THE BUSH ADMINISTRATION AND THE OFFICE 
of Legal Counsel (OLC) Torture 
Memos: A Content Analysis of the 
Response of the Academic 
Legal Community

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Ultimately, it is not the nuts that are the greatest threat to democracy, as 
history has shown us over and over and over again, the greatest threat to 
democracy is the unbridled power of the state over its citizens. Which, by 
the way, that power is always unleashed in the name of preservation.¹

Those who would give up essential liberty to purchase a little temporary 
safety, deserve neither liberty nor safety.²

Introduction

In great times of trouble and societal insecurity, dispassionate policy-
making can be difficult to achieve. Between 1861 and 1865, the 
United States suffered a civil war that nearly destroyed the nation and 
left 620,000 American soldiers dead.³ During this period, the dogs of

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Perspective (2011).

¹ The West Wing: The State Dinner (NBC television broadcast Nov. 10, 1999).
² 6 Benjamin Franklin, The Papers of Benjamin Franklin 242 (Ed. Leonard W. Labaree, 
1963).
³ Drew Gilpin Faust, The Dread Void of Uncertainty: Naming the Dead in the American Civil 
War, 11 S. Cultures 7, 8 (2005).
war and the nature of war, treachery, insecurity and fear allowed President Lincoln to suspend habeas corpus, impose martial law, close the courts, subject citizens to military commissions, and ignore judicial orders from the Supreme Court itself. Reflecting on this period and noting that such an environment is not conducive to dispassionate objective consideration of the law and its meaning, Justice Davis observed only when “the temper of times [that] did not allow . . . calmness in deliberation and discussion . . . are happily terminated [and] public safety is assured [can a legal] question . . . be discussed and decided without passion or the admixture of any element not required to form a legal judgment [with] full and cautious deliberation.” It has been more than a decade since the events of 9/11, and with “calmness in deliberation,” it is the goal of this article to explore how the opinions by the United States Department of Justice, Office of Legal Counsel (“OLC”) under the Bush Administration were viewed by the legal and academic community.

On September 11, 2001, the United States suffered an attack that was rivaled only by the attack on Pearl Harbor on December 7, 1941. The events of 2001 resulted in the deaths of almost 3,000 people, the destruction of the World Trade Center Towers, calls for revenge, and concerns of future attacks by an unseen enemy. The national demand for safety resulted in the practical necessity for actionable intelligence in the War on Terror and the Bush Administration’s policies resulted in accusations that the OLC was specifically and intentionally authorizing torture by government agents. After the attacks, President George W.

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5 Ex parte Milligan, 71 U.S. 2, 109 (1866).
6 Id.
8 See John Ashcroft, Never Again (2006); Philip Zelikow, Codes of Conduct for a Twilight War, 49 Hous. L. Rev. 1 (2012).
9 See John Yoo, War By Other Means (2006); Jack Goldsmith, The Terror Presidency (2007); Ashcroft, supra note 8.
10 See, e.g., David J. Gottlieb, How We Came to Torture, 14 Kan. J. L. & Pub. Pol’y 449, 449 (2005) (“My thesis is as follows: The law of war and international human rights agreements place limits on the conduct of American soldiers on and off the battlefield. Some of these limits apply even when soldiers have captured members of the enemy who have violated the laws of war and are therefore illegal or unprivileged combatants.”); Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,
Bush determined that the 9/11 attacks were an "act of war" and would be treated as such. Subsequently, the OLC issued a set of opinions, asserting that the acts of September 11th activated the full powers of the President as Commander in Chief and that the President had the power to act to protect the United States from future attacks. Soon after the attacks of September 11th, the United States invaded Afghanistan and ultimately defeated the Taliban government in Afghanistan, which the Bush Administration had condemned for its support and protection of the terrorist organization Al Qaeda that perpetrated the attacks of September 11th.


Memorandum from John Yoo for Timothy Flannigan, Deputy Counsel for the President (Sept. 25, 2001) [hereinafter September 2001 memo].

Id.

