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S. HRG. 111–786

THE OFFICE OF PROFESSIONAL RESPONSIBILITY INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL MEMORANDA

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

FEBRUARY 26, 2010

Serial No. J–111–75

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
63–193 PDF WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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THE OFFICE OF PROFESSIONAL RESPONSIBILITY INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL MEMORANDA

FRIDAY, FEBRUARY 26, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:12 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Sessions, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, and I apologize for the delay. I understand the local newscast was on this morning talking about the major power outages in parts of Northern Virginia. When I looked out the window where I live out there, I could see the satellite truck broadcasting. Unfortunately, I could not watch it because I was part of the power outage, which is interesting—well, I have a great deal of sympathy for the power companies. The winds are so high. I would not want for my convenience or anybody else's convenience that they risk their lives going up in their lifts to hook the power up. We can go without that for a while.

Senator SESSIONS. Well, you missed that good CNN show this morning on you and Senator Lugar looking so fabulous and getting along in a bipartisan way. What a puff piece.

[Laughter.]

Senator SESSIONS. I mean, goodness, how much did that cost you? Was that a paid ad?

Chairman LEAHY. Dick Lugar and I have been best of friends for over 30 years.

Senator SESSIONS. It was nice.

Chairman LEAHY. We actually filmed it in here, but he and I started out as the two most junior members of the Senate Agriculture Committee, and this is how things have changed. We were sitting at a long table, and we were down way at the end. We were almost in the anteroom as though they did not want us even in there, he on the Republican side, me on the Democratic side. And the Chairman at that time was a man named Herman Talmadge from Georgia, and Herman Talmadge and Jim Eastland of Mississippi would sit up at the part of the table smoking big Cuban cigars. They were very anti-Communist. They were burning Cas-

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tro's crops. But they would be puffing away, and they would kind of mutter, an amendment, a legal, technical amendment, usually about this thick, and I had the temerity once, when Dick and I were trying to figure out what was in the amendment, and I raise my hand, and I said, "Mr. Chairman, could you tell me what was in that amendment that we just passed?" And they both looked down there. You could see them muttering, like "Who the heck are these guys?" He takes his gavel, and he says, "We are adjourned."

[Laughter.]

Chairman LEAHY. On the way out, Hubert Humphrey mentioned to us now we understand what was in the amendment. We are much nicer. The Chairmen now just get run over by everybody else on the Committee, and it is a different world. But thank you for the compliment.

Senator SESSIONS. It was a good show.

Chairman LEAHY. As you know, Senator Lugar is one of the all-time gentlemen of the Senate, and I like working with you, Senator Sessions, Senator Durbin, and others. The nicest thing about the Senate is working with all of you.

It has now been more than a year now, on a more serious subject, since I first proposed the establishment of an independent, nonpartisan commission to engage in a comprehensive inquiry to determine how the U.S. Government came to authorize torture. And I had asked for such a nonpartisan commission a year ago. I wanted to take it out of politics, have been something like the 9/11 Commission look into it. Without support, we were unable to get that, and I think that is unfortunate.

But since that time, we have seen more and more evidence of what went wrong. We have seen the release of more Office of Legal Counsel memoranda documenting the authorization of brutal practices, an Inspectors General report that calls into question the guidance given by the Department of Justice, a CIA Inspector General report that reveals even those lax standards were violated during interrogations, and last week, finally, the release of the results of the Office of Professional Responsibility inquiry into the legal advice given by those at the Office of Legal Counsel.

I go down through that chronology because I think all these narrower reports point to why we need a comprehensive review. None of them can state definitively why these practices veered so far from American values.

The OPR investigation was limited to determining whether or not legal profession rules were violated. Well, that is the business of bar associations. Let bar associations worry about that. In my view, it is the wrong focus. These legal memoranda were only a part of the problem. They were intended to provide a "golden shield" to commit torture and get away with it.

As is now evident, even though the OPR investigation has consumed years, it is not complete. The investigators were denied access to key witnesses and documents. Did they interview David Addington, the counsel to Vice President Cheney? No. But yet, according to Alberto Gonzales and Jack Goldsmith, he was a key figure. Mr. Gonzales, former Attorney General, called him an "active player" in the drafting of these memoranda. Did they have the full record of John Yoo's communications with the White House? No.

There are so many gaps in this report that, in fact, my first question to the Justice Department witness today is going to be, "Where are Mr. Yoo's e-mails, which, by law"—by law—"are required by law to be maintained?"

The fundamental question here is not whether these were shoddy legal memos. They were shoddy legal memos. Everybody knows that. The legal work of Yoo and Bybee and Steven Bradbury, the acting head of OLC who reaffirmed the CIA interrogation program, was flawed. It failed to cite significant case law; it twisted the plain meaning of statutes.

The legal memoranda were designed to achieve an end. That is not what the Office of Legal Counsel should do, nor has ever done in any other administration, Republican or Democratic. These administration lawyers of the last administration, frankly, lost their way.

In my view, President Bush was actually disserved by the lawyers who worked for him. These lawyers told the administration not what President Bush should have heard, but rather what Vice President Cheney wanted to hear. Without question, our Government institutions were undermined. The rule of law was disrespected. The American people were harmed and I think put at far greater security risk. The torture of individuals was not just a violation of our laws and treaties; it handed al Qaeda a valuable propaganda tool to gain new recruits. Instead of making us safer, it made us less safe.

Focusing on whether these lawyers failed to meet legal ethical standards misses the fundamental point. The real concern is that lawyers who were supposed to be giving independent advice regarding the rule of law and what it prohibits were instead focused on excusing what the Bush-Cheney administration wanted to do. These lawyers abandoned their independent responsibilities to become apologists.

The role of the White House in the politicization of the OLC and in ensuring that these opinions delivered the legal immunity they were looking for has yet to be fully explored. My sense is that such a review would reveal the same untoward and corrupting influence we found when we investigated the purging of United States Attorneys for blatant political purposes.

As disturbing as the findings and evidence from this limited investigation are, they are not the final arbiter. I do believe we need a true accounting and a comprehensive, nonpartisan review. For the country to recover from this era, we should know what went wrong so that it will not happen again under this administration or the next administration or the administration after that.

Unfortunately, the Obama administration's attempts to repair this office and ensure that its lawyers are providing the Government with principled advice have been hamstrung by those who are continuing to delay appointment of the President's nominee to head the OLC.

Now, I have been conducting oversight of these issues for years. I was deeply concerned this country was treating people in our custody in a way that went against our laws and our values. That is why I did not hesitate to issue subpoenas for these memoranda when the last administration refused to cooperate, and the release

of those memos revealed how they were justifying torture. I am going to continue that aggressive oversight. I want to make sure that no future administration—I do not care whether it is of my party or the other party—makes such mistakes.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Chairman, for the last several years, this Committee——

Chairman LEAHY. Excuse me. Could I just mention that Senator Feinstein intended to be here, was looking forward to being here, in fact, had changed her plans to fly back to California to be here. She is not feeling well this morning, and that is why she is not here. She has been a very, very valuable assistant in this. I apologize.

Senator SESSIONS. For the last several years, the Judiciary Committee and the Armed Services Committee, of which I have been a part, as well as the Intelligence Committee, have spent an extraordinary amount of time debating and investigating legal and factual policy questions surrounding how we conduct the war with al Qaeda and other organizations, and second-guessing good people who made tough decisions at difficult times. So I think we ought to put this in context.

Today we are discussing memos that were written in 2002, not long after the 9/11 attack, when we did not know the extent of the infiltration into this country by cells that may have been planning further attacks. The memorandums that were then written were repealed in 2004, yet here we are in 2010 in large part because of the missteps and delays by the Department of Justice's Office of Professional Responsibility holding a hearing today to go through the issue one more time.

My big overall concern, Mr. Chairman, as I have expressed before and in the Armed Services Committee and on the floor of the Senate, is that, yes, there were three instances of waterboarding that have received severe criticism. But I would say that the nature, extent, and the rhetoric coming out of our committees has created an impression worldwide that there has been systematic torture of people in prisons in the United States, that we violated laws consistently, that the President had a policy to violate the law, and these hearings I think have made clear that that is really not correct. We do not need to, for heaven's sakes, tell the world our actions were worse than they are—driven, what, by some political opposition to the war? Every time you are in a conflict, the anti-war groups always find something to complain about because war is a very bitter, tough, dangerous life-and-death matter. People are killed. Sometimes innocent people are killed. That is just the nature of it, no matter how hard you work against it.

The people who desire to undermine a policy decided on by both parties and both Houses of Congress along with the President use these kind of discrete errors and events and missteps as a basis to attack the policy, and we have got to be aware of that, I think, as we go forward.

In the aftermath of September 11th, lawyers in the Department of Justice and our National security professionals have one unifying goal: preventing another attack on this country. The President said, "I am going to use every power I have to defend this country." He meant that, and the American people said, "Yes, we agree with that."

So the question is: What were the reaches of the President's power? How much power did he have? Lawyers are in deep disagreement about that. So these lawyers' job was serious. The pressures were enormous, to determine where the legal lines should be drawn and how far could they be pushed. Were they crossing the lines of propriety or were they just near the lines of propriety? That is what the President asked them to do. I think that is what the American people wanted, to use all the power that we could use. I do not think the American people wanted us to violate the law.

In his important book "The Terror Presidency," Jack Goldsmith, who disagreed with some of these policies, discussed openly and honestly what he called the "national security lawyer's dilemma," which was borne out the conflicting commands and pressures that they have upon them. And this is what he said: "Stay within the confines of the law, even when the law is maddeningly vague, or you will be investigated and severely punished. But be proactive and aggressive and imaginative. Push the law to its limit. Do not be cautious and prevent another attack at all costs, or you will be investigated and punished."

Times have changed. Jack Goldsmith's discussion—what could be termed a "prediction" now—of retroactive discipline and judgments in hindsight have become a reality in the investigation undertaken by the Office of Professional Responsibility in this matter, and I fear we are now in what Mr. Goldsmith called a cycle of timidity. Whatever the reason, the Obama administration has taken a dangerous turn away from the lessons I think we learned after 9/11. We have discussed some of those errors at some length here.

In 2010, we have an administration that not only repealed tough and effective interrogation techniques that are lawful, but announced to the terrorists around the world that we have done so in favor of a far more limited Army Field Manual.

We have an administration that gave Miranda warnings and a lawyer to a terrorist directly coming to America with an al Qaeda bomb to attack this country, who tried to blow up an airplane on Christmas Day, rather than questioning him aggressively for intelligence purposes so that we could learn all that we could as quickly as we could about al Qaeda and its new expanded presence in Yemen. We have an administration that insists on giving Miranda warnings to terrorists caught during wartime on the battlefields in Iraq and Afghanistan. We have an administration that has announced that it intends to hold an Article III common criminal trial for Khalid Sheikh Mohammed and other terrorists that are being held at Guantanamo Bay rather than prosecuting them, as the Attorney General has admitted is quite legal, through military commissions, which are constitutionally appropriate and have a long history in this country and in other countries.

These policy decisions are troubling and, in my view, dangerous. They have been made for reasons inexplicable to me, perhaps because the administration is trying to assuage the pressures from the left and maybe because some of the chief critics and anti-war activists who now populate the Department of Justice are involved in making current legal policy.

I am afraid that investigations like the one OPR conducted against Jay Bybee and John Yoo have sent a devastating message to those who might serve as national security lawyers. In the immediate aftermath of September 11th, under pressure so great that Attorney General Mukasey and Deputy Attorney General Mark Filip noted that they would wish it on "no American ever and certainly no member of the Department of Justice," John Yoo and Jay Bybee crafted two legal memoranda on the subject of enhanced interrogation techniques. One of those memos was later leaked to the press, and Members of Congress called for an investigation of the circumstances surrounding the drafting of this memo.

After 5½ years, two drafts and one final report later, the Office of Professional Responsibility concluded, apparently without sufficient legal or factual basis, that Mr. Bybee and Mr. Yoo had violated legal ethics rules and deserved to be referred to sanctions by State bar authorities. The D.C. Bar Association ethics rules and standards would be imposed on people with the job of providing guidance concerning some of the most dangerous work this country was engaged in. I think there is a danger there.

There is much that can be discussed about OPR's work in this matter, most of it not flattering. They dropped their first version of the report on Attorney General Mukasey on December 23, 2008, at the end of the Bush administration, and with little time for the Attorney General to respond. The first report was full of gaping holes, shoddy legal analysis, and something even worse—a clear desire to punish, it seems, Mr. Yoo and Mr. Bybee, even if the facts did not support it. Later versions of that OPR report attempted to change the legal standard to an unprecedented heightened standard that OPR contended applied only to Mr. Yoo and Mr. Bybee, the unfair equivalent of moving the goalposts in the middle of the game. And someone, by press accounts, perhaps OPR lawyers themselves, repeatedly leaked the draft reports and conclusions to the media in what would seem to be a transparent attempt to embarrass Mr. Yoo and Mr. Bybee and gain public support for their conclusions.

So I think that is unacceptable, and I am going to want to know whether the Department is investigating those leaks to determine whether they came from within the Department of Justice. Fortunately in this matter, cooler and wiser heads have prevailed. The senior career official at the Department, David Margolis, who has been held in great respect for many, many years, rejected OPR's efforts. Mr. Margolis, who has conducted the final review of every discipline matter of this sort in the last 17 years in the Department of Justice, drafted a 69-page opinion that lays out in great detail the serious problems with OPR's analysis. The Washington Post has called his opinion "courageous" and "correct." And I agree.

So where do we go from here? How does OPR rebuild its reputation and credibility? Can it even do so? And, most importantly, how

can we undo the damage that misguided investigations of this sort have on the willingness of national security lawyers to take on tough questions of life and death and provide candid legal advice without fear that their reputations and even their livelihoods and careers will be threatened if they give advice that falls out of political favor in years to come?

So I hope we will be able to talk about this, Mr. Chairman. I know it is important to you, and I know a lot of my colleagues feel like the Government went too far in some of the things that it did. That has all been made clear. It has all been made public. But I do think we have got to move past this. We are at war today. This matter was confronted, and corrections and changes were made during President Bush's administration. And I believe that we have a sound legal basis to protect our country, but I am troubled, frankly, that the President is not using the powers that he clearly has.

Thank you, Mr. Chairman.

Chairman LEAHY. Of course, we want to make sure that no President uses powers that he does not have.

I will put into the record a statement by Senator Feingold, and I would note that Senator Whitehouse, who had been eager to have this hearing, had to go home to Rhode Island for the funeral of a young marine from Rhode Island who was killed in Afghanistan. Each one of us has gone to such funerals and can well understand why he must be there.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman LEAHY. Senator Durbin, I believe you wanted to say something, and Senator Cornyn did. Then whether others come or not, after the two of you we are going to go to Mr. Grindler.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman, and thank you for this hearing.

It is worth reminding ourselves why we are here today. Mr. Bybee and Mr. Yoo authored the infamous torture memo which redefined torture as limited only to "abuse that causes pain equivalent to organ failure or death." They concluded that the President of the United States has the authority to ignore the law that makes torture a crime.

That memo provided legal cover for the Bush administration to authorize waterboarding, a torture technique that our country has historically repudiated as torture and, in fact, prosecuted as a war crime.

The late historian Arthur Schlesinger, Jr., said this about the previous administration's legal defense of torture, and I quote: "No position taken has done more damage to the American reputation in the world—ever."

The Senate considered this issue. The author of the legislation on this issue is the one man in the Senate uniquely qualified to speak to it: John McCain, prisoner of war in Vietnam, himself a victim of torture. John McCain offered an amendment to say that torture is unacceptable and will not be part of the American response to the war on terror. The vote on that legislation, 90–9. The Senator

from Alabama was one of those who voted against Senator McCain's torture amendment. He clearly has his own views. He is entitled to those views. But we are entitled to ask whether or not torture has now become an acceptable means of interrogation.

I believe it is clear from the Senate action, from the repudiation of the Bybee memo, and from this new administration's clear statements, that torture is not part of American policy. Why? Because the young men and women that we send into combat, into war, could themselves become prisoners. Would we stand idly by and accept it if they were tortured as prisoners? Of course not. That is what is behind this policy, that the United States stands up for conduct in the world that we not only defend but conduct which we would vigorously prosecute if used against our own.

I listened to the statements made by the Senator from Alabama, a reference to what he called "the cycle of timidity" in this administration, and his claim that we have forgotten the lessons we should have learned after 9/11. He uses as evidence of this the decision to give a Miranda warning to an accused terrorist. The suggestion is that this is a new Obama administration policy. The fact is it is not.

Under the Bush administration, policies were adopted for the FBI that, I quote, "Within the United States, Miranda warnings are required to be given prior to custodial interviews." A clear and unequivocal statement of policy from the previous administration.

What has this done? What have Miranda warnings resulted in? They have resulted in the prosecution of some of the worst terrorists threatening the United States. In this case of Abdulmutallab, it is true that after a period of time he was given Miranda warnings. But then what happened? His family came to the United States and urged him to cooperate and tell more to our Government, and he did. Would he have done that if he had been a victim of waterboarding and torture? I doubt it. But his family knew that he was in our legal system, they clearly respected that legal system, and they urged him to cooperate within that system.

And for those who argue that our courts and our criminal system cannot handle terrorism, let me tell you how wrong they are. They are wrong by a score of 195 to 3. One hundred ninety-five terrorists have been successfully prosecuted and convicted in the courts of America since 9/11. One hundred and ninety-five. How many have been successfully prosecuted in military commissions? Three.

Some of the most outrageous terrorists engaged in acts that threaten our Nation are now serving life sentences in super-max prisons because they were brought to the courts of our land. To argue now that going through the ordinary constitutional process, subjecting them to prosecution and conviction in our courts, will not keep us safe runs completely counter to our experience and the evidence.

Let me say a word about this particular hearing. On February 5, 2008, more than 2 years ago, Senator Sheldon Whitehouse and I asked Attorney General Mukasey to investigate whether the Bush administration's use of waterboarding violated any laws. He refused. Since then, for the past 2 years, Senator Whitehouse and I have pressed for this Office of Professional Responsibility report to

be completed and made public so the American people can judge for themselves. Now it has seen the light of day.

I heard high praise for David Margolis here and his role in this. Some claim that he has vindicated Mr. Yoo and Mr. Bybee. Far from it. Let me read an exact quote from Mr. Margolis: "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. . . . My decision not to adopt OPR's misconduct findings should not be misread as an endorsement of the subject's efforts."

High praise for Mr. Margolis, but candor from him about these two individuals.

In the end, what have we learned? We have learned that even when America is fearful and concerned about terrorism, we should never, ever forget our basic values. The time will come when those who do have to answer for it. If we stand true to our values and to our history as a Nation, we will be stronger, and we will be respected in the world. I am glad that this report has finally seen the light of day, and I yield the floor.

Chairman LEAHY. Thank you.

We will hear from Senator Cornyn, and then we will go to Mr. Grindler.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you very much, Mr. Chairman. Welcome, Mr. Grindler.

Mr. Chairman, I feel compelled to attend this hearing because I think that the Department's decision in this matter should once and for all put to rest any notion that Jay Bybee, John Yoo, and their associates deserve anything other than the thanks of a grateful Nation for their service. For too long, men and women who have dedicated their lives to protecting our country in the wake of 9/11 have been slandered, harassed, and threatened with professional sanctions and even criminal prosecution. Whether we are talking about Justice Department attorneys or CIA field agents, these men and women have sacrificed more than we can comprehend to keep the American people safe from another terrorist attack.

Of course, last week, after an investigation that spanned 5½ years—5½ years—Judge Bybee and Professor Yoo have been cleared of any professional misconduct.

Regrettably, a criminal investigation ordered by the Attorney General is still underway into the CIA interrogators who relied in good faith on this legal advice. This criminal investigation I believe is likewise unnecessary. It is unnecessary because Federal prosecutors in the Eastern District of Virginia have already reviewed an exhaustive number of cases referred by the CIA's Inspector General and military criminal investigators.

Think about that for a moment. The Attorney General has ordered a criminal investigation into interrogations conducted within parameters of legal advice provided by the Justice Department, legal advice that, regardless of one's policy preferences, has been judged by career officials in this Justice Department to have been

given in good faith. The President and the Attorney General should bring the investigation of these CIA personnel who relied in good faith on this legal advice to a close immediately.

But we are here, of course, to discuss the Office of Legal Counsel memos. Despite the Department's decision holding that Judge Bybee and Professor Yoo committed no professional misconduct, some on the far left continue to call on the Attorney General to prosecute them for rendering good-faith legal advice.

To be sure, the legal advice offered by the OLC attorneys addressed difficult and novel and close questions surrounding the fine line where aggressive interrogation becomes unlawful torture. But in a democracy committed to the rule of law, we must resist the temptation to criminalize policy differences and good-faith differences on legal matters.

Prosecuting the former administration's lawyers might be popular with some of the President's most left-wing supporters, but I am confident that such prosecutions would threaten the professional integrity of Government lawyers, the country's ability to gather intelligence and fight the war on terrorism, and the rule of law itself.

Let me just provide some context which I think the Margolis memo took into account, which I think is important and which we have forgotten, I think, too many of us have forgotten these many years after September 11, 2001.

The lawyers who offered their legal advice on the CIA's enhanced interrogation techniques were working at an extraordinary time in our Nation's history. 9/11 was less than a year in the past, and reliable intelligence indicated that al Qaeda was planning follow-on attacks. The CIA had several top al Qaeda agents in custody, and these terrorists revealed some useful information, but many of them had simply stopped talking. CIA interrogators were certain that these al Qaeda agents had additional information about plans to attack America and our interests overseas.

Of course, I recall the tremendous bipartisan pressure there was on our intelligence community to increase its counterterrorism efforts to gather actionable intelligence and prevent the next terrorist attack. The House and Senate Intelligence Committees have concluded that the intelligence community did not "demonstrate sufficient initiative in coming to grips with new transnational threats" in the days before 9/11. So the CIA wanted to know what it could legally do in order to demonstrate sufficient initiative in coming to grips with new transnational threats—just what Congress indicated they wanted.

So they wanted to know if they could legally use interrogation techniques that our own military uses in survival, evasion, resistance, and escape, or SERE training, including waterboarding. But the interrogators did not simply start using these techniques. Instead, they did the right thing, and they asked their superiors, they asked the lawyers at the Office of Legal Counsel for advice about the advisability and legality of these techniques. So the issue was raised and debated by lawyers within the CIA along with those in the White House and the Department of Justice's Office of Legal Counsel.

I think you cannot read these memos without seeing that there is an attempt to do what every lawyer does when presented with a novel and difficult question, and that is to do the research to try to offer opinions on both sides, and then ultimately you have to reach a conclusion. And I think they earnestly wrestled with these difficult legal questions. They called the question regarding the legality of waterboarding substantial and difficult, and it is no doubt a difficult question, one they sought to resolve to the best of their ability, as the Department concluded last week.

Today's hearing comes after the Department's decision that has found no grounds for charging these two men with professional misconduct. But from listening to some of the responses to the conclusion of Mr. Margolis, you might think they had been found guilty of professional misconduct, not exonerated of professional misconduct.

Perhaps the OPR investigation itself should be inquired about. I hope the witness, Mr. Chairman, can talk to us about the Office of Professional Responsibility's failure to follow its own standards. I realize the witness was not there then, but I would be interested to know what the Department of Justice intends to do to correct what Mr. Margolis said was a failure of OPR to follow its own standards.

And Mr. Margolis also pointed to OPR's failure to cite a violation of a known standard of conduct, risking the likelihood, which apparently occurred here, that there would be a subjective standard applied rather than one that lawyers could discern and find out and CIA interrogators could follow.

And then, of course, there was, as I mentioned, OPR's failure to take into account the circumstances that existed in the aftermath of September the 11th, when these individuals charged with protecting the American people were in good faith trying to prevent the death of other innocents, such as we saw at the Pentagon and we saw at the World Trade Center on September the 11th. And then—Senator Sessions mentioned this—the leaks to the media which have done irreparable damage to the reputations of these two men who have now been found not guilty of professional misconduct is just shameful, and I hope we get to the bottom of it.

Thank you.

Chairman LEAHY. Our witness this morning, Gary Grindler, comes to us from the Department of Justice. He is currently the Acting Deputy Attorney General. He previously served in the Department in a number of roles, including Principal Associate Deputy Attorney General, Counselor to the Attorney General, Deputy Assistant Attorney General in the Civil Division, and Assistant U.S. Attorney. Most recently, he was partner in King and Spalding's Washington, D.C., office, focused on white-collar criminal defense, internal corporate investigations, and complex civil litigation. He is seen by many as a lawyer's lawyer.

Mr. Grindler, did you wish to make some kind of an opening statement? Then we are going to ask questions. Is your microphone on?

STATEMENT OF GARY G. GRINDLER, ACTING DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC.

Mr. GRINDLER. Yes, Chairman Leahy, if I could just make a few brief remarks. Good morning, Chairman Leahy, Ranking Member Sessions, and other members of the Committee. I want to thank you for the opportunity to appear before you today, and I am pleased to respond to your interest in the Department's decisions about the Office of Professional Responsibility's review of work by former attorneys in the Office of Legal Counsel regarding the lawfulness of certain interrogation techniques.

Last week, we provided to the Committee a series of documents on this matter in response to the Chairman's request. While the nature of the documents we provided was extraordinary, we concluded that their disclosure was necessary for the Committee——

Chairman LEAHY. Mr. Grindler, I would note that everybody who is here is a guest. Holding up——

Mr. GRINDLER. I am sorry?

Chairman LEAHY. This has nothing to do with you. I would just note that everybody in this room is a guest. Holding up signs, whether I agree or disagree with the message, which also blocks people who are also guests here from seeing, is not acceptable. I have had an ironclad rule on that ever since I became Chairman of this Committee. I appreciate everybody's opportunity to be here. I appreciate everybody's opportunity to make statements that they might want to. But we will not interfere with everybody in here having an opportunity to hear you.

I am referring to somebody behind you, Mr. Grindler. Please go ahead.

Mr. GRINDLER. Thank you.

While the nature of the documents we provided was extraordinary, we concluded that their disclosure was necessary for the Committee to fully understand the ultimate decision in this matter. The legal complexity of the issues and our interest in assuring fairness to all of the individuals involved further supported our view that you should receive the requested documents that we might not otherwise disclose outside of the Department.

Although some may disagree with the Department's conclusions, we are confident that the Department followed an appropriate process in reviewing the OPR results and reaching a final resolution of this matter.

The OPR report was completed on July 29, 2009. In keeping with our current practice regarding cases of alleged professional misconduct, the subjects of the report were given the chance to appeal the adverse findings contained in that report to Associate Deputy Attorney General David Margolis. Mr. Margolis decided this matter without interference from the Attorney General, the Deputy Attorney General, or other Department officials, and his decision represents the Department's final action.

