DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

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

July 29, 2009

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INTRODUCTION AND SUMMARY

In June 2004, an August 1, 2002 memorandum from then Assistant Attorney General (AAG) Jay S. Bybee of the Department of Justice's Office of Legal Counsel (OLC) to Alberto R. Gonzales, then White House Counsel, was leaked to the press. The memorandum was captioned "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A" (the Bybee Memo), and had been drafted primarily by OLC's then Deputy Assistant Attorney General, John Yoo. The memorandum examined a criminal statute prohibiting torture, 18 U.S.C. §§ 2340-2340A (the torture statute), in the context of interrogations conducted outside the United States.

One of the primary areas of discussion in the Bybee Memo was the statute's description of what constitutes "torture." The definition contained in the statute is as follows:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
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> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340.

The Bybee Memo concluded that under the torture statute, torture:

> covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is sufficient range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.
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> Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.

Bybee Memo at 46.

Some commentators, law professors, and other members of the legal community were highly critical of the Bybee Memo. For example, Harold Koh, then Dean of Yale Law School, characterized the memorandum as "blatantly

wrong" and added: "[i]t's just erroneous legal analysis." Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, Financial Times, June 10, 2004. A past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, stated that "the government lawyers involved in preparing the documents could and should face professional sanctions." *Id.* Cass Sunstein, a law professor at the University of Chicago, said: "It's egregiously bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless." Adam Liptak, *Legal Scholars Criticize Memos on Torture*, New York Times, June 25, 2004 at A14. In the same article, Martin Flaherty, an expert in international human rights law at Fordham University, commented, "The scholarship is very clever and original but also extreme, one-sided and poorly supported by the legal authority relied on." *Id.*

Other commentators observed that the Bybee Memo did not address important Supreme Court precedent and that it ignored portions of the Convention Against Terrorism (CAT) that contradicted its thesis. *Id.* One article suggested that the Bybee Memo deliberately ignored adverse authority, and commented that "a lawyer who is writing an opinion letter is ethically bound to be frank." Kathleen Clark and Julie Mertus, *Torturing Law; The Justice Department's Legal Contortions on Interrogation*, Washington Post, June 20, 2004 at B3; *see* R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Washington Post, July 4, 2004 at A12. Other critics suggested that the Bybee Memo was drafted to support a pre-ordained result. Mike Allen and Dana Priest, *Memo on Torture Draws Focus to Bush*, Washington Post, June 9, 2004 at A3. Similar criticism was raised by a group of more than 100 lawyers, law school professors, and retired judges, who called for a thorough investigation of how the Bybee Memo and other, related OLC memoranda came to be written. Fran Davies, *Probe Urged Over Torture Memos*, Miami Herald, August 5, 2004 at 6A; Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, Washington Post, August 5, 2004 at A4.

A few lawyers defended the Bybee Memo. In a Wall Street Journal op-ed piece, two legal scholars argued that the Bybee Memo appropriately conducted a dispassionate, lawyerly analysis of the law and properly ignored moral and policy

considerations. Eric Posner and Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall Street Journal, July 6, 2004 at A22.[1]

On June 21, 2004, the Office of Professional Responsibility (OPR) received a letter from Congressman Frank Wolf. In his letter, Congressman Wolf expressed concern that the Bybee Memo provided legal justification for the infliction of cruel, inhumane, and degrading acts, including torture, on prisoners in United States custody, and asked OPR to investigate the circumstances surrounding its drafting.

On June 22, 2004, Executive Branch officials responded to public criticism of the Bybee Memo. Then White House Counsel Alberto Gonzales told reporters:

> [T]o the extent that [the Bybee Memo] in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President's power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President. . . .
>
> Unnecessary, over-broad discussions . . . that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review, and may be replaced, if appropriate, with more concrete guidance addressing only those issues necessary for the legal analysis of actual practices.

White House Daily Press Briefing, June 22, 2004 (2004 WLNR 2608695). The same day, Deputy Attorney General (DAG) James Comey, cited in news reports as a "senior Justice official" or a "top Justice official," told reporters during a not-for-

[1] *See also* Testimony of Michael Stokes Paulsen, Professor of Law, University of St. Thomas School of Law, before the Subcommittee on Administrative Oversight and the Courts of the United States Senate Committee on the Judiciary (May 13, 2009). In addition, John Yoo has vigorously defended his work since leaving the Department. *See, e.g.*, John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press 2006); John Yoo, *A Crucial Look at Torture Law*, L.A. Times, July 6, 2004 at B11; John Yoo, *Commentary: Behind the Torture Memos*, UC Berkeley News, January 4, 2005 (available at http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml).

attribution briefing session that the analysis in the Bybee Memo was "over broad," "abstract academic theory," and "legally unnecessary." Toni Locy & Joan Biskupic, *Interrogation Memo to be Replaced,* USA Today, June 23, 2004 at 2A. Comey reportedly added, "We're scrubbing the whole thing." *Id.*

On July 15, 2004, OPR asked then OLC AAG Jack Goldsmith, III, to provide certain information and documents relevant to the Bybee Memo. OLC's then Principal Deputy AAG, Steven G. Bradbury, met with then OPR Counsel H. Marshall Jarrett on July 23, 2004, to discuss that request. Bradbury provided OPR with a copy of the Bybee Memo, but asked us not to pursue our request for additional material. After considering the issues raised by Bradbury, we repeated our request for additional documents on August 9, 2004. On August 31, 2004, Bradbury gave OPR copies of unclassified documents relating to the Bybee Memo, including email and documents from the computer hard drives and files of the former OLC attorneys who worked on the project. We learned that, in addition to Bybee, the following OLC attorneys worked on the Bybee Memo: former Deputy AAG John Yoo; former Deputy AAG Patrick Philbin; and former OLC Attorney (b)(6), (b)(7)(C) .[2]

We reviewed the Bybee Memo, along with email, correspondence, file material, drafts, and other unclassified documents provided by OLC. On October 25, 2004, OPR formally initiated an investigation.[3]

On December 30, 2004, OLC Acting AAG Daniel Levin issued an unclassified Memorandum Opinion for the Deputy Attorney General captioned

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[2] (b)(6), (b)(7)(C)

[3] OLC initially provided us with a relatively small number of emails, files, and draft documents. After it became apparent, during the course of our review, that relevant documents were missing, we requested and were given direct access to the email and computer records of (b)(6), (b)(7)(C) Yoo, Philbin, Bybee, and Goldsmith. However, we were told that most of Yoo's email records had been deleted and were not recoverable. 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 (discussed below) was created – had also been deleted and were reportedly not recoverable. Although we were initially advised that Goldsmith's records had been deleted, we were later told that they had been recovered and we were given access to them.

"Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A" (the Levin Memo). The Levin Memo, which was posted on OLC's web site the same day, superseded the Bybee Memo and eliminated or corrected much of its analysis.

During the course of our investigation, we learned that the Bybee Memo was accompanied by a second, classified memorandum (addressed to then Acting General Counsel of the Central Intelligence Agency (CIA) John Rizzo and dated August 1, 2002), which discussed the legality of specific interrogation techniques (the Classified Bybee Memo). We also learned that the OLC attorneys who drafted the Bybee Memo and the Classified Bybee Memo subsequently prepared a classified March 14, 2003 Memorandum to the Department of Defense: "Memorandum for William J. Haynes, II, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Unlawful Combatants Held Outside the United States* (March 14, 2003)" (the Yoo Memo).

We conducted interviews of (b)(6), (b)(7)(C), Patrick Philbin, and Jack Goldsmith, all of whom told us that they could not fully discuss their involvement without referring to Sensitive Compartmented Information. We eventually obtained the necessary clearances and requested and reviewed additional documents from OLC and from the CIA. We then re-interviewed (b)(6), (b)(7)(C), Philbin, and Goldsmith, and interviewed Yoo and Bybee.[4]

In addition, we interviewed former DAG James Comey; former OLC Acting AAG Daniel Levin; former Criminal Division AAG Michael Chertoff; former Criminal Division Deputy AAG Alice Fisher; OLC Principal Deputy AAG Steven Bradbury; CIA Acting General Counsel John Rizzo;[5] former White House Counsel

[4] Bybee complained in his comments on OPR's draft report that he did not have access to classified material in preparing for his interview with OPR. That is inaccurate. Although our request to the National Security Counsel for security clearances for Bybee's attorneys had not been granted by the date of the interview, Bybee reviewed key documents, including emails and classified material, prior to his interview.

[5] Rizzo would not agree to meet with us until after his Senate confirmation hearing for the position of CIA General Counsel. That hearing was canceled and rescheduled, and finally held on June 19, 2007. We interviewed Rizzo on July 7, 2007.

Alberto Gonzales; former Counselor to Attorney General (AG) John Ashcroft, Adam Ciongoli; and former National Security Council (NSC) Legal Adviser John Bellinger, III.[6]

Some witnesses declined to be interviewed. Former AG Ashcroft did not respond to several interview requests but ultimately informed us, through his attorney, that he had declined our request. CIA Counter Terrorism Center (CTC) attorneys (b)(3) both refused to meet with us on the advice of counsel, but we were able to review brief summaries of their interviews with the CIA's Office of the Inspector General (CIA OIG) in connection with CIA OIG's investigation and May 7, 2004 report entitled "Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003)" (the CIA OIG Report). CTC attorney (b)(3) also refused our request for an interview, as did former CTC attorney (b)(3), although (b)(3) spoke briefly with us by telephone. Finally, former Counsel to the Vice President David Addington and former Deputy White House Counsel Timothy Flanigan did not respond to our requests for interviews.

In May 2005, Bradbury informed us that he had signed two classified memoranda that replaced the Classified Bybee Memo. Initially, we were permitted to review, but not to retain, copies of those documents, captioned "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005)" (the 2005 Bradbury Memo), and "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005)" (the Combined Techniques Memo). We were later provided with copies of these documents. The 2005 Bradbury Memo discussed certain individual

[6] Bellinger declined several requests for an interview, but informed us in response to a final request, as we were completing our draft report, that he would be willing to talk to us. We interviewed Bellinger on December 29, 2008.

interrogation techniques (referred to elsewhere herein as "enhanced interrogation techniques" or "EITs") and concluded that their use by CIA interrogators would not violate the torture statute. The Combined Techniques Memo concluded that the combined effects of those EITs would not render a prisoner unusually susceptible to severe physical or mental pain or suffering and thus would not violate the torture statute.

On July 20, 2007, the *New York Times* reported that President Bush had signed an executive order allowing the CIA to use interrogation techniques not authorized for use by the United States military, and that the Department of Justice had determined that those techniques did not violate the Geneva Conventions. Shortly thereafter, reporter Jane Mayer wrote in the August 13, 2007 issue of the *New Yorker* magazine that Senator Ron Wyden had placed a "hold" on the confirmation of John Rizzo as CIA General Counsel after reviewing a "classified addendum" to the president's executive order.

In late August 2007, we asked OLC to provide copies of the executive order and the "classified addendum." Bradbury informed us that there was no "classified addendum," but that he had drafted an additional classified opinion, captioned "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* (July 20, 2007)" (the 2007 Bradbury Memo). When we obtained copies of those documents on August 29, 2007, we learned that there was a third classified OLC memorandum – "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the*

Interrogation of High Value al Qaeda Detainees (May 30, 2005)" (the Article 16 Memo).[7] We reviewed those documents and conducted additional interviews.

After he became Attorney General in late 2007, Michael Mukasey reported to Congress, in his July 2, 2008 Responses to Questions for the Record by the Senate Committee on the Judiciary, that he had reviewed the Bradbury Memos and that he had concluded that the current CIA interrogation program was lawful. He also reported that the Bradbury Memos' analyses were "correct and sound."

A draft of OPR's report was completed in December 2008, and provided to Attorney General Mukasey and Deputy Attorney General Mark Filip for their comments and a sensitivity review for information that could not be made public. On December 31, 2008, OPR attorneys met with AG Mukasey and DAG Filip. The two were highly critical of the draft report's findings. However, AG Mukasey commented that the August 1, 2002 Bybee Memo was a "slovenly mistake."

