facts is, as Addington confirmed, that the client asked for the inclusion of those topics.

There is nothing remotely improper about answering such inquiries. That is OLC's role. Indeed, the ethics rules *encourage* OLC to answer. *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 unless the client expressly consents not to have certain information passed on." (emphasis added)). Although Gonzales and others have 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 *Addington* asked for them. *See* Draft Report 156 (Gonzales did not remember how the sections came to be in the memo but "mentioned that David Addington" might have been involved). But even were the evidence in equipoise here, that, by definition, could not support a finding of "clear and convincing" evidence. *See*, *e.g*., *Pearson v. Soo Chung*, 961 A.2d 1067, 1076 n.10 (D.C. 2008) ("evidence in equipoise falls far short" of "clear and convincing").

Also, even if not directly asked, there is nothing improper about OLC's decision to include the additional sections. OPR does not contend that these sections are not rationally related to the application of the torture statute. Indeed, as to the constitutional question of the President's Article II authority, the avoidance doctrine dictates a statutory construction that avoids serious constitutional doubts. It is hardly irrational to simply take the next step and answer the constitutional question directly. Indeed, some critics of the "constitutional avoidance" canon would argue that it is actually more legitimate to answer the constitutional question, rather than disingenuously dodge it, as many court and OLC opinions have done. These two approaches are functionally equivalent where, as here, Congress did not explicitly apply a given statute to the executive.

Finally, even assuming the client explicitly instructed the attorneys *not* to address these issues, *it would still be permissible* for OLC to include them if doing so "appears to be in the client's 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."). OPR has not attempted to show that OLC did not believe

inclusion of those sections to be in the client's interest.

2. OPR's Speculation Is Contrary to the Evidence

Contrary to or ignorant of the concrete evidence, OPR seems to imply that the sections were added as an inappropriate effort to circumvent the Criminal Division's refusal to grant an advance declination of prosecution: "Because of OLC's recognized role as the definitive interpreter of the law within the Executive Branch, these sections in effect constituted an advance declination of prosecution for future violations of the torture statute." Draft Report 155; *see id*. at 156 (based on the sequence of events, the sections were added "to achieve indirectly the result desired by the client").

First, this is pure speculation, devoid of any compelling evidence whatsoever and dependent on reading the facts in the most negative light and even then jumping to unsupported conclusions. OPR has not come close to demonstrating by "clear and convincing" evidence that Yoo included the new sections for any reason other than that the client asked a question and he provided an answer.[31] Moreover, Judge Bybee has categorically denied writing the Standards Memo to give the CIA carte blanche to do whatever it wished. Tr. 112-13. Had he so intended, the Techniques 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 2002 Standards 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." Standards Memo at 39. Even with this enormous limitation (that may have excluded everyone), no one was or could be assured that DOJ would refuse to prosecute based upon the opinion. Judge Bybee had no power to bind his successors who could (and did) withdraw the opinion. Assuring CIA agents that if they acted pursuant to a Presidential order that they would not be prosecuted as long as DOJ officials agreed with the OLC opinion is a far cry from "blanket immunity." Draft Report at 156. And OPR offers no evidence whatsoever that any agent ever conducted an interrogation based on the belief that OLC had assured him that he would be immune from prosecution. The implicit effort to link this good faith work product with unauthorized abuses that may have occurred somewhere in the world is extraordinarily unfair.

Similarly, common law affirmative defenses, such as necessity or self-defense, might not be accepted by a court or jury.[32] So, it is of little comfort to the defendant facing a criminal charge that OLC, the "definitive interpreter of the law within the Executive Branch," says that

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[31] The email from Yoo on July 18, 2002, stating that he has "a good idea about how we are going to do it now," is consistent with Addington having recently requested the additional sections, leading Yoo to state with certainty that he then understood how the memo would be structured.

[32] *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").

certain defenses *might* be available. In short, OLC never purported to commit the Department to concede the availability of these defenses in any particular cases and OLC cannot purport to dictate to courts and juries what defenses will be successful.

Third, OPR misunderstands OLC's permissible role. There is nothing improper about OLC seeking to further the President's goals. *See infra*; *2004 Principles to Guide OLC*, *supra*; Flanigan Decl. Indeed, OLC is "almost always aware" of precisely what course of conduct the executive branch would like to take and it is fully in bounds to seek legal means to permit the executive to carry out its policy goals. Flanigan Decl. ¶ 5. Thus, OPR's attempt to use the fact that OLC knows of the president's goals or the fact that the legal outcome permits those goals cannot serve as the linchpin for finding misconduct. In short, OPR's conclusions are built on conjecture and innuendo leading nowhere.

B. Commander-in-Chief Power

The Standards Memo concluded 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. The Standards Memo explained 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. Standards Memo at 33-35, *citing*, *inter alia*, *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 134 (May 30, 1984) (Olson); *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[.]" (emphases added)).

Thus, as the torture statute nowhere specifically applied to the President, OLC concluded it should not be read to reach his actions under Article II. Similarly, the 2002 Standards Memo reasoned that, insofar as the statute was read to reach Presidential interrogation orders, it would be unconstitutional. In reaching these conclusions, the Standards Memo explained 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. Standards Memo at 38. The Standards Memo reasoned 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 pointed 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 Standards 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.*

Some language in the Standards Memo, viewed in isolation, could be read to suggest that Congress had no power to criminalize *any* interrogations. *See*, *e.g.*, Standards 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, 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). However, properly viewed as a whole, the memo's holding is much more narrowly confined to a power that the President must invoke personally; a field agent could hardly deign to speak on his behalf. Although Yoo testified that this point could have been made more clearly, a point with Judge Bybee agrees, it was nonetheless the intent of the authors. The text of the memo firmly supports his testimony. *See* Standards 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 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.* (emphasis added). In addition, the Standards 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 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, 134 (1984). This analogy demonstrates that the memo's understanding was that the assertion of executive authority must be invoked personally by the President, just like privilege.

This is a reasonable position. Indeed, OPR does not contend that OLC's conclusion is wrong (let alone intentionally or recklessly so) or made in bad faith, only that the memo should have said more. That is, the conclusion was "not adequately supported by authority." Draft Report 157. *See also* Draft Report 159 ("[w]hatever the merits" of OLC's position, "it was not based on a thorough discussion of all relevant provisions of the Constitution"). Although Judge Bybee agrees that this discussion was not as clear or as complete as it could have been, it hardly rises to an ethical violation.[33] Moreover, the most appropriate way to judge whether OLC attorneys' performance is "commensurate" with "other lawyers in similar matters" would be to look to prior OLC and executive branch precedent. OPR has inexplicably failed to do so here. OPR has not examined *any* of OLC's prior opinions from prior administrations. Even a cursory review of such materials demonstrates the truly unprecedented and unwarranted nature of OPR's Draft Report.

1. OLC Adopted a Reasonable View on Unsettled Questions of Law

First, OPR criticizes OLC for taking "a minority view, one that did not acknowledge or address more widely-held, mainstream views as to the scope of executive power." Draft Report at 157. Even accepting that OLC took a "minority" view, it is nonetheless defensible in its conclusions and OPR does not contend otherwise. It is not the role of OPR to critique legal

[33] In any case, it is undisputed that this potential power was not the basis for OLC's advice in the Techniques 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 Standards Memo would have been irrelevant, and the Techniques Memo unnecessary.

judgments at all, *see In re Stanton*, 470 A.2d 281, 287 (D.C. 1983) (stating that an attempt to "put ourselves in the position of a sort of court of appeals from lawyers' judgments … would be the worst sort of second-guessing or Monday morning quarterbacking"), let alone to take a straw poll of academics, philosophers, and other vocal ideological critics. *See*, *e.g*., Draft Report at 2, 129 n.112, 135 n.116, 156 n.142, 162 n.144. Indeed, such polls might well be inconsistent with positions OLC has previously taken. In any event, the positions of the Standards Memo has garnered support. *See*, *e.g*., Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807, 830 (2006) ("It is therefore properly within President George W. Bush's constitutional powers to make orders concerning the capture, detention, and interrogation of enemy prisoners, irrespective of any arguably inconsistent congressional enactment. That is one of the important legal conclusions of the [Standards Memo], and that conclusion is almost certainly correct."); *cf.* Posner & Vermeule, *A "Torture" Memo and it Tortuous Critics*, Wall St. J., July 6, 2004, at A22 (OLC's analysis "falls well within the bounds of professionally respectable argument").[34]

The prevailing view is that there is *some* measure of core Commander-in-Chief and Article II war-making authority that Congress cannot encroach upon. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) ("Congress cannot "'intrude … upon the proper authority of the President'" and "'cannot direct the conduct of campaigns.'" (quoting *Ex parte Milligan*, 4 Wall. 2, 139 (1866) (Chase, C.J., concurring))); Walter Dellinger, Assistant Attorney General, OLC to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, *Re: Placing of United States Armed Forces Under United Nations Operations or Tactical Control* (May 8, 1996) ("[T]here 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") (emphasis added), *citing 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 ...."); 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."); *see also* 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. (Jan. 15, 2009) (President's authority can sometimes override Congress); *Nomination of David Ogden for Deputy Attorney General: Hearing Before the S. Comm. of the Judiciary*, 111st Cong. (2009) (same); Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1239 (2005) ("conventional academic view holds that to some extent these powers are beyond the power of Congress to restrict"). David Barron and Martin Lederman, who disagree with the prevailing majority view, nonetheless acknowledge that "[t]here is a venerable scholarly consensus that

[34] Cf. also 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").