It has long been the policy of the Justice Department that career attorneys in the Office of Professional Responsibility should investigate and review allegations of attorney misconduct and that a career official should review any appeal of OPR findings of professional misconduct with respect to former Department employees.

It is my understanding that no Attorney General or Deputy Attorney General has ever overturned the conclusion of the career official in such circumstances. As some of you are aware—and I think some mention has been made of this already this morning—Mr. Margolis has been deciding such matters for the Department for many years now. He brings to that task almost 45 years of Department experience, first as an Assistant United States Attorney, a strike force attorney, chief of the Organized Crime Strike Force, and for the last 17 years or so Associate Deputy Attorney General, during which time he also served as Acting Deputy Attorney General for a 5-week period in February and March of 2009. His lengthy service as a career attorney who has served administrations of both parties makes Mr. Margolis uniquely qualified to decide matters of this sensitivity on the merits, without fear or favor.

My primary role today is to answer questions about the process that led to the Department's final adjudication of this matter, and I hope you will understand that I am not in a position to delve deeply into the substance of the reports. Both OPR and Mr. Margolis reached their conclusions independently and without political influence. That is how it should be. I believe that each of them fulfilled their responsibilities in this matter through significant good-faith efforts, which I am not prepared to second-guess. The process that began with OPR's investigation culminated in Mr. Margolis' decision. The Department stands behind that decision, including the decision not to refer the matter to the bar associations where Mr. Bybee and Mr. Yoo are members. Any effort on my part to summarize or paraphrase the reasoning of OPR or Mr. Margolis would simply run the risk of misrepresenting a record that speaks for itself and is now available for all to review.

There is one common thread among the documents we provided to the Committee. They reflect a shared conclusion that the OLC memoranda were flawed. Judges Mukasey and Filip also wrote that the memoranda contained multiple, material errors. The disagreement among the reviewers is whether the legal work at issue here was so flawed as to amount to professional misconduct. This is a difficult question, and in the end, Mr. Margolis concluded that the authors of the memos exercised poor judgment, which in the context of an OPR investigation means that they chose a course of action that represents a marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.

The Attorney General and I have great faith in Mr. Margolis and in the process that led to his decision in this matter. At the same time, the Attorney General continues to have confidence in OPR's ability to investigate allegations of professional misconduct against Department attorneys. Under new leadership since last year, OPR is working to resolve cases more quickly and has been allocated additional resources to meet the demands of a workload that has grown substantially. The Department fully supports OPR's mission, and I have committed myself during my tenure as acting Deputy Attorney General to work with OPR to make improvements in their investigative and review process.

I hope this initial information is helpful, and I am happy to respond to your questions.

[The prepared statement of Mr. Grindler appears as a submission for the record.]

Chairman LEAHY. Thank you, and I do have many questions.

One of the things that bothered me, should bother a lot of Americans—and I know it does—is we talk about the reputation of John Yoo and Patrick Philbin, for example, but now we find that the Department of Justice e-mail records of both Mr. Yoo and Mr. Philbin have apparently been destroyed. They were not made available to OPR investigators. In just a footnote to the report, OPR states that investigators were told that most of Mr. Yoo's e-mail records had been deleted and were not recoverable, that Mr. Philbin's e-mail records from the crucial period July 2002 through August 2002, the time the Bybee memo was completed, had also disappeared and are not recoverable.

Now, it raises very serious concerns about Government transparency and whether the Office of Professional Responsibility had access to all the information relevant to the inquiries. As you know, the U.S. Code is very, very clear about these records have to be retained. In fact, it has penalties provided by law for the removal or destruction of these records.

Now, as does the Congress, the American people have a right to know, but we also have a right to know why these critical records were deleted. Why were they kept from the Federal investigators? Has the Department opened an investigation into the circumstances surrounding the destruction of the e-mails?

Mr. GRINDLER. Chairman Leahy, first, the report itself does not suggest that there was anything nefarious about——

Chairman LEAHY. That is not my question. The fact is that the law requires them to be retained. They were not retained. Has there been any investigation into why they were not retained?

Mr. GRINDLER. I am not aware of any——

Chairman LEAHY. I do not care whether it is nefarious or not. I just want to know the facts.

Mr. GRINDLER. Chairman Leahy, what I have done is I have met with the Assistant Attorney General for Administration for the Department of Justice who has oversight of the administrative operations of the Department, which include information technology systems. And I have directed him to work with his experts in information technology to determine what exactly was going on in terms of the archiving of these e-mails.

Chairman LEAHY. Will they make an effort to retrieve them?

Mr. GRINDLER. Well, I first have to find out what the facts are with respect to the e-mails. If they are retrievable, I will direct him to retrieve them. That is the part I do not know yet.

Chairman LEAHY. I recall when millions of e-mails mysteriously disappeared during the Bush administration, and I had publicly said, well, that is—you know, they do not just disappear, they must be there. And I recall them sending their press secretary, Ms. Perino, out to say, What is he, some kind of an IT expert? I mean, that is foolish. They have been deleted. They have disappeared. We all know they have disappeared. Why would anybody suggest otherwise? And then we found the 22 million e-mails that, of course, had disappeared, well, they had not, they were there.

The Federal criminal statutes, 18 U.S.C. Section 641 and 18 U.S.C. Section 2071 prohibit the destruction of these Federal records. And I appreciate what you are saying, you do not what the facts are. Have they disappeared? If they have and if they have been destroyed, either the Yoo e-mails or the Philbin e-mails, will the Department make also a determination whether the destruction was criminal? Violation of the criminal statutes would seem fairly clear.

Mr. GRINDLER. Chairman Leahy, what I would like to do, I first want to get the information back from the information technology experts, including all of the questions of what occurred, what the policies are, and what the archive system is. And at that point, I will be in a position to evaluate whether anything additional needs to be done.

I would point out in addition, though, that the report does include a review of some of Mr. Yoo's e-mails. I understand, for example—and it makes reference to them—that e-mails within the Department that he sent or may have received would then to some extent be contained in other people's e-mail boxes. All I am saying is that the report does not have a complete lack of his e-mails, that as soon as I learn the facts regarding this, I will provide appropriate information back to this Committee.

Chairman LEAHY. It is interesting because, you know, during the firing of the U.S. Attorneys, something everybody now agrees was an egregious mistake, when we looked into it, there were a number of e-mails by Mr. Karl Rove and others in the White House that were missing. Now, 2 months ago, we finally find those e-mails—of course, after the investigation was over and after the time when the U.S. Attorneys might have been reinstated.

Now, I hope we do not have to wait that long this time, and I would hope that what you find you will report to this Committee, report to me and to Senator Sessions what you find.

We also found that there is a pattern where the political operatives were using a second BlackBerry or nongovernmental e-mails to circumvent the Federal requirements of keeping Federal records. Will the Justice Department determine whether Mr. Yoo used a second BlackBerry or any other kind of e-mail system, nongovernmental e-mails, to communicate with Mr. Addington and others from the White House? Will you determine that?

Mr. GRINDLER. I will pose that question, Senator Leahy.

Chairman LEAHY. And will you give us the answer?

Mr. GRINDLER. Yes, Senator.

Chairman LEAHY. I mean, we all know the famous Shakespeare, Hotspur, "I can call them from the frothy depths," the response, of course, being, "Well, so can I, so can anybody." But will they come when you summon them? I want to know. I mean, I am trying to fulfill this Committee's oversight. We have made oral requests and written letters. We have held hearings. We have subpoenaed documents to get to the bottom of what happened. And, in fact, I have submitted for the record a number of letters dated from 2002 to 2007 detailing my correspondence, my requests to OLC to get this information.

We were always told that the information was not there, we could not get it. We would then eventually get a lot of it in the

newspapers after it had been leaked by people within the administration, within the Bush administration, and to the press. For example, on October 16, 2008, I issued a subpoena for all documents relating to the Office of Legal Counsel starting from September 11, 2001, concerning the administration's national security practices and policies related to interrogation and detention. I also subpoenaed the relevant index. It was not until the end of the last administration we were shown a few of the opinions, and then they were heavily redacted. Attorney General Holder released some of these memoranda on March 2, 2009, more on April 16, 2009. But after all this time, I still want to know whether we have seen all the relevant legal documents.

So I pressed the Department last year under the new administration for a complete index of the memoranda. I received a letter last year, June 16th, that they are working to produce the index. The President issued an Executive order on January 22nd of last year prohibiting the use of any interrogation technique not authorized by the Army Field Manual. An Executive order, of course, can be overturned.

So my question is this—and I will certainly give extra time to Senator Sessions—has every OLC memorandum that is cited in the OPR final report been withdrawn?

Mr. GRINDLER. Senator Leahy, first, with reference to the Executive order, the President in January of 2009 himself directed that none of the OLC opinions post-9/11 that related to interrogation techniques should be relied upon. I can confirm to you that seven of the eight OLC opinions referenced in the OPR report have, in fact, been formally withdrawn. The eighth OLC opinion is covered by the Executive order, and there has not been an occasion otherwise to formally withdraw it because it actually is a memorandum that refutes or modifies some of the seven other OLC opinions. But in any event, the Executive order makes clear that none of these opinions can be relied upon.

Chairman LEAHY. No other outstanding letters or opinions?

Mr. GRINDLER. Not that I know of, Senator.

Chairman LEAHY. The DOJ website now makes available to the public a number of withdrawn OLC opinions. Is that the full set?

Mr. GRINDLER. Senator, let me communicate with OLC and get you a definitive answer on that.

Chairman LEAHY. And my staff will make sure to fully define that question.

Has the Judiciary Committee been provided access to all OLC documents related to the Bush administration's interrogation and detention of individuals after September 11th?

Mr. GRINDLER. Again, I am going to have to go back and get definitive confirmation.

Chairman LEAHY. And if we have not, will you tell us when we will have it? I do not want to have to subpoena this again, but I will.

Mr. GRINDLER. Yes, Senator.

Chairman LEAHY. And that includes the index of all OLC opinions. And if it helps you when you go back to ask that, assure them I will issue a subpoena for the index if I do not have it.

Mr. GRINDLER. I know, Senator, that they are working on an index, and I will communicate with them about that also.

Chairman LEAHY. Thank you very much.

Mr. GRINDLER. You are welcome.

Chairman LEAHY. Senator Sessions, I appreciate your courtesy in waiting.

Senator SESSIONS. Thank you.

Mr. Grindler, Senator Durbin continues to repeat a party-line view that, post-9/11, these unlawful combatants were to be tried in civilian court, and then takes cases such as those that involve financing of terrorism and things of that nature to add them up to a total of 190 cases. I would just remind you that President Bush created a courtroom and a procedure to try cases in Guantanamo, which Attorney General Holder has said is legal, constitutional, and not in violation of our treaties. In fact, the only reason the Obama Administration chose not to do it was because the Attorney General thought as a policy decision it is better to use Federal court, which I steadfastly disagree with.

So those cases were set up to be tried there. The Attorney General has issued an opinion that the presumption is that people held at Guantanamo will be tried in civilian courts and not in those courtrooms set up in Guantanamo, even thourgh Congress acted over the last several years to pass legislation that responded to Supreme Court criticisms of trying cases in military commissions. They refined the military commissions, as has the Department of Defense refined the military commissions. They now fully, I believe, comply with any treaty, Constitution, or legal or court objection. So this is to me a pretty clear question.

The President said explicitly that he did not believe these individuals should be given Miranda warnings. He said that publicly, I think, in the "60 Minutes" interview. And yet when you try these cases in Federal court, isn't it true when you arrest anybody and make them a prisoner of the United States, and you desire to ask them questions and they are in custody, that they have to be given their Miranda rights?

Mr. GRINDLER. The policy that was referred to earlier, which is the FBI policy, does say that when you have someone in custody in the United States, you are required to give Miranda warnings. There are some exceptions—or at least one exception to that policy that I think was utilized in the case of Abdulmutallab in Detroit, because when he initially was taken off the plane, he was questioned without being provided Miranda warnings.

There is what is called a public safety exception in order to immediately determine whether there are other facts that need to be known to protect the safety of individuals at that point in time.

Now, it is true later on he was given Miranda warnings. There are also in the United States procedures that require that individuals in this context be brought before a Federal court for an arraignment within a certain period of time, and there are also rules relating to how you view interrogations that continue after 6 hours of detention. So these are all rules that have to be—or decisions that have to be made sort of on the split second.

Senator SESSIONS. Well, I just would say to you that, yes, you can ask them, for instances "Do you have a gun or anything on

you?," and those interrogations, in most cases that I have seen, can extend only a few minutes. But perhaps in this case it was so unusual, maybe you could go 50 minutes. But the net result is when you appoint them a lawyer and you tell a suspect that they have a right to remain silent, that usually, in my experience, increases the likelihood that the suspect will quit answering questions and will clam up.

The fact is that you could take them to a military commission. The Christmas Day bomber, who flew from an al Qaeda center with an al Qaeda bomb to the United States—al Qaeda being at war with the United States clearly met those standards of a military combatant. And just because you take a suspect into military custody does not mean you use enhanced techniques. But you do not have to do the kind of warning of rights, the right to a speedy trial, the right to discover, and the right to have an attorney paid for by the Government, because they are unlawful enemy combatants. They do not have those rights any more than a German or Japanese prisoner captured on the battlefield is entitled to a lawyer, entitled to be told he does not have to answer questions if they are posed to him. That is just a matter that we have been arguing over for some time. I should not have spent so much time on it, but it continues to me to be a serious matter.

With regard to OPR, I am troubled by the leaks that came out of that investigation, and that the whole process really has done some long-term damage to the credibility of OPR, in my opinion. Based on my staff's assessment of the recent annual reports of OPR, it seems that a primary focus of their attention is on leaks. Throughout the whole Department of Justice, if there is an allegation of a leak, OPR will investigate it because leaks violate the discipline, order, and really the sanctity of justice in America.

Mr. Grindler, let us say that an improper leak occurred in a Justice Department matter. OPR would be the one that would investigate that. Is that correct, normally?

Mr. GRINDLER. They would be involved in the investigation. Sometimes if there is a reason to believe that the leak may involve a criminal violation, it may be that a

U.S. Attorney's Office might be brought into it, or we have had circumstances in which——

Senator SESSIONS. Well, I understand, but they even have a rapid response team to deal with that, which is a healthy thing. Now I want to turn to the investigation at issue here. My understanding is that OPR's own policies and procedures state that OPR's finding their own findings may be publicly disclosed only when an investigation is final and after all available administrative reviews have been completed. Despite this, the investigation into the Bybee and Yoo memos was riddled with leaks.

For example, in February of 2009, Newsweek reported that one of their intrepid investigators had obtained a copy of the draft nonpublic OPR report. It ran a story on it which cited "two knowledgeable sources who asked not to be identified" discussing sensitive matters, and that was before Mr. Bybee and Mr. Yoo were given a chance to even look at the report and respond.

According to Yoo, he got an e-mail from this author of the story who asserted that, "Marshall Jarrett's folks"—in other words, the

OPR attorneys—who were unhappy with Attorney General Mukasey's refusal to endorse their conclusions. Soon after, a liberal blogger released previously unreported details about the investigations which he called "important inside information of a still classified report."

In May of 2009, an Associated Press writer reported about "the draft from an internal Justice inquiry," and the New York Times published an article that described the report.

Later in May, another blogger wrote about the then-current rumors concerning OPR and their report, saying, "A source in the Justice Department would not give me any more details about the forthcoming report, but confirmed that what has been reported about it in the media so far is accurate."

So I think it is clear that somebody was leaking, contrary to OPR's own policies and procedures. Would you agree that those facts show that improper leaks occurred?

Mr. GRINDLER. Senator, it appears from the articles that information that should not be public was made public. The Attorney General and I both abhor the situation with leaks. It is a problem that the Department of Justice has faced, but it is a common problem that agencies across the Government have had to face. They are difficult cases.

I can assure you that I take it very seriously, and, again, in my tenure as Acting Deputy Attorney General, when there are leaks, I will address whether or not further inquiries or investigations need to be——

Senator SESSIONS. Was there any use of OPR's powers and rapid response team to immediately respond to these leaks and find out how they were occurring?

Mr. GRINDLER. Senator, I am not aware of what has taken place in that regard up until the point—until now when I——

Senator SESSIONS. Has any investigation to date been undertaken to determine how these egregious leaks against policies and procedures of the Department occurred?

Mr. GRINDLER. I do not know, and, of course——

Senator SESSIONS. Well, I can tell you if it occurred in a normal criminal case in a United States Attorney's Office anywhere in America in a serious case like this, a direct violation of the policies, OPR would investigate that, would they not?

Mr. GRINDLER. I cannot really respond without knowing the exact circumstances, but I would tell you if there is——

Senator SESSIONS. Surely you would investigate a serious allegation of a leak in Milwaukee or Dallas, Texas.

Mr. GRINDLER. If there is a serious allegation of a leak, I can assure you that I will take it very seriously, yes.

Senator SESSIONS. Well, it should be investigated, and if it came from OPR, should it not be investigated or should it be investigated?

Mr. GRINDLER. It really does not matter what the source was if it is an improper leak.

Senator SESSIONS. I agree with that. It appears it was not investigated, and it appears the leak came from OPR itself.

Mr. Margolis wrote a memo to Attorney General Holder, I remember him as being one of the more respected members of the

Department of Justice when I was in it, and he came to the Department, maybe in the early 1970s, with long hair and all of that—you know, there was a discussion about Mr. Margolis. He was such an independent thinker. But everybody grew to respect him more and more over the years, so I have a lot of respect for him, just as so many people who have served in the Department do.

He noted that the OPR report "made a departure from standard practice and without explanation, OPR in its initial two drafts analyzed the conduct of the attorneys without application of OPR's own standard analytical framework." He goes on to express concerns saying that the framework has "applied virtually without exception" in the 17 years he had been tasked with resolving attorneys' challenges to OPR's findings.

During the course of this investigation, was there any rule in place, either in OPR or in DOJ practices and procedures, that called for OPR to disregard its own standard analytical framework in cases that dealt with attorneys in the Office of Legal Counsel?

Mr. GRINDLER. I am not aware of any rule such as that, Senator.

Senator SESSIONS. One of Mr. Margolis' primary objections to the final OPR report was that "it relied on a standard that was neither known nor unambiguous." In fact, OPR created a completely new standard, it seems to me, from different sources, several of which did not exist at the time the memos in question were written. Do you think it appropriate to judge an attorney's actions by a standard created after the action was taken?

Mr. GRINDLER. Senator, I think that David Margolis' commentary with respect to the first two drafts pointed out the issue that you are raising, and as a result of further discussion, that issue was resolved in terms of how the final report was approached.

Senator SESSIONS. I think that was an important step. These are difficult challenges that you face. OPR is not an entity that ought to be second-guessing the very important office of the Office of Legal Counsel or the Solicitor General on matters dealing with serious constitutional questions. I do not want to say they are pedestrian, but they are at a different level of legal analysis than these people who are required to do that. And the Dawn Johnsen confirmation matter is one that caused a great deal of concern because the Office of Legal Counsel really is an important office. It requires the ability to analytically consider important issues with the highest legal skill. So that is one of our concerns and it is always important that OLC be filled with the best people. And as you can see, when disagreements arise over OLC's opinions, we can have quite a stir.

Thank you.

Chairman LEAHY. Mr. Grindler, we have quite a stir on making sure that the United States follows its own high standards and laws. The Office of Legal Counsel is one that has served very well for both Republican and Democratic administrations when the people who are the professionals and nonpartisan professionals are allowed to operate. When they have indirection or direction of a political nature and respond to that, then the Department of Justice is

badly damaged. The Department of Justice has to make determinations outside of politics.

I recall when I was interviewed as a young law student by the then-Attorney General, asking me if I would come to work for the Department of Justice, I had asked him, "How much political influence would there be in the Department of Justice in criminal matters, civil rights matters, whatever?" He said, "I have told the President personally neither he nor anybody on his staff can interfere with what we are doing on prosecutions."

That Attorney General, incidentally, was Robert Kennedy, and he subsequently prosecuted somebody who was vitally important to his brother's election as President.

We found during the last administration, what raised my concern, that we had several hundred people in the White House who were allowed to get involved in prosecution matters. That is not the way this should operate. It should not operate that way in any administration. I think of handling terrorists, when President Reagan used the FBI to set a trap for a terrorist overseas, used their interrogation procedure, brought him back and convicted him. We have seen Zazi, who was convicted just in the last few days in New York.

Both the Bush administration and the Obama administration have been pretty effective in prosecuting people who we have followed their rights, we have gotten a great deal of information from them, and we have also been able to demonstrate to the rest of the world that we follow the rules.

That is why when we do not, it is a bad mark. As Senator Durbin indicated, we have these rules because we also want to be able to tell the rest of the world, if you capture one of our people—and we know some will not follow the rules, but we want to be able to have the high moral ground. We do not want to be in a case where we can be lectured on human rights by countries that do not follow it.

Senator SESSIONS. Mr. Chairman, I have a very important appointment. I am going to ask to leave. Thank you for your leadership. I will leave this Washington Post editorial on the report by Mr. Margolis, and, Deputy Attorney General, congratulations on your service. You have got a tough job, but it is an important job. Use good judgment, keep a cool head, and do right. And I agree with the Chairman completely that you have got to make these decisions based on the law and the facts, and we cannot allow politics to infect the Justice Department.

Thank you.

Mr. GRINDLER. Thank you, Senator.

Chairman LEAHY. Thank you, Senator Sessions, and we will keep the record open until the end of the day for statements by Senators or memos. In fact, I would ask that any questions that are submitted be answered by this time next week.

Let me ask you this: The Bybee and Yoo OLC memos argued that the commander-in-chief authority is so broad that in a time of war, even an undeclared war—or stating that we are at war because terrorists want to attack us, and I assume that they always will in my lifetime—the President could take any action in the name of national security, and that action would be lawful. In an interview with OPR, Mr. Yoo answered affirmatively when asked if the President could order a village of resistance to be massacred.

Mr. Yoo said such an order would fall within the commander-in-chief's power over tactical decisions.

Can you imagine how we would react if we heard the head of another country's government make such an order? There would be total outrage expressed by people from the right to the left in this country.

So let me ask you: What is the current OLC interpretation of the commander-in-chief authority? Has OLC articulated a formal interpretation since the Obama administration took office?

Mr. GRINDLER. Senator, if you are talking in terms of interrogation authority—is that the question?

Chairman LEAHY. No. I am talking about what is the commander-in-chief authority. Is it basically, as Mr. Yoo seems to indicate, virtually without bounds because we know that we will face and probably will always continue to face attacks by terrorists against the United States.

Mr. GRINDLER. I believe that some of the memoranda prepared by Mr. Yoo and Mr. Bybee did, as you pointed out, address what the President's power may be in certain circumstances. I am not aware of OLC having rendered any opinions since the President had indicated that the opinions post-9/11 were no longer to be relied upon. But to give you a definitive view, I will go back to OLC and provide that information to you. But I am not aware that they have issued any opinions since President Obama came into office.

Chairman LEAHY. Well, the reason I ask this, in January 2008, then-Attorney General Michael Mukasey sent a letter to this Committee, and he said that waterboarding might be reintroduced under the defined process by which any new method is proposed for authorization in the CIA's interrogation program. It is sort of a complicated way of saying that if the CIA or the White House asked again, well, then, the Department of Justice might find waterboarding to be legal.

The Obama administration, as you said, issued an Executive order limiting intelligence techniques to the Army Field Manual. They did that on January 22nd of last year, which basically outlaws waterboarding because the Army Field Manual does. But this administration at the most will hold office for 7 more years, either 3 more years or 7 more years. But some prominent Republicans, including candidates for executive office, have outright endorsed waterboarding or they refuse to condemn it. So that other than that January 22nd Executive order, is there any authority in force today to prevent either this administration from changing its mind or a subsequent administration from approving waterboarding is a legal interrogation technique? Notwithstanding the fact that we have in the past prosecuted people who abused waterboarding.

Mr. GRINDLER. Senator, again, the President of the United States has made clear that torture will not be condoned and that any interrogation must be consistent with the Army Field Manual.

Again, with respect to OLC, which does have the responsibility as delegated to them by the Attorney General to provide advice to the President on legal matters, I am not aware that they have issued another opinion since this President came into office on interrogation or even the broader powers of the President in these

circumstances. I will confirm that, but I think that is about all I could say right now.

Chairman LEAHY. Do you know anything offhand in the law that would stop a subsequent President from just saying we are no longer following that Executive order?

Mr. GRINDLER. Well, I mean, as long as this Executive order is in place, that would be in the first instance something that would prevent it. Again, with questions of this magnitude, one would hope in the future if a President considered any modification of that, that they would go back to the Office of Legal Counsel and seek an opinion.

Chairman LEAHY. We have talked about the OLC being sort of the gold standard. It stays out of politics. People respect it—and I know they do not just within the White House, but with obviously other departments. The Department of Commerce, the Department of Transportation may ask for an OLC memo, and it usually has virtually the power of law where that Department comes down. But we find when Mr. Bybee and Mr. Yoo worked at the OLC that the White House involvement with what they did was extraordinary. The then-White House Counsel, Alberto Gonzales, marked up their draft memos. Mr. Gonzales described David Addington, then-counsel to Vice President Cheney, as an active player in the draft of the first so-called torture memo. Former Deputy Attorney General James Comey told OPR there was significant pressure on OLC from the White House, particularly Vice President Cheney and his staff. He then added—and this was rather chilling—"You would have to be an idiot to not know what they wanted." Former Deputy Attorney General Comey said that the Justice Department leadership believed the acting head of OLC, Daniel Levin, was forced out because he had not delivered on what the White House wanted in interrogation.

I mentioned my conversation with Robert Kennedy when I was a law student. Obviously, as a young law student—I think I was 23 at the time. It was a few months before I was going to graduate from Georgetown. You can imagine how awestruck I was just to be in—no matter who was Attorney General, to be in the office. But to hear him say so emphatically that he had to be independent, when I became a prosecutor, State's Attorney in Vermont, I never forgot that. And I would get calls from—in fact, once from my predecessor here in the U.S. Senate and basically hung up the phone on him because he wanted to talk about a friend who had been picked up and what might be done. And I told the Governor's office that they could not—that I would have to make that decision. If I made a bad legal decision, the courts would overturn it.

Now, you are a career prosecutor. You are a long-time employee of the Department. You had been a career prosecutor. Is it common in your experience for the White House to be so intimately involved in the drafting of an OLC opinion?

Mr. GRINDLER. In my experience as a prosecutor, I was a line prosecutor so I did not have any contact with the White House at that time. However, when the President of the United States asks for legal advice, that is one of the responsibilities of OLC. I believe, though, that——

Chairman LEAHY. What if he says, "I want legal advice to tell me that I can do such-and-so, no matter what the law is?"