On January 19, 2009, AG Mukasey and DAG Filip submitted a letter to OPR outlining their concerns and criticisms of the draft report.

On January 22, 2009, President Obama issued an executive order providing, among other things, that no officers, employees, or agents of the United States government could rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009.

OPR provided copies of the draft report to Bybee, Yoo, Philbin, and the CIA for review and comment. AG Mukasey gave a copy of the draft to OLC for comment and Bradbury participated in the review of the draft report. OLC's

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[7] According to Bradbury, he did not bring the Article 16 Memo to OPR's attention when it was issued because it did not replace either the Bybee Memo or the Yoo Memo, which OLC understood to be the only subjects of OPR's investigation. The Article 16 Memo may have been inadvertently turned over to us when a junior OLC attorney produced other classified documents we had asked to reexamine in August 2007. The 2005 Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo are hereinafter referred to collectively as the Bradbury Memos.

comments were received in January 2009. OPR later offered Bradbury an additional opportunity to comment on the draft report, and he declined. Written comments from Bybee, Yoo, and Philbin were received by OPR on May 3, 2009.[8] Yoo also submitted a letter from Ronald Rotunda, a professor at Chapman University Law School. Comments were submitted by Rizzo on April 8, 2009. OPR carefully reviewed these responses and made changes to the draft report where appropriate.[9]

Although we have attempted to provide as complete an account as possible of the facts and circumstances surrounding the Department's role in the implementation of certain interrogation practices by the CIA, it is important to note that our access to information and witnesses outside the Department of Justice was limited to those persons and agencies that were willing to cooperate with our investigation.

During the course of our investigation significant pieces of information were brought to light by the news media and, more recently, by congressional investigations. 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.

Although we refer to works of legal commentary in this report, we did not base our conclusions on any of those sources. We independently researched and analyzed the issues that are discussed in this report. Citations to law review articles and other commentary are intended to note the sources of certain arguments and to inform the reader where further discussion can be found. They

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[8] Those comments are subsequently referred to as the Bybee Response, Bybee Classified Response, Yoo Response, and Philbin Response.

[9] Because they were not criticized in the draft report, OPR did not request that either [redacted], Levin, or Goldsmith provide comments on the draft report. However, Goldsmith sent Associate Deputy Attorney General David Margolis a memorandum discussing the OPR investigation.

are not offered as support for our conclusions.

Similarly, although we report the views of some former Department officials regarding the merits of the memoranda, we did not base our findings on their comments. Our findings are limited to the particular circumstances of this case, which, as discussed below, involved issues of the highest importance that demanded the highest degree of thoroughness, objectivity, and candor from the lawyers involved.

Based on the results of our investigation, we concluded that former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.

We concluded that former AAG 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.[10]

We did not find that the other Department officials involved in this matter committed professional misconduct.

In addition to these findings, we recommend that, for the reasons discussed in this report, the Department review certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG.

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[10] Pursuant to Department policy, we will notify bar counsel in the states in which Yoo and Bybee are licensed.

I. BACKGROUND

A. The Office of Professional Responsibility

OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. 28 C.F.R. Section 0.39a(a)(1). In addition to reporting its findings and conclusions in individual investigations, OPR is also charged with providing advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures that become evident during the course of OPR's investigations. 28 C.F.R. Section 0.39a(a)(8).

OPR receives allegations against Department attorneys from a variety of sources, including self-referrals and referrals of complaints by officials in U.S. Attorneys' offices and litigating divisions, private attorneys, defendants and civil litigants, other federal agencies, state or local government officials, judicial and congressional referrals, and media reports.

Upon receipt, OPR reviews allegations and determines whether further investigation is warranted. OPR ordinarily completes investigations relating to the actions of attorneys who have resigned or retired in order to better assess the impact of alleged misconduct and to permit the Attorney General and Deputy Attorney General to determine the need for changes in Department policies or practices.

OPR investigations normally include a review of all relevant documents and interviews of witnesses and the subjects of the investigation.[11] OPR has the power to compel the testimony of current Department employees and collect internal Department documents, but it does not have the ability to subpoena documents

[11] Typically, interviews of witnesses are audio recorded; interviews of subjects typically are taken under oath and transcribed.

or witnesses.[12] In analyzing the evidence collected in the course of the investigation, OPR uses the preponderance of the evidence standard.[13]

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

If OPR concludes that a Department attorney committed professional misconduct, it will recommend an appropriate range of discipline for consideration by the attorney's supervisors. OPR may include in its report information relating to management and policy issues noted in the course of the investigation for consideration by Department officials. In cases in which OPR finds professional misconduct, pursuant to Department policy, it ordinarily notifies bar disciplinary authorities in the jurisdiction where the attorney is licensed of its finding.

B. This Investigation

This was not a routine investigation. A routine case investigated by OPR receives little or no public attention and discipline is handled within the Department without any public disclosure. This matter has been followed closely by the media, Congress, the American public, and international audiences.

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[12] OPR's administrative review of allegations of professional misconduct is unlike civil litigation, where parties may request documents or notice depositions, or a criminal investigation, where access to witnesses and documents may be obtained through the use of a grand jury subpoena.

[13] OPR's use of the preponderance of the evidence standard is based on the statutory standard of proof for upholding a disciplinary action for misconduct. *See* 5 U.S.C. § 770(c)(1)(B). State bar authorities, on the other hand, generally use the higher "clear and convincing evidence" standard of proof.

Despite the complexity and notoriety of this matter, however, OPR must determine whether Department attorneys acted in conformity with the Department's expectations and professional obligations. Assessing compliance of Department attorneys with Departmental and professional standards, whether in conducting litigation or providing legal advice, is the core function of OPR.[14]

In order to best accomplish OPR's mission, we allowed the subjects of the investigation to review and comment on a draft of this report prior to its issuance. In addition, we recommended that the report be released publicly. We based our recommendation on the amount of public interest in this matter, the gravity of the matter, and the interest of the Department in full disclosure of the facts to the American public.