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, 945-46 (2008) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring)); *see also id.* at 1025 & n.334 (collecting commentary endorsing the majority view); *id*. at 945 ("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"); *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 586 (Thomas, J., dissenting) ("[W]e need not decide that question because Congress has authorized the President."); *Padilla v. Hanft*, 547 U.S. 1062, 126 S. Ct. 1649 (2006) (Ginsburg, J., dissenting from denial of cert) (arguing that the Court should address the extent of executive authority to detain indefinitely); *but see Hamdan*, 548 U.S. at 593 n.23 (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). 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), *rev'd*, 542 U.S. 426 (2004).

Nearly all agree that the Commander-in-Chief power must extend at least to tactical commands on the battlefield and the conduct of campaigns, *see*, *e.g*., *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* at 21 (May 22, 1970), and 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); *see also* 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."). Others see the Commander-in-Chief power as extending beyond the battlefield. *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.").

Significantly, most argue that it also includes some measure of intelligence gathering. *See*, *e.g*., *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir.) ("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." (quoting *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972)), *cert. denied*, 128 S. Ct. 373 (2007); *In re Sealed Case*, 310 F.3d 717, 742 (U.S. 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."); *Memorandum Opinion for the Attorney General*, 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 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 …."). For instance, subsequent to the 2002 and 2003 memos, in a White Paper, OLC later 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 (O.L.C.) 6179901, at *3 (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 …."); *but see ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated by* 493 F.3d 644 (6th Cir. 2007). Similarly, 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 12 n.9, *Hepting v. NSA*, No. 08-cv-4373 (N.D. Cal. Apr. 3, 2009) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988)); *United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (recognizing the President's constitutional authority to protect national security information) (citing *Reynolds*); and *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007)).

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 use of the tactics at issue here during an interrogation of suspected terrorists believed to have knowledge of imminent catastrophic attacks is within the Commander-in-Chief's power. *See* Paulsen, *supra*, 40 Ga. L. Rev. at 13 ("[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 to both direct his forces in combating the enemy and collecting 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 and OPR does not contend otherwise.

Executive branch attorneys (OLC and the AG) have long taken a robust view of Executive Authority, without regard to whether it was a minority 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 at 36. Numerous administrations have either explicitly or implicitly found the War Powers Resolution unconstitutional and ignored it. In fact, "every President has taken the position that [WPR] 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* 2 (2002); *see also Overview of the War Powers Resolution*, 8 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).

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 his 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 O.L.C. 123, 1995 WL 1767996, at *3 (May 16, 1995) (Dellinger). Along the same lines, OLC declared unconstitutional a bill proposing to limit the President's ability to place United States armed forces under the UN operational or tactical control. Memorandum from Walter Dellinger, Assistant Attorney General, OLC to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, *Re: Placing of United States Armed Forces Under United Nations Operations or Tactical Control* (May 8, 1996); *see also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (Nov. 28, 2001) (provision restricting funds for use of troops in UN peacekeeping missions is unconstitutional). As to intelligence gathering in particular, as OLC has explained, "'[T]he 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 intelligence and other national security information in the Executive Branch.'" *Access to Classified Information*, 20 O.L.C. 402 (Nov. 26, 1996) (quoting Brief for the Appellees, *Am. Foreign Serv. Ass'n v. Garfinke*l, 488 U.S. 923 (1988) (No. 87-2127)).[35] OLC has similarly advanced the President's Article II authority in other contexts,[36]

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[35] *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 (O.L.C.) 34474450 (Dec. 22, 2000) (reading Fed. Draft Report Crim. P. 6(e) to avoid impinging on Article II authority); *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 O.L.C. 92, 1998 WL 1180178, at *1 (May 20, 1998) (Moss written testimony before House committee) (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 Article II authority over nation's diplomatic affairs).

[36] *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. 300, 304-06 (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*

including asserting that criminal statutes of general applicability do not apply to the executive unless they specifically so state.[37]

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" Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (Nov. 2, 1994) (emphasis added). 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*. (emphasis added). OPR has not examined *any* of these executive branch precedents or practices, as a "thorough discussion" of this matter surely demands. *Cf*. Draft Report at 159.

This discussion demonstrates that even if the 2002 memos represent a step beyond 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 "responsibility as head of the office of legal counsel, to be a vigorous defender of the president's prerogative." Tr. at 54. OLC's views are reasonable, persuasive, and in no way reckless *See Safeco*, 127 S. Ct. at 2216 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, *A "Torture" Memo and its Tortuous Critics*, Wall St. J., July 6, 2004, at A22 (OLC's analysis "falls well within the bounds of professionally respectable argument"); *see also* 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").[38]

Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress, 8 Op. O.L.C. 30, 31 (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 (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 (Jan. 29, 2008) (surveying past decisions reading reporting statutes to avoid constitutional problems).

[37] *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. OLC 101, 127 (May 30, 1984) (Olsen) (interpreting criminal contempt statute not to apply to President and subordinates asserting executive privilege lest it impinge on Executive authority).

[38] The arguments do not suddenly become less reasonable—let alone unethical—if successor attorneys decline to adopt the analysis as unnecessary, *see* Levin Standards Memo at 2 ("Because the discussion in [the 2002 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* 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,*

2. The Decision Not to Reiterate *Youngstown*

Second, OPR cites OLC's failure to cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as support for its professional misconduct findings. Draft Report at 161 ("[W]e believe a competent attorney providing objective advice to his client would have acknowledged its relevance to the debate."). 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. *See id*. at 88, 161 & n.42. As an argument about competence or candor, this argument lacks merit.

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.* 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 (emphasis added).

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 v. Rumsfeld*, 548 U.S. 557 U.S. 593 n.23 (2006) (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 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

2001, at 3 (Jan. 15, 2009) (Commander-in-Chief discussion was withdrawn). Although OPR cites Bradbury, Goldsmith, and Levin, as taking issue with the Commander-in-Chief analysis, even if they disagree, mere disagreement is not evidence of ethical failings. OPR makes no mention, beyond carefully-evoked innuendo, of its interviewees' views on the whether the conduct here was *unethical*. Indeed, 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. Again, this no more proves OLC incompetence or bad faith 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.

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 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 there was no analytical rationale for citing *Youngstown* because such a citation would not alter the ultimate analysis. *See* Tr. 93 (stating that *Youngstown* is a "mode of analysis," that "it doesn't answer the question," and that the memo is "quite consistent" with the *Youngstown* mode of analysis). 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).[39]

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." 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" *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 127 (May 30, 1984).

More recently, in 1996, OLC nowhere cited *Youngstown* in concluded 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

[39] 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 (emphasis added); *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 (emphasis added). 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. 28 U.S.C. § 2340.

authority as Commander-in-Chief." Memorandum from Walter Dellinger, Assistant Attorney General, OLC to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, *Re: Placing of United States Armed Forces Under United Nations Operations or Tactical Control* (May 8, 1996).[40] Where the President determines that the purposes of a particular military operation require a particular action (there, 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 *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61-62 (1941)).

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.*, *Whether the President May Have Access to Grand Jury Material In the Course of Exercising His Discretion to Grant Pardons*, 2000 WL (OLC) 34474450, at *1, 6 (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 Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.))) (not citing *Youngstown*); *Whistleblower Protections for Classified Disclosures*, 22 OLC 92, 1998 WL 1180178, at *1 (May 20, 1998) (Moss written testimony before House committee) (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*); Memorandum for Janet Reno, Attorney General, from Walter Dellinger, *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*).[41]

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[40] *See also* David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb — A Constitutional History*, 121 Harv. L. Rev. 941, 1091(2008) ("[T]he [Dellinger] opinion did not cite, let alone discuss, Youngstown.").

[41] *See also Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 O.L.C. 350 (Dec. 18, 1995) (not citing *Youngstown*, but citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992)) ("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"); *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,

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 three-part 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 Standards Memo, though not expressly referring to *Youngstown*, was consistent with its methodology and nothing would have changed even with a mechanical reference to *Youngstown*.

3. The Decision Not to Reiterate Congress's Enumerated Powers

Third, OPR criticizes the failure to discuss Congress's enumerated powers. Draft Report at 159-60. According to OPR, the Standards Memo "should have addressed the significance of the enumerated powers of Congress before concluding that the President's powers were exclusive." Draft Report at 160.

Judge Bybee has readily conceded, in retrospect, this particular section could have been more fulsome. *See generally* Tr. However, the memo did examine the relationship between Article I and Article II powers, Standards Memo at 34-38, and implicitly concluded that the powers at issue here were not "expressly assigned in the Constitution to Congress" and thus were "vested in the President." Standards Memo at 37. Also, the Memo incorporates by reference prior OLC opinions that do give a more detailed discussion. *See*, *e.g.*, 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) (*Transfer Opinion*) [cited at Standards Memo at 38]; Memorandum from William

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291-92 (1981) and *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319-20 (1936)); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248 (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 Op. for Attorney General from John M. Harmon, *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 (Aug. 13, 1980) (proposed legislative veto "intrudes upon the constitutional prerogatives of the Executive") (not citing *Youngstown*); *Constitutional Issues Raised by CJS Appropriations Bill*, (Nov. 28, 2001) (not citing *Youngstown*). *See also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (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*).

There are also a number of opinions that, while citing *Youngstown*, do not explicitly address the popular Jackson concurrence. *See*, *e.g.*, Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (Nov. 2, 1994) ("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"); Memorandum from William Rehnquist, Assistant Attorney General, *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'"); Benjamin R. Civiletti, *Authority for the Continuance of Governmental Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5-6 (1981) (concluding, without employing the Jackson framework, that statute "should not be read as necessarily precluding exercises of executive power").