Mr. GRINDLER. No, I think that the question must be: "These are the actions we propose to take. Are they lawful?" And then, yes, you get into play the integrity of the lawyers at the Office of Legal Counsel, and there is a long history there. And lawyers want to be in that office in part because of the independence and integrity that they have demonstrated historically. And I do think that that continues based on my contact with the Office of Legal Counsel since I have been Acting Deputy Attorney General. In fact, I meet with a representative of OLC, the head of it, at least once a week if I can. But I do think that there are things in place that help ensure the integrity of the Office of Legal Counsel.

For example, they do communicate with White House Counsel, but there are regular meetings in which the Attorney General and the Deputy Attorney General are also present. So they are there because it is as a result of the delegation of authority from the Attorney General to the Office of Legal Counsel that they are able to fulfill this responsibility.

Also, what the office does is they have a robust system of soliciting views from agencies that are interested parties in their legal analysis, and that helps because it brings to bear to their analysis the analysis of a variety of parties. And I think that process is part of what will help to ensure the integrity of those decisions.

At the end of the day, you have to have people with integrity, people that are strong, to be able to render these difficult opinions. But I think that that is what is going on in the Office of Legal Counsel today.

Chairman LEAHY. But you would agree with me, whether it is President Obama or President Clinton or President Bush, no matter who is the President, OLC has to be independent or they lose—actually, they lose the ability to give the President good advice.

Mr. GRINDLER. I totally agree they have to be independent, but they also have to listen to the views of the interested agencies and the President.

Chairman LEAHY. Oh, I understand. Yes, I understand that, but not to the point of having somebody dictate a result which may be different than their own legal conclusions.

Mr. GRINDLER. Absolutely. At the end of the day, they have to come to the decision that they think is right.

Chairman LEAHY. In his review of the OPR final report, Mr. Margolis describes a group that was reviewing the OLC memos as "a limited and sophisticated audience," suggesting the players involved would have been aware that Mr. Yoo's assessment of the commander-in-chief authority represented the most aggressive view on the topic.

I have a hard time buying that, and I will tell you why. Even White House Counsels are not experts on every single area of the law, which is why you have an Office of Legal Counsel. Then-White House Attorney General Gonzales was not an expert in every field of the law. This attorney was not an expert in the laws of war or the commander-in-chief authority in a case of war because they normally are not, and remember these attitudes and questions being asked were different after 9/11 than before.

Now, Mr. Addington, who was Vice President Cheney's counsel, was well known from his prior work and his writing to have views on a very expansive Executive power. They are very similar to Mr. Yoo's.

Now, I feel that as OLC clients, both Mr. Gonzales and Mr. Addington would have been better served by being given a complete picture of the relevant facts and the law, especially as the Yoo memo went beyond anything OLC had previously said.

I also think the Nation would have been better served if there had been an impartial account to the law. It almost comes across like something in a political campaign: what do we do to win, not what do we do to obey the law.

Was it poor lawyering, poor action as a lawyer by Mr. Yoo that would present a one-sided articulation, what even Mr. Margolis called the most aggressive interpretation of the commander-in-chief powers?

Mr. GRINDLER. Mr. Margolis did conclude that the analysis was flawed. He also concluded that it was a close question as to Mr. Yoo's intent.

Chairman LEAHY. Well, I worry about some of the things that I—I have a great deal of respect for OPR. I have had a great deal of respect for it in Republican administrations and Democratic administrations, and I have relied a lot of times in determining how I might vote on issues—not that I ask them for an opinion, but I have looked at some of their opinions on what the law is with regards other departments, what it is as regards the powers of the Executive, and I have looked at a lot of those, but I have made my own decisions as to how I might vote on an issue coming up, because I think of them as being the facts and the law objectively stated, as it should be. I would think any President would want that and would be better served.

Now, the OPR report does not find the former acting head of OLC Steven Bradbury to have violated any technical ethic standard, but I see his complicity in offering flimsy legal advice to justify the White House actions. In May of 2005, Mr. Bradbury wrote two memos to reaffirm the use of waterboarding. This was after the so-called torture memo had been leaked to the public and then withdrawn by the Bush administration. Still, Mr. Bradbury disregarded the concerns of senior Department officials, like former Deputy Attorney General James Comey, who said that one of Bradbury's memos would come back to haunt the Department of Justice. Mr. Comey also said that the Attorney General, who is now Alberto Gonzales, was under great pressure from the Vice President to issue these memos. And Mr. Comey was concerned that Mr. Bradbury, who was in an acting capacity as head of OLC but was known to want the official job, would be susceptible to just that kind of pressure.

Now, on May 11th of last year, Attorney General Holder issued a memorandum from the Department of Justice setting up a process for all requests for legal advice from the White House. It said the Assistant Attorney General for the Office of Legal Counsel should report to the Attorney General and the Deputy Attorney General any communications that in his or her view constitute im-

proper attempts to influence the Office of Legal Counsel's legal opinion.

I think that is a good start. But I would urge you, if you have thoughts on this, to pass them on to me, what further steps the Justice Department can make to protect us, because the OLC is extremely important to us. It is extremely important no matter who is President. It is extremely important to the country. Are there further things that we can do to make sure its integrity is preserved, whether in this administration or future administrations?

Mr. GRINDLER. Well, I do think that it starts with the leadership of the Department, the Attorney General and the Deputy Attorney General making clear not just to the head of OLC but the other lawyers working there that their role must be an independent role, and what you have already articulated, that if they ever perceive or feel like there is any effort to improperly influence that decision-making, that they need to take it to the Deputy Attorney General or the Attorney General. And it would be incumbent upon them to interact with the White House, or if it is coming from another government agency, whatever it may be, to interact with the head of those agencies in order to address that problem.

Chairman LEAHY. Thank you. My staff has reminded me I said I have great respect for OPR opinions. Obviously, I meant OLC. That is what we were discussing at the time.

Mr. GRINDLER. Right.

Chairman LEAHY. Well, Mr. Grindler, I thank you for taking the time. There probably will be some follow-up questions, and I appreciate your being here. This may seem arcane to some, this discussion. I just feel very strongly about the integrity of the Department of Justice. You have, as you know, some amazingly talented and dedicated men and women in the Department of Justice. I have known so many I have worked with over the years. I have no idea what their politics are. I do not really care. They are just extremely good. Just like we see in our prosecutors' offices around the country some remarkable men and women who at great sacrifice serve this Nation. And they serve the Nation because it is a higher calling. This is a great Nation. The Department of Justice is a great institution. If it had not been for the tugs I felt from my native State of Vermont, I would have accepted the invite from Attorney General Kennedy. I do not know what life would have been otherwise, but I just wanted to get back home to Vermont. But I have never forgotten that. I have never forgotten what was driven into me by my law school professors, many no longer with us, who said about how the Department of Justice has to have integrity, has to be independent.

I see you in that mode, Mr. Grindler, and I mean that as a compliment to you, sir. And we have to maintain it. Otherwise, how are you going to attract these remarkable men and women who serve there day in and day out?

Mr. GRINDLER. I agree with you, Senator.

Chairman LEAHY. Thank you.

Mr. GRINDLER. Thank you.

Chairman LEAHY. We will stand in recess.

[Whereupon, at 11:50 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Questions For the Record
To Gary Grindler
Acting Deputy Attorney General
U.S. Department of Justice

U.S. Senate Committee on the Judiciary
"The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda"
February 26, 2010

Questions Posed by Senator Patrick J. Leahy

Missing E-mails:

Footnote 3 of the Office of Professional Responsibility (OPR) report states that its investigators were told that

> **".... most of [Mr. John] Yoo's e-mail records had been deleted and were not recoverable. [Mr. Patrick] Philbin's email records from the crucial period July 2002 through August 5, 2002 – the time when the August 2002 Bybee Memo was completed ... had also been deleted and were not recoverable."**

This raises very serious concerns about government transparency and whether the OPR had access to all the information relevant to this investigation. The U.S. code is very clear that such records must be retained and that there are penalties provided by law for the removal or destruction of these records.

At the February 26 hearing, you said that you were in the process of determining what happened to these emails. I appreciate your commitment to getting to the bottom of this and providing the Committee with the results of your inquiry. Please provide answers to the following questions:

Q. Has the Justice Department opened a formal investigation into the circumstances surrounding the destruction of these e-mail records?

Q. What steps is the Justice Department taking to retrieve the missing records?

Q. Will the Justice Department determine whether the destruction of Mr. Yoo's and Mr. Philbin's e-mails violated any criminal statutes?

Q. Will the Department of Justice Inspector General be a part of this investigation?

Q. Will the Justice Department determine whether Mr. Yoo used a second e-mail address—including a nongovernmental e-mail—to communicate with officials from the White House?

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The review that the Acting Deputy Attorney General commissioned is nearing completion. The Department will provide the Committee with the results of the inquiry after it is completed.

Outstanding Requests for OLC Opinions and Index

During the February 26 hearing, I asked you when the Department of Justice will provide the Judiciary Committee with the index of relevant documents contained in a Committee subpoena issued on October 16, 2008.

Q: When will Department of Justice provide this Committee with the index I requested?

The documents referenced in the Committee's October 16, 2008 subpoena include numerous classified and unclassified memoranda, none of which were distinctly categorized or organized in particular locations within the Office of Legal Counsel (OLC) as "legal analysis and advice . . . concerning the Administration's national security practices and policies related to terrorism." OLC has worked diligently to identify all such responsive documents, and the Department is presently coordinating an interagency process to determine the form in which some or all such documents may be identified to the Committee, consistent with the Executive Branch's legitimate classification and confidentiality considerations. That review is being conducted consistent with OLC's long-established "third-agency practice," in which OLC consults with all other entities in the Executive Branch that have equities in the legal advice reflected in its memoranda before any decisions are made about whether and how disclosure would be appropriate. Where such documents are classified, moreover, the Department generally was not the classifying entity, and therefore any declassification decisions must be made outside the Department.

Q: Has the Judiciary Committee been provided access to all Office of Legal Counsel documents related to the Bush administration's interrogation and detention of individuals after September 11, 2001? If not, when will access to outstanding requests, including all documents listed in the October 16, 2008 subpoena, be provided?

Since January 2009, the Department has released over 40 OLC opinions and other legal memoranda concerning national security-related matters—including many involving interrogation and detention—with separate releases on March 2, 2009, April 16, 2009, August 24, 2009, December 15, 2009, March 15, 2010, and June 4, 2010. OLC has posted many of these documents on its FOIA Reading Room webpage: http://www.justice.gov/olc/olc-foia1.htm. The Department will continue to make additional OLC memoranda available to the Committee and to the public when possible, consistent with the directives of the President and Attorney General on transparency and with the Executive Branch's legitimate classification and confidentiality considerations. In accord with long-established "third-agency practice," OLC consults with other entities in the Executive Branch that have equities in the legal advice reflected in its memoranda before any decisions are made about whether and how disclosure would be appropriate. Moreover, where such documents are classified, the Department generally

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was not the classifying entity, and therefore any declassification decisions must be made outside the Department.

Commander in Chief Authority

The Bybee/Yoo Office of Legal Counsel (OLC) memos argue that the Commander-in-Chief authority is so broad that, in a time of war, the President could take nearly *any* action in the name of national security, and that action would be lawful. In an interview with the Office of Professional Responsibility, Mr. Yoo answered affirmatively when asked if the President could order "a village of resistants to be massacred." Mr. Yoo said that such an order "would fall within the Commander in Chief's power over tactical decisions." This is the kind of statement that we would strongly condemn if it were made by a foreign government. In the hearing, you stated that you were not aware of any OLC opinion related to the Commander-in-Chief authority having been issued since the Obama administration took office in January 2009.

Q: What is the current OLC interpretation of the Commander-in-Chief authority?

Even before the current Administration began, the Office of Legal Counsel had rejected the view of the Commander-in-Chief Authority that you describe. In a memorandum dated January 15, 2009, Principal Deputy Assistant Attorney General Steven G. Bradbury signed a memorandum, now posted on the OLC "FOIA Reading Room" webpage (see http://www.justice.gov/olc/docs/memostatusolcopinions01152009.pdf), in which he stated that the assertions of such a view in several OLC opinions between March 2002 and 2003 "are not the position of OLC." Bradbury explained further that:

> A number of OLC opinions issued in 2002-2003 advanced a broad assertion of the President's Commander-in-Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror. The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President.
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> * * * *
>
> Article I, Section 8 of the Constitution also grants significant war powers to Congress. We recognize that a law that is constitutional in general may still raise serious constitutional issues if applied in particular circumstances to frustrate the President's ability to fulfill his essential responsibilities under Article II. Nevertheless, the sweeping assertions in the opinions above that the President's Commander-in-Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable.

OLC continues to agree with these statements.

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Q: Please confirm whether OLC has articulated a formal interpretation since the Obama administration took office.

In this Administration, OLC has not had occasion to articulate a formal interpretation of the Commander-in-Chief authority in the contexts raised by your question.

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Questions Posed by Senator Sheldon Whitehouse

Need to Review / Rescind Other OLC Memos

The OPR report found that even after the Yoo and Bybee memos, other OLC memos – like the 2005 Bradbury memo – were improperly written "with the goal of allowing the ongoing CIA program to continue." OPR also found evidence there was pressure from President Bush and Vice President Cheney on Mr. Bradbury to write his memo to allow the CIA interrogation program to go forward.

- **Because of these conclusions in the OPR report that are separate and apart from the determinations on disciplinary action for Mr. Yoo and Mr. Bybee, will DOJ revisit and engage with Congress on what other OLC memos need to be rescinded?**

In section 3(c) of Executive Order 13491, issued on January 22, 2009, President Obama directed that "[f]rom this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government . . . may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2-22.3, and its predecessor document, Army Field Manual 34-52—issued by the Department of Justice between September 11, 2001, and January 20, 2009." This Executive Order applies to all of the interrogation-related memos referenced in the OPR report. In addition, OLC has formally withdrawn seven of the eight formal memoranda of the Office relating to interrogation discussed in the OPR Report, including the three memoranda issued by Mr. Bradbury in May 2005 (see http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf). Other interrogation-related documents discussed in the OPR Report, along with many other OLC documents from the prior administration, are posted on OLC's FOIA Reading Room Page (http://www.justice.gov/olc/olc-foia1.htm), under a heading that states that "[t]hese memoranda, in whole or in part, may not necessarily be operative, . . . or otherwise reflect the Office's current views."

- **What can be done to make sure all of the faulty OLC opinions are not just rescinded, but also corrected so that a future administration cannot just adopt them as a prior precedent?**

In consequence of Executive Order 13491 and OLC's formal withdrawal of a number of opinions, the views contained in the interrogation memoranda may not be relied upon as binding legal interpretations of the Executive Branch as a matter of "precedent." OLC may in the future revisit particular legal arguments appearing in those memoranda if the circumstances warrant.

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Role of the Associate Deputy Attorney General

According to the memorandum authored by Associate Deputy Attorney General David Margolis, beginning in the 1990s, he has been the sole Department of Justice official who has resolved challenges to negative OPR findings against former Department attorneys, most often in the context of proposed bar referrals.

- **While I am sure that Associate Deputy Attorney General Margolis is qualified, should one person have the authority to modify the recommendations of the Office of Personal Responsibility? Has the Department considered a different process, such as including outside experts in attorney professional responsibility?**

Both current and former Department attorneys are permitted to contest Office of Professional Responsibility (OPR) findings of misconduct via procedures that differ slightly for current versus former employees. For current Department employees, OPR provides its report to their component head or United States Attorney. Under current practice, when OPR determines that a Department attorney has engaged in professional misconduct, OPR also recommends a range of discipline that may include a reprimand, suspension or removal. The authority to impose discipline has been delegated to certain supervisory Department officials. Federal law, regulations, and Department policy require a multi-step disciplinary process. *See* 5 U.S.C. §§ 7501-04 and 7511-14, and 5 C.F.R. Part 752. In the case of a written reprimand, Department attorneys are entitled to grieve a written reprimand to a higher level supervisor than the issuing supervisor. In the case of a suspension of 14 days or less, the regulations require that a supervisor issue a disciplinary proposal. The employee then has the right to respond to that proposal to a higher level supervisor who acts as the deciding official. After considering the response, the deciding official then issues a decision imposing discipline or not. For suspensions of 14 days or less, the employee can grieve the deciding official's action to a higher level supervisor. For suspensions longer than 14 days or removal, the employee can appeal the disciplinary action to the Merit Systems Protection Board. Therefore, when OPR finds a current Department attorney to have engaged in misconduct, the attorney can challenge that finding through the disciplinary process.

This regulatory required disciplinary process could result in inconsistent application of the rules of professional responsibility to Department attorneys if the disciplinary officials were free to reject OPR findings without Department oversight. At the same time, a requirement that the disciplinary official impose discipline based on an OPR finding of misconduct with which the official disagrees would compromise the process required by statute and regulation because an employee is entitled to respond to proposed discipline. However, if the deciding official is bound by the proposed disciplinary action, then that response is not meaningful.

In order to address these two issues, Department policy requires that disciplinary officials notify the appropriate career Associate Deputy Attorney General of their desire to depart from OPR's findings of misconduct by current employees. In those instances, the component head or United States Attorney may challenge the findings with OPR and, if OPR affirms its original findings, with that Associate Deputy Attorney General. Upon receiving a challenge to an OPR finding from a component head or United States Attorney, the career Associate Deputy Attorney

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General entrusted with the review will typically resolve the challenge in one of three ways: by authorizing the disciplinary official to depart from OPR's findings, by reassigning the matter to another disciplinary official who has authority to decide the matter, or by proposing discipline himself or herself. Whichever course is taken, the final Department determination is not reached until the disciplinary process is complete, and that final determination will govern whether the Department refers the misconduct finding to the state bar of which the subject attorney is a member. The Department has determined that these procedures best meet the goals of empowering managers to supervise the employees in their offices while also achieving consistency in the application of Rules of Professional Responsibility to the conduct of Department attorneys.

Former Department employees cannot be disciplined by the Department, so that process is not available to adjudicate their objections to OPR's findings. However, in most instances, Department policy requires referral of those findings of misconduct to the state bar of which the former Department attorney is a member. Therefore, for many years, the Department has afforded former Department attorneys the chance to seek review of OPR's findings prior to the bar referral. In these instances, the appropriate career Associate Deputy Attorney General—in this case, Mr. Margolis—can adopt in whole or in part OPR's findings, downgrade those findings, or reject them in their entirety. If findings of misconduct are adopted, then the Department will refer the matter to the state bar in those instances in which Department policy calls for a referral. *See* http://www.justice.gov/opr/polandproc.htm. Once again, the performance of this function by a career Associate Deputy Attorney General ensures consistency of application of the Rules of Professional Responsibility to the conduct of Department attorneys.

It would not be appropriate for the Department to consult outside ethics experts as part of this process. First, OPR's investigative reports often include grand jury information and other confidential information that should not be disclosed outside the Department. Second, generally, the Privacy Act would preclude discussion of disciplinary matters with individuals outside the Department. Finally, as noted above, the disciplinary process and the review process for former Department attorneys require that the deciding official make the final decision after full consideration of the subject attorney's response to proposed discipline or, in the case of former attorneys, OPR's findings. For all of the above reasons, the Department believes that the procedures currently in place effectively meet the demands of the federal disciplinary process and the goal of uniform application of the Rules of Professional Responsibility to the conduct of Department attorneys.

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Recommendations on Prosecution for Detainee Abuse

I have followed very carefully, as a Member of the Intelligence Committee, cases in the past several years where the CIA's Inspector General has referred cases to the Department of Justice for a decision whether to prosecute cases of abuse in detention and interrogation. The Office of Professional Responsibility (OPR) has recommended that the Department review the declinations of prosecution in those cases.

- **Has the Department reviewed any of its past declinations to prosecute, per OPR's recommendation?**

On August 24, 2009, the Attorney General announced that he had expanded the mandate of Assistant United States Attorney John Durham, who had been designated to investigate the destruction of interrogation videotapes by the CIA, to conduct a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. The Attorney General noted that the information he reviewed prior to making the decision to expand Mr. Durham's mandate included the OPR report, and that "the report recommend[ed] that the Department reexamine previous decisions to decline prosecution in several cases related to the interrogation of certain detainees."

Congressional Oversight

Congress has the responsibility of oversight. In order to do that, we need to understand how the Executive Branch is interpreting the laws we pass, which means we need to understand the Office of Legal Counsel memoranda that impact the operation of Executive Departments and agencies, particularly, those in the intelligence community. The last Administration withheld several OLC opinions from Congress, especially those opinions having to do with detention and interrogation and with the electronic surveillance of U.S. persons.

- **Does the Department have a policy on when it will withhold OLC memoranda from Congress, and under what circumstances?**

The Department has a policy of seeking to accommodate this Committee's oversight interests in a manner consistent with our own responsibilities, but there is no specific policy on disclosure of OLC memoranda. As you know, we have disclosed numerous OLC memoranda from both the previous and current Administrations, even including classified memoranda in some instances.

Next Steps

According to the Margolis memorandum, "the bar associations in the District of Columbia and Pennsylvania can choose to take up this matter, but the Department will make no referral."

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- **Does the lack of a referral preclude these bar associations from initiating investigations or sanctioning Mr. Yoo or Mr. Bybee? Do you expect to provide any additional documentation to these bar associations if they request it?**

The lack of a referral does not preclude bar associations from initiating an investigation or sanctioning Mr. Yoo or Mr. Bybee. The Department would work with any relevant bar association that requests information in an effort to accommodate such a request.

Concerns about other OLC opinions

The OPR report found that John Yoo and Jay Bybee failed in their duty to give thorough, objective, and candid legal advice, even if it was not what the client wanted to hear.

- **Given this concern about the objectiveness of the advice provided by OLC, in addition to opinions that have been withdrawn, what actions has the Department taken to identify and correct OLC opinions – particularly those issued during the period John Yoo was at OLC – that fail to give thorough, objective and candid legal advice?**

OLC has withdrawn seven of the eight formal Opinions that the Office issued between 2002 and 2007 dealing specifically with interrogation techniques and discussed in the OPR report. OLC has also posted many other OLC documents from the prior administration on OLC's FOIA Reading Room Page (http://www.justice.gov/olc/olc-foia1.htm) under a heading that states that "[t]hese memoranda, in whole or in part, may not necessarily be operative, . . . or otherwise reflect the Office's current views." In addition, in section 3(c) of Executive Order 13491, issued on January 22, 2009, President Obama directed that "[f]rom this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government . . . may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2-22.3, and its predecessor document, Army Field Manual 34-52—issued by the Department of Justice between September 11, 2001, and January 20, 2009." This Executive Order applies to all of the interrogation-related memos referenced in the OPR report.

In other cases where the Office of Legal Counsel has had occasion to revisit questions addressed by prior Administrations, it has always carefully reviewed those questions, and the Office's previous views, on their merits. Where appropriate, OLC has rejected the Office's prior views. See, for example, *Constitutionality of the Matthew Shepard Hate Crimes Prevention Act*, http://www.justice.gov/olc/2009/shepard-hate-crimes.pdf; *Validity of Statutory Rollbacks as a Means of Complying with the Ineligibility Clause*, http://www.justice.gov/olc/2009/ineligibility-clause.pdf

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Provision of OLC opinions to Congress

The OPR report finds that the failure to broadly circulate the classified interrogation memos among attorneys and policy makers with expertise—a failure in part due to security clearance issues—contributed to the failure to identify major flaws in OLC's legal advice.

- **How do you intend to ensure that future OLC opinions on classified national security matters are properly vetted within the Department and among experts?**

OLC's practice is to seek views from interested agencies and DOJ components before providing legal advice. Such views are, whenever possible, provided to OLC in writing. OLC also routinely holds inter-agency meetings to explore competing views. Even for matters that are highly classified, OLC seeks the views of relevant entities to ensure full consideration of the relevant issues; and OLC has a practice that, whenever possible, at least the acting head of the Office and two other Deputy Assistant Attorneys General be cleared to review any classified matters. OLC also keeps the leadership of the Department apprised of its activities, including its work on classified national security matters.

- **Given the fact that legal interpretations in OLC opinions could affect congressional assessment of the need for legislation, will the Department of Justice commit to provide to Congress future OLC opinions on classified national security programs at the time they are issued?**

See response to "Congressional Oversight" question, above.

- **For prior opinions on classified programs, will the Department of Justice identify and provide to Congress major opinions that have not yet been provided?**

See responses to Chairman Leahy's questions concerning "Outstanding Requests for OLC Opinions and Index," above.

Shock the conscience

In May 2005, Steve Bradbury, then the Assistant Attorney General for OLC, authored an opinion concluding that CIA's interrogation program—including waterboarding—did not "shock the conscience" or otherwise violate the Fifth, Eighth or Fourteenth Amendments. OPR did not find that Steve Bradbury committed misconduct in drafting this opinion. Although this opinion has now been withdrawn, I think we need to engage in a more robust discussion about the substance of those decisions.

- **To what extent does the Department use the analysis in prior opinions—even when they have been withdrawn—to guide legal interpretation in the future?**

When an opinion has been withdrawn, it no longer represents the views of the Office and the Office does not give it any precedential weight.

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- **Could individuals rely on the withdrawn opinions to conclude that the legal analysis that waterboarding and other harsh techniques does not "shock the conscience" or violate the Detainee Treatment Act is reasonable?**

The President has directed that "[f]rom [January 22, 2009] forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government . . . may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2-22.3, and its predecessor document, Army Field Manual 34-52—issued by the Department of Justice between September 11, 2001, and January 20, 2009."

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SUBMISSIONS FOR THE RECORD

March 4, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

We have in common that we have all served as senior leaders of the Department of Justice, although we have served in the administrations of different parties. What we also have in common, and what is particularly relevant at the moment, is that we all benefited during our tenures from the wise counsel and good judgment of David Margolis. His advice is informed by his long experience and delivered with utter lack of partisan bias or any other distorting prejudice. We greatly admire and appreciate the unique role he has played in the Department over many years.

While we do not comment here on the merits of the decision regarding the discipline of John Yoo and Jay Bybee, we are certain that it was reached conscientiously and wholly without partisan purposes. Obviously, Congress has the right to explore this decision with the Department, as this Committee did in hearing from the Acting Deputy Attorney General last Friday, but we write to emphasize that we have no doubts at all about the honesty and integrity of David Margolis's decision in this matter.

As those who have benefited from David Margolis's counsel, we know he remains a great asset to the Department and the country for the present and future.