This investigation was long and difficult. It was hampered by the loss of Yoo's and Philbin's email records, our need to seek the voluntary cooperation of non-DOJ witnesses, and our limited access to CIA records and witnesses (including almost all of the CIA attorneys and all witnesses from the White House other than former White House Counsel Alberto Gonzales). Our investigation was slowed by some of the witnesses' initial reluctance to provide information, as well as time spent obtaining the necessary security clearances for OPR personnel, witnesses, and their attorneys. In addition, we were initially not permitted to copy or to retain copies of many of the key underlying documents, which increased the difficulty of our task. Moreover, the scope of our investigation changed as new information about the CIA interrogation program came to light through press reports and congressional investigations. All of these problems were exacerbated

[14] In his response, Bybee argued that "[i]t is not the role of OPR to critique legal judgment at all." Bybee Response at 59. We reject that assertion. As discussed above, the Department has charged OPR with the investigation of allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or *provide legal advice*.

In his response, Bybee also claimed – based on an examination of OPR's annual reports containing summaries of selected cases – that OPR has never previously reviewed legal advice. That claim is incorrect.

by limited OPR resources, in light of an unprecedented number of complex investigations of high-level officials occurring during this same time period.

C. The Office of Legal Counsel[15]

The Attorney General has delegated to the OLC the function of providing authoritative legal advice to the President and all the Executive Branch agencies. The OLC provides written opinions and oral advice in response to requests from the Counsel to the President, agencies of the Executive Branch, and offices within the Department. OLC opinions are binding on the Executive Branch.

In a memorandum that "reaffirm[ed] the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office," Principal Deputy AAG Bradbury stated that OLC's role is to provide "candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers."[16] As Bradbury wrote to the OLC attorneys:

> In general, we strive in our opinions for clarity and conciseness in the analysis and a balanced presentation of arguments on each side of an issue. . . . OLC's interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.

OLC Best Practices Memo at 3. Thus, "it 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." *Id.* at 1.

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15 Attachment A is a timeline of OLC leadership and significant events relevant to this report. Attachments B and C are glossaries of acronyms and of names used in the report. Attachment D is a chronological list of OLC memoranda on the issue of enhanced interrogation techniques.

16 Memorandum for Attorneys of the Office *Re: Best Practices for OLC Opinions*, authored by Steven G. Bradbury, Principal Deputy Assistant Attorney General, May 16, 2005 (OLC Best Practices Memo) (Attachment E) at 1. Bradbury told us that the OLC Best Practices Memo was written to "set forth some basic principles that we should all keep in mind as we prepare opinions" and to "reaffirm traditional practices in order to address some of the shortcomings of the past."

OLC attorneys from prior administrations share Bradbury's view of the mission and role of the OLC. These views are expressed in a document entitled Principles to Guide the Office of Legal Counsel, December 21, 2004 (OLC Guiding Principles) (Attachment F), signed by nineteen former OLC attorneys. The document explains that:

> When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC Guiding Principles at 1. The OLC should take the Executive Branch's goals into account and "assist their accomplishment within the law" without "seek[ing] simply to legitimate the policy preferences of the administration of which it is a part." *Id.* at 5.

The legal standards, including the rules of professional responsibility, that apply to all Department attorneys also apply to OLC attorneys.[17] Despite the complexity and difficulty of the issues the OLC attorneys handle, they are, and must be, held to professional legal standards. Furthermore, OLC attorneys must adhere to the well-established principles that were described in its own Best Practices Memo.

OLC's obligation to counsel compliance with the law pertains with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

> An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's

[17] We reject Bybee's assertion that "the rules of professional responsibility have no role to play in evaluating the conduct of OLC attorneys." Bybee Response at 3.

> constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. . . . OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all the varied work of the executive branch.

OLC Guiding Principles at 1, 2. If the OLC fails to provide complete and objective legal advice, it fails to properly represent its client – the Executive Branch.

These principles are not simply aspirational. They mirror the Model Rules of Professional Responsibility, which require that "a lawyer shall exercise independent professional judgment and render candid advice." Model Rules of Professional Conduct, Rule 2.1.[18]

The OLC's duties are heightened because many of its opinions will never be reviewed by a court or disclosed publicly and are made outside of an adversarial system where competing claims can be raised. *See* Model Rules of Professional Conduct, Rule 3.3(d), Candor toward the Tribunal ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse"). In contrast to attorneys in private practice, the OLC establishes through its opinions the state of the law for the Executive Branch, the head of which is constitutionally charged with upholding the Constitution and laws of the United States. U.S. Const. art. II, § 3.

The importance of the OLC's duties can be seen in the effect of its opinions on actions by government officials. As former OLC AAG Goldsmith stated:

> One consequence of OLC's authority to interpret the law is the power to bestow on government officials what is effectively an advance

[18] In addition, courts have frequently observed that the government has an overriding obligation to see that justice is done, and that such an overriding obligation imposes an expectation of even greater candor on government counsel than attorneys representing private parties. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935).

> pardon for actions taken at the edges of vague criminal laws. This is the flip side of OLC's power to say "no," and to put a brake on government operations. It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards. . . . Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecutions for wrongdoing.

Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 149-50 (WW Norton & Co. 2007).

D. OPR's Analytical Framework and Professional Standards

1. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

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

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages

in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.[19]

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

2. Professional Standards

Pursuant to Department of Justice regulations set forth at 28 C.F.R. Part 77, *Ethical Standards for Attorneys for the Government*, Department attorneys must conform to the rules of ethical conduct of the court before which a particular

[19] We disagree with Bybee's assertion in his response that the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), "squarely forecloses" any finding of recklessness on the facts at issue here. Bybee Response at 28. In *Safeco*, the Court defined the term "recklessness" as consistent with common law standards in the context of the Fair Credit Reporting Act, which requires willfulness to establish civil liability. The definition of "recklessness" under the OPR standard is explained in OPR's analytical framework and does not require willfulness.

case is pending. 28 C.F.R. § 77.4.[20] Where there is no case pending, "the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rules of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought." 28 C.F.R. § 77.4(c)(1). Because Bybee is a member of the District of Columbia Bar, the D.C. Rules of Professional Responsibility apply to his conduct.