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"). Previously, in the *Transfer Opinion*, OLC held that the President has the Commander-in-Chief power to transfer terrorists detained outside the U.S. to other countries. OLC examined the text, structure, and history (including historical practice) of Articles I and II 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. OLC determined that Congress's powers to "'make Rules concerning Captures on Land and Water,'" Article I, Section 8, Clause 11, applied only to property, not persons. *Id*. at 5. 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,'" Article I, Section 8, Clauses 12 and 14, 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). But, ultimately, OLC found that the executive retains the "the power to handle captured enemy soldiers" because the Constitution does not "specifically commit[] the power to Congress." *Id.* at 4-5.

The Draft Report acknowledges that the prior OLC memo had "concluded that the word 'captures' was limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons." Draft Report at 160 n.141. But then OPR simply proceeds on its own authority to take issue with this prior OLC legal conclusion. *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. OLC, in a memorandum from Steve Bradbury, recently withdrew OPR'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. 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.

4. The Decision Not to Reiterate Take Care Clause Jurisprudence

Fourth, OPR criticizes the Standards Memo's failure to read the "Take Care" clause in conjunction with the Commander-in-Chief clause. Draft Report at 161-62 & 143. 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. *See*, *e.g*., Memorandum from Walter Dellinger, Assistant Attorney General, OLC to Alan J. Kreczko, *Special Assistant to the President and Legal Adviser to the National Security Council, Re: Placing of United States Armed Forces Under United Nations Operations or Tactical Control* (May 8, 1996) (finding provision unconstitutional under Commander-in-Chief clause without mentioning Take Care clause); Memorandum for Bernand N. Nussbaum, Counsel to the President, *The Legal Significance of Presidential Signing Statements*, 17 O.L.C. 131, 133 (Nov. 3, 1993) (explaining, 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'"). 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 O.L.C. 37, 47 (Feb. 16, 1990) (Barr, AAG) (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." 14 O.L.C. 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.[42] In other words, OLC has already "reconciled the Commander-in-Chief clause with the Take Care clause." Draft Report at 162; *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).

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). And 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 running afoul of the Take Care clause. 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.[43]

5. Relevant Context

Context matters. The recipients of the Standards Memo consisted of sophisticated executive branch attorneys who did not need a primer on the separation of powers. It is incoherent to find OLC did not say enough without factoring in everything OLC did say and the audience to which it said it.

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[42] The same would, of course, hold true as to treaties. *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.").

[43] The draft report also states that the 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." Draft Report at 159. This is facile rubbish.

All of the OLC memos—including the ones at issue here—are part of an ongoing dialogue, a fact the memo explicitly highlighted. *See* Standards Memo at 36 ("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.") (emphasis added); *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); Tr. 87. The first known memo in that dialogue came just two weeks after September 11th. *See* Memorandum 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). In that memo, OLC acknowledged Justice Jackson's *Youngstown* concurrence. And the memo 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." Later, a March Standards Memo discussed the Captures clause. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, OLC, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002). Both of these memos are cited in the Standards Memo's Commander-in-Chief section. Standards Memo at 32, 35, 38. The conversation included numerous other memos. *See supra* (listing memos).

To force OLC to reiterate basic constitutional law principles, and 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, *see infra*, with no value added for the client. The idea that these highly-skilled executive branch attorneys would not know about *Youngstown*, Congress's enumerated powers, and the Take Care clause is preposterous.

C. Common Law Criminal Defenses to Torture

The final section of the Standards Memo discussed two possible defenses to violations of the anti-torture statute: the necessity defense and self defense. Because many of OPR's criticisms with regard to the two defenses overlap, we will discuss them together.

The sections outlining the common law defenses were added in mid-July 2002 after Addington requested their inclusion. The language used throughout both sections is entirely conditional, cautious, and equivocal. *E.g.*, Standards Memo at 39 (stating that the authors "*believe* that a defense of necessity *could* be raised, under current circumstances, to an allegation of a Section 2340A violation" and that "under current circumstances, *certain* justification defenses *might* be available that would *potentially* eliminate criminal liability" (emphases added)); *id.* at 42-43 (stating that "a defendant *could* still appropriately raise a claim of self-defense," and , and that "we believe that a defendant accused of violation Section 2340A *could* have, in *certain* circumstances, grounds to properly claim the defense of another"). At no point does the Standards Memo ever definitively conclude that either defense will negate liability under § 2340A. The Memo merely suggests that a government official prosecuted under § 2340A could argue, depending on the circumstances underlying the prosecution, that he acted by necessity or in self defense.

1. The Standards Memo appropriately discussed Supreme Court Precedent

First, OPR criticizes the Standards Memo for misrepresenting or omitting to discuss certain Supreme Court precedent. Specifically, OPR criticizes the Standards Memo for citing *United States v. Bailey*, 444 U.S. 394 (1980), for the proposition that "the Supreme Court has recognized the [necessity] defense," but not recognizing that the majority in *United States v. Oakland Cannabis Buyer's Cooperative*, 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 …." 532 U.S. 483, 490 n.3 (2001). As a preliminary matter, the concurrence in *Oakland* makes clear that the majority's characterization is entirely incorrect because "our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words." *Id.* at 501 (citing *Bailey*, 444 U.S. at 415) (Stevens, J., concurring).[44] Moreover, even OPR admits that *Oakland*'s statement about the general viability of the necessity defense is *dicta*. Draft Report at 164. This is amply demonstrated by one of the cases that OPR cites. In *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001), issued after *Oakland*, the First Circuit discussed the availability of the necessity defense but neither cited *Oakland* nor discussed its dicta. And there is a wealth of case law in which lower courts have permitted defendants to raise the necessity defense in prosecutions under a federal statute. *See*, *e.g.*, *United States v. Colon*, 278 Fed. Appx. 588 (6th Cir. 2008); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001); *United States v. Blanco*, 754 F.2d 940, 943 (11th Cir. 1985)..

In any event, even if it would have been better to cite *Oakland*, this is not evidence of an ethics violation.[45] As explained above, to prove a violation of Rule 1.1, OPR must demonstrate not only that the attorney failed to apply his or her skill and knowledge, but also that this failure constituted a serious deficiency in the representation. *In re Ford*, 797 A.2d at 1231. The failure to cite *Oakland* did not affect the memo's ultimate conclusion that the necessity defense *might* be available for an official charged under § 2340A and the Supreme Court has never held that it is not available. Consequently, the client was not and could not have been prejudiced by the lack of citation to *Oakland*.

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[44] In fact, the lower court decisions cited by OPR that were issued after *Bailey* but prior to *Oakland* interpreted *Bailey* as recognizing the defense. *See United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990) ("In *Bailey*, the Supreme Court held 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) (stating in response to the government's argument that a necessity defense should only be considered in mitigating the penalty assessed after conviction that "[t]he teachings of the Supreme Court in *United States v. Bailey* … indicate otherwise. In *Bailey*, the Court determined that the justification defenses of duress and necessity are generally available ….").

[45] Even the Supreme Court and the Solicitor General's Office has on occasion overlooked relevant or even potentially dispositive material. For example, last year *in Kennedy v. Louisiana*, 127 S. Ct. 2641, (2008), the Supreme Court considered the constitutionality of the death penalty for the crime of child rape. A central point of the Court's analysis was the observation that child rape was a capital offense in only six states, and that none of the 30 other states with the death penalty, nor any federal jurisdiction, authorized the death penalty for that crime. The Court thus noted a trend away from the use of death to punish such crimes both here and abroad. But the Court—both the majority and the dissent—failed to take into account that in 2006 no less an authority than Congress, in the National Defense Authorization Act, had prescribed capital punishment as a penalty available for the rape of a child by someone in the military. None of the ten briefs filed with the Court, mentioned the provision. Notably, the Solicitor General's Office, which had also missed the 2006 statutory amendment, sent the Court a formal apology for its oversight. No attorneys or jurists were referred to the bar for failing to identify the provision.

OPR also contends that the Memo mischaracterized *Cunningham v. Neagle*, 135 U.S. 1 (1890). The Memo cited *Neagle* as support for the proposition that "a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government." Standards Memo at 45. OPR itself admits that *Neagle* observed that "[w]e cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death." 135 U.S. at 67. Yet OPR thinks that "*Neagle*'s value as precedent is arguably limited by the unusual factual background of the case." Draft Report at 177 n.165. Although OPR might prefer not to rely on it, the fact is that "*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 …." Peter M. Shane & Harold H. Bruff, *Separation of Powers: Cases and Materials* 53 (2d ed. 2005). Although *Neagle* concerned the use of inherent executive power to protect the domestic interests of the United States (the life of Justice Field, traveling in California), it has frequently been cited for broader purposes. For example, Professor Monaghan, citing *Neagle*, has suggested that the President has the inherent power to protect U.S. personnel and property. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 66 (1993) ("[I]nherent in the concept of the American Chief Executive is the power (and perhaps the duty) to use force as necessary to enforce federal law when a breakdown in the normal civil process has occurred, and not only to defend the United States against sudden attack, but also to 'protect' the government's personnel, property, and instrumentalities. While this latter 'protective' power finds its clearest illustrations in cases of immediate danger, it is, in principle, not so limited."). What is more, the Standards Memo makes clear that its suggestion that self defense of the nation might be available as a defense for a government defendant indicted under § 2340A is an extension of *Neagle*'s dicta. The Standards Memo stated that "*if* the right to defend the national government can be raised as a defense in an individual prosecution …, *then* a government defendant should be able to argue that [his conduct] … was undertaken pursuant to more than just individual self-defense or defense of another." Standards Memo at 45.