Sincerely,

John D. Ashcroft
Attorney General
2001-2005

William P. Barr
Attorney General
1991-1993

Benjamin R. Civiletti
Attorney General
1979-1981

James B. Comey
Deputy Attorney General
2003-2005

Mark R. Filip
Deputy Attorney General
2008-2009

Alberto R. Gonzales
Attorney General
2005-2007

Jamie S. Gorelick
Deputy Attorney General
1994-1997

Jo Ann Harris
Assistant Attorney General,
Criminal Division
1993-1995

Philip B. Heymann
Deputy Attorney General
1993-1994

Paul J. McNulty
Deputy Attorney General
2005-2007

Craig S. Morford
Acting Deputy Attorney General
2007-2008

Michael B. Mukasey
Attorney General
2007-2009

David W. Ogden
Deputy Attorney General
2009-2010

Janet W. Reno
Attorney General
1993-2001

James K. Robinson
Assistant Attorney General,
Criminal Division
1998-2001

George J. Terwilliger III
Deputy Attorney General
1992-1993

Larry D. Thompson
Deputy Attorney General
2001-2003

CREW | citizens for responsibility and ethics in washington

February 25, 2010

By Facsimile: 202-514-4507

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 25030

Dear Attorney General Holder:

Citizens for Responsibility and Ethics in Washington (CREW) respectfully requests that you investigate the destruction of email records of former Office of Legal Counsel (OLC) Deputy Assistant Attorneys General John Yoo and Patrick Philbin, as documented in a recently issued report of the Department of Justice's Office of Professional Responsibility (OPR). The knowing failure to preserve and restore email records violates the Federal Records Act (FRA) and may be subject to criminal sanctions.

The Department of Justice, as a federal agency, is subject to the FRA, which dictates the creation, management, and disposal of federal or "agency" records. 44 U.S.C. §§ 2201-18, 2901-09, 3101-07, and 3301-24. Among other things, the FRA requires federal agencies to establish a program for the creation and preservation of agency records that includes effective controls over the records' use and safeguards against their removal or loss. 44 U.S.C. §§ 3101, 3102, 3105. Emails without question fall within the scope of these obligations, as the U.S. Court of Appeals for the D.C. Circuit recognized as early as 1993. *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1282 (D.C. Cir. 1993) (recognizing the "undisputed proposition" that "electronic communications systems can create, and have created, documents that constitute federal records under the FRA").

Last Friday, the Department of Justice released an OPR report, "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Related to the Central Intelligence Agency's Use of 'Enhanced interrogation Techniques' on Suspected Terrorists," dated July 29, 2009 (Report). Among other things, the Report notes the OPR investigation "was hampered by the loss of Yoo's and Philbin's email records." Report at 14. "[M]ost of Yoo's email records" as well as "Philbin's email records from July 2002 through August 5, 2002 – the time period in which the Bybee Memo was completed and the Classified Bybee Memo . . . was created," were deleted. *Id.* at p. 5 n.3. According to OPR, the deleted emails included "relevant documents." *Id.*

1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005 | 202.408.5565 phone | 202.588.5020 fax | www.citizensforethics.org

63193.014

The Honorable Eric Holder
Page Two
February 25, 2010

The destruction of emails from high-ranking officials such as Messrs. Yoo and Philbin related to a subject of critical importance to the Department of Justice and the nation as a whole clearly violates the FRA. Moreover, the apparent failure of the Department of Justice to take any action in the face of knowledge that crucial records had been destroyed reflects a patent disregard of mandatory federal record keeping laws. Just as significant, the Department's failure to initiate action upon this discovery to recover any of the missing emails leaves us now, given the passage of time and change in administrations, with only a limited chance of recovering them.

Just as the circumstances surrounding the destruction by the CIA of interrogation videotapes justified a criminal inquiry, so too here the facts surrounding the destruction of email records of high-ranking Department of Justice officials justify the initiation of a criminal investigation to determine not only whether Messrs. Yoo and Philbin, and possibly others, violated federal record keeping laws, but also whether they obstructed justice and violated other criminal laws.

The recently released OPR report has ignited a firestorm of criticism over a very controversial subject, and left too many unanswered questions about the actions of so-called rogue interrogators, those Department of Justice officials like Mr. Yoo who facilitated torture, and whether any of those involved truly have been held accountable for their actions. The destroyed emails likely would have shed light on this shameful episode. Given this context, inaction by the Department of Justice should not be an option.

Thank you for your attention to this very serious matter.

Very truly yours,

Melanie Sloan
Executive Director

cc: Chairman Patrick J. Leahy
Senate Judiciary Committee

Chairman John Conyers, Jr.
House Judiciary Committee

63193.015

Statement of Senator Dick Durbin
Hearing of the Senate Judiciary Committee
"The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda"

February 26, 2010

Thank you Mr. Chairman for this hearing and for your leadership on this issue.

It is worth reminding ourselves why we're here today.

Mr. Bybee and Mr. Yoo authored the infamous torture memo, which redefined torture as limited only to abuse that causes pain equivalent to organ failure or death. They concluded that the President has the authority to ignore the law that makes torture a crime. That memo provided legal cover for the Bush Administration to authorize waterboarding, a torture technique that our country has always repudiated as torture and prosecuted as a war crime.

The late historian Arthur Schlesinger said this about the Bush Administration's legal defense of torture: "No position taken has done more damage to the American reputation in the world—ever."

In February 2008, I asked then Attorney General Mukasey to investigate whether the Bush Administration's use of waterboarding violated any laws. He refused. Since then, for the past two years, Senator Whitehouse and I have pressed for this OPR report to be completed and made public so that the American people can judge for themselves what was done in their name.

Now, thanks to Attorney General Holder, this report has finally seen the light of day. I want to commend Attorney General Holder for the transparent and apolitical way he has handled this investigation.

Some claim that David Margolis has vindicated Mr. Yoo's and Mr. Bybee's conduct because he concluded that they did not engage in professional misconduct. But Mr. Margolis did not vindicate Jay Bybee and John Yoo. Far from it. Here is what he said:

> "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. ... my decision not to adopt OPR's misconduct findings should not be misread as an endorsement of the subject's efforts."

It should also be clear that this is not the end of the road when it comes to investigating the torture scandal. There is strong evidence in the OPR report that other Bush Administration officials worked closely with Mr. Bybee and Mr. Yoo to make sure that the Justice Department signed off on the legality of torture techniques like waterboarding. According to the OPR report, there was extensive discussion of granting "advance pardons" to allow the CIA to engage in

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illegal conduct. John Yoo said that former Attorney General Ashcroft was "sympathetic" to this idea.

After other Justice Department officials rejected the concept of "advance pardons," Mr. Yoo added the section to the torture memo which stated that the President, as Commander-in-Chief, could override criminal laws prohibiting torture. This would allow Administration officials to engage in illegal conduct, safe in the knowledge that the President could simply set aside the laws they were violating.

When one of John Yoo's colleagues objected to the Commander-in-Chief override, Mr. Yoo told him, "They want it in there." Who were they? Mr. Yoo doesn't tell us, but the OPR report documents repeated meetings between Mr. Yoo and top White House officials, including then-White House Counsel Alberto Gonzales, and David Addington, Vice President Cheney's chief of staff. And Mr. Gonzales said that Mr. Addington was "an active player" in drafting the memo.

The Attorney General has made it clear that the Justice Department will not prosecute interrogators who relied in good faith on legal advice provided by the Office of Legal Counsel. But that would not apply to senior political appointees who were involved in authorizing the use of torture.

In the end, what have we learned? We have learned that even when America is fearful and concerned about terrorism, we should never forget our basic values. The time will come when those who do have to answer for it. If we stand true to our values and to our history as a nation, we will be stronger and we will be respected in the world.

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Senate Judiciary Committee Hearing on
"The Office of Professional Responsibility Investigation
into the Office of Legal Counsel Memoranda"
Friday, February 26, 2010

Statement of U.S. Senator Russell D. Feingold

Mr. Chairman, the Office of Professional Responsibility (OPR) report reminds us in no uncertain terms that John Yoo and Jay Bybee engaged in disgraceful conduct by writing and signing legal memos authorizing torture.

While much of the information in the OPR report has previously been declassified and discussed in various places, the report is stunning in its recounting of the history of these torture memos. The Department of Justice deserves credit for making available so many documents relating to this report. The report reminds us of the pressure coming from the White House, and particularly the Office of the Vice President, on the CIA's interrogation program; the extreme legal theories and one-sided presentation of the law that Yoo provided in response; and the extraordinary secrecy with which these issues were handled. Even after the memos signed by Bybee and Yoo in 2002 and 2003 were withdrawn in 2004, subsequent memos went on to authorize what can only be described as acts of torture, including one drafted in 2005 by Steven Bradbury over the objection of Deputy Attorney General James Comey, who also raised concerns that Bradbury was susceptible to pressure because he was hoping to be nominated by the President to be an Assistant Attorney General.

Those later memos have now been withdrawn, although it's worth nothing that other controversial memos governing wiretapping remain in effect. The job of reversing the mistaken Bush Administration-era theories of executive power is still not complete.

As we suspected all along, the OPR report also confirms that the administration pushed to include certain provisions in the Military Commissions Act of 2006 precisely to "remove the legal barriers to the CIA program that had been created by the DTA [Detainee Treatment Act of 2005] and *Hamdan* [*v. Rumsfeld*, 548 U.S. 557 (2006)]." OPR Final Report at 154. Indeed, in 2007, Bradbury issued yet another OLC memo concluding that six 'enhanced' interrogation techniques the CIA still wanted to use did not violate domestic or international law. It took a new President and a new Attorney General to repudiate both the use of torture and the tortured legal reasoning justifying it.

Mr. Chairman, I am deeply troubled that one of the architects of this perversion of the law is now sitting on the federal bench. I agree with you that Jay Bybee should step down from his lifetime appointment. I do not see how he can serve as a credible federal judge – someone who is supposed to be an independent decision-maker whose judgment and integrity are beyond question – under these circumstances. His name is now synonymous with an extreme legal analysis that has been repudiated by almost everyone except the few people involved in writing it. I opposed Judge Bybee's nomination in 2003 because the administration refused to make his OLC opinions available to the committee. He claimed he would uphold the law and follow Supreme Court precedent, but legal memos that would have given this committee a very good

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window into whether he would fulfill that commitment were withheld. Little did I know at the time what a difference it would have made to see those memos. I have no doubt that had this committee been given access to the OLC opinions it asked for when Judge Bybee was nominated to the Ninth Circuit, he would never have been confirmed.

Mr. Chairman, I ask that a copy of my floor statement in opposition to Judge Bybee's nomination dated March 13, 2003, be included in the record of this hearing.

That brings me to the other issue the OPR report raises: the ongoing problem of secret law. The legal theories in the Bybee and Yoo memos offered the most extreme possible interpretation of presidential power, and failed to present more mainstream views or conflicting arguments. Tragically, there was no judicial or congressional oversight of these interpretations. This is an ongoing problem. We have an executive branch office writing binding legal opinions on issues that often are never adjudicated by any court. Not only that, but that same office treats its own decisions as precedent that can then be cited in future opinions. And many of these decisions remain not only outside the public eye, but also unavailable to congressional oversight committees. When you have an executive branch institution with an inherent bias in favor of executive power and authority to issue binding legal opinions, and little if any opportunity for congressional, judicial or public oversight of its opinions, is it surprising that something like the Bybee and Yoo memos were the result?

This is exactly why I have pushed for more congressional reporting to Congress on OLC opinions, including the bill that Senator Feinstein and I introduced last Congress, the OLC Reporting Act.

Mr. Chairman, I want to make one final point. The history of what happened in the Office of Legal Counsel during the Bush Administration is exactly why we need to confirm Dawn Johnsen to head that office. She understands the crucial role of the OLC in upholding the rule of law and has championed institutional reforms to make sure that nothing like the Bybee/Yoo memos ever happens again.

Thank you again for holding this important hearing.

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didn't have any problem in reminding him where both were to be found.

But the Senator from Minnesota today is referring to the Constitution of the United States, written in 1787, signed by 39 individuals, among whom was one kinsman of the distinguished Senator from Minnesota, MARK DAYTON, and his name is found in that illustrious roll of signers from the State of New Jersey. William Livingston, David Brearley, William Paterson, Jonathan Dayton. The Senator from Minnesota, Mr. MARK DAYTON, voted to uphold the Constitution, concerning which he has stood before that desk of the Presiding Officer with his hand on the Bible and swore to support and defend that Constitution.

This Senator who sits in front of me, I now put my hand on his shoulder, Senator KENT CONRAD, he was among the 23, yes. He was on that illustrious roll to which someone in ages hence will point. The Senator from Illinois, Mr. DURBIN, sits here on the floor today. He, too, was one of the 23 who stood for the Constitution on that day, when a majority of the Senate voted to shift the power to declare war to the President of the United States. But 23 Senators voted to leave that authority where the Constitution puts it: namely, in Congress.

What would Jonathan Dayton have said could he have spoken on the day that those 23 Members stood up for the Constitution—21 Democrats, one Independent and one Republican—what would Jonathan Dayton of New Jersey have said if he could have spoken to the Senate that day? What would his advice to us have been?

Mr. DAYTON. I think he would have said it was a good thing we added West Virginia to the United States of America so we could have the distinguished Senator from West Virginia to give us the guidance he did that day.

Since the hour is approaching for the vote under the rules, I will conclude my remarks.

Mr. BYRD. I thank the distinguished Senator for yielding.

Mr. DAYTON. I thank the Senator for his kind words.

I respectfully urge the majority leader and all of my colleagues to turn their attention to this fateful decision when we return next week. A decision whether or not to vote a declaration of war is one that would be a very difficult vote, one that would be a career-shaping or career-shattering vote, but it would be one the Constitution requires of us, as do our fellow citizens who elected us. And it is one that only we can and must do, to vote on whether or not to declare war.

I urge the Senate to turn its attention to that matter when it resumes next week.

I yield the floor.

Mr. FEINGOLD. Mr. President, I will oppose the nomination of Jay Bybee to the Ninth Circuit Court of Appeals. I was not able to attend the hearing that was held on Mr. Bybee because of Secretary Powell's presentation that morning to the United Nations. So I submitted written questions, as did a number of my colleagues. Unfortunately, I have to say after reviewing Mr. Bybee's response to those questions that his unwillingness to provide information in response to our inquiries is striking. On more than 20 occasions, Mr. Bybee refused to answer a question, claiming over and over again that as an attorney in the Department of Justice he could not comment on any advice that he gave at any time. This is unfortunately becoming a very familiar refrain of nominees before the Judiciary Committee.

I say unfortunate because it puts many of us in the position of having to oppose nominees because they have not been forthcoming. This was not the approach taken by at least some Bush nominees in the last Congress. Michael McConnell, for example, was forthcoming in his testimony and answers to written questions. He convinced me that he would put aside his personal views if he were confirmed to the bench.

There is an extensive body of legal work both written by or at least signed off on by this nominee, in this case unpublished Office of Legal Counsel opinions. The administration and the nominee are acting as if they are irrelevant to the confirmation process. A nominee cannot simply claim that he or she will follow Supreme Court precedent and ask us to take that assurance on faith, when there are written records that may help us evaluate that pledge, but the nominee refuses to make those records available.

Only three OLC opinions had been made publicly available since Mr. Bybee's confirmation to head that office. That is extraordinary, given that 1,187 OLC opinions dating back to 1996 are publicly available. This is a dramatic change in the Department's practice, a change that did not occur until this nominee was confirmed to be Assistant Attorney General for the office. While there may be some justification for releasing fewer opinions since 9/11, the wholesale refusal to share with the public and Congress important OLC decisions affecting a wide range of legal matters is, to say the least, troublesome.

But the failure to make OLC opinions available to the Judiciary Committee during the consideration of a nominee for a seat on a circuit court is unacceptable. Even White House Counsel Alberto Gonzalez, in a letter Mr. Bybee cites in his written responses, agrees that there is no universal bar to disclosure of OLC opinions. Gonzalez wrote that:

> No bright-line rule historically has governed, or now governs, responses to congressional requests for the general category of Executive Branch "deliberative documents."

The administration should be able to agree to an acceptable procedure to allow the Judiciary Committee to review Mr. Bybee's OLC opinions. Given the recent history of many OLC opinions being made public, it is hard to believe that there are no opinions authored by Mr. Bybee that could be disclosed without damaging the deliberative process. Indeed, it is very hard to give credence to the idea that OLC's independence would be compromised by the release of some selection of the opinions of interest to members of the Judiciary Committee or the Senate.

Without the OLC memos, important questions about the nominee's views on how far the Government can go in the war on terrorism, enforcing the rights of women, enforcing the rights of gays and lesbians, and other important issues do not just remain unanswered, they apparently remain off-limits.

One of Mr. Bybee's responses may explain the reluctance to make any OLC materials available. In his response to a question from Senator BIDEN about why DOJ did not create an independent Violence Against Women Office at DOJ as required by Congress in a bill passed last year, Mr. Bybee left the impression that OLC may have either intentionally omitted or ignored the key portions of the legislative history in crafting its opinion.

In a series of questions from Senator BIDEN about his involvement in DOJ's decision on the VAWO, Mr. Bybee was given the opportunity to clarify his view of the law and correct what appears to be a clearly erroneous interpretation of the legislative history. Instead he seems to try to downplay the importance of his office's legal analysis on the decision. He states at one point:

> The structure of the letter would thus indicate that legislative history had no significant bearing on its analysis or conclusion.

The members of the Judiciary Committee are entitled to better. How can we be confident that Mr. Bybee will put aside his personal policy views and fairly interpret and apply the law as passed by this body, when it seems that his office crafted a legal opinion designed to allow the Department of Justice to willfully ignore clear legislative intent? Perhaps the legal opinion itself will shed some light on this question, but we are not being permitted to see it.

Mr. Bybee also mischaracterized many of his own writings and speeches and failed to directly answer most of the questions put to him about them, claiming he would simply follow existing Supreme Court precedent. As we all know, the Supreme Court has not answered every legal question. It is our circuit court judges that are routinely in the position of having to address novel legal issues, not the Supreme Court.

For example, I asked Mr. Bybee about his views, published in a law review article, that we should consider repealing the 17th Amendment which provides for the direct election of Senators. The nominee now simply states that Senators should be popularly elected, almost claiming he had never argued to the contrary in his article.

His answers to my questions about this article were evasive, not forthcoming.

Another telling example is his response to a series of questions from Senator EDWARDS about a 1982 article in which he criticized the IRS decision to deny tax exempt status to Bob Jones University because of its racially discriminatory practices. The article is full of statements revealing a disdain for anti-discrimination policies and warned of a parade of horribles should the government continue to use its spending power to advance such policies.

Yet, in his written responses, Mr. Bybee seems to deny the very clear meaning of his written words. He goes so far as to claim that he was only commenting on the Government's change in position in the case and not the very important public policy issue at the heart of the case. That, it seems to me, is an adventurous reading of the article, at best.

Based on Mr. Bybee's unwillingness to answer any question about his views on a wide range of issues, his distortion of his own limited but telling written record, and the failure of the administration to provide any of his numerous OLC opinions to the Judiciary Committee for review, I must vote no on his nomination to the Ninth Circuit Court of Appeals.

Mr. DURBIN. Mr. President, I rise today in opposition to the nomination of Jay Bybee for the Ninth Circuit Court of Appeals. Mr. Bybee recently passed out of the Judiciary Committee by a vote of 12 to 6.

Mr. Bybee is a smart person and a talented attorney—there is no argument about that. But he is one of the most strident voices in the country in advocating states' rights over Federal rights.

For example—and I think members of the Senate here should take special note of this—he wrote a law review article arguing that the 17th amendment was a bad idea. The 17th amendment, of course, is the amendment that allowed for direct election of United States Senators.

Mr. Bybee believes that ratification of the 17th amendment has resulted in too much power for the Federal government, and too little for the States. Here is what he said in his law review article:

> If we are genuinely interested in federalism as a check on the excesses of the national government and therefore, as a means of protecting individuals, we should consider repealing the 17th Amendment.

I, for one, disagree.

On behalf of a conservative foundation, Mr. Bybee wrote a successful amicus brief in the 2000 case United States v. Morrison, in which the Supreme Court struck down part of the Violence Against Women Act. Mr. Bybee wrote that Congress had no power under either the Commerce Clause or the 14th amendment to pass crucial provisions of this law. I thought this was settled law 75 years ago. Mr. Bybee thinks it is time to revisit this notion.

In addition, I am troubled by Mr. Bybee's positions regarding gay rights. He has been very critical of the Supreme Court's 1996 decision, Romer v. Evans, that struck down a Colorado constitutional amendment that prohibited local governments from passing laws to protect gay people. He called such laws that protect gay people from discrimination "preferences for homosexuals."

In another gay rights case, he wrote a brief defending the Defense Department's policy of subjecting gay and lesbian defense contractors to heightened review before deciding whether to give them security clearances. He argued that this policy was not a violation of the Equal Protection Clause and argued that such reviews were justified, in part, because some gays and lesbians experienced "emotional instability."

I am also concerned that Mr. Bybee—as head of the Justice Department's Office of Legal Counsel—has been involved in shaping some of the most controversial policies of the Ashcroft Justice Department. For example, he may have been involved in the new interpretation of the second amendment.

He may have been involved in the TIPS program, in which people in the United States are encouraged to spy on their neighbors and coworkers and report any conduct they find to be "unusual."

He may have been involved in the decision to declare the al Qaeda and Taliban detainees at Guantanamo Bay as prisoners of war under the Geneva Convention.

I say "may have been involved" because he refused to tell us. In written responses to 20 different questions we posed to him, he gave the following answer:

> As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

Mr. Bybee is the most recent example of an appellate court nominee who has stonewalled the Senate Judiciary Committee. I do not believe that such conduct should be rewarded.

I oppose the nomination of Mr. Bybee to the Ninth Circuit.

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT—CONTINUED

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

> CLOTURE MOTION
>
> We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 21, the nomination of Miguel A. Estrada to be United States Circuit Judge for the District of Columbia Circuit.
>
> Bill Frist, Orrin Hatch, Trent Lott, Robert F. Bennett, Peter Fitzgerald, Jeff Sessions, John Ensign, Kay Bailey Hutchison, Rick Santorum, Don Nickles, Jim Talent, Lindsey Graham of South Carolina, Lisa Murkowski, Conrad Burns, John Warner, John Sununu, Gordon Smith, Elizabeth Dole, Saxby Chambliss, Christopher Bond, Susan Collins, Wayne Allard, Lamar Alexander, Norm Coleman, Pat Roberts, Craig Thomas, Larry E. Craig, Olympia Snowe, John McCain, James Inhofe, Jon Kyl, Lincoln Chafee, Judd Gregg, Richard G. Lugar, George Allen, Chuck Grassley, George V. Voinovich, Mike Crapo, Michael B. Enzi, Thad Cochran, Mike DeWine, Arlen Specter, Sam Brownback, Ben Nighthorse Campbell, Richard Shelby, Ted Stevens, Chuck Hagel, John Cornyn, Pete Domenici, Mitch McConnell, Jim Bunning.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The senior assistant bill clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Carolina (Mr. EDWARDS), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) would each vote "No."

The PRESIDING OFFICER (Mr. SUNUNU). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 55, nays 42, as follows:

[Rollcall Vote No. 53 Ex.]

YEAS—55

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (FL)
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Chafee	Hatch	Specter
Chambliss	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Voinovich
Craig	McCain	Warner
Crapo	McConnell	
DeWine	Miller	

NAYS—42

Akaka	Clinton	Feingold
Baucus	Conrad	Feinstein
Bayh	Corzine	Graham (FL)
Bingaman	Daschle	Harkin
Boxer	Dayton	Hollings
Byrd	Dodd	Inouye
Cantwell	Dorgan	Jeffords
Carper	Durbin	Johnson

Statement of Senator Dianne Feinstein

Hearing before the
Senate Judiciary Committee

on

"The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda"

February 26, 2010

I am very disappointed that, due to illness, I was unable to attend today's hearing of the Senate Judiciary Committee on the investigation of the Office of Professional Responsibility (OPR) into the Office of Legal Counsel (OLC) memoranda on interrogation of al-Qa'ida detainees.

The Office of Legal Counsel opinions written by former Deputy Assistant Attorney General John Yoo and former Assistant Attorney General Jay Bybee contained deeply flawed legal reasoning that paved the way for the CIA's disastrous use of coercive interrogation techniques.

The Office of Professional Responsibility, the unit within the Department of Justice charged with investigating allegations of misconduct by Department of Justice attorneys that relate to the exercise of their authority to provide legal advice, among other things, found that Messrs. Yoo and Bybee had committed 'professional misconduct' (in Yoo's case, intentionally so) and that their relevant bar associations should consider sanctions, potentially to include disbarment. Although it found no other instances of professional misconduct, the unit also expressed concern about the objectivity and reasonableness of later opinions about interrogation.

The Department of Justice official who resolves challenges to negative OPR findings declined the OPR recommendation to refer Yoo and Bybee to their relevant bar associations, instead determining that Yoo and Bybee "exercised poor judgment."

The bottom line is that the August 1, 2002, opinions by these attorneys and the several successor opinions through July 20, 2007, significantly misinterpreted U.S. law and international treaty obligations, to reach pre-ordained conclusions, with grave consequences for our national security. The OLC memos reached egregious conclusions that coercive interrogation techniques did not cause severe physical or mental pain or suffering and that their use did not "shock the conscience." They were absolutely wrong.

The techniques that John Yoo and Jay Bybee authorized had been honed by repressive regimes and zealots from the Spanish Inquisition to the Khmer Rouge. They were techniques designed to force false confessions and to punish, not to elicit accurate intelligence. And they were techniques that the U.S. military trained its personnel to resist, precisely because they were gruesome and fell outside the norms established in the Geneva Conventions for appropriately handling prisoners of war.

Even under the Bush Administration, the Department of Justice revoked aspects of John Yoo and Jay Bybee's opinions. Successor heads of OLC, Jack Goldsmith, Dan Levin, and Stephen Bradbury, criticized, replaced or revoked earlier OLC opinions. Attorney General Eric Holder rescinded the OLC opinions on

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detention and interrogation which authorized harsh techniques. So it is clear that the legal reasoning they contained could not withstand scrutiny.

The report of the Office of Professional Responsibility outlines the many ways in which John Yoo and Jay Bybee failed to provide acceptable legal reasoning. The OPR review found "errors, omissions, misstatements, and illogical conclusions" in the Bybee memo and that it "did not represent thorough, objective, and candid legal advice."

By all accounts, John Yoo and Jay Bybee were not incapable lawyers. There were reasons why their OLC memos were so poor. We need to understand these reasons and make sure they have been properly addressed. We need to make sure that the many negative consequences of these opinions are examined and remedied. And we need to ensure that Congress is properly informed of opinions of this nature, so that we can properly exercise our responsibility to provide oversight of the Department of Justice and make whatever changes in the law may be necessary as a result of such opinions.

Analysis to Reach a Desired Conclusion. OLC reached conclusions that the use of brutal interrogation techniques and prolonged detention didn't violate the torture statute, the Constitution, the War Crimes statute, or the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment" of the Geneva Conventions. The shortest explanation of how this could happen is because those were the conclusions that the White House, the CIA, and the authors wanted to reach. OPR found that "the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs [enhanced interrogation techniques]." OPR "also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor.'

In 2005, Stephen Bradbury memorialized the role of OLC. He wrote that OLC was to provide "candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers."