George W. Bush, U.S. President, Address to the Nation from the White House Treaty Room (Oct. 7, 2001) available at http://middleeast.about.com/od/afghanistan/qt/me081007b.htm (President Bush ordered the beginning of a joint international military attack on Afghanistan led by the United States and Great Britain as a result of Afghanistan's failure to meet certain US demands. "More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand over leaders of the al Qaeda network; and return..."
Bush Administration posed to the OLC the following legal questions: (1) what laws governed the capture and treatment of captured Al Qaeda and Taliban fighters, and (2) what laws governed the interrogation of such captured fighters, specifically how the Geneva Convention Against Torture (CAT) and federal laws prohibiting torture apply to that treatment.

All foreign nationals, including American citizens, unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price.


16 The CAT defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.


Article 16 of the CAT defines and prohibits treatment that does not rise to the level of torture as defined by Article I.

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

Article 16 (emphasis added).

17 Pursuant to 18 U.S.C. § 2340,

(1) “torture” means an act committed by a person acting under 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;

(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;
Although much ink has been spilled by both myself\textsuperscript{18} and others in the academic and legal community\textsuperscript{19} on the answers that the OLC pro-

\begin{itemize}
  \item[(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;
  \item[(C)] the threat of imminent death; or
  \item[(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; and
\end{itemize}

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (emphasis added). As detailed by the Congressional Research Service in a 2008 report, Congress has supplemented the anti-torture statute on numerous occasions since 9/11 making clear that torture is prohibited.

Congress has approved additional, CAT-referencing guidelines concerning the treatment of detainees. The Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163), contained a provision prohibiting the cruel, inhuman and degrading treatment of persons under custody or control of the United States (this provision is commonly referred to as the McCain Amendment). The Military Commissions Act of 2006 (MCA, P.L. 109-366) contained an identical measure and also required the President to establish administrative rules and procedures implementing this standard. These Acts are discussed briefly in this report and in greater detail in CRS Report RS22312, Interrogation of Detainees: Overview of the McCain Amendment, by Michael John Garcia. In the 110th Congress, the U.S. 'Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (P.L. 110-28), the Department of Defense Appropriations Act, 2008 (P.L. 110-116), and the Consolidated Appropriations Act, 2008 (P.L. 110-161), barred the funds they made available from being used to commit torture.


\textsuperscript{18} See generally Arthur H. Garrison, The Role of the OLC in Providing Legal Advice to the Commander-in-Chief after September 11th: The Choices Made by the Bush Administration Office of Legal Counsel, 32 J. OF THE NAT'L ASS'N OF ADMIN. L. JUD. (forthcoming 2012); Arthur H. Garrison, The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong, 49 CRIM. L. BULL. (forthcoming 2013); Arthur H. Garrison, The Opinions by the Attorney General and the Office of Legal Counsel: The How and Why They are Significant, 76 ALB. L. REV. (forthcoming 2013); and infra note 19.

vided\textsuperscript{20} to President Bush during the first two years after the events of September 11th, this article will focus on the OLC opinions from a different perspective; a content analysis of how the OLC opinions were characterized by the legal community after they were made public. In this article, I group the reactions of the legal community to the OLC into three broad categories: (1) righteous moral indignation; (2) accusations that attorneys in the OLC failed to meet the cannons of legal ethics and professional responsibility; and (3) failure of the OLC to comply with its own institutional regulations and procedures. It will be contended in this article that the literature on the OLC opinions fails to address the true failures of the opinions by confusing moral, political, and policy conclusions regarding torture with legal analysis on what the OLC actually proposed in the so called “torture memos.”

**The OLC Opinions and the Academic Community**

**Moral Indignation**

If not a truism, it is at least established well beyond reasonable doubt that the legal academic community has condemned the OLC opinions\textsuperscript{21} as badly reasoned at best, and worthy of criminal prosecution

\textsuperscript{20} See supra notes 12, 15. See also infra notes 130-31.