Finally, even if the Standards Memo's assessment of *Neagle* is incorrect, an incorrect interpretation of unsettled law is not an ethical violation. "If reasonable attorneys could differ with respect to the legal issues presented, the second-guessing after the fact of … professional judgment is not a sufficient foundation" to prove a malpractice claim, let alone an ethical violation. *Biomet Inc*, 967 A.2d at 667-78. Nor has OPR come close to showing by clear and convincing evidence that OLC recklessly interpreted the law because "the text and relevant precedent allow for more than one reasonable interpretation." *Safeco*, 127 S. Ct. at 2216 n.19.

2. OLC made clear that asserting either defense in these circumstances would be an extension of law

OPR notes that the only authority cited for extending the common law of self-defense to the ticking time bomb scenario was a law review article. *See* Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989). OPR contends that the article cited more scholarly authorities than legal ones and that it was a moral assessment, not a legal assessment. OPR concludes that the Standards Memo's conclusion that "a detained enemy combatant . . . may be harmed in self-defense if he has knowledge of future attacks because he has assisted in

their planning and execution," was not based on any law and that the Memo failed to disclose the novel nature of the extension of self defense to this area. This criticism is simply not warranted.

There is no question that the Standards Memo was correct in stating that self-defense is a standard criminal law defense, and while its extension to this area might be novel, that does not make it wrong. It is certainly not an ethical violation or incompetent lawyering to advance a position that extends the current case law to novel factual scenarios. Indeed, that is the essence of what lawyers do. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985) (lawyer may advance positions that "can be supported by a good faith argument for an extension, modification or reversal of existing law" as long as "there is some realistic possibility of success if the matter is litigated"). Moreover, the Memo qualified its analysis by saying that self-defense "would not ordinarily be available to an interrogator accused of torturing a prisoner who posed no personal threat to the interrogator." Standards Memo at 44. And, the assertion that the Memo did not identify for the client the fact that this was a novel interpretation is plainly wrong. The Memo states "[t]o be sure, this situation is different from the usual self-defense justification." Standards Memo at 44. Indeed, the very fact that the memo cited a scholarly article—as opposed to case law—in support of such an extension of self-defense demonstrates that it was a novel theory. In addition, the Memo's intended audience would have been well-aware that a ticking time bomb scenario had yet not been tested in the U.S. courts.

3. OLC's discussion of the defenses was sufficiently thorough

OPR levels a general criticism at both defense sections and contends that the Standards Memo should have provided a more fulsome discussion of the applicable case law. Precisely because the Memo was addressing the defenses in a novel factual scenario not yet asserted in or addressed by a U.S. court, there was no compelling reason to discuss additional federal court opinions on the defenses. The existing federal case law on both defenses was so far afield and not factually analogous to the ticking time bomb scenario that the Memo contemplated that the addition of extraneous case law would have unnecessarily overwhelmed the client with unnecessary information. In addition, Judge Bybee has confirmed that the purpose of these sections was to call attention to the fact that such defenses *might* be available to an official prosecuted under the statute. It was not meant to be an exhaustive study of the common law defenses. Tr at 97.

Moreover, the Memo contained a thorough discussion of the black letter law on both defenses. With regard to the necessity defense, OPR takes issue with the Memo's assessment of the elements asserting that a thorough memo would have included an element by element analysis of how the defense would be applied to a government interrogator accused of violating the torture statute. OPR's criticism is utterly baffling. Every alleged deficiency identified by OPR was specifically addressed in the Standards Memo. *Compare* Draft Report at ___ *with* Standards Memo at 31 n.17, 40-41.

OPR contends that the memo should have discussed the fact that the first element of the defense requires the defendant to demonstrate that he faced an immediate, well-grounded threat of death or serious injury. *But see* Standards Memo at 41 (explaining that there are "two factors that will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to

prevent an attack, the more necessary interrogation will be. Second, the more likely it appears that a terrorist attack is likely to occur and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary."). OPR asserts that the Standards Memo should have discussed the fact that a defendant asserting a necessity defense must prove that he had no reasonable legal alternative to violating the law. *But see id.* at 40 (stating that "[t]he defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm."). OPR states that the Memo should have discussed a real world situation in which a defendant could prove that he reasonably anticipated that torture would produce information directly responsible for preventing an immediate impending attack. *But see id.* at 31 n.17 (mentioning the ticking time bomb scenario as precisely such a real world situation).[46] OPR says that the Memo should have discussed the fact that when a criminal statute expressly provides that a necessity defense is prohibited or that it is available, the statute's determination is controlling. *But see id.* at 41 (identifying "an important exception to the necessity defense," which is that "the defense is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values" regarding its availability).

As for self defense, the Memo defined it and reviewed each element. It cautioned that an individual may not use self-defense if he suffers no harm or risk in waiting to use force, *id.* at 42, or if he did not reasonably believe that force was necessary, *id.* at 43, or if the violence is not imminent, *id.* at 43. The memo even identified reasons why a court might not be convinced of a claim to self defense in such a novel scenario. *See id.* at 44 (stating 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 ….."). This discussion was more than ample to provide the client with the necessary and requested information.

At bottom, what OPR actually takes issue with is that the authors did not adequately lay out how a government defendant could successfully raise a necessity defense, but the Memo never purported to demonstrate how the defense could be successful under every conceivable fact pattern that might arise in the future. Again, as Judge Bybee, confirmed, the purpose of the section was simply to identify the defenses as potentially applicable in a criminal prosecution.

4. The Memo did not ignore relevant material in its assessment of the necessity defense

OPR states that the memo ignored relevant material that undermined or negated its arguments. Draft Report at 170-73. Article 2, paragraph 2 of the CAT states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture." OPR points out that although the Reagan administration's proposed conditions for ratification of the

[46] Indeed, the OLC attorneys working on the 2002 Memo had been briefed on the apprehension of Jose Padilla on May 8, 2002. Padilla was believed to have built and planted a dirty bomb—a radiological weapon which combines radioactive material with conventional explosives—in New York City. It is easy for OPR, seven years removed from the horror of 9/11 to scoff at the notion of a ticking time bomb scenario, but the context in which these memos were written simply cannot be forgotten. Indeed, one need only review the reaction to the recent publicity stunt involving Air Force One's flyover in New York City to see how swiftly the public's mentality can shift. *See Air Force One Backup Rattles N.Y. Nerves*, N.Y. Times, Apr. 27, 2009.

CAT included the understanding that Article 2.2 does not preclude the availability of common law defenses, the Bush administration deleted that understanding from the proposed conditions. OPR faults the Standards Memo for omitting reference to the Bush administration's deletion of the understanding of the availability of common law defenses. Although Judge Bybee agrees that in retrospect it would have been useful to cite either the Bush Administration's understanding of the availability of the necessity defense or both the Reagan Administration's and the Bush Administration's understanding, such an omission does not rise to the level of an ethics violation. And, in any event, Congress ultimately did not adopt the language of CAT Article 2.2. As the Standards Memo explained, "Congress did not incorporate CAT Article 2.2 into Section 2340. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense." Memo at 41 n.23.

Moreover, OPR provides absolutely no evidence that Judge Bybee acted in bad faith by not citing the Bush administration's deletion in its proposed understanding. OPR's statement that the memo's drafters "knew" of the Bush Administration's deletion, but "did not discuss in the memorandum" is supported only by reference to what [redacted] knew. Draft Report at 172 n.158 (noting that [redacted] files included marked up copies of the omitted materials). At his deposition, Judge Bybee stated that he routinely asked his staff whether they had included all relevant information. It is simply not his role, as head of the office, to conduct independent research for all OLC legal opinions. *See infra*.

OPR also finds the Memo deficient for failing to note that the Sentencing Guidelines, which provide for a reduced sentence when a defendant commits a crime to avoid a perceived greater harm, might constitute Congress' decision that the necessity defense is unavailable under §§ 2340 and 2340A. In support of its argument, OPR cites a single state court decision, *Long v. Commonwealth of Virginia*, 23 Va. App. 537, 544 (1966), which held that where a legislature has addressed the factors that would give rise to the common law necessity defense in sentencing provisions it has made a determination that the defense should not be available. However, it is simply ridiculous to assert that the Guidelines—created by the Sentencing Commission—constitute a legislative determination with respect to the entire body of federal criminal law. And OPR's support for this particular criticism comes from one *state* court decision issued in 1966, nearly twenty years before the Sentencing Guidelines were adopted. In any case, the most OPR can muster is that it is "equally reasonable" to adopt OPR's preferred interpretation of the statute (that Congress nullified the common law necessity defense sub silentio). Draft Report at 172. It is not OPR's role to overrule OLC's interpretation by providing an additional competing interpretation.

5. Citing Secondary Sources

OPR complains that OLC cited a treatise for the black letter definitions of both defenses. With regard to self defense, OPR simultaneously criticizes the Standards Memo while acknowledging that the first citation is to a D.C. Circuit case, *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973). Putting aside this oversight, the fact that the Standards Memo cited the leading treatise on criminal law—LaFave & Scott's *Substantive Criminal Law*—for the black letter law on necessity and self defense is perfectly acceptable. Indeed, a Westlaw search reveals that the Supreme Court itself has cited LaFave & Scott in its opinions over 130 times (not to mention the fact that OPR itself cites LaFave & Scott). This criticism is fatuous.