The Office of Legal Counsel during the period of 2002 to 2007 abjectly failed – in some instances, deliberately so--to provide such independent analysis.

Our Nation has paid an enormous price because of the interrogations that were sanctioned by these ill-rendered opinions. They cast shadow and doubt over our ideals and our system of justice. Our enemies have used our practices to recruit more extremists. And our key global partnerships, crucial to winning the war on terror, have been strained.

I intend to discuss with the Attorney General how the OLC is being insulated now from undue pressure by policymakers, so that OLC can truly provide thorough, objective, and candid advice, and not just reach pre-ordained results.

Examining Ongoing Effects of the Repudiated OLC Opinions. While the OLC interrogation and interrogation opinions have been withdrawn and no longer represent the views of OLC, a future Attorney General might decide to revive them and individuals could seek to use them to come to their own conclusions about the interpretations of these legal restrictions. It's important therefore to have a full debate, both in legal

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scholarship and continuing study by the Judiciary Committee, of the correct analysis of the Convention Against Torture, the U.S. constitutional provisions that are made applicable by the Convention, Common Article 3 of the Geneva Conventions, and federal torture and war crimes statutes.

Excessive Secrecy. As was the case in the OLC opinions concerning the Terrorist Surveillance Program, the OLC memos on interrogation were not subjected to extensive internal or external review. John Yoo and Jay Bybee did not circulate their opinions to national security law experts who might have recognized the opinions' flaws, did not challenge the CIA's assessments of the need for, and benefits of, the CIA program, and did not conduct their own research into how interrogation techniques were going to be used by the CIA in practice.

While OLC must base its legal analysis on the independent views of its attorneys, it is better able to conduct quality legal reasoning when more viewpoints are considered and facts gathered.

This can, and must, be done even in matters of the highest sensitivity and classification.

Providing OLC Opinions to Congress. Congress is responsible for passing legislation and for overseeing how the Executive Branch implements the law. To fulfill those responsibilities, the Congress must understand how the Executive Branch interprets the law. To do this, Congress must have access to OLC opinions.

OLC opinions are binding on the Executive Branch. If we are to properly exercise our duty to oversee that Branch, it is imperative that we know what rules they are operating under, rules that are, in some cases, enunciated by the OLC. Furthermore, if OLC is providing advice that is contrary to the intent of Congress, or that highlights unintended consequences of legislation that we have enacted, we need to know that so we can take whatever legislative action is necessary in response.

I can speak from personal experience about this, in this very area of the law. I began to voice concern and objection to the CIA's use of coercive interrogation techniques when I was first briefed on them in September, 2006. As the legal opinions were eventually provided and more information was made available, I authored legislation to prohibit the use of these interrogation techniques.

When Senator Whitehouse and I learned that OLC had written opinions arguing, amazingly, that the Foreign Intelligence Surveillance Act (FISA) was not intended to be the exclusive means to govern the use of electronic surveillance, we wrote legislation re-affirming the exclusivity of FISA.

In fact, the large majority of OLC opinions deal with unclassified matters and are made public. However, for those cases where classification or other sensitivities preclude public release, OLC opinions should be made available at least to the appropriate oversight committees of Congress.

I look forward to working with the Attorney General, the Office of Legal Counsel, and colleagues in Congress to address these vital issues.

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Testimony of

Michael S. Frisch

For the United States Senate
Committee on the Judiciary

The Office of Professional Responsibility Investigation into
the Office of Legal Counsel Legal Counsel Memoranda

February 19, 2010

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Chairman Leahy, Ranking Member Sessions and Members of the Committee:

Thank you for providing me with the opportunity to submit comments concerning the determination of the United States Department of Justice (hereinafter "Department") to decline to refer former Department attorneys Jay Bybee and John Yoo to their respective state bars for an investigation of possible violations of applicable ethical standards. In my view, there was a basis for such a bar referral with respect to both attorneys.

I have been a member of the District of Columbia Bar since 1975. I was admitted to practice in Maryland in 1980 and am presently inactive in that jurisdiction. From February 1984 to July 2001, I served as Assistant and Senior Assistant Bar Counsel to the District of Columbia Court of Appeals. In that capacity, I investigated and prosecuted bar complaints involving allegations of misconduct against members of the District of Columbia Bar. Since 1992, I have taught courses in legal ethics as an adjunct professor at Georgetown University Law Center. In 2001, I was appointed as Ethics Counsel at Georgetown Law and presently serve in that capacity. The views expressed here are solely my own.

My review of the Margolis Memorandum (hereinafter "Memorandum") of January 5, 2010 leads me to the conclusion that the internal process at the Department failed to adequately consider the most applicable governing ethical rule with respect to the allegations of misconduct. The Memorandum concludes that, under the circumstances, no bar referral is appropriate because the Office of Professional Responsibility (hereinafter "OPR") failed to establish "professional misconduct" in violation of a "known, unambiguous obligation or standard to the attorney's conduct." Memorandum at 2. The Memorandum discusses Rules of Professional Conduct 1.1 (competence) and 2.1 (obligation to exercise of independent judgment and render candid advice) and finds insufficient evidence that the conduct found by OPR meet the DOJ's internal standard for a state bar referral.

In my view, such a known and unambiguous ethical obligation does exist and is found in Model Rule of Professional Conduct 1.2(d). The Rule is identical in Pennsylvania and the District of Columbia, where the obligation appears at Rule 1.2(e). The Rule provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The line drawn with respect to aiding a crime or fraud is addressed in an explanatory comment found in ABA Model Rule 1.2 at comment 6 and D.C. Rule 1.2 at comment 9:

> There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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The question not fairly considered was whether the Office of Legal Counsel (hereinafter "OLC") memoranda were issued with knowledge on the part of the attorneys that the advice contained therein would encourage the recipient to violate the law and would thus violate the ethical rule. A fair and independent assessment of that issue is essential to the resolution of the most pertinent ethical obligation with respect to the OLC memoranda.

The Memorandum dismisses the suggestion that the alleged misconduct was done to knowingly assist or encourage criminal conduct. "Knowingly" is defined in ABA Model Rule and D.C. Rule 1.0(f) as "denot[ing] actual knowledge of the fact in question. A person's knowledge can be inferred from circumstances." In my view, whether the knowledge requirement for a Rule 1.2(d) violation to be established would and should be the central question to resolve with an independent inquiry by the bars with jurisdiction over Messrs. Bybee and Yoo.

The Memorandum suggests that governing District of Columbia law did not apply a "reckless" standard of conduct for a violation of Rule 8.4 (prohibiting dishonesty, fraud, deceit or misrepresentation) until the decision of the Court of Appeals in *In re Romansky*, 825 A.2d 311 (D.C. 2003). [1] Memorandum at 26. However, it has long been established that reckless conduct is treated as intentional for purposes of sanction in misappropriation cases. *In re Hines,* 482 A.2d 378 (D.C. 1984). The Court of Appeals held that a reckless indifference for the accuracy of information on a bar application is treated as the legal equivalent of deliberate behavior. *In re Rosen,* 570 A.2d 728, 729-30 (D.C. 1989). Thus, a more thorough study of District of Columbia disciplinary law would have revealed that a reckless disregard of an ethical obligation is treated as knowing and intentional misconduct for purposes of determining whether or not the accused attorney violated ethical standards. I am aware of no suggestion to the contrary in the applicable case law.

The Memorandum suggests that the ethical standards for prosecutors charged with public protection should be understood in the context in which the advice was given and that a national emergency such as the horrors of September 11 somehow justifies or excuses lawless advice. Such claims were properly and squarely rejected by the Supreme Court of Colorado in *Matter of Pautler,* 47 P.3d 1175 (Colo. 2002). There the court considered ethics charges brought against a Chief Deputy District Attorney who was attempting to secure the surrender of a person who had confessed to three just-committed murders. The prosecutor impersonated a public defender and made promises to the person that led him to surrender without incident. The court rejected claims that the ethical obligation of honesty is suspended during an emergency where further loss of life was possible. The court found that the conduct was not justified by the circumstances and not defensible with claims of duress or choice of evils. The court gave weight to the motive of the prosecutor in imposing a probationary sanction with a six-month suspension if the probation was violated.

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[1] I was responsible for the investigation and prosecution of the *Romansky* matter and argued the initial appeals before the Board on Professional Responsibility and the District of Columbia Court of Appeals. After the court remanded for further proceedings, I was no longer with the Office of Bar Counsel. The case involved allegations of dishonesty as evidenced by inflated bills to clients. The attorney also obtained free legal services for a relative by having the services performed by a firm associate and "parking" the hours with another client who was not billed on an hourly basis. In my view, the case had more to do with the discomfort of volunteer lawyers adjudicating discipline matters involving billing allegations than about standards for lawyer honesty and integrity in the District of Columbia.

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The legal profession has enjoyed the privilege of self-regulation for as long as attorneys have been subject to loss of licensure or other professional sanctions. The Preamble to the ABA Model Rules posits that self-regulation is necessary for an independent legal profession. Preamble at [10] - [12]. The privilege of self-regulation carries with it a responsibility "to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." Id. at [12].

An indispensible element of self-regulation is, subject to the duty of client confidentiality, an ethical obligation to report serious allegations of misconduct on the part of fellow bar members to appropriate bar disciplinary authorities. ABA Model Rule and D.C. Rule 8.3(a) provide:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Notably, the commentary to the above Rule makes clear that it is the seriousness of the alleged ethical violation triggers the obligation to report and "not the quantum of evidence of which the lawyer is aware." ABA and D.C. Rule 8.3, comment [3]. Thus, it is not for the reporting attorney to assess the evidence but rather to identify the possible violations and leave it to the appropriate professional authority to make that independent assessment.

One overarching institutional concern that emerges from the OPR process and, in particular, the Margolis review, is its failure to acknowledge and adhere to the obligation set forth in D. C. Rule 8.3(a). Where DOJ identifies a serious issue of professional responsibility, it should be obligatory for there to be a bar referral in order to have a disinterested evaluation of the available evidence that might establish misconduct.

The Memorandum notes that the bars of the District of Columbia and Pennsylvania are aware of these matters and are free to conduct investigations. Memorandum at 67. This is true. However, as an institutional matter, the Department should recognize that its obligation to refer matters to the state bars must be coextensive with its ethical obligations under Rule 8.3(a). To the extent that the internal Department review fails to recognize that fundamental obligation, a danger exists that future allegations of serious misconduct will go unreported as the Rule requires.

As the Colorado Supreme Court observed in 2002 in the Pautler case:

> The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation; but, they certainly do not signal that the obligation itself has eroded. For example, the profession itself is engaging in a nation-wide project designed to emphasize that "truthfulness, honesty and candor are the core values of the legal profession." (citation omitted) Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession – as well as the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are

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> dishonest, then there is a perception that the system too, must be dishonest. Certainly, the reality of such behavior must be abjured so that the perception of it may diminish.

The above-quoted language applies with equal force to evidence that may establish that high-ranking officials of the Department provided legal advice that counseled or assisted in criminal conduct. The Departmental regime of internal peer review should err on the side of reporting to the state bars that have licensing jurisdiction over its current and former attorneys.

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United States Senate Committee on the Judiciary

"The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda"

February 26, 2010

Written Testimony for the Record

Jesselyn A. Radack
Homeland Security Director

Kathleen McClellan
Homeland Security Counsel

We commend the Committee for holding this timely hearing on the Department of Justice Office of Professional Responsibility's (OPR) recently released report, and we thank you for the opportunity to submit written testimony.

To date, Jesselyn Radack is the only Justice Department attorney referred by OPR for advice given in a terrorism case. Ms. Radack, Government Accountability Project (GAP) Homeland Security Director, is a legal ethicist, recognized by the American Bar Association (ABA), who has served on the D.C. Bar Legal Ethics Committee and teaches professional responsibility. She is also a whistleblower. As the former Justice Department ethics advisor in the case of "American Taliban" John Walker Lindh, Ms. Radack blew the whistle when her advice to provide Lindh counsel was disregarded and evidence of that advice "disappeared" in contravention of a federal court order.[1] Among other retaliatory acts, the Justice Department hastily and vindictively referred Ms. Radack to the state bars in which she is licensed as an attorney based on a secret report.[2] Although the Maryland Bar dismissed the charges, the District of Columbia Bar investigation is still pending after nearly seven years. A recent interview with Ms. Radack published in *Harper's Magazine* is attached to this testimony.

Founded in 1977, GAP is the nation's leading whistleblower protection and advocacy organization. Since 9/11, a steady stream of national security whistleblowers have come to GAP with tales of wild and rampant wrongdoing at several levels of our government. Unfortunately,

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[1] *See generally*, The Canary In the Coalmine, Home Page, http://www.patriotictruthteller.net/; JANE MAYER, THE DARK SIDE 95-97 (Random House, Inc. 2008); ERIC LICHTBLAU, BUSH'S LAW 35 (Random House, Inc. 2008); CHARLIE SAVAGE, TAKEOVER 107-10 (Little, Brown and Co. 2007).

[2] *See* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 726-32 (2005).

due to the nature of their work, these whistleblowers can often face a terrible agency culture and weak or nonexistent protections when they attempt to speak out about illegal activity, waste, fraud or abuse. GAP's Homeland Security Program acts as both legal counsel to these whistleblowers, and as an advocate for necessary changes to the system – both to better protect such innocent employees, and to speak out in favor of greater overall transparency and against wrongful government behavior. GAP's advocacy stems from the principle that adherence to the rule of law, even in times of great crisis, is the best mechanism for securing our homeland. When our government officials ignore the rule of law, especially in times of great crisis, the need for accountability is paramount.

On February 19, 2010 the Justice Department released OPR's July 29, 2009 report, "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" (OPR Report).[3] OPR's investigation focused on memos Mr. John Yoo and Judge Jay Bybee penned while serving in Justice Department's Office of Legal Counsel (OLC). The OPR Report found that former Deputy Assistant Attorney General John Yoo "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice," and that former Assistant Attorney General Jay Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."[4] The OPR report also states that "[p]ursuant to Department policy, we will notify bar counsel in the states in which Yoo and Bybee are licensed."[5] However, a memorandum from Associate Deputy Attorney General David Margolis (Margolis Memo), also released on February 19, 2010, rejected OPR's conclusions, downgraded the finding to one of "poor judgment," and specifically did not "authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed."[6]

The Justice Department's refusal to refer Mr. Yoo and Judge Bybee to their respective bar associations, even in the face of an OPR conclusion five years in the making and overwhelming evidence of professional misconduct, teaches an important lesson about Executive Branch agencies' ability to self-regulate and demonstrates the growing need for real transparency and accountability.

The Vast Majority of the Legal Community Has Condemned the Memoranda

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[3] OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS (July 2009) [hereinafter OPR Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.

[4] OPR Report, *supra* note 3, at 11 (footnote omitted).

[5] OPR Report, *supra* note 3, at 11 n.10.

[6] David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Dep't of Justice, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigations into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists," 2, 68, January 5, 2010 [hereinafter Margolis Memo], *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

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The OPR report references the plethora of journalists, government officials, and legal scholars who have almost universally discredited the memos under investigation, including past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, University of Chicago law professor, Cass Sunstein, and international human rights law expert at Fordham University, Martin Flaherty.[7] Additionally, during confirmation hearings for former Attorney General Alberto Gonzales, Harold Koh, who at the time was the dean of Yale Law School and is now serving as Legal Adviser to the United States Department of State, repudiated Mr. Bybee's August 1, 2002 memo, and noted the possible ethical violations associated with it:

> [I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read...[t]he August 1, 2002 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client If a client asks a lawyer how to break the law and escape liability, the lawyer's ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act...the August 1, 2002 OLC memorandum is a stain upon our law and national reputation.[8]

The significance of flaws in the memoranda is magnified considering OLC's lofty purpose of providing the President and all Executive Branch agencies with authoritative legal advice particularly on constitutional questions or especially complex legal issues, often in the form of opinions binding on Executive Branch employees.[9] Conservative scholars have agreed the memos abandoned OLC's mission. Prominent conservative thinker and former Reagan

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[7] *See* OPR Report, *supra* note 3, at 2-3.

[8] *The Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary* 109th Cong. 526 (2005) (statement of Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School), *available at* http://frwebgate4.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=09777647417 2+0+1+0&WAISaction=retrieve.

[9] The Department of Justice website describes OLC's role within the Executive branch:

> "[b]y delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the Executive branch on all constitutional questions and reviewing pending legislation for constitutionality."

See United States Department of Justice, Office of Legal Counsel homepage (Last visited June 22, 2009), http://www.usdoj.gov/olc/. A best practices memo dated May 16, 2005, authored by Principal Deputy Assistant Attorney General Steven Bradbury, further articulates the important role OLC attorneys play in the Executive Branch:

> [I]t is imperative that [OLC] opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice–even when that advice may be inconsistent with the desires of policymakers.

Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions, May 16, 2005, *available at* http://www.usdoj.gov/olc/best-practices-memo.pdf.

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administration Associate Attorney General, Bruce Fein, has said that, "OLC is supposed to be a check on overzealousness...The reason why you have OLC is to say, 'Here we draw the line.'"[10] Even in refusing to refer the authors to bar counsel, Mr. Margolis maintains that "these memos contained some serious mistakes," and "represent an unfortunate chapter in the history of the Office of Legal Counsel."[11] Similarly, even in criticizing a draft of the OPR Report, former Attorney General Michael Mukasey called the August 1, 2002 Bybee Memo a "slovenly mistake," a trivial assessment of the horrible techniques the memo authorized, but hardly a commendation of the memo's legal reasoning.[12]

OPR Cannot Fully Investigate Wrongdoing Relating to the OLC Memoranda

The broad consensus that the memos under investigation were a quality of legal work far below the high standards expected of Justice Department attorneys makes it more mind-boggling that the Margolis Memo refused to accept OPR's findings of professional misconduct. The internal Justice Department investigation failed to fully examine its attorneys' conduct and hold them accountable for their actions.

The Margolis Memo Demonstrates the Institutional Limitations of OPR as an Internal Watchdog

To the extent that OPR holds itself out as an internal watchdog of the Justice Department, that is belied by the fact that Mr. Margolis, a single senior career attorney who has been with the Department for more than 40 years, has the unilateral power to override OPR's conclusions. Like most career bureaucrats, Mr. Margolis obviously has a vested institutional interest in legitimizing the Justice Department's conduct. The Margolis Memo is more a distracting attack on OPR than it is a well-reasoned review of whether OPR correctly concluded that Mr. Yoo and Judge Bybee committed professional misconduct. Worse, Mr. Margolis's approach in attacking OPR is alarmingly underhanded. Having himself suggested that OPR "solicit and review" responses to OPR's draft reports from the subjects of the investigation, Mr. Margolis lampoons OPR for editing their drafts in light of the subjects' responses and primarily relies upon the responses to attack OPR's analysis.[13]

More specifically, woven through the Margolis Memo are two excuses incredibly destructive to legal ethics standards and the rule of law, which Mr. Margolis uses to immunize Mr. Yoo and Judge Bybee from professional responsibility for their, as the Margolis Memo understates, "poor judgment." First, Mr. Margolis insistently references the "context" in which the memos were drafted, relying upon assertions of the very officials under investigation that the context is relevant, and, effectively, carves out some sort of "national security emergency exception" to the ethics rules.

The Margolis Memo sets the stage for this manufactured exception:

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[10] *See* Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGAL TIMES, June 14, 2004, at 1 (quoting Bruce Fein).
[11] Margolis Memo, *supra* note 6, at 67.
[12] OPR Report, *supra* note 3, at 9.
[13] Margolis Memo, *supra* note 6, at 10 ("...considering subjects' responses that I recommended that they solicit and review").

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> [I]n hindsight, the concerns underlying the classified Bybee memo *may have been* overblown, but I certainly am not willing to conclude that, less than one year after 9/11, the officials responsible for preventing another attack took the threat *too* seriously. (Emphasis in original).[14]

This statement is particularly unsound as it implies that authorizing torture and cruel, inhuman, and degrading treatment of detainees is somehow necessary to take the threat of terrorist attacks seriously. Nonetheless, Margolis uses this paradigm to conclude:

> People of substantial intellect and integrity advocated that OPR's "review of the Bybee and Yoo OLC opinions for professional competence must be informed by this context" ...and that OPR "exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis"...Yet OPR dismissed this issue in a paragraph with no discussion of those positions, no attempt to address those historic events that the challenge their conclusion including the Jackson and Bates examples to which Goldsmith directed them, and no mention that Philbin had explained the belief at the time that "people are going to die if we don't prevent this attack."[15] [Internal citations omitted].

These "people of substantial intellect and integrity," upon which the Margolis Memo relies are largely former Justice Department officials who also possess a substantial bias in finding against professional misconduct of OLC attorneys, such as former Deputy Assistant Attorney General Patrick Philbin, who served in OLC when the memos under investigation were issued, and Assistant Attorney General Jack Goldsmith III, the head of OLC from October 2003 to July 2004.

Mr. Margolis also frequently excuses the memos' obvious flaws in legal reasoning and blatant omissions of relevant precedent because the memos were not intended for public release:

> Although Yoo and Bybee's errors were more than minor, I do not believe that they evidence serious deficiencies that could have prejudiced the client. This conclusion is largely supported by the reality that the memos were written for a limited audience and were but a part of the dialogue with the CIA.[16]

This is an especially dangerous proposition considering that OLC opinions, though they may not be intended for a broad audience when drafted, are, in fact, binding on the entire Executive Branch, and future Executive Branches. The fact that a small number of oligarchic officials - some of whom should not have been so closely interfering with OLC's activities - were involved in the drafting of the memos in no way excuses the authors from having to abide by legal ethics rules.

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[14] Margolis Memo, *supra* note 6, at 53.

[15] Margolis Memo, *supra* note 6, at 21.

[16] Margolis Memo, *supra* note 6, at 65. *See also, id.* at 33 ("Unlike the unclassified Bybee memo, the Levin memo was expressly written for public release"); *id.* at 45 ("...the memo was intended for high level officials within the White House, the CIA, and, with respect to the Yoo, memo, the Department of Defense...They were most likely aware that Yoo's assessment of the Commander-in-Chief authority represented the most aggressive view on the topic").

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These two excuses are prevalent throughout Mr. Margolis's analysis, but are perhaps most obvious in the rejection of the OPR Report's valid criticism that the memos under investigation failed to address relevant precedent interpreting the Convention Against Torture:

> This criticism is particularly harsh for a memo intended for a limited audience and crafted in a finite amount of time during a national security emergency. While the standard OPR applies might work as a matter of Department expectations when there are no time constraints and no pending national security emergencies resolution of which may depend on the memo, it is not realistic to suggest that a memo for a small group of sophisticated attorneys in a time of national crisis fell short of professional obligations for failure to cite additional supportive cases.[17]

By excusing Mr. Yoo and Judge Bybee from the ethics rules because of the fear the country felt after September 11th, the Margolis Memo sends a tragic message for the future of legal ethics at the Justice Department: that it is acceptable to ignore the rules of professional conduct when attorneys are under immense pressure in times of national emergency and only a few officials are going to be taking the advice.

OPR Struggled to Obtain Crucial Information Relevant to the Investigation

The inadequacy of OPR as an internal oversight mechanism is further evidenced by the vast array of problems that OPR encountered in obtaining information throughout the course of its investigation, frequently being resigned to learning information from public press reports.[18]

Due to its jurisdictional limits – only current Justice Department officials are required to cooperate with an OPR investigation – and lack of ability to compel testimony, OPR was unable to interview key officials, such as former Counsel to the Vice President David Addington, former Deputy White House Counsel Timothy Flanigan, and former Attorney General John Ashcroft, who headed the Justice Department at the time OLC released the memos being investigated.[19]

The OPR report also contains indicia of outright obstruction of the investigation. For example, Principal Deputy Assistant Attorney General Steven Bradbury "provided OPR with a copy of the Bybee Memo, but asked [OPR] not to pursue [its] request for additional material."[20] Most disturbingly, OPR also reported "most of Yoo's email records had been deleted and were not recoverable," a felony, and that former Deputy Assistant Attorney General Patrick Philbin's "email records from July 2002 through August 5, 2002 – the time period in which the Bybee Memo was completed and the Classified Bybee Memo…was created – had also been deleted and were reportedly not recoverable."[21] OPR expressed frustration with the difficulty of obtaining a full record and had to qualify its findings based on the lack of information:

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[17] Margolis Memo, *supra* note 6, at 36.
[18] *See* OPR Report, *supra* note 3, at 8.
[19] OPR Report, *supra* note 3, at 7.
[20] OPR Report, *supra* note 3, at 5.
[21] OPR Report, *supra* note 3, at 5 n.3; *See also* 18 U.S.C. §§641, 2071 (federal statutes governing the destruction of public property).

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> During the course of our investigation significant pieces of information were brought to light by the news media and, more recently, by congressional investigation. Although we believe our findings regarding the legal advice contained in the Bybee Memo and related, subsequent memoranda are complete, given the difficulty OPR experienced in obtaining information over the past five years, it remains possible that additional information eventually will surface regarding the CIA program and the military's interrogation programs that might bear upon our conclusions.[22]

These shortcomings are not necessarily the fault of OPR, but of the institutional structures which permit single attorney in the Deputy Attorney General's office to overrule the OPR Report's recommendations after five years of investigatory work. This is particularly true considering that there were two other iterations of the report, both of which OPR took the time to edit in light of responses from the subjects of the investigation and from former Attorney General Michael Mukasey and former Deputy Attorney General Mark Filip.

OPR's Investigation is a Narrow Inquiry Into Expansive Misconduct at OLC

As incomplete as OPR's inquiry was as a result of institutional limitations, the scope of the investigation was also incomplete because it barely scratched the surface of the faulty memoranda issued by OLC during the George W. Bush Administration, many of which were authored by Mr. Yoo and Judge Bybee and could constitute professional misconduct warranting bar referrals. For example, on November 2, 2001, Mr. Yoo signed a still-secret memo to Attorney General John D. Ashcroft in support of a secret, and highly scrutinized, domestic surveillance program later dubbed the "President's Surveillance Program" (PSP).[23] The November 2, 2001 memo contended that the Foreign Intelligence Surveillance Act (FISA), despite its purporting "to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence...cannot restrict the President's ability to engage in warrantless searches that protect the national security."[24] A joint report from several Inspectors General called into question the integrity and independence of Mr. Yoo and his analysis in the November 2, 2001 memo, noting that Mr. Yoo "became the White House's guy," that the DOJ Inspector General (DOJ IG) discovered "serious factual and legal flaws in Yoo's early analysis" of the surveillance program, and that the analysis was "at a minimum factually flawed."[25]

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[22] OPR Report, *supra* note 3, at 10.

[23] OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY, AND OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 11 (Jul. 10, 2009), *available at*, http://www.fas.org/irp/eprint/psp.pdf; *See also* James Risen and Eric Lichtblau, Bush Let's U.S. Spy on Callers Without Courts, N.Y. TIMES, Dec. 16, 2005, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html.