Yoo is a member of the Pennsylvania bar. Under the Pennsylvania Disciplinary Rules of Professional Conduct, where the conduct in question is not in connection with a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred [shall be applied], or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Pennsylvania Disciplinary Rules of Professional Conduct, Rule 8.5, Disciplinary Authority, Choice of Law.[21] Because there is no
one jurisdiction in which the legal advice rendered in this matter will have effect, the District of Columbia bar rules, where Yoo authored the advice, apply.[22]

[20] These regulations implement Title 28, section 530B of the U.S. Code, which provides that an "attorney for the Government shall be subject to State laws and rules, and local Federal court rules governing attorneys in each State where such attorney engages in that attorney's duties . . . ." The phrase "attorney for the Government" includes "any attorney employed in . . . a Department of Justice agency." 28 C.F.R. § 77.2.

[21] In his response to the draft report, Yoo incorrectly asserted that the Pennsylvania Rules of Professional Conduct apply. Yoo also asserted that the Pennsylvania Bar's statute of limitations has run on any possible action against him. Department policy requires that OPR notify relevant state bars of professional misconduct findings. The state bar then applies its rules as it sees fit. As discussed above, the Department's interest in OPR's investigation of allegations of misconduct is to ensure that Department attorneys adhere to the highest ethical standards, not to assist state bars in enforcing their rules.

[22] In addition, we note that Philbin, (b)(6), (b)(7)(C) and Bradbury are members of the District of Columbia Bar. Philbin is also a member of the Massachusetts bar, and (b)(6), (b)(7)(C)

(b)(1), (b)(3)

(b)(1), (b)(3)

a. The Duty to Exercise Independent Professional Judgment and to Render Candid Advice

The Bybee Memo was written to advise the CIA on whether certain conduct would violate federal law. Thus, the OLC attorneys were not acting as advocates, but advisors, and had the duty, under D.C. Rule 2.1 ("Advisor") (Attachment G), to "exercise independent professional judgment and render candid advice."

This requirement is explained further in the commentary accompanying the rule:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.[23]

Echoing these concepts, the OLC Best Practices Memo observes that the office "has earned a reputation for giving candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers." OLC Best Practices Memo at 1.

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[23] D.C. Rule 2.1 also states that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The relevant commentary adds that "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." Because the rule's language regarding extra-legal considerations is permissive, however, a lawyer's decision not to provide such advice should not be subject to disciplinary review. D.C. Rules, Scope at ¶ 1; ABA, Ann. Mod. Rules Prof. Cond., Preamble and Scope at ¶ 14 (6th ed. 2007).

(b)(1), (b)(3)

(b)(1), (b)(3)

The ABA Committee on Ethics and Professional Responsibility wrote, in Formal Op. 85-352 (1985):

> [i]n the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged .... Competent representation of the client would require the lawyer to advise the client fully as to whether there is or was substantial authority for the position taken ....

Although some courts have found attorneys to have violated Rule 2.1, the reported decisions and professional literature provided little guidance for application of the standard in this context.[24] Accordingly, in addition to the rules and comments set forth immediately above, we looked to the OLC's own Best Practices Memo, as well as the OLC Guiding Principles Memo, for guidance.

b. The Duty of Thoroughness and Care

Relevant to Rule 2.1's duty to exercise independent professional judgment and render candid advice are the provisions of D.C. Rule 1.1. Rule 1.1(a) provides that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." D.C. Rule 1.1 (b) states that: "A

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[24] The Annotation to the Model Rule 2.1 explains the dearth of Rule 2.1 cases as follows:

> Although Rule 2.1 is the ethics rule that clearly enunciates the lawyer's duty to exercise independent professional judgment in representing a client, it is not invoked nearly as frequently as the ethics rules that address specific threats to that independence. These issues are fully addressed in the Annotations for Rule 1.7 (Conflict of Interest: Current Clients), Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules), and Rule 5.4 (Professional Independence of a Lawyer); also see Rule 1.9 (Duties to Former Clients) and Rule 1.18 (Duties to Prospective Client).

lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."[25] (Attachment H.)

Comment 5 to Rule 1.1 adds, among other things: "The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." In addition, as noted in Comment 2 to Rule 1.1, the analysis of precedent is an essential element of competent legal advice. Thus, an error or omission that might be considered an excusable mistake in a routine matter, might constitute professional misconduct if it relates to an issue of major importance.

Legal research must be sufficiently thorough to identify all current, relevant primary authority. Christina L. Kunz, et al., *The Process of Legal Research* 2-3 (Aspen Publishing 1989). *See United States v. Russell*, 221 F.3d 615, 620 (4th Cir. 2000) (in evaluating allegations of ineffective assistance of counsel, the court noted that, pursuant to Rule 1.1, "an attorney has a duty to adequately examine the law and facts relevant to the representation of his client"); OLC Best Practices Memo at 1 ("it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned").

Adequate steps must be taken to identify any subsequent authority that affirms, overrules, modifies, or questions a cited authority. *See, e.g., Continental Air Lines, Inc., v. Group Systems International Far East, Ltd.*, 109 F.R.D. 594, 596 (C.D. Cal. 1986) (in considering the imposition of Rule 11 sanctions, the court noted that failure to cite important U.S. Supreme Court case decided four months earlier "fell below the required standard of reasonable inquiry"); *Cimino v. Yale*, 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) (admonishing counsel that "diligent research, which includes Shepardizing cases, is a professional responsibility"); *Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172, 180 (W.D. Mo. 1984) (award for attorney's fees justified in part by fact that opposing counsel "never

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[25] This rule has been interpreted in the District of Columbia as requiring proof of a "serious deficiency" in an attorney's work and more than "mere careless errors." *In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002) (citations omitted).