6. OLC authored the Standards Memo for sophisticated clients who had an advanced knowledge of these basic principles

Finally, OPR states that the Standards Memo should have made clear that federal courts rarely allow the necessity defense to be presented to a jury, that it has never resulted in an acquittal, and that it is an affirmative defense that the defendant bears the burden of proving. Such criticism entirely ignores the audience for whom the memo was written. The memo authors' clients were sophisticated attorneys who did not need to be told that necessity is an affirmative defense or that a defendant bears the burden of proving an affirmative defense. Indeed, then-White House Counsel Alberto Gonzales, the only named recipient on the Standards Memo, was a former state supreme court justice. *See*, *e.g.*, *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 646 (Tex. 2000) (Justice Gonzales, writing for the court, noting that a defendant must prove conclusively the elements of the affirmative defense of limitations when moving for summary judgment). Furthermore, Judge Bybee has confirmed that "this was a conversation among very sophisticated lawyers who were very capable …." Tr. 87. And John Rizzo has authorized us to represent that he paid very little attention to the 2002 Standards Memo and only relied on the 2002 Techniques Memo in providing advice to the CIA.

VI. OPR'S INEXPLICABLE FAILURE TO DIFFERENTIATE ROLES

One of the more baffling aspects of the Draft Report is OPR's complete failure to distinguish between the various roles played by the different OLC attorneys in creating the Memos and its seemingly selective and illogical findings of misconduct.

As should be plainly obvious, the vast majority of OPR's criticisms regarding the substance of the memos relate to researching, Shepardizing, and checking citations—in short, the work of the line attorneys at OLC. Judge Bybee's role with regard to the Memos was a managerial one. Judge Bybee, who, as the head of OLC, was responsible for overseeing an office of over twenty extraordinarily talented and experienced attorneys, cannot be held responsible for conducting independent research or Shepardizing every case. OLC produced numerous memos over his tenure, which all required a significant amount of leg work. The head of OLC must be able to delegate tasks and trust the work of his subordinates. Otherwise, the office would cease to function. Here, Judge Bybee had exceptionally well-qualified staffing on the memos, including three former or future Supreme Court law clerks, one of whom was an extensively-published professor considered by many to be an expert in the relevant doctrine. *See*, *e.g.*, John C. Yoo, *UN Wars, US War Powers*, 1 Chi. J. Int'l L. 355 (2000); John C. Yoo, Kosovo, *War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673 (2000); John C. Yoo, *Treaties and Non-Self Execution*, 94 Am. Soc'y Int'l L. Proc. 47 (2000); John C. Yoo, *Globalism and the Constitution: Treaties, Non Self-Execution, and the Original Understanding 99 Colum. L. Rev 1955 (1999); John C. Yoo, CLIO at War: The Misuse of History in the War Power Debate*, 70 U. Colo. L. Rev. 1169 (1999); John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 Minn. L. Rev. 1435 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev 167 (1996); Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 Int'l Law. 715 (1992).

Moreover, Patrick Philbin, the Second Deputy in charge of reviewing and editing the Standards Memos has said that he did not conduct independent research, cite check the memos, or Shepardize the cases. Yet OPR specifically "concluded that Patrick Philbin did not commit professional misconduct in this matter because he did not participate in the drafting and did not sign the memoranda." Draft Report at 188. Under OPR's logic, although the AAG is responsible for re-performing all of the line attorney's preliminary efforts in creating a draft opinion, the Deputy AAG is not. Such a conclusion is nonsensical and divorced from any sense of how an efficient government—or really any—office runs. Moreover, why wouldn't such responsibility extend to Judge Bybee's superior? OPR itself acknowledges that Ashcroft, was "ultimately responsible for the [Memos] and for the Department's approval of the CIA program[,]" but OPR concludes that "it was not unreasonable for senior Department officials to rely on the advice from OLC." Draft Report at 189. (Remarkably, OPR notes "that Ashcroft was at least consistent in his deference to OLC." *Id.*) That must be equally true as to Judge Bybee's justifiable reliance on his well-trained staff.

OPR concludes that "[redacted] because of [redacted] relative inexperience and subordinate position, did not commit misconduct" "[a]lthough she appears to bear initial responsibility for a number of significant errors of scholarship and judgment …." Draft Report at 188. Again, this highlights the absurdity of OPR's stance, holding Judge Bybee responsible for redoing a line attorney's work while excusing the line attorney herself.

VII. OPR'S PROCEDURAL IRREGULARITIES

In addition to OPR's incredible overreach with regard to the substance of its criticisms, it has also demonstrated an appalling disregard for any sense of fairness or due process for the targets of its investigation. After OPR informed Judge Bybee that he was the subject of their investigation, he voluntarily agreed to an interview on the record. At that time, OPR informed Judge Bybee and his counsel that he would have an opportunity to submit a written response before OPR issued any adverse findings. Over the course of OPR's investigation, Judge Bybee's counsel attempted to maintain open communication, sending letters addressed to [redacted] on September 27, 2005, February 17, 2006, and October 1, 2008, and to keep abreast of OPR's investigation. After three years with virtually no word from OPR, during the 2008 holiday season Judge Bybee and his counsel were shocked to learn from David Margolis that not only had OPR completed a draft report with adverse findings that would have placed Judge Bybee's professional career in jeopardy, but that OPR had already scheduled a date (January 12, 2009) on which to release the report to Congress and the public. Indeed, had staff from the Attorney General's Office not intervened and contacted Judge Bybee's counsel, Judge Bybee might not have had any opportunity for review and response despite OPR's previous assurances.

In addition to failing to communicate with the targets of its investigation, OPR strategically waited until the waning days of the Bush Administration to share the Draft Report with any of the Department's officials. On December 23, 2008, OPR permitted Attorney General Mukasey and Deputy Attorney General Filip to review the Draft Report, informing those officials that they should provide any concerns to OPR by January 2, 2009. On December 31, 2008, Mukasey and Filip met with officials from OPR to express their preliminary concerns about the Draft Report and its conclusions. At that time, OPR told Mukasey and Filip that it had not yet informed the targets of the investigation of the existence of the Draft Report. In the wake

of the meeting, OPR informed Mukasey and Filip that it would neither finalize the Draft 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 meaningful review and input.

Despite Mukasey and Filips' concerns that as of December 31, 2008, OPR had not yet informed Judge Bybee of the Draft Report's completion, OPR waited until March 4, 2009 to grant Judge Bybee and his counsel access to the Draft Report. On the same day it set a 60-day deadline in which to review the 200-page Draft Report and prepare a response. This is a shorter time frame than that afforded a petitioner seeking review in the Supreme Court or a routine appellant in the courts of appeals. *See* Sup. Ct. R. 13 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."). Judge Bybee and his counsel pointed out that such a deadline was unrealistic and unacceptably short, particularly given the length of OPR's own investigation and the length and classification level of the Draft Report itself. Indeed, one must question why OPR took four and a half years to produce its Draft Report if time was of the essence. It is almost as if OPR is rushing to meet some unspecified external deadline.

Throughout the entire review period, the Draft Report was classified at the sensitive compartmented information level. This fact greatly complicated counsel's ability to review the classified portions of the Draft Report and adequately respond to those sections. Moreover, OPR informed Judge Bybee's counsel that the associate immersed in the investigation would not receive the necessary security clearance for four months. After being so informed, counsel submitted to OPR a reasonable proposal that would permit Judge Bybee to respond 60 days from the date that the associate received the appropriate clearance. OPR rejected this request as well, instructing counsel to find another associate with the necessary clearance to assist in preparing the response. OPR provided absolutely no explanation whatsoever for its rigid adherence to such an absolutely capricious and rushed deadline. Fortunately for Judge Bybee another associate with the necessary clearance was identified and available to provide assistance with the classified portions of the Draft Report.

Accepting the 60-day time period in which to prepare a response, Judge Bybee's counsel submitted a request for all non-public documents that OPR reviewed in the course of its four and a half year investigation and relied upon in making the allegations in the Draft Report. Such review, counsel argued, was necessary in order to prepare a response. Included within counsel's request was access to the transcripts of all witness interviews and all exculpatory evidence. OPR categorically and without any explanation denied requests for any documents except the transcript of Judge Bybee's own interview. OPR also opaquely avoided answering counsel's request for exculpatory evidence, refusing to affirmatively assert the absence of any exculpatory evidence. Such refusal is shocking in the wake of Attorney General Holder deciding to abandon the case against former Senator Stevens, in large part due to the prosecutors' failure to turn over key evidence. *Cf. Brady v. Maryland*, 373 U.S. 83 (1963). 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), *at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-

288.html. OPR likewise denied Judge Bybee access to the then-classified 2005 Bradbury memos. But for the fortuity of the August 16, 2009 declassification by the Department, Judge Bybee would have been deprived of the highly relevant fact that the Bradbury memos upheld the same techniques as the 2002 memos.

To make matters worse, OPR has disregarded its own precedent and its promises to Judge Bybee during the course of its investigation. For at least the last decade and spanning Administrations of both political parties, Associate Deputy Attorney General David Margolis has been the definitive word on OPR's ethics investigations, particularly with regard to findings against former Department employees. Judge Bybee and his counsel were led to believe that he would play the same role here, particularly since OPR has rejected all of Judge Bybee's requests as part of OPR's "standard procedure." If this investigation proceeds as any other standard investigation, Margolis should play the same role that he always has played. But, with the new administration in charge, it appears that Margolis might be stripped of his authority. While DOJ political appointees are certainly within their rights to run the Department as they see fit, by bypassing Margolis, they expose themselves to political interference in a long-standing and highly-contentious investigation. They run the risk of appearing to have pre-ordained the result of this response. OPR promised an appeal, but it is now uncertain whether there will be an open-minded review or, bypassing Margolis, merely a rubber stamp. For the record, if OPR proceeds to issue a Report, Judge Bybee requests an opportunity to exercise his full and standard appellate rights within DOJ before any professional bar referrals are made and before any report is publicly released.