[24] OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY, AND OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 11 (Jul. 10, 2009), *available at* http://www.fas.org/irp/eprint/psp.pdf.

[25] *Id.* at 11, 16, 30.

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When read together, the full body of post-September 11th OLC memos – that the public has seen – show a shocking disregard for widely-accepted constitutional theories of separation of powers and a favoritism towards the theory that the President occupies a constitutionally superior position as Commander-in-Chief. The November 2, 2001 memo is one small piece of the body of law developed at OLC using this fringe unitary executive theory. Mr. Yoo's unitary executive theory appears harmless as a theoretical matter, however, reading all of the publicly-available memos as a whole, the actions OLC advises that the President can unilaterally undertake result in an Executive Branch that can routinely overpower Congress and the Courts, disregarding federal statues and ratified treaties.[26] Without examining the full body of "law" OLC produced in the aftermath of September 11th, any investigation cannot fully assess the magnitude of the professional misconduct committed.

Conclusion

The Justice Department's refusal to hold accountable Mr. Yoo and Judge Bybee in the face of the OPR Report's finding of professional misconduct calls into question the ability of the Justice Department's internal watchdog mechanisms to aggressively investigate alleged professional misconduct and respond appropriately. The fact that Ms. Radack is still under bar referral only underscores the Justice Department's inability to conduct politically-independent investigations.

While the Justice Department has proven incapable of self-policing its attorneys, only an independent body with a wide-range of hard-hitting investigatory tools, such as subpoena power and the ability to investigate allegations for both criminal conduct and professional misconduct, can ensure government legal professionals are held accountable for authorizing illegal and morally reprehensible conduct. We urge the Committee to continue its inquiry into the OPR Report and launch an inquiry into all of the questionable OLC memos issued post-September 11th, and to subpoena current and former Justice Department officials who refuse to appear before Congress. The Justice Department should also expand the scope of the Special Prosecutor's current investigation into the CIA's interrogation program to include the legal justification for and authorization of abusive tactics.[27]

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[26] *See e.g.* Memo from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel to Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, Authority for Use of Military Force To Combat Terrorist Activities Within the United States, Oct. 23, 2001, at 2, *available at* http://www.usdoj.gov/opa/documents/memomilitaryforcecombatus10232001.pdf (arguing, *inter alia*, that the Fourth Amendment does not apply to domestic military operations); Memo from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice to Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Applicability of 18 U.S.C. §4001(a) to Military Detention of U.S. Citizens, June 27, 2002, at 10, *available at* http://www.usdoj.gov/opa/documents/memodetentionuscitizens06272002.pdf (arguing, *inter alia*, that Congress has cannot interfere with the President's authority to can detain enemy combatants); Memo from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 22, 2002, at 15, *available at* http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee122002mem.pdf (arguing, *inter alia*, that the President can unilaterally suspend U.S. treaty obligations, particularly the Geneva Conventions).

[27] *See generally*, Carrie Johnson, *Prosecutor to Probe CIA Interrogations*, WASH. POST, Aug. 25, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082401743_2.html?sid=ST2009082401068.

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In the absence of aggressive oversight and accountability, future generations of Justice Department attorneys will be able to authorize the same abusive techniques without consequences. The *New York Times* summed-up the absolute necessity of real accountability in its February 25, 2010 editorial: "The quest for real accountability must continue. The alternative is to leave torture open as a policy option for future administrations."[28] Holding accountable the officials who breached their duties as lawyers and as public servants during the past nine years is not a political attack on the previous administration but rather a prerequisite to putting this sad chapter in American history behind us and truly moving forward.

[28] Editorial, *The Torture Lawyers*, N.Y. TIMES, Feb. 25, 2010, at A32, *available at* http://www.nytimes.com/2010/02/25/opinion/25thur1.html.

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HARPER'S
MAGAZINE

No Comment

By Scott Horton

February 23, 5:30 PM

Justice's Vendetta Against a Whistleblower: Six Questions for Jesselyn Radack

The current controversy surrounding the velvet glove treatment the Justice Department gave to torture memo authors John Yoo, Jay Bybee, and Steven Bradbury led me to an interview with Jesselyn Radack, a former Justice Department lawyer who "did the right thing." Not only did she dispense indubitably accurate advice, she caught the Justice Department in the middle of acts of what might have been criminal obstruction and insisted that they be corrected. What happened? Radack found herself facing trumped up criminal charges, had frivolous complaints filed against her before two bar associations, and was subjected to repeated petty harassment, including being placed on the "No-Fly" List. I put six questions to Jesselyn Radack about her nightmarish experience in the hands of so-called Justice Department ethics staffers.

1. When an American citizen, John Walker Lindh, was captured in northern Afghanistan, FBI agents sought guidance on whether and how he could be questioned and the request was sent to you for an opinion. Can you explain what your job was, and what advice you wound up giving?

Jesselyn Radack

I was a legal advisor to the Justice Department on matters of ethics. On December 7, 2001, I fielded a call from a Criminal Division attorney named John DePue. He wanted to know about the ethical propriety of interrogating "American Taliban" John Walker Lindh without a lawyer being present. DePue told me unambiguously that Lindh's father had retained counsel for his son. I advised him that Lindh should not be questioned without his lawyer.

2. Was your advice followed?

I gave my advice on a Friday. Over the weekend, the FBI interrogated Lindh anyway. DePue called back on Monday asking what to do now. I advised that the interview might

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have to be sealed and used only for intelligence-gathering or national security purposes, not criminal prosecution. Again, my advice was ignored.

Three weeks later, on January 15, 2002, then-Attorney General John Ashcroft announced that a criminal complaint was being filed against Lindh. "The subject here is entitled to choose his own lawyer," Ashcroft said, "and to our knowledge, has not chosen a lawyer at this time." I knew that wasn't true.

Three weeks later, Ashcroft announced Lindh's indictment, saying Lindh's rights "have been carefully, scrupulously honored." Again, I knew that wasn't true.

3. Later, when the Bush Administration decided to try Lindh on criminal charges in a federal court in Virginia, the judge issued a discovery order. How did you find out about it? What did you learn about the Justice Department's compliance with discovery requests? What did you do about that?

On March 7, I inadvertently learned that the judge presiding over the Lindh case had ordered that all Justice Department correspondence related to Lindh's interrogation be submitted to the court. Such orders routinely are disseminated to everyone with even a remote connection to the case in question, but I heard about it only because the Lindh prosecutor contacted me directly.

There was more. The prosecutor said he had only two of my e-mails. I knew I had written more than a dozen. When I went to check the hard copy file, the e-mails containing my assessment that the FBI had committed an ethical violation in Lindh's interrogation were missing.

With the help of technical support, I resurrected the missing e-mails from my computer archives. I documented and included them in a memo to my boss and took home a copy for safekeeping in case they "disappeared" again. Then I resigned.

4. Once the "disappeared" e-mails resurfaced, what did the Justice Department do to you?

As the prosecution proceeded rapidly, and the Justice Department continued to claim that it never believed at the time of his interrogation that Lindh had a lawyer, I disclosed the e-mails to *Newsweek* in accordance with the Whistleblower Protection Act and the crime-fraud exception to confidentiality.

A few weeks later, the Lindh case ended in a surprise plea bargain on the eve of a suppression hearing regarding whether statements Lindh made while in custody in Afghanistan–the ones I had advised against–could be used against him at trial–which I also advised against.

Afterwards, I was forced out of my job, fired from my subsequent private sector job at the government's behest, placed under criminal investigation without any charges ever being brought, referred for disciplinary action to the state bars where I'm licensed as a lawyer, and put on the "No-Fly" List.

5. I understand the Maryland ethics board concluded that the Justice Department's accusations were meritless in 2005, but now, seven years later, the same charges are still pending with the D.C. Bar Counsel—with which the Justice Department claims a "special relationship." What's going on there?

You would have to ask Bar Counsel Wallace E. "Gene" Shipp, Jr. He personally took over the handling of my case a year and a half ago. The Maryland Bar dismissed the charges against me in 2005. My referral to the D.C. Bar (the same Bar to which Yoo and Bybee would have been referred) is still pending after almost seven years. A number of legal scholars, including Jim Moliterno, have written about politically-motivated bar

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discipline. The referral was certainly retaliatory. I am disappointed, though, that the D.C. Bar would allow itself to be used as a tool of the Bush Justice Department. Ironically, from 2005-07, I was elected by the D.C. Bar Board of Governors to serve on the D.C. Bar Legal Ethics Committee, which is separate from the disciplinary arm of the bar. Obviously, the right hand doesn't speak to the left.

6. How can your case be compared with the cases of John Yoo, Jay Bybee, and Steven Bradbury?

I am now the only Justice Department attorney that OPR referred for bar disciplinary action stemming from advice I gave in a terrorism case–and my advice was to permit an American terrorism suspect to have counsel.

Contrary to OPR's own policies, it hastily and vindictively forwarded my case to the state bars in which I'm licensed, absent a finding of "professional misconduct," much less a finding of "intentional misconduct or reckless disregard of an applicable standard or obligation"–the benchmark that OPR uses. Instead, OPR referred me to the bar disciplinary authorities for "possible misconduct." Moreover, I was referred based on a secret report to which I did not have access. Finally, I was referred for conduct I engaged in as a private citizen, not as a public servant, after I had left the employ of the Justice Department.

To the extent that OPR holds itself out as an internal watchdog of the Justice Department, that is belied by the fact that David Margolis, a single senior career attorney who has been with the Department for more than 40 years, has the unilateral power to override anything OPR does. Like most career bureaucrats, he obviously has a vested institutional interest in legitimizing Department conduct. Margolis's take-away message is that it's okay to ignore the rules of professional conduct if you're scared or in a hurry, failing to realize, perhaps because he's a government attorney, that stress and deadlines are the *status quo* for most lawyers.

Although entirely predictable, the Justice Department's decision to give Yoo and his cohorts a pass should offend all lawyers. It is now incumbent upon the legal profession, which is entirely self-regulated, to provide oversight and accountability within its own ranks and to the public.

Source: http://www.harpers.org/subjects/NoComment

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 26, 2010

Statement Of Chairman Patrick Leahy (D-Vt.),
Hearing On The Office of Professional Responsibility Investigation
Into the Office of Legal Counsel Memoranda
Senate Committee On The Judiciary
February 26, 2010

It has now been more than a year since I first proposed the establishment of an independent, nonpartisan Commission to engage in a comprehensive inquiry to determine how the United States Government came to authorize torture. Over one year ago, I called for a bipartisan effort to create a nonpartisan commission to conduct a needed comprehensive review. I proposed to take these matters out of politics and find out exactly what happened so we can understand what went wrong and make sure it does not happen again. My regret is that no Republican came forward in that spirit to join in that effort. I said from the outset that without a bipartisan commitment to a fair, independent and comprehensive review it would not happen. That is a shame.

Since that time we have seen more and more evidence of what went wrong during the last administration. We have witnessed the release of more Office of Legal Counsel (OLC) memoranda documenting the authorization of brutal practices, an Inspectors General report that calls into question the guidance given by the Department of Justice, a CIA Inspector General report that reveals even those lax standards were violated during interrogations and last week, finally, the release of the results of the Office of Professional Responsibility (OPR) inquiry into the legal advice given by those at the Office of Legal Counsel. All of these narrower reports point to why we need a comprehensive review. None of them can answer the question of how the last administration veered so far off course and away from American values.

The OPR investigation was limited to determining whether or not legal profession rules were violated. That is the business of bar associations. It is, in my view, the wrong focus. That office within the Justice Department does not have the power or authority to conduct the broader investigation that is still needed. These legal memoranda were only a part of the problem. They were intended to provide a "golden shield" to commit torture and get away with it.

As is now evident, even though the OPR investigation has consumed years, it is not complete. The investigators were denied access to key witnesses and documents. Did they interview David Addington, counsel to Vice President Cheney? No. According to Alberto Gonzales and Jack Goldsmith, he was a key figure. Mr. Gonzales called him an "active player" in the drafting of these memoranda. Did they have the full record of John Yoo's communications with the White

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House? No. In fact, my first question to the Justice Department witness today will be, "Where are Mr. Yoo's emails, which are required by law to be maintained?"

The fundamental question here is not whether these were shoddy legal memos. They were. The administration famously withdrew the Bybee memo written by Mr. Yoo in advance of the confirmation hearing on the nomination of Alberto Gonzales to be Attorney General. Dean Koh called that memo "perhaps the most clearly legally erroneous opinion I have ever read." Jack Goldsmith called the memos "deeply flawed." David Margolis, the senior Justice Department attorney who provided the final review of the OPR report, did not endorse those memos. The legal work of Yoo, Bybee and Steven Bradbury, the acting head of OLC who reaffirmed the CIA interrogation program, was flawed. It failed to cite significant case law and twisted the plain meaning of statutes.

These legal memoranda were designed to achieve an end. That is not what the Office of Legal Counsel should do, nor had done in other administrations. These Bush administration lawyers lost their way.

In my view President Bush was disserved. These lawyers told the administration what Vice President Cheney wanted to hear. Without question, our government institutions, the Justice Department and, in particular, the Office of Legal Counsel, were undermined. The rule of law was disrespected. Most importantly, the American people were harmed and put at greater security risk. The torture of individuals was not just a violation of our laws and treaties; it handed al Qaeda a propaganda tool to gain new recruits, and it made us less safe.

Just last weekend, General Petraeus said that "the use of the interrogation methods in the Army Field Manual" work, and that when we have "taken expedient measures, they have turned around and bitten us in the backside." He is right. Colin Powell was right. Alberto Mora was right. The many JAG officers who fought these encroachments were right.

Focusing on whether these lawyers failed to meet legal ethics standards misses the fundamental point. The real concern is that lawyers who were supposed to be giving independent advice regarding the rule of law and what it prohibits were instead focused on excusing what the Bush-Cheney administration wanted to do. The OLC is charged to provide, both in times of war and peace, "candid, independent and principled advice -- even when that advice may be inconsistent with the desires of policymakers." These lawyers abandoned their independent responsibilities to become apologists.

The role of the White House in the politicization of the OLC and in ensuring that these opinions delivered the legal immunity they were looking for has yet to be fully explored. My sense is that such a review would reveal the same untoward and corrupting influence we found when we investigated the purging of United States Attorneys for political purposes.

As disturbing as the findings and evidence from this limited investigation are, they are not the final arbiter. We need a true accounting and a comprehensive review. The dark cloud that Patrick Fitzgerald talked about hanging over the Bush-Cheney administration at the end of the Libby trial is still there. The politicization of the rule of law function at the Justice Department is another example of the last administration's corruption of the government. For the country to fully recover from this era we need to know what went wrong so that it does not happen again.

Unfortunately, the Obama administration's attempts to repair this office and ensure that its lawyers are providing the government with principled advice have been hamstrung by Senate Republicans who continue to delay appointment of the President's nominee to head the OLC.

I have been conducting oversight of these issues for years, because I was deeply concerned this country was treating people in our custody in a way that went against our laws and our values.

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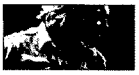
That is why I did not hesitate to issue subpoenas for these memoranda when the last administration refused to cooperate, and the release of those memos revealed how they were justifying torture. I will continue that aggressive oversight. I am determined to ensure that no future administration, of either political party, can ever justify torture.
# # # # #

The New York Times



February 25, 2010

EDITORIAL

The Torture Lawyers

Is this really the state of ethics in the American legal profession? Government lawyers who abused their offices to give the president license to get away with torture did nothing that merits a review by the bar?

A five-year inquiry by the Justice Department's ethics watchdogs recommended a disciplinary review for the two lawyers who produced the infamous torture memos for former President George W. Bush, but they were overruled by a more senior Justice Department official.

The original investigation found that the lawyers, John Yoo and Jay Bybee, had committed "professional misconduct" in a series of memos starting in August 2002. First, they defined torture so narrowly as to make it almost impossible to accuse a jailer of torturing a prisoner, and they finally concluded that President Bush was free to ignore any law on the conduct of war.

The Justice Department's Office of Professional Responsibility said appropriate bar associations should be asked to look at the actions of Mr. Yoo, who teaches at the University of California, Berkeley, and Mr. Bybee, who was rewarded for his political loyalty with a lifetime appointment to the federal bench. It was a credible accounting, especially since some former officials, like Attorney General John Ashcroft, refused to cooperate and e-mails from Mr. Yoo were mysteriously missing.

But the more senior official, David Margolis, decided that Mr. Yoo and Mr. Bybee only had shown "poor judgment" and should not be disciplined. Mr. Margolis did not dispute that Mr. Yoo and Mr. Bybee mangled legal reasoning and produced work that ultimately was repudiated by the Bush administration itself. He criticized the professional responsibility office's investigation on procedural grounds and excused Mr. Yoo and Mr. Bybee by noting that everyone was frightened after Sept. 11, 2001, and that they were in a hurry.

Americans were indeed frightened after Sept. 11, and the Bush administration was in a great rush to torture prisoners. Responsible lawyers would have responded with extra vigilance, especially if, like Mr. Yoo and Mr. Bybee, they worked in the Justice Department's Office of Legal Counsel. When that office renders an opinion, it has the force of law within the executive branch. Poor judgment is an absurdly dismissive way to describe giving the green light to policies that have badly soiled America's reputation and made it less safe.

As the dealings outlined in the original report underscore, the lawyers did not offer what most people think of as "legal advice." Mr. Yoo and Mr. Bybee were not acting as fair-minded analysts of the law but as facilitators of a scheme to evade it. The White House decision to brutalize detainees already had been

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made. Mr. Yoo and Mr. Bybee provided legal cover.

We were glad that the leaders of the House and Senate Judiciary Committees, Representative John Conyers Jr. and Senator Patrick Leahy, committed to holding hearings after the release of the Justice Department documents.

The attorney general, Eric Holder Jr., should expand the investigation into "rogue" interrogators he initiated last year to include officials responsible for facilitating torture. While he is at it, Mr. Holder should assign someone to look into the disappearance of Mr. Yoo's e-mails.

The American Bar Association should decide whether its rules are adequate for deterring and punishing ethical failures by government lawyers.

The quest for real accountability must continue. The alternative is to leave torture open as a policy option for future administrations.

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February 12, 2010
OP-ED CONTRIBUTOR – THE NEW YORK TIMES
Tribunal and Error

By ALI H. SOUFAN

SINCE Mayor Michael Bloomberg of New York announced that he no longer favored trying Khalid Shaikh Mohammed, the self-proclaimed 9/11 mastermind, in a Manhattan federal court because of logistical concerns, the Obama administration has come under increasing attack from those who claim that military commissions are more suitable for prosecuting terrorists. These critics are misguided.

As someone who has helped prosecute terrorists in both civilian and military courts — I was a witness for the government in two of the three military commissions convened so far — I think that civilian courts are often the more effective venue. In fact, the argument that our criminal justice system is more than able to handle terrorist cases was bolstered just last week by revelations that Umar Farouk Abdulmutallab, the so-called Christmas bomber, is cooperating with the authorities.

Of the three terrorists tried under military commissions since 9/11, two are now free. David Hicks, an Australian who joined Al Qaeda, was sent back to his native country after a plea bargain. Salim Hamdan, Osama bin Laden's former driver and confidante, is a free man in Yemen after all but a few months of his five-and-a-half-year sentence were wiped out by time spent in custody. (The third terrorist, Ali Hamza al-Bahlul, a former Qaeda propaganda chief, was sentenced to life in prison.)

In contrast, almost 200 terrorists have been convicted in federal courts since 9/11. These include not only high-profile terrorists like Zacharias Moussaoui, who was convicted of conspiracy to kill United States citizens as part of the 9/11 attacks, but also many people much lower on the Qaeda pecking order than Mr. Hamdan.
The federal court system has proved well equipped to handle these trials. It has been the venue for international terrorism cases since President Ronald Reagan authorized them in the 1980s, and for other terrorist cases long before that. Prosecutors have at their disposal numerous statutes with clear sentencing guidelines. Providing material support, for example, can result in a 15-year sentence or even the death penalty if Americans are killed.

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Military commissions, however, are new to lawyers. Military prosecutors are among the most intelligent and committed professionals I have ever known, but they faced great difficulties as they operated within an uncharted system, the legality of which has been challenged all the way to the Supreme Court three times.

It's also worth noting that, since 9/11, there have been only two terrorists apprehended under military law on United States soil: Jose Padilla, the American accused of plotting to set off a "dirty bomb," and Ali Saleh al-Marri, a Qaeda operative accused of being a sleeper agent. After several years, both were transferred to the federal system and are now serving time. If anything, holding them in military detention might have hindered our ability to gain their cooperation, as they gave no new significant information during that period.

Nonetheless, attacks on the abilities of the federal justice system have intensified ever since Mr. Abdulmutallab was arrested in Detroit on Dec. 25 and charged with federal crimes. Critics claim that he should have been held under the laws of war and not read his Miranda rights.

Whether suspects cooperate depends on the skill of the interrogator and the mindset of the suspects — not whether they've been told they can remain silent. When legally required, I've read some top Qaeda terrorists their rights and they've still provided valuable intelligence. Now we've learned that "despite" being read his Miranda rights, Mr. Abdulmutallab is cooperating with his F.B.I. interrogators. This should have been no surprise.

Critics were also off base in claiming that the two F.B.I. agents who first questioned Mr. Abdulmutallab were inexperienced local officials. They were veterans of counterterrorism work, at home and abroad, and are led by the special agent in charge of the bureau's Detroit office, who has run antiterrorist operations across the world. I've worked with him; he's highly experienced. The bureau ignored the attacks on the effectiveness and professionalism of its agents as it focused on getting vital intelligence from Mr. Abdulmutallab. It is owed an apology.

Indeed, it's very disappointing to see politicians and pundits smear the law enforcement community, to imply that the United States attorneys and the F.B.I. cannot do their job properly under the law. Our justice system is an integral weapon in our war against Al Qaeda, and its successes are a big reason the terrorist group has failed to hit our homeland for nine years.

Other criticisms are similarly off the mark, including claims that classified information is at risk in federal courts. Terrorism cases aren't the only instances in which classified information is handled in federal courtrooms — in espionage cases the threat of sensitive material being made public is just as great. That's why in 1980 Congress passed the Classified Information Procedures Act, which allows the government to request permission to withhold classified

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information, produce summaries and redacted versions, or to show information only to defense lawyers with security clearances. The law is routinely invoked in terrorism trials, especially those related to Al Qaeda.

Critics also claim that trials might give terrorists a soapbox. But federal courts do not allow photography, recordings or broadcasts. What the defendants say is made known only through press reports afterward — just as with military commissions. And federal judges (like military judges) have the power to gag or remove defendants who try to disrupt trials.

Military commissions do serve an important purpose. We are at war, and for Qaeda terrorists caught on the battlefield who did not commit crimes inside the United States, or who killed American civilians abroad, military commissions are appropriate. But for terrorists like Khalid Shaikh Mohammed, who plotted to murder the innocent on United States soil, federal courts are not only more suitable, they're our best chance at getting the strongest conviction possible.

Ali H. Soufan was an F.B.I. special agent from 1997 to 2005.

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Statement of Senator Whitehouse

The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda
February 26, 2010

Thank you, Chairman Leahy, for holding this important hearing today to consider the Office of Professional Responsibility investigation into the Office of Legal Counsel's torture memos.

OLC's failings during the Bush administration are legion. Rather than recount them all here, I would like to take this opportunity to stress one particular failure that continues to stick in my craw: the failure of the Office of Legal Counsel to cite *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984). *Lee* was a Department of Justice criminal prosecution of Texas sheriffs for waterboarding prisoners, but it never appeared in any OLC discussion of waterboarding—even to be distinguished or otherwise explained away. I find its omission even more significant than OPR's report suggests, and far more damaging than the Margolis memo suggests.

To determine whether Jay Bybee and John Yoo should have cited *Lee*, we first must identify the proper standard for evaluating their work. What should that standard be? We know that they had a professional responsibility to provide candid advice on the legality of waterboarding.[1] Few cases have interpreted the scope of this duty for advisors, however, so we must look elsewhere for precedents. I find the best analog in Professional Conduct Rule 3.3, governing an advocate's duty of candor toward a judicial tribunal, which demands that a lawyer not knowingly "[f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client."[2] A comment to that rule elaborates: "A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."[3] The checks and balances of court review and of his adversary's advocacy make it likely that "the truth will out" even if a lawyer fails in this duty of candor in a judicial tribunal. Those protections are not present in the formulation of OLC opinions, particularly classified ones, so OLC's duty of candor likely should actually be set higher than that required of meat-and-potatoes working lawyers arguing before a court. Thus, I would expect an advocate's duty of candor under Rule 3.3 to set the very minimum standard required of OLC.

Under Rule 3.3's standards, Office of Legal Counsel attorneys evaluating the legality of waterboarding should have cited *Lee*—at least to "recognize [its] existence," if nothing else. Indeed, *Lee* very well could be argued to be controlling: it involves a very similar technique to that evaluated by Yoo and Bybee, it is a decision by a United States Court of Appeal (and thus, in the absence of a Supreme Court decision, the highest jurisdiction to have considered this question), and it draws from constitutional prohibitions imposed by the Fifth and Fourteenth Amendments—prohibitions that appear in the standard of the Convention Against Torture. It certainly is adverse to Yoo and Bybee's position. And if you were looking for dispositive authority on the question whether U.S. Courts think waterboarding is torture, *Lee* is an obvious place to start. Leaving it out would seem to be exactly the type of behavior that gives rise to

[1] *See* D.C. Rules of Professional Conduct Rule 2.1.
[2] D.C. Rules of Professional Conduct Rule 3.3 (text of rule effective from January 1, 1991, to January 31, 2007).
[3] *Id.* cmt. 3.

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violations of Rule 3.3. *See, e.g.*, *Tyler v. Alaska*, 47 P.3d 1095, 1105–06 (Alaska 2001) (explaining that "a court decision can be 'directly adverse' to a lawyer's position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case"); *In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000) (concluding that attorney violated Rule 3.3 and also concluding that failure to inform the client of adverse authority "effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued," and thereby connecting this standard to the client advisory relationship). And it is not as if the *Lee* opinion is overly subtle: the Fifth Circuit describes the technique as "torture" at least nine times. Nor is it hard to find. A Westlaw or Lexis search of federal case law for "water torture" (the traditional term for waterboarding and a reasonable one to expect an attorney of even moderate experience to search) turns it up right away (*see* Appendix – *Lee* is #5 on Westlaw, #2 on Lexis).

Former Attorney General Mukasey has tried previously to deprecate the importance of *Lee*. He made the argument that the case was not on point because it was a criminal case brought under the Civil Rights Act, whereas the controlling law for Bush administration lawyers evaluating waterboarding was the torture statute, 18 U.S.C. §§ 2340–2340A, and the Convention Against Torture (CAT). This argument goes nowhere. The substantive standard behind the Civil Rights Act as applied in *Lee* is the United States Constitution, specifically the Fifth and Fourteenth Amendments. Pursuant to an American reservation to the treaty, the substantive standard of the CAT is the United States Constitution, specifically "the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." *Lee* and compliance with the CAT ultimately turn on the same thing – standards imposed by the United States Constitution. *Lee* belongs in any serious, responsible, and competent discussion of waterboarding and the CAT.