Shepardized his principle [sic] authority" and failed to identify later decisions that limited the cited authority to its facts); Charles R. Calleros, *Legal Method and Writing* 177-78 (Aspen Publishing 5th ed. 2006).

In legal memoranda or opinion letters that seek to predict a legal outcome, a thorough discussion of the law should include the strengths and weaknesses of the client's position and should identify any counter arguments. Calleros at 88; William Statsky, *Legal Research and Writing, Some Starting Points* 179 (West Publishing Co. 1999). The OLC Best Practices Memo specifically states: "In general, we strive in our opinions for . . . a balanced presentation of arguments on each side of an issue . . . , taking into account all reasonable counter arguments." OLC Best Practices Memo at 3.

3. Analytical Approach

In order to determine whether the Department attorneys who drafted and reviewed the OLC memos met the minimum standards of independent professional judgment, candid advice, thoroughness, and care commensurate with the complexity and sensitivity of the issues confronting them, we reviewed the memoranda in question and identified the legal arguments and conclusions the authors presented. We examined the methodology and legal authority underlying the memoranda's arguments and conclusions in light of the basic standards discussed above. We also conducted independent research to determine whether the cited authorities constituted a thorough, objective, and candid view of the law at the time the memoranda were written.

Moreover, we looked at the circumstances surrounding these particular requests for legal advice, to assess whether the requirements of the applicable professional rules and Department regulations were met. In doing so, we began with the premise that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir.), *cert. denied*, 507 U.S. 1017 (1993). *See also, e.g., Filartiga v. Pena-Irala*, 630

F.2d 876, 884 (2d Cir. 1980).[26] We thus determined that Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct.

II. FACTS

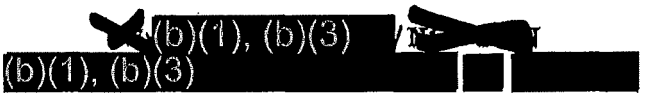
A. Subject and Witness Backgrounds

The first AAG for the OLC under the Bush administration was Jay Bybee, who was not sworn in until November 2001. Bybee graduated from the J. Reuben Clark Law School, Brigham Young University, in 1980. He worked as a Department attorney early in his career, first at the Office of Legal Policy (1984-1986), and then in the Civil Division (1986-1989). From 1989 to 1991, he was Associate Counsel to the President in the White House Counsel's Office. From 1991 to 1998, he was a professor at the Paul M. Hebert Law Center, Louisiana State University, and then at the William S. Boyd School of Law, University of Nevada from 1999 to 2000.

Bybee was nominated by President Bush for a position as federal judge on the United States Court of Appeals for the Ninth Circuit on May 22, 2002. He was confirmed on March 13, 2003, and he resigned from the Department on March 28, 2003.

John Yoo joined the OLC as a Deputy AAG in the Summer of 2001. He had graduated from Yale Law School in 1992 and then clerked for Judge Laurence H. Silberman, U.S. Court of Appeals for the D.C. Circuit. Yoo joined the faculty of the University of California Berkeley School of Law in 1993. He later took a leave of absence from Berkeley to clerk for U.S. Supreme Court Justice Clarence Thomas. He served as general counsel of the U.S. Senate Judiciary Committee from 1995-1996, then continued to teach at Berkeley until joining OLC.

[26] *Jus cogens* refers to principles of international law so fundamental that no nation may ignore them. Other *jus cogens* norms include the prohibitions against slavery, murder, genocide, prolonged arbitrary detention, and systematic racial discrimination. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 702 (1987).



At the time of the September 11, 2001 terrorist attacks, Yoo was the resident expert in the OLC on foreign policy and national security issues. Yoo wrote in his book, *War By Other Means*:

> Among scholars, I was probably best known for my work on the historical understanding of the Constitution's war powers, and I had written a number of articles on the relationship between presidential
>
> and legislative powers over foreign affairs. . . . I was one of the few appointed Justice Department officials whose business was national security and foreign affairs.

John C. Yoo, *War By Other Means: An Insider's Account of the War on Terror* 20 (Atlantic Monthly Press 2006).

After September 11, 2001, Yoo authored a number of OLC opinions dealing with terrorism and presidential power. One of the first was dated September 25, 2001, and was entitled "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." In the opinion, signed by Yoo, he asserted that no law "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make." In that same time period, Yoo authored a memorandum on the legality of a program of warrantless electronic surveillance by the National Security Agency (NSA) and a memorandum on the applicability of the Geneva Convention to al Qaeda and Taliban detainees.[27]

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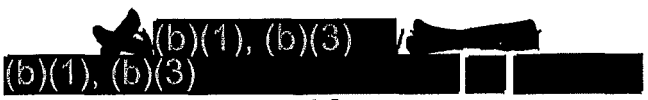
[27] The latter memorandum, which was signed by Bybee, concluded that Common Article Three of the Geneva Conventions did not apply to al Qaeda or Taliban detainees. In a February 2002 memorandum, President Bush issued a formal decision that Common Article Three did not apply to the armed conflict with al Qaeda. These findings were subsequently rejected by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (overturning the opinion of the United States Court of Appeals for the D.C. Circuit by a 5-4 vote).



(b)(1), (b)(3)

Yoo resigned from the Department in late May 2003 and returned to his tenured position at Berkeley.

Patrick F. Philbin graduated from Harvard Law School in 1992. He clerked for Supreme Court Justice Clarence Thomas from 1993 to 1994. Philbin was an associate at the law firm of Kirkland & Ellis for several years before joining the Department. In September 2001, he became a Deputy AAG in OLC. In June 2003, he became an Associate Deputy Attorney General in the Office of the Deputy Attorney General. He resigned from the Department in 2005 and returned as a partner to Kirlkand & Ellis.