Finally, the fact that the preliminary results of OPR's investigation were leaked to the press greatly prejudiced Judge Bybee, who had not even been granted access to the Draft Report at the time. The leak had a wholly predictable effect, fueling cries for impeachment and even criminal prosecution. Indeed two Senators have publicly issued what is in essence a warning to OPR not to change its previously-established findings regardless of the merits of Judge Bybee's response. Counsel wrote a letter to OPR expressing dismay at the leaks and Mr. Margolis has referred the matter to the Department's Office of the Inspector General.

As should be plainly obvious, OPR has shown virtually no regard for the due process rights of the subjects of its investigation. Nor has it much concerned itself with keeping up even the appearance of fairness. OPR's entire course of conduct has been one-sided and outcome-driven.

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

Aside from the myriad legal and logical flaws in the Draft Report and the procedural irregularities that have impeded our efforts to prepare our response, we also wish to emphasize the irreparable institutional harm proceeding with these baseless charges would cause to the Executive Branch generally and the Office of Legal Counsel in particular.

First, allowing OPR to second-guess the merits of OLC opinions with the benefit of hindsight and months or years of scrutiny will have a chilling effect, discouraging OLC attorneys from giving meaningful answers to difficult questions and dissuading talented attorneys from

choosing to work at OLC or, indeed, in government generally. Fear of personal and professional liability on the basis of rendering legal opinions will provide strong incentives to simply eschew definite positions, *see, e.g.*, Levin Standards Memo at 16-17 (declining "to try to define the precise meaning of 'specific intent' in section 2340"); Bradbury Techniques Memo at 28 (same), lest future political winds shift direction. *See* 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."). In his book, *The Terror Presidency*, Jack Goldsmith warned against creating such an excessive sense of caution among government lawyers due to fear of "retroactive discipline." Goldsmith, *The Terror Presidency* 93. Indeed, the effects of OPR's investigation, even before its findings have been made public, are already being felt. Recently, a 20-year veteran prosecutor, who served in the Department of Justice under presidents of both parties, declined to participate in a bi-partisan government task force, for fear 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." Letter from Andrew McCarthy to Attorney General Holder (May 1, 2009) (on file with author). As he noted, in light of OPR's investigation, "any prudent lawyer would have to hesitate before offering advice to the government." *Id.*

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, these consequences run directly counter to OPR's stated concern for "candor." *See* 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."); Transcript of Reporters Roundtable Discussion With Attorney General Michael B. Mukasey (Dec. 3, 2008), *available at* http://in.sys-con.com/node/767568 (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"). This can ultimately have disastrous consequences for the Department. Indeed, in defending John Yoo in a civil suit premised on his OLC writings, the Obama Justice Department itself recently recognized that subjecting government attorneys to liability based on their 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").

Second, OLC must be able to correct its opinions without triggering ethics investigations. Such reversals may be relatively infrequent, but as demonstrated above 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, 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."); *supra*. 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," *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part II)*, 110th Cong. 6 (2008) (statement of Daniel Levin), OPR should tread cautiously in investigating and taking upon itself to review previously-issued OLC opinions.

Third, the standards of managerial review implicit in the Draft Report will cripple efficiency among managing government attorneys. Under OPR's interpretation of Rule 1.1's duty of competence, managers like Judge Bybee can *never* rely on the legal research of even the most credentialed attorneys (e.g., Yoo, a former Supreme Court clerk and professor or [redacted]. He will be compelled — on pain of professional reprimand — to cite check every case and independently research every area of law to make sure no relevant cases or counterarguments are missing. This is untenable on numerous levels. As head of OLC, Judge Bybee had constant demands on his time, and was not in a position to duplicate the work of his line attorneys. As former Attorney General John Ashcroft, who held ultimate responsibility for the OLC memos, noted: "[I]t is important to bear in mind that each week during my tenure as Attorney General—and especially following 9/11—scores of critically important matters came to my desk…. Necessarily, then, I did what every attorney general and cabinet officer must: I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staff the Department." *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part V): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary* , 110th Cong. 5 (2008) (statement of John Ashcroft). This is not to suggest that Attorney General Ashcroft should be held to the same standard as Judge Bybee, but to point out that Judge Bybee should not be held to the same legal competence standard as those who actually drafted the memos. This is all the more true given that Judge Bybee had fewer than two weeks in which to review the memos. Draft Report at 37. In this space of time, it was literally impossible for Judge Bybee to have conducted the sort of review OPR demands. 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, in sharp contrast to OLC's current practice of giving succinct opinions for their sophisticated clientele unlike those of federal judges or authors of law review articles.

Fourth, OPR undermines OLC's institutional norms by demanding an artificial separation from those who request its advice. OPR criticizes OLC for being "aware of the result desired by the client" and asserts that OLC "drafted memoranda that supported that result." Draft Report at 180. But there is nothing wrong with OLC having such knowledge of its clients' interests. In fact, according to the "Principles to Guide the Office of Legal Counsel," dated December 21, 2004, "OLC *must* take account of the administration's goals and assist their accomplishment within the law." *2004 Principles to Guide OLC* 5 (emphasis added); *see also* Goldsmith, *The Terror Presidency* at 35 ("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."); *id.* at 38 ("The head of

OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President find legal ways to achieve his ends, especially in connection with national security."); Steven Bradbury, *Memorandum for Attorneys of the Office* (May 16, 2005) ("Before we 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—in many cases, there will be preliminary discussions with the requesting agency before the formal opinion request is submitted to OLC, and the agency will be able to provide its analysis along with the opinion request.").

The Office of Legal Counsel holds a unique position within the federal government and there are many different views and theories as to what its proper role should be. Some believe OLC should serve as an impartial and neutral adjudicator, while others see OLC as composed of executive branch lawyers who cannot be impervious to the President's objectives. *See* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1305-06 (2000) (contrasting the role of advocate and judge as "two fundamentally distinct conceptions of how executive branch lawyers might approach legal interpretation"). 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).

In the end, the truth is that OLC plays both roles. First, it serves as a quasi-judicial body settling disputes between different executive agency branches; and, second, it advises the Executive and defends the Presidency. In the latter role, OLC is not neutral as between the Presidency (as an office, not any particular president) and Congress. But OPR fails to acknowledge OLC's binary character and purports to be the final arbiter of its proper place within the Department of Justice and the federal government generally. *Cf*. Draft Report at 182 (demanding unfailing citation to adverse authority). Then-Judge Alito has 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 Posner & Adrian Vermuele, *A "Torture" Memo and its Tortuous Critics*, Wall St. J. Jul. 6, 2004, at A22 ("[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."). As a former head of OLC has explained:

> OLC is an executive branch agency and, in crafting its legal advice, its attorneys are almost always aware of the course of action the client wishes to take. 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.

Fifth, OPR's Draft Report intrudes on policy questions well beyond its institutional expertise. The subject matter of the memos in question has been a hotly-debated political issue since 9/11, and Congress itself has struggled with, and not resolved, where to draw the line on torture. *See, e.g.,* William McGurn, *Congress's Phony War on Torture*, Wall St. J. (Feb. 3, 2009) ("For the past few years, no word has been more casually thrown about than 'torture.' At the same time, no word has been less precisely defined. That suits Congress just fine, because it allows members to take a pass on defining the law while reserving the right to second-guess the poor souls on the front lines who actually have to make decisions about what the law means."). Significantly, around the time the Standards Memos were written, the CIA gave some thirty briefings to members of Congress on the various techniques at issue here, including waterboarding. Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, Wash. Post, Dec. 9, 2007, at A1. "With one known exception, no formal objections were raised by the lawmakers briefed about the harsh methods during the two years in which waterboarding was employed, from 2002 to 2003, said Democrats and Republicans with direct knowledge of the matter." *Id.* However, "'[i]n fairness, the environment was different then because we were closer to Sept. 11 and people were still in a panic.'" *Id.* (quoting official). The attitude at the time was: "'We don't care what you do to those guys as long as you get the information you need to protect the American people.'" *Id.*

Once the Standards Memo became public in summer 2004, neither the American public nor Congress rebuked those responsible for its creation; President Bush was reelected that November and Alberto Gonzales was confirmed as Attorney General in early 2005. More recently, former Attorney General Mukasey was confirmed, with significant bipartisan support, despite his agnosticism on whether waterboarding constitutes torture. In recent years, after the political winds had shifted, Congress has attempted—but failed—to ban the techniques at issue here, with the votes falling largely along partisan lines. For example, in 2006, an amendment to ban waterboarding failed 46-53. *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). ; *see also, e.g.,* H.R. 2082, 110th Cong. (2008) (failed to override president's veto).

The debate continues to this day, as just a few months ago Attorney General Holder stated unequivocally at his confirmation hearing, without any supporting analysis, that waterboarding is torture. On the other hand Senator Lieberman recently explained his view that waterboarding is not torture and, while "terrible," might sometimes be necessary. Similarly, a few days ago, former Secretary of State Rice, explained her view that waterboarding did not run afoul of the Convention Against Torture and that "we did not torture anyone." Glenn Kessler, *Rice Defends Enhanced Interrogations*, Wash. Post, Apr. 30, 2009, *at* http://voices. washingtonpost. com /44/2009/04/30/rice_defends_enhanced_interrog.html?wprss=44. In short, as Senator Kyl has stressed, reasonable attorneys can disagree about the memos' conclusions. The point is simply that, in such matters of legitimate policy and legal debate, it is not for OPR to insert itself into the mix and purport to act as a "sort of court of appeals from lawyers' judgments," conducting "the worst sort of second-guessing or Monday morning quarterbacking" in a pre-ordained post-hoc game. *In re Stanton*, 470 A.2d 281, 288 (D.C. 1983). At root, the Draft Report reads as if OPR simply does not agree with OLC's approval of the interrogation techniques at issue here and *no* amount of additional citations, counter-arguments, or caveats

would have been satisfactory.