Moreover, as Professor David Luban of Georgetown Law School explained at a hearing I chaired last year, from a professional responsibility point of view, *Lee* is broadly important to the duty of an attorney analyzing whether waterboarding is torture. The bottom line is that a Federal Circuit Court had no trouble recognizing that waterboarding is torture under a common sense, standard definition of that term.

> In past discussion before this Committee, Attorney General Mukasey responded that *Lee* is not germane, because it is a civil rights denial case, not a torture case. That response misses the point, however, which was not what legal issue the court was addressing in *Lee*, but the fact that the judges had no hesitation about labeling waterboarding "torture," a label they used at least nine times. They obviously could not reference the Convention Against Torture (CAT) or the torture statutes, 18 U.S.C. §§ 2340-2340A, which did not yet exist. But there is no reason to suppose that they would have reached a different characterization of waterboarding than they did in *Lee*. That might be the case if CAT and the torture statutes had transformed the meaning of the ordinary-language word 'torture,' making it more technical, and raising the standard of harshness so that waterboarding might not be torture under the new, technical standard.
>
> That simply did not happen. The statutes' definition of torture as severe mental or physical pain or suffering is neither unusual nor technical. Indeed, a standard pre-

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> CAT dictionary definition of torture describes it as "severe or excruciating pain or suffering (of body or mind)"—a definition so similar to the language of CAT that it seems entirely possible that CAT's drafters modeled the treaty language on the Oxford English Dictionary definition. Other *Lee*-era dictionaries use formulations that do not in any way suggest that at the time of *Lee* 'torture' meant something milder than the statutory standard—Webster's Third (1971) says "intense pain"; Webster's Second (1953) says "severe pain" and "extreme pain."

As Professor Luban makes clear, a lawyer evaluating the reach of a statute that defines "torture" in plain English can't just ignore a Circuit Court also using plain English and calling waterboarding "torture."

The Margolis memo's breezy dismissal of *Lee* also is unfortunate, and in my view an error. Mr. Margolis adds the observation that the opinion does not describe the technique. But the briefs in *Lee* and the record of that case make clear that the defendants in that case used a technique that is nearly identical to the one authorized by Yoo and Bybee. Consider the following examples from the appellee's brief:

> Count one asserted that the defendants conspired to subject prisoners to a suffocating "water torture" ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and the mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning.

Brief at *2, 1984 WL 274706.

> Q. Now then, what did they do to you?
> A. Floyd Baker took a towel and folded it long ways twice where it was about this wide. He wrapped the towel around my face, pulled it tight in the back and pulled my head back. While he did that, John Glover took a bucket of water and slowly poured it over the towel, asking me questions every once in a while.
> . . . .
> Q. Were you frightened?
> A. Yes.
> Q. What were you afraid of?
> A. Afraid of drowning; it was hard to breathe.

Id. at *4 (quoting testimony of Kevin Coffman, a former inmate in the county jail).

> James Hicks, another former inmate, testified that . . . Lee took him from a small holding cell to the detoxification cell in the new county jail. Hicks stated that Baker told him to sit in a chair and handcuffed his hands behind his back. Hicks kicked Lee when Lee tried to shackle his legs to the chair, and Lee hit Hicks in the faces with a blackjack. Hicks testified that:
> after I finally gave out, they did shackle my legs down to the chair and Floyd Baker placed a towel around my face, covered my eyes and my nose and my

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> mouth, and they tied a rope around my midsection. They laid the chair down on its back with the bottom rung in the back rest on this little concrete ledge in that cell, with my head down toward the drain in the center of that floor. Then they poured water over my face through the towel.

Id. at *5.

Margolis's point that the description does not appear in the opinion could mean only two things: one, that the judges did not know what conduct they were talking about at the time so their categorization of it as torture can be disregarded; or two, that one cannot determine what conduct the judge had in mind because the record of the case does not yield up that information. Neither is true. Moreover, since the Department of Justice was the prosecuting party in the *Lee* case, it has particular access to the above descriptions of the waterboarding that was a crime in *Lee*. Thus Margolis's point is meaningless.

As Professor Luban recently explained, the primary distinction between "the technique described in *Lee* and water-boarding is that the Texas sheriffs used a tilted chair instead of a tilted board." This is a distinction without a difference when considering whether waterboarding is torture. And it is no excuse that this information did not appear in the Fifth Circuit's opinion. Yoo and Bybee should have looked at the briefs if they had any doubt about the type of "water torture" at issue in *Lee*. Those briefs certainly aren't hard to find. They are on Westlaw. And remember who the appellee was: the United States, represented by the Justice Department, with four attorneys from Main Justice on the brief, as well as a local United States Attorney. Not only was the brief on Westlaw, it was in the building.

OLC's citation in an appendix of *Hilao v. Estate of Marcos*, 103 F.3d 789, 790–91 (9th Cir. 1996),[4] reflects on the failure to cite *Lee*. In *Hilao*, the torture victim was waterboarded, threatened with electric shock and death, and subjected to five years of solitary confinement and other unspeakable acts. Although not analyzed in detail by Yoo or Bybee, the implication of the citation of *Hilao* was that it could be distinguished on the grounds that the whole course of mistreatment had been held to be torture, not waterboarding alone. *Lee*, which was waterboarding alone, at least should have been included in the same appendix as *Hilao*, as to cite *Hilao* alone is highly misleading.

The entire picture is darkened by the unexplained disappearance of emails from the relevant period belonging to John Yoo and Patrick Philbin, the refusal of key Bush Administration officials to cooperate with the investigation, and the strained post-hoc rationalizations of the memos' failings offered by Attorney General Mukasey and others. And looming in the background is the influence of Vice President Cheney and his counsel David Addington—a subject about which the OPR report only raises further questions. Indeed, the OPR report confirms that the Department of Justice had far too cozy a relationship with the White House during this period. Political pressure was rampant. Margolis leaves unchallenged, for example, OPR's description of David Addington telling Patrick Philbin that he would never get another job in government again—all because Philbin had the temerity to support the withdrawal of

[4] *See* Jay Bybee, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A*, at 49 (Office of Legal Counsel, Aug. 1, 2002).

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another shocking John Yoo opinion in which he approved President Bush's warrantless wiretapping program.[5] The OPR report leaves the distinct impression that people like Addington were running the show, and that "adult leadership" was lacking at OLC.

The failure to cite *Lee* looks worse in the context of OLC's heavily slanted advice and multiple departures from OLC's proper and historic role as the provider of serious and impartial legal advice. It may be telling that all the errors and omissions slanted toward the same policy result. I believe that Margolis was far too quick to overlook the significance of this pattern, far too ready to give Yoo and Bybee the benefit of the doubt in light of that pattern, and far too willing to see the authors' numerous failings as separate, isolated incidents. I believe as a lawyer of 25 years experience that *Lee* is too obvious to have been missed inadvertently, that the OLC opinions are far too slanted to give the client the balanced view of the law required by professional standards, that the pattern of communication and pressure and departure from OLC standards all in the same substantive direction is sufficient to remove the benefit of the doubt regarding good faith error, and that the seriousness of the issues and the high standards expected of OLC are far too great to let any future OLC attorney fall to such levels. Too many questions remain unanswered to have confidence, once and for all, that everyone connected with the creation of these opinions made a good faith effort to keep the Bush administration within the bounds of the law. The missing emails, contradictory testimony, and witnesses who refused to cooperate with the investigation leave an ominous "empty chair."

Once again, thank you, Chairman Leahy, for holding this important hearing and for your continued leadership on restoring the rule of law. President Obama and Attorney General Holder are leading the way, but Congress also must play its part as the Department of Justice and its Office of Legal Counsel are put back on solid foundations. I look forward to working with you, Chairman Feinstein of the Intelligence Committee, and my other colleagues in the Senate on that crucial task.

[5] OPR Report at 143.

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APPENDIX

Westlaw.

QUERY - "WATER TORTURE" DATABASES(S) - ALLFEDS

1. **H** In re Estate of Marcos, Not Reported in F.Supp., 1994 WL 874222, , D.Hawai'i, January 03, 1995(MDL No. 840.)

...was taken onto a boat where he was interrogated. Josepito was then taken to a military camp where he was **tortured**. Josepito was blind-folded and naked while **water** was poured on him and he was beaten all over his body, which left him with bruises and swollen lips. When he denied the interrogators' allegations, **water** was poured on his face which caused Josepito to feel like vomiting "especially when they sat on [his] stomach, [he ...

...on his head and bruises all over his body, which took one month to heal. As a result of the **watertorture**, after Josepito would eat he would then vomit so that he only has meals of small amounts of rice and ...

...military confinement, I was separated from my husband in a small airless room closed [sic] to the toilet where they **tortured** our companions." The military attempted to rape Raquel and "they were always threatening me." Raquel was forced to witness the **torture** of other detainees - "most of the time I would be kept under locked [sic] but when they **tortured** the men, they would open the door and show me "One particular incident that I cannot forget this guy they continuously **tortured** by giving him the **water** therapy with the **water** from the faucet ejecting on his face, and he is blouted [sic] and stepped on his stomach and they forced his head inside the toilet bowl which was full of **water** and all that time this guy was silently drowned they brought him out naked, paraded him in front of me...

2. **C** Torres v. Mukasey, 551 F.3d 616, 2008 WL 5336906, , C.A.7, December 23, 2008(No. 08-1614.)

...3) [11] 24 Aliens, Immigration, and Citizenship 24VII Asylum, Refugees, and Withholding of Removal 24VII(E) Relief Under Treaties Against **Torture** 24 552 k. Standard for Relief. To succeed on a claim for relief under the Convention Against **Torture** (CAT), an applicant must prove that it is more likely than not that he will be **tortured** within the meaning of the Convention if he returns to his native country. 8 C.F.R. § 208.16(c)(4 ...

...As examples of persecution, we have cited "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or **torture**." Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir.1995) [11] As a third and final avenue to avoiding removal, Torres also requested protection under the Convention Against **Torture**. See 8 C.F.R. § 208.16 (C). To succeed, Torres must prove that it is more likely than not that he will be **tortured** within the meaning of the Convention if he returns to Honduras. See Prela, 394 F.3d at 519; see also 8 C.F.R. § 208.16(c)(4) "**Torture**" is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by ...

...C.F.R. § 208.18(a)(1) The IJ in this case declined Torres's request for relief under the Convention Against **Torture**. B. The IJ's Adverse Credibility Determination The IJ rejected all three of Torres's claims-for asylum, withholding of removal, and protection under the Convention Against **Torture**-solely because the IJ found that Torres's evidence lacked credibility. [12] [13] [14] One of an immigration judge's primary functions...

3. **H** Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1988 WL 19084, 15 Media L. Rep. 1043, , C.A.7 (Ill.), February 26, 1988(No. 87-1247.)

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...mounting controversy over U.S.-supported repression in Latin America. Scores of Latin journalists, clergy and others told of grisly police **torture** of political prisoners in Uruguay, Brazil and elsewhere. Stripped, beaten, sexually abused, **tortured** under **water** and on racks, burned with electric needles under fingernails, shocked with electrical wires on the breasts of women and the ...

...Prize-winning Amnesty International, from a former Uruguayan police commissioner who resigned in revulsion, from another police official who was **tortured** himself as a suspected Tupamaro spy, from Catholic priests and then from the U.S. Catholic Conference of Bishops. **Torture** in Uruguay, said the array of authorities, had been "common," "normal," "habitual" before 1969. And the U.S. adviser who had been Mitrione's predecessor for four years, whose office was on the first floor of the Montevideo jefatura, where **torture** reportedly took place and the screams of the victims reverberated, who by his own account had intimate and influential relations with the Uruguayan police, was Adolph Saenz. From Montevideo, allegations of **torture** by his police clients would follow Saenz through subsequent assignments in Colombia and Panama. By the time he left Panama ...

...basis, perhaps even a reasonable one, exists for Saenz's claim that the Playboy article implied his personal involvement in political **torture** while an official with OPS. One passage of the article reads: **Torture** in Uruguay, said the array of authorities, had been "common," "normal," "habitual" before 1969. And the U.S. adviser who had been Mitrione's predecessor for four years, whose office was on the first floor of the Montevideo jefatura, where **torture** reportedly took place and the screams of victims reverberated, who by his own account had intimate and influential relations with the Uruguayan police, was Adolph Saenz. From Montevideo, allegations of **torture** by his police clients would follow Saenz through subsequent assignments in Colombia and Panama Whether this implies no more than that Saenz was in a position to know about **torture** conducted in the countries where he served, as the district court concluded, or whether it impliedly charges Saenz with complicity in that **torture** is, we believe, a question for the jury under New Mexico law, either resolution of which is constitutionally permissible. Nothing...

4. Hilao v. Estate of Marcos, 103 F.3d 789, 1996 WL 721212, 96 Cal. Daily Op. Serv. 9101, 96 Daily Journal D.A.R. 15,080, , C.A.9 (Hawai'i), December 17, 1996(No. 95-16779.)

...limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured **water** down his nostrils so that he felt as though he were drowning. This lasted for approximately six hours, during which time the interrogators threatened Sison with electric shock and death. At the end of this **watertorture**, Sison was left shackled to the cot for the following three days, during which time he was repeatedly interrogated. He ...

...of the trial as to the human-rights abuses inflicted on him, and the jury found Marcos liable for the **torture** of Sison. The jury instructions in the liability phase had defined **torture**, in relevant part, as "any act, directed against an individual in the offender's custody or physical control, by which severe ...

...claim to special damages (such as for medical costs, lost wages, etc.). FN2. This definition tracks those given in the **Torture** Victim Protection Act, 28 U.S.C. § 1350 , note § 3(b)(1), and in Article I of the Convention Against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984) , as modified, 24 I.L.M...

5. U.S. v. Lee, 744 F.2d 1124, , C.A.5 (Tex.), October 12, 1984(No. 83-2675.)

...for Severance or Joinder 110 622 7(6) k. Antagonistic Defenses; Hostility. (Formerly 110k622.2(6) Defense of codefendant, that he participated in **torture** of prisoners only because ordered to do so by

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his superiors and did not know that it was illegal, and ...

...mutually exclusive for purposes of determining whether severance of trials should be granted, since defendant's participation or lack thereof in **torture** sessions was irrelevant to codefendant's belief in legality of his own actions. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A [7] 110 Criminal ...

...Glover, and the County Sheriff, James Parker, based on a number of incidents in which prisoners were subjected to a "**watertorture**" in order to prompt confessions to various crimes. On the morning trial was to begin, Floyd Baker's counsel informed the...

6. C Cassey v. Coca-Cola Enterprises, Not Reported in F.Supp.2d, 2006 WL 3862005, , W.D.La., December 29, 2006(No. CIVA 05-0152.)

...of a specific job opportunity." [Doc. No. 33, p. 2]. However, he asserts that CCE cannot engage in "the Chinese **watertorture**" method of discrimination. 5 He contends that CCE provided him with tools that are inferior to those provided to Caucasian ...

...overtime, and that African-American employees are given less favorable shifts. FN5. Cassey appears to have argued that his "Chinese **watertorture**" theory is sufficient to support both his claim of discrimination and harassment. There is no dispute that Cassey is a ...

...U.S. at 81 Cassey argues, as he did with his race discrimination claim, that he was subjected to a "Chinese **watertorture**" method of harassment that meets the necessary standards for hostile work environment. There is no dispute that Cassey is a...

7. Kaweesa v. Ashcroft, 345 F.Supp.2d 79, 2004 WL 2729747, , D.Mass., November 18, 2004(No. CIV.A.04-10513-WGY.)

...was returning to the country. However, Human Rights Watch just released a 76 page report last week ("State of Pain: **Torture** in Uganda," Vol. 16[4], March 2004) delineating a rapidly growing pattern of **torture**, rapes, and beatings among political detainees in Uganda. The report documents that Ugandan security forces are **torturing** supporters of the political opposition and holding them in secret detention amid the government's pursuit of rebels involved in the ...

...beaten them severely with wooden or metal rods, cables, hammers, or sticks studded with protruding nails, and subjected them to **watertorture** in which the victim is forced to lie face up while a **water** spigot is opened directly into his mouth." Military, intelligence, and security agents secretly arrest thousands of persons who are suspected ...

...life after losing the election that year. Since then, many of his supporters have been arrested and killed and/or **tortured**. The Ugandan Human Rights Commission reports that "**torture** is on the increase and, during the period [January 2001-September 2002], more cases than ever had been received." The **torture** occurs rarely in the prisons today, almost always in special safe houses where the **torture** is conducted entirely in secret. The report says, "[i]n many cases, suspects believe they were detained only because they personally...

****

REMAINING 93 CITATIONS OMITTED

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Lexis Search: "Water Torture" in "Federal Court Cases Combined" (Nat. Lang. search)

1. Cassey v. Coca-Cola Enters., CIVIL ACTION NO. 05-0152 , UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION, 2006 U.S. Dist. LEXIS 94378, December 28, 2006, Decided , December 29, 2006, Filed
... in "the Chinese water torture" method of discrimination. 5 ...
... that his "Chinese water torture" theory is sufficient ...
... to a "Chinese water torture" method of harassment ...
... recovery. Cassey's "Chinese water torture" theory has some ...

2. United States v. Lee, No. 83-2675, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, 744 F.2d 1124; 1984 U.S. App. LEXIS 17759, October 12, 1984 , Petition for Rehearing En Banc Denied November 9, 1984.
... subjected to a "water torture" in order to ...

3. Powers v. Snyder, No. 04-1961 , UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, 484 F.3d 929; 2007 U.S. App. LEXIS 10327, April 4, 2007, Submitted , May 3, 2007, Decided , On remand at, Summary judgment granted by Powers v. Snyder, 2009 U.S. Dist. LEXIS 25784 (C.D. Ill., Mar. 26, 2009)
... a rubber truncheon, water torture, electric shock, incessant ...

4. Katel L.L.C. v. AT&T Corp., 1:02-cv-02440-RJH, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 2009 U.S. Dist. LEXIS 29299, March 16, 2009, Decided, March 17, 2009, Filed
... form of Chinese water torture in which the ...

5. AUDIOVISUAL PUBLRS., INC. v. CENCO INC., No. 72 Civ. 1681 (WCC), UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 1983 U.S. Dist. LEXIS 19046, February 23, 1983
... suggestive of Chinese water torture, inordinate amounts of ...

6. Rozell v. Ross-Holst, 05 Civ. 2936 (JGK)(JCF), UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 2007 U.S. Dist. LEXIS 46450, June 21, 2007, Decided, Costs and fees proceeding at, Application granted by, in part Rozell v. Ross-Holst, 2008 U.S. Dist. LEXIS 41609 (S.D.N.Y., May 29, 2008)
... case of Chinese water torture, eventually cross the ...

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ILLINOIS

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COMMITTEE ON THE JUDICIARY

COMMITTEE ON RULES AND ADMINISTRATION

ASSISTANT MAJORITY LEADER

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durbin.senate.gov

February 5, 2008

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

I will object to proceeding with the nomination of Judge Mark Filip to be Deputy Attorney General until you respond to my inquiries regarding the Administration's torture policies and practices. In light of the Justice Department's continued non-responsiveness to Congress on the issue of torture, including your disappointing testimony on waterboarding last week, I have reluctantly concluded that placing a hold on Judge Filip's nomination is my only recourse for eliciting timely and complete responses to important questions on torture.

Some suggested that your confirmation was an opportunity to turn a new page after Attorney General Gonzales's troubled tenure, but your failure to take a position on waterboarding raises questions about whether your leadership will bring significant changes to the Justice Department. Your silence does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. If the United States does not explicitly and publicly condemn waterboarding, it will be more difficult to argue that enemy forces cannot waterboard American prisoners.

Last week, you testified that waterboarding is not currently authorized by the Administration but you refused to comment on whether waterboarding has been authorized in the past or will be authorized in the future. In other words, your assurance that the Administration does not use waterboarding was good for the day you testified and no longer.

Today Central Intelligence Agency Director Michael Hayden testified to the Senate Select Intelligence Committee that, "Waterboarding has been used on only three detainees." In light of your testimony that, "There are circumstances where waterboarding is clearly unlawful," the Justice Department should investigate the instances in which the Administration has used waterboarding to determine whether any laws were violated. You suggested during last week's hearing that you would not investigate these incidents because waterboarding was authorized by the Administration: "It's a question of telling agents out there that we are investigating the CIA based on speculation about what happened and whether they got proper authorizations." Needless to say, a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law. Please respond to this question: Will the Justice Department investigate the Administration's use of waterboarding to determine whether any laws were violated?

While the United States has considered waterboarding to be a war crime for decades, last week you testified that it is unclear whether waterboarding is illegal because it is not explicitly prohibited by the Military Commissions Act and the Detainee Treatment Act. While I disagree with your analysis of the MCA and the DTA, you did not address whether waterboarding is prohibited by

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Common Article 3 of the Geneva Conventions, which you have acknowledged applies to all detainees in U.S. custody. Common Article 3 states that "outrages upon personal dignity, in particular humiliating and degrading treatment" are absolutely prohibited. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, told me unequivocally that waterboarding and several other abusive interrogation techniques are illegal and violate Common Article 3. On August 2, 2007, I sent then Attorney General Alberto Gonzales the attached letter asking him, among other things whether it would be legal for enemy forces to subject an American citizen to these same techniques. Please respond to this letter.

During last week's hearing, you repeatedly referenced the Justice Department's prosecution of CIA contractor David Pasarro as evidence that the Department would not permit detainee abuses. However, you neglected to mention that, following the indictment of Mr. Passaro by the U.S. Attorney's Office for the Eastern District of North Carolina, then Attorney General John Ashcroft assigned all pending detainee abuse cases to the U.S. Attorney's Office for the Eastern District of Virginia on June 17, 2004. It has been over three and a half years since then and in that time there has not been a single indictment. On January 10, 2008, I sent you the attached letter requesting an update on the Justice Department's handling of detainee abuse allegations. Please respond to this letter.

During last week's hearing, you refused to comment on the scope of the Justice Department's investigation of the CIA's destruction of detainee interrogation videos. We have now learned that there may be video or audio recordings of detainees whom the CIA transferred to other countries to be interrogated. According to the *Chicago Tribune*, in February 2003 the CIA detained a man named Abu Omar in Italy. The CIA then took Abu Omar to Egypt and turned him over to the Egyptian government. Abu Omar claims he was tortured and that his Egyptian interrogators recorded "the sounds of my torture and my cries." On December 12, 2007, I sent you a letter asking you to expand the Justice Department's inquiry into the CIA's torture tapes to cover recordings of detainees whom the CIA rendered to foreign countries. Please respond to this letter.

During last week's hearing, we discussed the nomination of Steven Bradbury to be the head of the Justice Department's Office of Legal Counsel. I have repeatedly urged President Bush to withdraw this nomination because of Mr. Bradbury's involvement in authorizing some of the Administration's most controversial policies, including torture techniques that are inconsistent with American values and law and warrantless surveillance of innocent Americans.

Prior to your confirmation, you pledged to me in writing that you would personally review all OLC opinions regarding surveillance, interrogation techniques and detention standards to determine whether each of these opinions can be provided to Congress and to determine whether the legal analyses and conclusions of each of these opinions are correct. However, at last week's hearing, you acknowledged that you had not reviewed all of these opinions, including an opinion, reportedly authored by Mr. Bradbury, on so-called "combined effects," which authorized the CIA to use multiple abusive interrogation techniques in combination. According to *The New York Times*, then Attorney General Alberto Gonzales approved this opinion over the objections of then Deputy Attorney General James Comey, who said the Justice Department would be "ashamed" if the memo became public. As you committed prior to your confirmation, please review all OLC opinions regarding surveillance, interrogation techniques and detention standards and notify me whether each of these opinions can be provided to Congress and whether you believe the legal analyses and conclusions of each of these opinions are correct.

Mr. Bradbury is currently the Principal Deputy Assistant Attorney General of OLC. There is no Acting Assistant Attorney General, so Mr. Bradbury is the effective head of OLC. During last

week's hearing, you acknowledged that Mr. Bradbury is the "principal person" in OLC. Under the Vacancies Reform Act, after a nomination is returned to the President a second time, the nominee may continue to serve as acting head of the office for only 210 days. Mr. Bradbury was first nominated in June 2005 and his nomination was returned to the President for the second time on September 29, 2006, well over a year ago. The fact that Mr. Bradbury continues to serve as the effective head of OLC appears to be an attempt to circumvent the confirmation process in order to install a controversial nominee in a key Justice Department post. Please respond to the following question: Does Steven Bradbury's continued service as the "principal person" in OLC violate the Vacancies Reform Act?

In sum, I will object to proceeding with the nomination of Mark Filip to be Deputy Attorney General until I receive responses to the following:

1. Will the Justice Department investigate the Administration's use of waterboarding to determine whether any laws were violated?

2. My letter, dated August 2, 2007, asking then Attorney General Alberto Gonzales whether it would be legal for enemy forces to subject an American citizen to waterboarding and other abusive interrogation techniques.

3. My letter, dated January 10, 2008, asking you for an update on the Justice Department's handling of detainee abuse allegations.

4. My letter, dated December 12, 2007, asking you to expand the Justice Department's inquiry into the CIA's torture tapes to cover recordings of detainees whom the CIA rendered to foreign countries.

5. Will you provide Congress with all OLC opinions regarding surveillance, interrogation techniques and detention standards? Do you believe the legal analyses and conclusions of each of these opinions are correct?

6. Does Steven Bradbury's continued service as the "principal person" in OLC violate the Vacancies Reform Act?

You testified that, "The continued wait for Senate-confirmed officials creates a tentative atmosphere that is not in the interest of the Department or of the country." That well describes the situation created by your refusal to condemn waterboarding and answer other important questions on torture. I respect Judge Filip and do not object to his continued public service but at some point you must accept your responsibility under our Constitution to acknowledge the role of Congress. I look forward to your timely response.

Thank you for your time and consideration.

Sincerely,

Richard J. Durbin

Attachments

The Attorney General
Washington, D.C.
February 7, 2008

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

Dear Senator Durbin:

I write in response to your letter dated February 5, concerning the nomination of Judge Mark Filip to be Deputy Attorney General. It appears that we are in agreement that Judge Filip is a highly qualified nominee, and I expect you will also agree with me that it is imperative that the position of Deputy Attorney General—a position responsible for supervising much of the day-to-day operations of the Department of Justice, including the coordination of many of its national security efforts—be filled with a Senate-confirmed official as soon as possible. I was encouraged last week when the full Judiciary Committee voted to move him to the Senate floor without objection.