(b)(6), (b)(7)(C)

Jack Goldsmith, III, is a 1989 graduate of Yale Law School. In 1991, he received a graduate degree from Oxford University, and from 1992 to 1994 he worked as an associate at the Washington, D.C. office of Covington & Burling. He became an Associate Professor at the University of Virginia School of Law in 1994, and a Professor at the University of Chicago School of Law in 1997. From September 2002 until July 2003 he worked at the Defense Department, assisting General Counsel Haynes on international law issues. In July 2003 he was asked to take the position of AAG at OLC, and he began working at the Department on October 6, 2003. Goldsmith resigned from the Department on July 17, 2004. He is currently a tenured Professor of Law at Harvard Law School.

Daniel Levin served as the Acting AAG for OLC from June 2004, until he resigned from the Department in February 2005. Prior to serving as Acting AAG, Levin held a number of high-level positions in the Department, including Chief of

(b)(1), (b)(3)

Staff to the Director of the FBI (2001-2002), and Counselor to the Attorney General (2002, 2003-2004). Levin became Senior Associate Counsel to the President and Legal Adviser to the National Security Council in 2005. He is currently a partner at the law firm of White & Case.

After Levin's departure from OLC, Steven G. Bradbury, the Principal Deputy AAG under Goldsmith, became the Acting AAG and was nominated by the White House for the position of AAG of OLC on June 23, 2005. Bradbury graduated from the University of Michigan Law School in 1988. He was an Attorney Advisor at OLC from 1991-1992, and served as a law clerk for Supreme Court Justice Clarence Thomas from 1992-1993. Bradbury was at Kirkland & Ellis from 1993 to 2004, first as an associate and then as a partner. In April 2004, Bradbury was hired by Goldsmith to serve as his Principal Deputy AAG.

Bradbury's nomination to be AAG expired without action by the Senate. Bradbury continued to act as head of OLC under the title of Principal Deputy AAG. He was renominated by President Bush in January 2007 and January 2008, but he was not confirmed.

Prior to the current administration taking office, the OLC either withdrew or cautioned against reliance on a number of Yoo's and Bybee's opinions. In addition to the withdrawal of the Bybee and Yoo Memos, the memorandum authored by Yoo relating to warrantless electronic surveillance by the NSA was withdrawn by Goldsmith. Bradbury later cautioned against reliance on seven additional memoranda. On October 6, 2008, Bradbury wrote a memorandum "advising that caution should be exercised before relying in any respect" on the October 23, 2001 Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States*. Bradbury found that the memorandum was "the product of an extraordinary – indeed, we hope, a unique – period in the history of the Nation: the immediate aftermath of the attacks of 9/11." However,

it found that the memorandum's treatment of several legal issues was "either incorrect or highly questionable."[28]

On January 15, 2009, Bradbury issued another memorandum, identifying certain propositions in several OLC memoranda authored after September 11, 2001, and stating that they did not "reflect the current views" of the OLC.[29] Bradbury stated that some of the OLC opinions – including the previously withdrawn Bybee and Yoo Memos and three additional opinions authored by Bybee, Yoo, and Philbin, "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." Bradbury January 15, 2009 Memo at 2.

Bradbury also withdrew a Yoo memorandum which "relied on a doubtful interpretation of the Foreign Intelligence Surveillance Act (FISA)," and confirmed that two other opinions – one by Bybee and one by Yoo – that dealt with the President's authority to suspend treaties had been withdrawn. *Id.* at 6-8. Finally, Bradbury withdrew another memorandum by Yoo, noting that the memorandum's assertion that "national self-defense" was a justification for warrantless searches "inappropriately conflate[d] the Fourth Amendment analysis for government searches with that for the use of deadly force." *Id.* at 10.

[28] Bradbury October 6, 2008 Memo at 1. These included Yoo's findings in the memorandum that: (1) the Fourth Amendment would not apply to domestic military operations designed to deter and prevent further terrorist attacks; (2) "broad statements" suggesting that First Amendment speech and press rights under the Constitutionally would potentially be subordinated to overriding military necessities; and (3) that domestic deployment of the Armed Forces by the President to prevent and deter terrorism would fundamentally serve a military purpose rather than law enforcement purpose and thus would not violate the Posse Comitatus Act. These and other positions taken in the memorandum were disavowed by Bradbury.

[29] Bradbury January 15, 2009 Memo at 1. Bradbury noted that his memorandum on the previous OLC opinions was not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility."

(b)(1), (b)(3)

Bradbury resigned from the Department in January 2009. He is currently a partner at Dechert, LLP.

B. The Bybee Memo and the Classified Bybee Memo (August 1, 2002)

1. The CIA Interrogation Program

On September 17, 2001, President Bush issued a Memorandum of Notification (MoN) that authorized the CIA, among other things (b)(1) to conduct operations "designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities." (b)(1), (b)(5)

Following issuance of the MoN, the CIA began developing a system of secret overseas facilities to hold "high value" terrorist suspects. (b)(1)

CIA Acting General Counsel John Rizzo told us that the term "interrogation" has traditionally been used by the CIA to describe active, aggressive questioning designed to elicit information from an uncooperative or hostile subject, as opposed to "debriefing," which involves questioning the subject in a non-confrontational way. Rizzo told us that throughout most of its history the CIA did not detain subjects or conduct interrogations. Prior to the September 11, 2001 terrorist attacks, CIA personnel debriefed sources and (b)(1), but the agency was not authorized to

(b)(1), (b)(3)

detain or interrogate individuals and, therefore, had no institutional experience or expertise in that area.[30]

In late 2001, CIA CTC attorney (b)(3) asked CTC attorney (b)(3) to draft a memorandum on the parameters of legally permissible interrogation. (b)(3) told OPR that (b)(3) only had a few days to complete the assignment. (b)(3) said she looked at the relevant treaties, statutes and case law, including the CAT and the torture statute, and drafted a short memorandum.

In response to our request for a copy of (b)(3) memorandum, the CIA provided an untitled, 28-page draft document dated November 7, 2001, which did not include the name of the author or recipient. It is organized into the following ten sections: the applicability of the Constitution overseas; the applicability of habeas corpus overseas; length of detention; potential civil liability; coordination with law enforcement; interrogation procedures; operating procedures; the status of Guantanamo Bay; short-term detention; and disposition of detainees.