Finally, 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*, *see* Appendix, would open a Pandora's Box that will increase partisan rancor and perhaps bring OPR's own attorneys under scrutiny for the contents of its Draft Report.[47] Should OPR publish its Draft Report, finalized in the first days 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.[48] As Senator Kyl recently 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." Trish Turner, *Senate Democrats Praise Obama for Possible Prosecution of BushOfficials*, Fox News, Apr. 21, 2009, http://www. foxnews. com/ politics/ 2009/ 04/ 21/senate-democrats-praise-obama-possible-prosecution-bush-officials/ (last visited May 1, 2009); *see also* Joseph Williams, *Some Call for Bush 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. This is not Latin America.'" (quoting Sen. Specter)).

Moreover, under OPR's own standard, the Draft Report comes up sorely lacking—failing to cite a single case in the relevant jurisdiction, failing to cite the proper evidentiary standard (clear and convincing evidence), failing to cite the scienter requirement (at least recklessness), failing to cite the proper legal standard for judging professional misconduct (fashioning its own Rule 2.1 standard from whole cloth), failing to conduct independent research to discover the proper standard (relying on a law review article), failing to cite relevant Supreme Court and lower court case law (*Safeco*, *Price*, *Pierre*), failing to give meticulous counter-arguments, failing to cite public testimony that directly refutes factual findings (Addington as the client), and so on. The prior Attorney General and Deputy Attorney General likewise pointed out several errors in the Draft Report that remain uncorrected. Letter from Michael Mukasey & Mark Filip to H. Marshall Jarrett (Jan. 19, 2009) (noting, for instance, that the Draft Report's citation to unpublished case law is potentially sanctionable). Fortunately for OPR, the standard it conjures is not the law.

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 grave consequences. OPR must not release this genie.

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[47] Indeed, OPR's annual reports from 1994 through 2006 demonstrate that OPR's bailiwick is prosecutorial misconduct or conflicts of interest, not complex statutory and constitutional interpretation. See Appendix.

[48] 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, to cite *Pierre*, the Third Circuit en banc case consistent with the 2002 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 contrary authority.

IX. CONCLUSION

The draft report's recommended 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. The precedent set by such a finding will not end with this report or the current administration, but will serve as a license for second guessing, political retaliation, and partisan warfare for the foreseeable future. And the consequences of this ill-considered path will tarnish the image of the Department of Justice and impair the ability of all Presidents, present and future, to get candid advice on the most vexing legal issues. As former Assistant Attorney General for OLC Timothy Flanigan stated, such a course by OPR will have "a long-term chilling effect on the willingness of OLC attorneys to render opinions on difficult and sensitive areas of law." Flanigan Decl. ¶ 9. OPR should conclude that, whatever the differences among lawyers and Presidents, Judge Bybee did not violate the rules of professional conduct.

EXHIBITS

1. Declaration of Timothy Flanigan (May 2, 2009)
2. Declaration of Daniel Levin (Apr. 29, 2009)
3. Summaries of OPR Annual Reports

Declaration of Timothy E. Flanigan

I, Timothy E. Flanigan, declare as follows:

1. I received my Bachelor of Arts degree from Brigham Young University in 1976 and my Juris Doctor degree from the University of Virginia School of Law in 1981. I served in the United States Department of Justice ("DOJ") as Assistant Attorney General for the Department's Office of Legal Counsel ("OLC") from 1992 until 1993, and was the Principal Deputy Assistant Attorney General for OLC from 1990 until 1992. I served as Deputy Counsel and Deputy Assistant to the President of the United States from 2001 until 2002.

2. I understand from press accounts that the DOJ's Office of Professional Responsibility ("OPR") has been conducting an investigation into whether the authors of an OLC memorandum dated August 1, 2002 ("Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A"), including Judge Jay S. Bybee, who was then Assistant Attorney General of OLC and signed the memorandum, and Professor John C. Yoo, who was then a Deputy Assistant Attorney General of OLC and assisted in drafting the memorandum, engaged in professional misconduct in the preparation of this memorandum. Recent press reports indicate that OPR may recommend professional sanctions.

3. I was very surprised to read these press accounts given my own personal knowledge and experience with respect to the matters in question. To be sure, reasonable attorneys can disagree about aspects of this memorandum. I have criticized the memorandum in part due to its reliance on certain arguments that I believed were not strictly necessary to support its conclusions. But I nonetheless believe that its essential analysis is sound. Further, I have no doubt that Judge Bybee, Professor Yoo, Attorney General Ashcroft and the other senior DOJ attorneys who reviewed and contributed to it intended only to provide an honest, good faith

assessment of these very difficult and challenging questions of law.

4. To be perfectly clear, any criticisms of the 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. Quite to the contrary, 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.

5. I have also read press reports suggesting criticism of the August 2002 memorandum on the grounds, in effect, that it "gave the answers the client wanted to hear." This criticism reflects a misunderstanding of OLC's role and is incorrect insofar as it implies that Judge Bybee or Professor Yoo succumbed to pressure to reach particular legal conclusions. Of course, OLC is an executive branch agency and, in crafting its legal advice, its attorneys are almost always aware of the course of action the client wishes to take. 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. I did not pressure or otherwise attempt to influence Judge Bybee or Professor Yoo to reach legal conclusions that were contrary to their best legal judgment, nor am I aware that anyone else in the White House did so.

6. OLC's opinions interpreting the President's powers under the Constitution and relevant statutes have tended to reflect a robust view of those powers. I believe that most who have led that office would agree (a) there are limited areas of authority that are committed solely to the Executive and (b) the President's powers are particularly strong in certain aspects of his role as Commander-in-Chief and the area of foreign affairs.

7. OLC is not authorized to determine matters of policy, such as whether it is

desirable, moral, or wise to use any particular interrogation techniques. In my view, Judge Bybee and Professor Yoo acted appropriately in leaving such matters to be decided by policymakers.

8. As I recall, Attorney General Ashcroft and other senior leaders in the department reviewed the memorandum prior to its issuance. In my view, this illustrates the lengths to which OLC and DOJ went to ensure that it provided responsible legal analysis of these important issues.

9. Finally, based on my experience as a former Assistant Attorney General for 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 options available to the President, the Attorney General and other officers of the Executive Branch in the exercise of their duties.

Executed this 2nd day of May, 2009, in Solebury, Pennsylvania.

By: _____
Timothy E. Flanigan

Declaration of Daniel Levin

I, Daniel Levin, declare as follows:

1. I received my Bachelor of Arts degree from Harvard College in 1978 and my Juris Doctor degree from the University of Chicago Law School in 1981. I have served in the United States Department of Justice in the four previous Administrations. I was the Acting Assistant Attorney General at the Department's Office of Legal Counsel ("OLC") from July 2004 until February 2005.

2. On August 1, 2002, OLC produced two legal memoranda (collectively "the 2002 memos"): one entitled "Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A" ("2002 Interpretation Memo"), and the other entitled "Interrogation of al Qaeda Operative" ("2002 Application Memo"). At that time, Jay S. Bybee, who signed the memos, was the Assistant Attorney General of OLC and John C. Yoo, who assisted in drafting the memos, was a Deputy Assistant Attorney General of OLC (collectively "the authors").

3. In July 2004, I was appointed Acting Assistant Attorney General of OLC. On December 30, 2004, I completed and signed a memorandum, entitled "Legal Standards Applicable Under 18 U.S.C. § 2340-2340A," which superseded the 2002 Interpretation Memo.

4. I understand the Department's Office of Professional Responsibility ("OPR") is conducting an investigation into whether the authors of the 2002 memos met applicable standards of professional conduct. On separate occasions, OPR and counsel for the authors interviewed me in connection with that investigation.

5. In my opinion the issues raised by the statutory analysis involved very difficult questions. Reasonable attorneys can disagree about various aspects of the statutory analysis, and as I testified before Congress, on various points where I disagreed with the statutory analysis in

the 2002 Interpretation Memo, the authors might be right and I might be wrong.

6. My disagreements with aspects of the authors' analysis were not intended to suggest that I believed the authors had committed professional misconduct. I simply disagreed with aspects of their analysis.

7. In my view, the authors believed what they wrote. Over the years I had a number of discussions with Mr. Yoo and I never had any reason to believe that he did not set forth his honest assessment of these difficult questions. While I did not discuss these issues with Mr. Bybee, based on my dealings with him on other matters I have no reason to believe that he also did not set forth his honest assessment of these issues.

8. In my experience, in crafting its legal advice, OLC attorneys are generally aware of the course of action the client wishes to take, especially in areas that raise questions involving national security. In my opinion, it is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons.

Executed this 25 day of April, 2009, in Washington D.C.