Nonetheless, you indicate that you will object to Judge Filip's confirmation unless you receive answers to several questions you raise in your letter. Consistent with the spirit in which I have attempted to work with you and your colleagues since my confirmation, I will respond to these questions to the fullest extent that I believe appropriate.

First, you ask for responses to three letters you have sent to me or to my predecessor. A written response to each is attached. I trust you will find these replies acceptable, as they represent the most comprehensive response that the Department can provide on these issues at this time.

Second, you ask whether Steven Bradbury's current appointment as Principal Deputy Assistant Attorney General of the Department's Office of Legal Counsel is consistent with the Vacancies Reform Act. I believe that it is, for reasons that the Department has provided to the Senate Judiciary Committee previously, and which are contained in a letter that is attached. I know that we disagree about the merits of Mr. Bradbury's nomination, but I believe that Mr. Bradbury is an exceptional lawyer who has served the Department and the Nation admirably during his tenure in the Office of Legal Counsel.

Third, you ask whether the Justice Department will open a criminal investigation based upon Director of the Central Intelligence Agency Michael Hayden's disclosure this week that waterboarding was used on three senior al Qaeda terrorists in the past. I do not believe such an investigation is necessary, appropriate, or legally sustainable. Before the CIA used this technique, the CIA sought advice from the Department of Justice, and

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the Department informed the CIA that its use would be lawful under the circumstances and within the limits and the safeguards of the program. It is vital that our intelligence professionals be able to rely on the advice of the Department about what the law permits and what it does not. They will be unable to perform their duties to protect the country if they fear that the advice provided by one Attorney General will survive only as long as the tenure of the person who gave it, and that a subsequent Attorney General could disregard their prior reliance in deciding whether they acted within the law.

Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice. This is, of course, not to say that Attorneys General are bound going forward by the decisions of their predecessors. It is merely a recognition that it would be unwise, and terribly unjust, to expose those who relied in good faith on those prior decisions to possible criminal penalties. I therefore do not believe General Hayden's disclosures this week should serve as a basis for opening a criminal investigation into the conduct of intelligence professionals who relied upon this Department's advice in taking actions to protect us in the War on Terror.

Fourth, your letter asks for my views concerning the legal analysis and conclusions of past opinions of the Department's Office of Legal Counsel; your letter places particular emphasis on the Department's opinions supporting the legality of the methods authorized for use in the CIA's interrogation program. As I stated in advance of my hearing before the Judiciary Committee last week, I carefully reviewed the Department's legal advice concerning those techniques that are currently authorized for use in the CIA's program. I found those techniques to be lawful, and found the Department's analysis and conclusions concerning those techniques—analysis and conclusions which were contained in multiple opinions, including opinions authored in 2005 and 2007—to be correct and sound.

I explained to the Senate Judiciary Committee last week that waterboarding is not currently authorized for use in the program, and accordingly may not be used. As I testified, I did not believe it appropriate for me to provide an opinion on the legality of waterboarding unless and until the issue was presented to me, in concrete circumstances and after consideration of all of the legal provisions that bear on the question. I do not believe General Hayden's testimony confirming that the technique was used in the past makes it any more appropriate for me to provide this opinion. As I testified last week, there is a defined process by which a technique would be considered for use in the CIA program, one step of which would require my analysis of the lawfulness of the technique under the circumstances and limits proposed—taking into account, of course, substantial changes in the law since the technique was previously analyzed and authorized. In the event that General Hayden and Director McConnell proposed using waterboarding, I would conduct such an analysis, which would necessarily include a review of any extant advice on waterboarding previously provided by the Department. Currently, however, I have no occasion to review any prior advice provided by the Department on waterboarding, or any other technique that is not currently authorized for use in the CIA

program. I also have committed that I will notify the Judiciary Committees if waterboarding is ever again authorized for use in the CIA program.

Your letter indicates that it is important for me to provide an opinion on the lawfulness of waterboarding because it may bear on a decision as to whether a criminal investigation should be initiated. But as I have explained, a question about whether to initiate an investigation into conduct that took place in 2002 and 2003 based upon advice provided by this Department cannot—indeed, must not—depend upon the retrospective views of the Attorney General in place years later. Again, if our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subjected to criminal investigation for it.

Finally, you ask whether the Department's opinions in this area and others—including opinions concerning our intelligence surveillance efforts in the War on Terror—can be provided to the Congress. I believe that substantial accommodations have been made in recent months in this regard. Highly classified opinions concerning the Terrorist Surveillance Program have recently been made available to the Intelligence Committees and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, I know that the Intelligence Committees have been briefed on both the classified details of and the legal analysis supporting the program, and that unclassified briefings have also been provided to the Congress. While the Department's opinions themselves are both highly classified and privileged, I am willing to continue to work with the Congress to explore additional avenues of accommodating the Congress's legitimate oversight interests in this information.

Although I believe it is unfortunate that you have placed a hold on Judge Filip's nomination, and that it is harmful to the Department to continue to operate without a Senate-confirmed official as Deputy Attorney General, I very much appreciate your statement on the floor of the Senate yesterday that what you were asking for was a good faith response—not a response with which you would necessarily agree. I expect that you will not agree with all of the answers I have provided, but I have responded in good faith to your questions, based upon what I believe to be in the best interests of the Department and the Nation.

Yours sincerely,

Michael B. Mukasey

RICHARD J. DURBIN
ILLINOIS

COMMITTEE ON APPROPRIATIONS

COMMITTEE ON THE JUDICIARY

COMMITTEE ON RULES
AND ADMINISTRATION

ASSISTANT MAJORITY
LEADER

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durbin.senate.gov

February 7, 2008

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

Thank you for your prompt response to my February 5th letter. I am disappointed in your response, but, as promised, I will lift my objection to the nomination of Judge Mark Filip to be Deputy Attorney General.

I want to take this opportunity to respond to several points in your letter. Although Central Intelligence Agency Director Michael Hayden admitted this week that the CIA has engaged in waterboarding and you testified last week that, "There are circumstances where waterboarding is clearly unlawful," you say you will not open an investigation because the Justice Department informed the CIA that it would be lawful to use waterboarding. Your justification is that, "no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice." However, I did not request nor suggest that those who relied on the Justice Department's advice should be investigated. Rather, as I said in my letter, "a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law" (my emphasis).

Under U.S. law, command responsibility is a well-established theory of liability that covers those who authorize violations of law. In response to a recent letter I sent you, Principal Deputy Assistant Attorney General Brian Benczkowski said that the Justice Department "has not had occasion to consider whether 'command responsibility' as defined in your letter is a theory under which an individual may be criminally prosecuted under the Torture Statute." Your acknowledgement that the Justice Department informed the CIA that waterboarding would be lawful presents such an occasion.

There clearly is sufficient information to warrant a preliminary inquiry and/or criminal investigation into whether those who authorized waterboarding violated the law. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, which were signed by then Attorney General John Ashcroft in 2002 and remain in effect, state, "[A] preliminary inquiry [] should be undertaken when there is information or an allegation which indicates the possibility of criminal activity and whose responsible handling requires some further scrutiny beyond checking initial leads." Moreover, during last week's Senate Judiciary Committee hearing, in the context of discussing the Justice Department's investigation of the CIA's destruction of detainee interrogation tapes, you explained the low threshold for a criminal investigation: "When that preliminary inquiry showed some reason--some reason--to believe that some statute may have been violated, which is a very low standard, it's well below probable cause,

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when that was met, that low bar, we were required to, and did, begin a criminal investigation." In light of your conclusion that waterboarding is unlawful in some circumstances, CIA Director Hayden's admission that the CIA used waterboarding certainly indicates at least "the possibility of criminal activity" and "some reason to believe that some statute may have been violated."

Nonetheless, you have indicated that you will not investigate this matter. Therefore, I will ask the Justice Department's Inspector General and the Office of Professional Responsibility to investigate the conduct of Justice Department officials who advised the CIA that waterboarding is lawful. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful.

I am also disappointed that you do not intend to fulfill your commitment to me to review all Office of Legal Counsel (OLC) opinions regarding surveillance, interrogation techniques, and detention standards. Prior to your confirmation, I asked you, in writing, "If you are confirmed, will you pledge to review personally all OLC opinions regarding surveillance, interrogation techniques, and detention standards to determine whether each of these opinions can be provided to Congress and to determine whether the legal analysis and conclusions of each of these opinions is correct?" You responded, in writing, "Yes." However, at last week's hearing you acknowledged that you had not reviewed all of these opinions. In your letter to me today, you state, "I have no occasion to review any prior advice provided by the Department on waterboarding, or any other technique that is not currently authorized for use in the CIA program."

In response to my question about Steven Bradbury's continued service as the head of OLC, you said, "Mr. Bradbury is an exceptional lawyer who has served the Department and the Nation admirably during his tenure in the Office of Legal Counsel." Since you have only served as Attorney General since November 9, 2007, and you refuse to fulfill your commitment to review all OLC opinions regarding surveillance, interrogation techniques, and detention standards, it is unclear how you can make such a sweeping conclusion about Mr. Bradbury's tenure at OLC. I am particularly concerned that you apparently have not reviewed an opinion, reportedly authored by Mr. Bradbury, on so-called "combined effects," which authorized the CIA to use multiple abusive interrogation techniques in combination. According to *The New York Times*, then Attorney General Alberto Gonzales approved this opinion over the objections of then Deputy Attorney General James Comey, who said the Justice Department would be "ashamed" if the memo became public.

I agree with you that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. However, CIA agents have been put in jeopardy by misguided counsel from the Justice Department, including legal opinions that the Administration has been forced to repudiate. Your refusal to review these opinions, much less investigate those who authorized waterboarding, places CIA agents at risk of receiving similarly flawed advice in the future. Moreover, your continued refusal to repudiate waterboarding does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces

Sincerely,

Richard J. Durbin

United States Senate

WASHINGTON, DC 20510

February 12, 2008

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Inspector General Fine and Counsel Jarrett:

We request that you investigate the role of Justice Department officials in authorizing and/or overseeing the use of waterboarding by the Central Intelligence Agency.

Attorney General Michael Mukasey refuses to investigate the Administration's authorization and use of waterboarding. CIA Director Michael Hayden has testified that the CIA waterboarded three detainees, and Attorney General Mukasey has testified that, "There are circumstances where waterboarding is clearly unlawful." Nonetheless, the Attorney General refused Senator Durbin's request to investigate because he does "not believe such an investigation is necessary, appropriate, or legally sustainable."

Attorney General Mukasey admitted that, "the CIA sought advice from the Department of Justice, and the Department informed the CIA that [waterboarding's] use would be lawful under the circumstances and within the limits and the safeguards of the program." The Attorney General's justification for refusing to open an investigation is that, "no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice." However, this does not address Senator Durbin's request that "a Justice Department investigation should explore whether waterboarding was authorized and whether those who authorized it violated the law" (our emphasis).

Waterboarding has a sordid history in the annals of torture by repressive regimes, from the Spanish Inquisition to the Khmer Rouge. The United States has always repudiated waterboarding as a form of torture and prosecuted it as a war crime. The Judge Advocates General, the highest-ranking attorneys in each of the four military services, have stated unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions.

Yet, despite the virtually unanimous consensus of legal scholars and the overwhelming weight of legal precedent that waterboarding is illegal, certain Justice Department officials, operating behind a veil of secrecy, concluded that the use of waterboarding is lawful. We believe it is

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appropriate for you to investigate the conduct of these Justice Department officials. As you know, a similar investigation is underway regarding Justice Department officials who advised the National Security Agency that its warrantless surveillance program is lawful.

To restore the faith of our intelligence professionals and the American people in the Justice Department's ability to provide accurate and honest legal advice, we request that you make your findings public.

We ask that you explore, among other things:

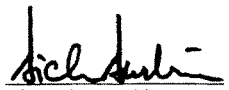
- Did Justice Department officials who advised the CIA that waterboarding is lawful perform legal work that meets applicable standards of professional responsibility and internal Justice Department policies and standards? For example, did these officials consider all relevant legal precedents, including those that appear to contradict directly their conclusion that waterboarding is lawful? Did these officials consult with government attorneys who are experts in the relevant legal standards, e.g. Judge Advocates General who are experts in the Geneva Conventions? Was it reasonable to rely on standards found in areas such as health care reimbursement law in evaluating interrogation techniques?

- Were Justice Department officials who advised the CIA that waterboarding is lawful insulated from outside pressure to reach a particular conclusion? What role did White House and/or CIA officials play in deliberations about the lawfulness of waterboarding?

We agree with Attorney General Mukasey that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. However, if CIA agents or contractors have been put in jeopardy by misguided counsel from the Justice Department, including legal opinions that the Administration has been forced to repudiate, and as a result they risk war crimes prosecution overseas, this is a serious matter. It also places CIA agents at risk of receiving similarly flawed advice in the future. Moreover, the Justice Department's continued refusal to repudiate waterboarding does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. We believe it merits investigation to determine if these grievous results were the product of legal theories violating the Department's professional standards, or improper influence violating the Department's standards for independent legal advice.

We respectfully request that you inform us whether you plan to initiate a review as soon as possible, and no later than February 19, 2008. We also request that you inform us whether the results of your review will be provided to Congress and made public. Thank you for your time and consideration.

Sincerely,



Richard J. Durbin

Sheldon Whitehouse

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U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

FEB 19 2008

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Senators Durbin and Whitehouse:

In your February 12, 2008 letter to this Office (OPR) and to the Office of the Inspector General, you requested an investigation into the role of Department of Justice officials in authorizing and overseeing the use of waterboarding by the Central Intelligence Agency. I am writing to advise you that the issues raised in your letter are included in a pending OPR investigation into the circumstances surrounding the drafting of the August 1, 2002 memorandum from the Department's Office of Legal Counsel to Alberto R. Gonzales, then Counsel to the President, captioned "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," and related, subsequent OLC memoranda. Among other issues, we are examining whether the legal advice contained in those memoranda was consistent with the professional standards that apply to Department of Justice attorneys.

Upon completion of our investigation, we will provide you with our results. Moreover, because of the significant public interest in this matter, OPR will consider releasing to Congress and the public a non-classified summary of our final report.

Thank you for bringing your concerns to our attention. We hope you will find this information useful.

Sincerely,

H. Marshall Jarrett
Counsel

02/19/2008 5:40PM

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 16, 2009

The Honorable H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Mr. Jarrett:

We write to inquire about the status of the Office of Professional Responsibility's (OPR) investigation of Justice Department attorneys who provided legal advice regarding waterboarding and other abusive interrogation techniques.

According to "A Torture Report Could Spell Big Trouble for Bush Lawyers," a February 14th *Newsweek* article by Michael Isikoff, a draft report on OPR's findings was "submitted in the final weeks of the Bush Administration." The article states that the OPR report "sharply criticized" former Justice Department officials Jay Bybee, John Yoo, and Stephen Bradbury, and that then Attorney General Michael Mukasey "strongly objected" to the report's findings.

As you know, on February 12, 2008, we sent a letter to you and Justice Department Inspector General Glenn Fine requesting an investigation of Justice Department officials who authorized waterboarding and asking whether the results of this investigation would be provided to Congress and the American people.

On February 18, 2008, you responded that you were investigating whether legal advice in Office of Legal Counsel memoranda regarding interrogation techniques "was consistent with the professional standards that apply to Department of Justice Attorneys." You also wrote: "Upon completion of our investigation, we will provide you with our results. Moreover, because of the significant public interest in this matter, OPR will consider releasing to Congress and the public a non-classified summary of our final report."

On July 9, 2008, during a Judiciary Committee hearing, Senator Durbin asked then Attorney General Mukasey whether he would approve the release of OPR's investigation. Attorney General Mukasey testified under oath, "If OPR wants it released, it will be released."

On October 1, 2008, Senator Durbin's chief counsel sent an e-mail to Keith B. Nelson, then Principal Deputy Assistant Attorney General of the Justice Department's Office of Legislative Affairs, stating, "Can you please let me know the status of OPR's investigation of DOJ attorneys who provided advice on interrogation matters? ... OPR Counsel Marshall Jarrett said he would provide the Senators with the results of the investigation upon its completion." On October 16,

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2008, Mr. Nelson responded, "Heard back from OPR. Should be done in 4-5 weeks. I believe he [Marshall Jarrett] will provide it to the Members. I'll let you know if anything else develops." Mr. Nelson did not contact Senator Durbin's staff again regarding this matter.

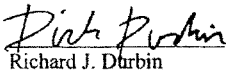
It has been one year since you notified us about OPR's investigation. We would appreciate an update on the investigation's status and would be grateful if you would respond to the following questions:

1. Have you submitted a draft report on OPR's findings? If so, when did you submit this report?
2. Did then Attorney General Mukasey object to the draft report's findings? If so, please describe these objections.
3. Has OPR interviewed Justice Department attorneys who provided legal advice regarding interrogation techniques, including former Office of Legal Counsel (OLC) Assistant Attorney General Jay Bybee, former OLC Deputy Assistant Attorney General John Yoo, and former OLC Deputy Assistant Attorney General Stephen Bradbury? If so, when did OPR conduct these interviews?
4. Have you recommended that an unclassified summary of OPR's report be released to Congress and the public? If so, when do you plan to release this summary?
5. Will you release to appropriate committees of Congress the classified portions (if any) of your report?

We agree with Attorney General Eric Holder and CIA Director Leon Panetta that our intelligence professionals should be able to rely in good faith on the Justice Department's legal advice. This good faith is undermined when Justice Department attorneys provide legal advice so misguided that it damages America's image around the world and the Justice Department is forced to repudiate it. If the officials who provide such advice fail to comply with professional standards, they must be held accountable in order to maintain the faith of the intelligence community and the American people in the Justice Department.

Our interest in this matter is such that we request that you respond to this letter at your earliest convenience, and if possible no later than February 23, 2009. Thank you for your time and consideration.

Sincerely,


Richard J. Durbin

Sheldon Whitehouse

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 25, 2009

The Honorable Richard J. Durbin
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Durbin:

This responds to your letter, dated February 16, 2009, which requested information about the status of OPR's investigation concerning whether legal advice in the Office of Legal Counsel (OLC) memoranda regarding interrogation techniques was consistent with the professional standards that apply to Department of Justice attorneys. An identical response is being sent to Senator Whitehouse, who joined in your letter.

OPR has completed its investigation of this matter and in late December 2008, provided the draft report to Attorney General Mukasey and invited comment. Attorney General Mukasey shared the report with Deputy Attorney General Filip and OLC. Thereafter, Attorney General Mukasey, Deputy Attorney General Filip and OLC provided comments, and OPR revised the draft report to the extent it deemed appropriate based on those comments.

In addition, during the course of the investigation, counsel for the former Department attorneys asked OPR for an opportunity to review and comment on the report prior to any disclosure of its results to Congress or the public. Attorney General Mukasey and Deputy Attorney General Filip likewise requested that OPR provide the former Department attorneys with such an opportunity. For these reasons, OPR is now in the process of sharing the revised draft report with them. When the review and comment period is concluded, OPR intends to review the comments submitted and make any modifications it deems appropriate to the findings and conclusions. OPR will then provide a final report to the Attorney General and Deputy Attorney General. After any additional review they deem appropriate, the Department will determine what disclosures should be made. Due to the complexity and classification level of the draft report, the review process described above likely will require substantial time and effort.

The Honorable Richard J. Durbin
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In determining appropriate disclosures, we will be mindful of the considerable interest that Congress has previously expressed in connection with this matter and will seek to accommodate the information needs of our oversight committees in response to requests from their chairmen. While we appreciate your request for a disclosure commitment, we can only fully evaluate the scope of appropriate disclosures once the review process is completed. We trust you understand that those decisions depend in part on the content and conclusions of the OPR final report and the outcome of any further Departmental review.

Thank you for your continued interest in this matter. We will supplement this response when additional information becomes available.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 31, 2009

M. Faith Burton
Acting Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 3266
Washington, D.C. 20530

Dear Ms. Burton:

Thank you for your letter, dated March 25, 2009, responding to our inquiry regarding the status of the Office of Professional Responsibility's (OPR) investigation of Justice Department attorneys who provided legal advice regarding waterboarding and other abusive interrogation techniques. We would appreciate your response to the additional questions posed below.

Your letter confirms that the OPR investigation was completed before the end of the Bush Administration, and that then-Attorney General Michael Mukasey provided OPR's draft report to the Office of Legal Counsel (OLC). According to your letter, Attorney General Mukasey, then-Deputy Attorney General Mark Filip and OLC provided comments and OPR "revised the draft report to the extent it deemed appropriate based on those comments."

Your letter does not indicate whether Steven Bradbury was recused from reviewing and providing comments on the draft report. Mr. Bradbury, who was then the Principal Deputy Assistant Attorney General of OLC, is reportedly a subject of the OPR investigation. As such, it would appear to be a conflict of interest for Mr. Bradbury to review and comment on the OPR report on OLC's behalf. We note that on January 15, 2009, Mr. Bradbury issued a "Memorandum for the Files" criticizing OLC opinions issued in 2001-2003. He wrote that the January 15th memorandum and a previous memorandum were 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." If Mr. Bradbury did review the OPR report, this could have improperly influenced the opinions he expressed on OLC's behalf in the January 15th memorandum, particularly his decision to emphasize that the authors of discredited OLC opinions on detainee issues had not necessarily violated their professional responsibilities.

According to your letter, Attorney General Mukasey and Deputy Attorney General Filip asked OPR to allow former Justice Department officials who were subjects of the investigation to review and comment on the report prior to any disclosure of its results to Congress or the public. According to media reports, these officials are former Office of Legal Counsel head Jay Bybee and former OLC official John Yoo. According to "OPR Process," posted at http://www.usdoj.gov/opr/proc-hdl.htm:

> In many cases, OPR notifies the attorney against whom the allegation has been made and requests a written response. OPR may also conduct on-site investigations. Based on the

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results of the investigation, OPR prepares a report to the component head concerned with a copy to the Office of the Deputy Attorney General setting forth its findings and conclusions, and advises the complainant and the attorney involved of the conclusion reached.

Accordingly, while OPR often notifies an attorney of the allegations against her and the conclusion of the investigation, and provides the report on its findings and conclusions to the attorney's component head, it appears that it is a departure from normal OPR practice to provide an opportunity for the attorney to review and comment on the report.

Your letter states that OPR is "now in the process of sharing the revised draft report" with former Justice Department attorneys who are the subjects of the investigation. The letter does not indicate when this process will be completed or whether the attorneys have been given a deadline for responding.

Your letter indicates that OPR will provide a final report to the Attorney General and the Deputy Attorney General for their review. We are concerned that the Attorney General and the Deputy Attorney General, and ultimately Congress, will review a report that has undergone significant revisions at the behest of the subjects of the investigation without the benefit of reviewing OPR's initial draft report.

Please respond to the following questions:

1. Was Steven Bradbury involved in reviewing and commenting on the draft OPR report?

2. Is there any precedent for allowing the subject of an OPR investigation to review and provide comments on a draft report containing OPR's findings and conclusions?

3. Have the former Justice Department attorneys who are the subjects of the investigation been given a deadline for responding?

4. Have counsel or other officials from other Executive Branch agencies or the White House been given an opportunity to review the draft OPR report? If so, is this a departure from normal practice?

5. Will OPR provide Attorney General Holder and Deputy Attorney General Ogden with the draft report that it provided to Attorney General Mukasey so that Attorney General Holder and Deputy Attorney General Ogden will know what revisions have been made to the report?

Thank you for your time and consideration.

Sincerely,

Richard J. Durbin

Sheldon Whitehouse

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 4, 2009

The Honorable Richard Durbin
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Durbin:

This responds to your letter of March 31, 2009, which requested additional information, following up our March 25, 2009 letter, concerning the investigation by the Department's Office of Professional Responsibility (OPR) into legal advice provided by the Office of Legal Counsel (OLC) regarding interrogation techniques. We are sending an identical response to Senator Whitehouse, who joined in your letter to us.

In the past, former Department employees who were subjects of OPR investigations typically have been permitted to appeal adverse OPR findings to the Deputy Attorney General's Office. A senior career official usually conducted that appeal by reviewing submissions from the subjects and OPR's reply to those submissions, and then reaching a decision on the merits of the appeal. Under this ordinary procedure, the career official's decision on the merits was final. This appeal procedure was typically completed before the Department determined whether to disclose the Report of Investigation to the former employees' state bar disciplinary authorities or to anyone else. Department policy usually requires referral of OPR's misconduct findings to the subject's state bar disciplinary authority, but if the appeal resulted in a rejection of OPR's misconduct findings, then no referral was made. This process afforded former employees roughly the same opportunity to contest OPR's findings that current employees were afforded through the disciplinary process. While the Department has previously released public summaries of OPR reports under some circumstances, public release of the reports themselves has occurred only rarely. In the past, the release of a public summary occurred only after the subjects were afforded an opportunity to appeal any adverse findings. The Department currently is reviewing some of these procedures, but the described process has been the historic practice.

The OPR investigation in this matter has been the subject of significant congressional and public interest, unlike most OPR matters. In late December 2008, OPR advised Attorney General Mukasey and Deputy Attorney General Filip that it intended to publicly release its report of investigation in early January. However, Attorney General Mukasey and Deputy Attorney General Filip understood that, in response to requests from the former employees during the course of the investigation, OPR had agreed to provide them with an opportunity to review and comment on the report. Based on that understanding and upon the recommendation of the senior career Department

official referenced above, Attorney General Mukasey and Deputy Attorney General Filip asked OPR to afford the subjects the chance to respond to the report prior to any release. OPR agreed to that procedure. The Department's new leadership likewise agreed that this opportunity for review and comment was fair and reasonably correlates with the process usually applicable to OPR investigations relating to former employees. The former employees have until May 4, 2009, to provide their comments on the draft report. Any revisions to the report thereafter will be based upon OPR's best judgments about the accuracy and fairness of the document.

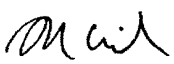
Then Principal Deputy Assistant Attorney General Steven Bradbury participated in OLC's review of and response to the draft report. OPR has considered the concerns you expressed regarding Mr. Bradbury's participation in the review process. Because Mr. Bradbury's participation in that process was transparent, OPR advised that it can evaluate the OLC response with the knowledge of Mr. Bradbury's participation just as it would evaluate a response from anyone whose actions were within the scope of OPR's investigation. Therefore, OPR does not believe that Mr. Bradbury's participation in the OLC response was improper.

OPR also shared its initial draft with the Central Intelligence Agency (CIA) for a classification review. In its response regarding classification issues, the CIA requested an opportunity to provide substantive comment on the report. OPR has since provided the revised draft for both classification review and substantive comment. We have not examined whether disclosures were made to the White House in either Administration. However, we can confirm that OPR has neither sought nor received comment from any other Executive Branch agencies or the White House.

Finally, the Attorney General and Deputy Attorney General will have access to whatever information they need to evaluate the final report and make determinations about appropriate next steps.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,



Ronald Weich
Assistant Attorney General

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