The November 7, 2001 memorandum reflected the view that the CIA's interrogation policy would allow only methods that "generally comport with commonly accepted practices deemed lawful by United States Courts [and] permissible under applicable United States law (including statutory law, common law, and those customary and treaty-based international legal principles that are accepted by the United States.)" In addition, the memorandum recommended that CIA prison facilities be operated as if its inmates were protected by United States law.

The CIA also provided us with a copy of an undated, unsigned, ten-page memorandum titled "United Nations Convention Against Torture and Other Cruel,

30 *But see* Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Henry Holt & Co. 2006) (describing the CIA's role in sponsoring and conducting research into coercive interrogation techniques in the decades following World War II, and its propagation of such techniques overseas during the Cold War era).

Inhumane, or Degrading Treatment." The memorandum discussed the CAT definition of torture, the ratification history of the CAT, United States reservations to the treaty, interrogation-related case law from foreign jurisdictions, and a discussion of cruel and unusual punishment under the Eighth Amendment.[31]

The interrogation of suspected terrorists overseas was initially conducted jointly by CIA operational personnel and FBI agents. The FBI used traditional "rapport building" interrogation techniques that were consistent with United States criminal investigations. The CIA operatives soon became convinced, however, that conventional interrogation methods and prison conditions were inadequate to deal with hardened terrorists and that more aggressive techniques would have to be developed and applied. CIA leadership agreed, and began exploring the possibility of developing "Enhanced Interrogation Techniques," or EITs.

The issue of how to approach interrogations reportedly came to a head after the capture of a senior al Qaeda leader, Abu Zubaydah, during a raid in Faisalabad, Pakistan in late March 2002. Abu Zubaydah was transported to a "black site," a secret CIA prison facility (b)(1), where he was treated for gunshot wounds he suffered during his capture.

According to a May 2008 report by the Department of Justice Office of the Inspector General and other sources, the FBI and the CIA planned to work together on the Abu Zubaydah interrogation, although the FBI acknowledged that

[31] Although the CIA Office of General Counsel (OGC) told us that these were the only CIA memoranda in its possession on interrogation policy, some of the information we obtained from the CIA suggested otherwise. In an internal email message dated February 1, 2002, from CTC attorney (b)(3) to (b)(3) referred to "[CIA Attorney (b)(3) papers reflecting on necessity and anticipatory self-defense." The two CIA memoranda referred to above did not discuss either of those subjects. In (b)(3) interview with CIA OIG, (b)(3) stated that before consulting OLC, CTC legal staff had concluded that all proposed enhanced interrogation techniques were lawful except waterboarding and mock burial. (b)(3) told CIA OIG that CTC did extensive research on the legality of interrogation techniques before asking DOJ to consider the issue.

the CIA was in charge of the interrogation and that the FBI was there to provide assistance.[32] Because the CIA interrogators were not yet at the site when the FBI agents arrived, two experienced FBI interrogators began using "relationship building" or "rapport building" techniques on Abu Zubaydah. During this initial period, the FBI was able to learn his true identity, and got him to identify a photograph of another important al Qaeda leader, Khalid Sheikh Muhammad, as "Muktar," the planner of the September 11, 2001 attacks.

When the CIA personnel arrived, they took control of the interrogation. The CIA interrogators were reportedly unhappy with the quality of information being provided, and told the FBI interrogators that they needed to use more aggressive techniques. The FBI believed that its traditional interrogation techniques were achieving good results and should be continued. However, the CIA interrogators were convinced that Abu Zubaydah was withholding information and that harsh techniques were the only way to elicit further information. According to an FBI interrogator quoted in the DOJ OIG Report, the CIA began using techniques that were "borderline torture," and Abu Zubaydah, who had been responding to the FBI approach, became uncooperative. According to one of the FBI interrogators, CIA personnel told him that the harsh techniques had been approved "at the highest levels."

According to the DOJ OIG Report, the FBI interrogators reported these developments to FBI headquarters and were instructed not to participate in the CIA interrogations and to return to the United States. One of them left the black site in late May 2002, and the other left in early June 2002.[33]

[32] The DOJ Inspector General's Report, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* (the DOJ OIG Report), focuses on the FBI's role in military interrogations at Guantanamo and elsewhere but also discusses the CIA's handling of Abu Zubaydah.

[33] Although CIA and DOJ witnesses told us that the CIA was waiting for DOJ approval before initiating the use of EITs, the DOJ OIG Report indicates that such techniques may have been used on Abu Zubaydah before the CIA received oral or written approval from OLC.

The CIA's perception that a more aggressive approach to interrogation was needed accelerated the ongoing development by the CIA of a formal set of EITs by CIA contractor/psychologists, some of whom had been involved in the United States military's Survival, Evasion, Resistance, and Escape (SERE) training program for military personnel.

SERE training was developed after the Korean War to train pilots to withstand the type of treatment they could expect to receive at the hands of the enemy during wartime. The SERE program placed trainees in a mock prisoner of war camp and subjected them to degrading and abusive treatment, similar to, but less intense than, actual conditions experienced by United States troops in the past. Its purpose was to prepare trainees for the demands they may face as prisoners of war and to improve their ability to resist harsh treatment. Aggressive interrogation techniques used in SERE training were based on techniques used by the German, Japanese, Korean, Chinese, and North Vietnamese military in past conflicts. They included slapping, shaking, stress positions, isolation, forced nudity, body cavity searches, sleep deprivation, exposure to extreme heat or cold, confinement in cramped spaces, dietary manipulation, and waterboarding.

However, according to a May 7, 2002 SERE training manual, "Pre-Academic Laboratory (PREAL) Operating Instructions" (PREAL Manual), the SERE training program differed in one significant respect from real-world conditions. The PREAL Manual noted that:

> Maximum effort will be made to ensure that students do not develop a sense of "learned helplessness" during the pre-academic laboratory.
>
> * * *
>
> The goal is not to push the student beyond his means to resist or to learn (to prevent "Learned Helplessness"). The interrogator must recognize when a student is overly frustrated and doing a poor job resisting. At this point the interrogator must temporarily back off,