By: 
Daniel Levin

OPR Annual Reports:

1994: Public Criticism of the Court; Alerting a Friend to an On-Going Investigation; Improper Use of Frequent Flyer Miles; Failure to Advise Court of Critical Information Related to Plea; Submitting False Travel Voucher; Presenting Improper Argument to the Jury; Improper Use of DOJ Resources for Personal Business; Serving as Counsel for Relative in a Criminal Matter

1995: Procuring Approval for Improper Plea Agreement; Improper Extrajudicial Statement; Inflammatory Comments to the Grand Jury; Improper Comments on Defendant's Post-Arrest Silence and Retention of Counsel; Threatening Criminal Prosecution to Coerce Settlement of a Civil Case; Causing Government's Complaint to be Dismissed With Prejudice; Misstatement of Fact to Court; Leaking Investigative Information to Subjects; Willful Compromise of Electronic Surveillance; Improper Contact with Represented Party; Improper Taping of Telephone Conversation; Filing Duplicative Pleadings

1996: Intentional Misrepresentation to the Court; Conflict of Interest. Failure to Disclose Brady Material; Abuse of Prosecutorial Authority; Improper Disclosure of Nonpublic Information; Conflict of Interest - Relationship with a Witness; Failure to Correct False Testimony of a Government Witness; Neglect of Duty/Failure to Comply with Court Orders; Improper Closing Argument; Violation of Federal Rule of Criminal Procedure 6(e); Violation of Federal Rule of Criminal Procedure 6(e); Unauthorized Outside Practice of Law; Abuse of Prosecutorial Authority; Failure to Correct False Testimony of a Government Witness; Failure to File Substantial Assistance Motion

1997: Multiple Discovery Violations; Improper Contact with Represented Defendant; Failure to Timely File an Appellate Brief; Improper Subpoena; Improper Introduction of Evidence; Intentional Misrepresentation to the Court; Conflict of Interest -- Attorney's Marriage to Investigator; perjury by a Government Witness; disclosures to the Media ;Alleged Authorization of Unlawful Search; Failure to Honor Plea Agreement; Unprofessional Conduct. Misleading the Court; Failure to Timely Indict; Improper Conduct in the Grand Jury; abuse of Prosecutorial Authority; Improper Coercion/Intimidation of a Grand Jury Witness; Improper Approval of a Defective Warrant Application; Improper Contact with a Represented Party; Failure to Honor Plea Agreement; Improper Closing Argument; Improper Comments to the Grand Jury.

1998: Failure to Disclose Brady/Giglio Material; Violation of Petite Policy; Failure To Timely Correct Magistrate Judge's Finding; Unauthorized Disclosure of Information; Unauthorized Practice of Law; Failure to Disclose Brady/Giglio Material; Failure to Disclose Rule 16 Material; Abuse or Misuse of Official Position; Alteration of a Court Document; Improper Coercion or Witness Intimidation; Misrepresentation to an Administrative Agency; Attempt to Breach Attorney-Client Privilege.; Failure to Provide Discovery in a Civil Matter; Unauthorized Disclosure of Information; Improper Closing Argument; Mischaracterization of Evidence; Subornation of Perjury; Misrepresentation to the Court; Breach of Plea Agreement; Conflict of Interest. Misrepresentation/Misleading the Court.

1999: Misrepresentation to the Court; Improper Closing Argument; Unauthorized Disclosure to the Media; Unauthorized Disclosure to the Media; Violation of Grand Jury Secrecy; Abuse of Process. Discovery Violation; Shifting Prosecution Theory Mid-Trial; Misrepresentation to the Court; Misuse of Official Position; Failure to Comply with Court Order; Abuse of the Grand Jury; Improper Statements to the Media; Improper Opening Statement and Closing Argument. Misrepresentation to the Court; Misuse of Official Position; Violation of Petite Policy; subornation of Perjury; Improper Closing Argument; Misrepresentation to Defense Counsel; Improper Examination of a Witness; Misconduct Before the Grand Jury; Failure to Comply with Court Order; Improper Contact Between Prosecutor and Court Clerk; Prejudicial Statement by Prosecutor; Misrepresentation to the Court; Breach of Plea Agreement; Misuse of Subpoenas; Failure to Disclose Brady Material; Violation of Grand Jury Secrecy

2000: Improper Closing Argument; Overzealous Prosecution; Failure to Comply with DOJ Regulations; Abuse of Subpoena Power; Improper Introduction of Inflammatory Evidence; prohibition Against Acting as Both a Witness and the Prosecutor; Inaccurate Representation to the Court; Violations of Court Orders on Discovery; Witness Intimidation; Grand Jury Abuse; Improper In-Court Identification; Personal Relationship with Grand Jury Witness; Late Court Filings; Failure to Disclose Brady Material; Subornation of Perjury/Failure to Correct False Testimony; Failure to Obtain Supervisory Approval for a Downward Departure; Intentional Failure to Maintain Active Law License, Satisfy Debts, Provide Truthful Responses to Federal Investigators; Grand Jury Abuse; Outside Unauthorized Practice of Law; Unauthorized Disclosure of Classified Information; Improper Closing Argument; Unauthorized Disclosure of Rule 6(e) Material; Improper Use of Peremptory Strikes in Jury Selection; Failure to Timely Respond to Admissions Requests; Failure to Honor Plea Agreement; Failure to Disclose and Misrepresentation of Facts to the Court; Abuse of the Grand Jury or Indictment Process; Misrepresentation/Misleading the Court; Conflict of Interest; Violation of DOJ Policies.

2001: Destruction of Evidence; Misrepresentation/Misleading the Court; Improper Introduction of Evidence; Improper Performance of Duties; Improper Examination of a Witness; Improper Statements to the Media; Improper Closing Argument; Unauthorized Disclosure of Information; Improper Contact with Represented Party; FBI Whistleblower Claim; Brady Violation; Improper Closing Argument; Speedy Trial Act Violation; Failure to Correct False Testimony; Unauthorized Disclosure of Information; Misrepresentations to the Court and Opposing Counsel; Abuse of Authority, Failure to Honor Plea Agreement; Unauthorized Disclosure of Information; Overzealous Prosecution; Rule 6(e) Violation; Unauthorized Disclosure of Information; Abuse of Prosecutive Authority; Misrepresentation to Court and/or Defense Counsel; Speedy Trial Act Violation; Unprofessional Conduct During Immigration Hearings; Improper or Illegal Search.

2002: Unprofessional or Unethical Behavior; Abuse of Prosecutive or Investigative Authority; Pre-Hyde Amendment Claim; Misrepresentations in State Bar Referral; Failure to Find Substantial Assistance; Failure to Prosecute; State Bar Complaint by Alleged Subject of an Ongoing Criminal Investigation; Abuse of Prosecutive and Investigative Authority; Misrepresentation to the Court; Threat of Harm; Theft of Government Property; Misrepresentation/Misleading the Court; Misrepresentation to Opposing Counsel; Subornation of Perjury; Failure to Comply with DOJ Rules and Regulations; Abuse of Investigative Authority; Negligence; Improper Performance of Duties; Misrepresentations to the Court; Discovery

Violations; Witness Intimidation; Criminal Conduct; Abuse of Prosecutive Authority; Misuse of Official Position; Abuse of Authority; Misuse of Office; Misleading the Court; Abuse of Investigative and Prosecutive Authority; Subornation of Perjury; Unauthorized Disclosure of Grand Jury Materials; Defiance of Court Order; Misleading the Court and Improper Search; Retaliation; Destruction of Evidence; Subornation of Perjury.

2003: Subornation of Perjury; Unauthorized Plea Agreement; Misrepresentation to the Court; Conflict of Interest; Failure to Comply with DOJ Rules and Regulations; Improper Performance of Duties; Interference with Defendant's Rights; Unauthorized Disclosure to the Media; Improper Cross-Examination; Improper Closing Argument; Failure to Comply with DOJ Press Guidelines; Abuse of Authority; Unauthorized Disclosure to the Media of Grand Jury Material; Misrepresentations to the Court; Failure to Correct False Testimony; Failure to Perform; Abuse of Authority; Abuse of Process; Improper Contact with Represented Party; Unprofessional Statements or Comments; Conflict of Interest; Unprofessional or Unethical Behavior.

2004: Unauthorized Disclosure; Misrepresentation to the Court; Subornation of Perjury; Misrepresentation to the Court; Falsification of Records; Unauthorized Practice of Law; Abuse of Prosecutive Authority; Unauthorized Disclosure of Classification Information; Unprofessional Statements; FBI Whistleblower Complaint; Approval of Warrant Application Not Supported by Probable Cause; Abuse of Prosecutive Authority; Conflict of Interest; Abuse of the Indictment Process; Failure to Maintain Active Bar Membership; Abuse of Authority; Failure to Comply with DOJ Rules and Regulations; Abuse of Authority; Unauthorized Disclosure; Failure to Comply with DOJ Rules and Regulations (Petite Policy); FBI Whistleblower Complaint; Unauthorized Disclosure of Tax Information; False Statements, Misrepresentation; Contempt of Court.

2005: Abuse of Prosecutive Authority; Unauthorized Disclosure; Obstruction of Justice; Misuse of Official Position; Selective Prosecution; Disclosure of Tax Information; Failure to Maintain Active Bar Membership; False Statements; Abuse of Prosecutive Authority; Unauthorized Disclosure of Grand Jury Material; Abuse of Authority; Failure to Pay Bar Dues; Abuse of Prosecutive Authority; Improper Investigation; Conflict of Interest; Improper Litigation Tactics; Abuse of Prosecutive or Investigative Authority; Failure to Maintain Active Bar Membership; Improper Contact with the Court; Subornation of Perjury; Equal Employment Opportunity Complaint.

2006: Unauthorized Disclosure of Information; Abuse of Prosecutive Authority; Unauthorized Practice of Law; Unauthorized Disclosure to the Media; Misrepresentation to the Court; Abuse of the Grand Jury Process; Misuse of Official Position; Failure to Disclose Exculpatory Material; Violation of Speedy Trial Act; Contact With a Represented Party; Unauthorized Disclosure to the Media; Failure to Comply with Scheduling Deadlines; Conflict of Interest; Failure to Maintain Active Bar Membership; Lack of Candor to the Court; Abuse of Authority; Misuse of Official Position; Use of Inadmissible Evidence; Improper Filing with the Court; Misuse of Official Position; Improper Assistance from a Non-DOJ Attorney; Violation of the Speedy Trial Act.