\textsuperscript{21} See generally Julie Angeli, Note, Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel, 18 GEO. J. LEGAL ETHICS 557 (2005); David Brennan, Torture of Guantanamo Detainees With the Complicity of Medical Heath Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs, 45 U.S.F. L. REV. 1005 (2011); Steven Giballa, Note, Saving the Law from the Office of Legal Counsel, 22 GEO. J. LEGAL ETHICS 845 (2009); Aaron Jackson, Comment, White House Counsel Memo: The Final Product of a Flawed System, 42 CAL. W. L. REV. 149 (2005); Lavitt, supra note 10; Bradley Lipton, Call for Institutional Reform of the Office of Legal Counsel, 4 HARV. L. & POL’Y REV. 249 (2010); Marisa Lopez, Note, Professional Responsibility: Tortured Independence in the Office of Legal Counsel, 57
in either a domestic or international court at worst. The argument that criminal charges should result from the OLC opinions asserts that (1) the opinions were clearly drafted to legally justify and protect the Bush Administration, which intentionally conducted torture of captured enemy combatants, and (2) the OLC knew that the opinions would be used to justify and "legalize" the waterboarding and torture of Abu Zubaydah and other specific captured members of Al Qaeda. Although the OLC's August 2002 memo clearly had flaws in its legal reasoning, some of the attacks in the literature are clearly more political or policy driven than academic disagreement on the meaning of the law. For example, the comparison of the OLC memos to the Fuehrer Principal of total power and superiority of government over the law during the reign of Nazi Germany is taking criticism of John Yoo's view of a plenary president in time of war too far.


22 See Lavitt, supra note 10, at 177.

[The opinions that Deputy Assistant Attorney General Yoo and his colleagues provided to the Bush administration were commodities put to an arguably felonious use. The OLC opinions unequivocally assured the president and his delegates that the power of the presidency would shield them from criminal responsibility. A properly instructed finder of fact rightfully could find that the OLC gave those assurances for the very real purpose of promoting and facilitating the contemplated torture enterprise.

The OLC certainly acted with the knowledge that tendering exculpating legal opinions to the Bush administration would result in it carrying out stated policy imperatives to torture Zubaydah and others, and proceeded with the purpose that those imperatives be carried out and succeed. The OLC attorneys carefully constructed legal opinions patently planned to thwart prospective prosecutions for the illegal torture of Zubaydah and others, enabling the Bush administration to act with the assurance that their opinions would serve that very purpose.

Id. at 177-78.

23 Id. at 179-80. See CIA Interrogation memo, supra note 15. According to the CIA Inspector General redacted report, three detainees were named to have been subjected to the waterboard technique: Khalid Shaykh Muhammad (183 times), Abu Zubaydah (83 times) and Al-Nashiri (2 times). See CIA Report infra note 62 at 45 and 90 respectively.

24 Lavitt, supra note 10 at 186-87. Lavitt softens his comparison making clear that:
Professor David Cole, one of the leading scholars on the OLC opinions, in his latest book *The Torture Memos: Rationalizing the Unthinkable*, compared the memos to the work of the state in Orwell’s *1984* in that the “Justice Department memos do precisely what Orwell foretold: twist language and the law in order to rationalize the unthinkable.”\(^\text{25}\) Professor Cole concluded that:

Considered as a whole, the memos read not as a good-faith effort to apply the law to regulate a proposed course of conduct, but as a calculated conspiracy to give legal cover to conduct that on its face violated federal criminal law, international treaties, and basic human decency.\(^\text{26}\)

\[^\text{25}\] COLE, *supra* note 10, at 1.

\[^\text{26}\] Id. at 35. “When considered as a whole, the memos read not as an objective assessment of what the law permits or precludes, but as a strained effort to rationalize a predetermined – and illegal – result. Rather than demand that the CIA conform its conduct to the law, the lawyers contorted the law to conform it to the CIA’s desires.” *Id.* at 4.

The problem with this type of analysis is, besides that it lacks legal objectivity, it assumes that the law was so clear that the answers proposed by the OLC had to be illegal by definition. As I discuss in this article, and in more detail in other writings, a legally arguable case can be made for at least the *December 2003 memo*, and perhaps the August 2002 memos. The fact that the memos do not provide the best view of the law, and that the OLC utilized the private lawyer model approach to the questions posed by the CIA does not make the opinions illegal per se. See *supra* note 18.

Although Professor Cole and I are in agreement on some, but not all, of the legal errors made by the OLC opinions dealing with the law on torture, it is simply not true that the opinions can be explained as a conspiracy to authorize rank torture in the face of clear domestic and international law.
The Bush Administration clearly came to office skeptical, to say the least, of the utility and efficiency of complying with or joining international treaties that limited American foreign policy options and military power. Soon after taking office, the Administration abandoned the Kyoto Protocols and withdrew the U.S. signing of the International Criminal Court treaty. After the Supreme Court ruled in *Hamdan v. Rumsfeld* in 2006 that Common Article 3 of the Geneva Convention

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27 On April 28, 2008, President Bush held a press conference to announce the new U.S. policy dealing with global warming (CO\textsubscript{2} emissions) and explained why the U.S., on March 28, 2001, formally announced it was abandoning the Kyoto Protocols:

When I took office seven years ago, we faced a problem. A number of nations around the world were preparing to implement the flawed approach of Kyoto Protocol. In 1997, the United States Senate took a look at the Kyoto approach and passed a resolution opposing this approach by a 95 to nothing vote.

The Kyoto Protocol would have required the United States to drastically reduce greenhouse gas emissions. The impact of this agreement, however, would have been to limit our economic growth and to shift American jobs to other countries — while allowing major developing nations to increase their emissions. Countries like China and India.

So the United States has launched — and the G8 has embraced — a new process that brings together the countries responsible for most of the world’s emissions. We’re working toward a climate agreement that includes the meaningful participation of every major economy — and gives none a free ride.


28 On December 31, 2000, President Clinton signed the treaty but announced that he would not recommend that President Bush should submit the treaty to the Senate, and on May 6, 2002, President Bush announced that he was withdrawing the U.S. signature to the treaty. In August 2002, Congress passed and President Bush signed the American Service Members' Protection Act which said in part:

(11) It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.

(e) PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT - Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.

Title II American Service-Members' Protection Act, §§ 2002 (11) and 2004 (e).


30 Common Article 3 prohibits:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
applied to the United States as implemented through the Uniform Code of Military Justice (UCMJ), President Bush misquoted Common Article 3 to prohibit “outrages upon human dignity” while asserting that it did not provide military interrogators with clear guidance. Note the framing of the issue. President Bush in his press conference focused on the vagueness of Common Article 3 in regard to its impact on the interrogators, not the protection of those being interrogated.

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Convention (III) relative to the Treatment of Prisoners of War. Geneva art. 3, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Common Article 3]. It was Common Article 3(d) that the Supreme Court ruled was codified in U.S. law (through the UCMJ) that required the Bush Administration to seek Congressional approval for creating military tribunals to deal with enemy combatants. See Hamdan, 548 U.S. at 557 (2006); Arthur H. Garrison, Hamdan v. Rumsfeld. Military Commissions, and Acts of Congress: A Summary 30(2), AM. J. OF TRIAL ADVOC. 339 (2006).


32 In responding a question regarding the policy of interrogation and whether it rose to the level of torture, President Bush answered as follows:

This debate is occurring because of the Supreme Court’s ruling that said that we must conduct ourselves under the Common Article 3 of the Geneva Convention. And that Common Article 3 says that, you know, there will be no outrages upon human dignity.

It’s like – it’s very vague. What does that mean, “outrages upon human dignity”? That’s a statement that is wide open to interpretation. And what I’m proposing is that there be clarity in the law so that our professionals will have no doubt that which they’re doing is legal. You know, it’s a — and so the piece of legislation I sent up there provides our professionals that which is needed to go forward.

Now, the court said that you’ve got to live under Article 3 of the Geneva Convention, and the standards are so vague that our professionals won’t be able to carry forward the program, because they don’t want to be tried as war criminals. They don’t want to break the law.

These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law. And that’s what we have asked to do.

Now, this idea that somehow, you know, we’ve got to live under international treaties, you know — and that’s fine. We do. But oftentimes the United States government passes law to clarify obligations under international treaty. And what I’m concerned about is, if we don’t do that, that it’s very conceivable our professionals could be held to account based upon court decisions in other countries. And I don’t believe Americans want that.

Id.
President Bush was not alone in his skepticism of international treaties. As Professor Michael Scharf observed, during the Bush Administration, there was a group of legal policy makers in the White House who “saw it as [their] mission to convince those inside the government that international rules that constrain U.S. power and thus compromise national security are not really binding.” When Jack Goldsmith advised the White House that the President had the authority to act outside of the law, he encountered resistance and surprise, especially when he said so as head of the OLC. Goldsmith explained the skepticism as follows:

The post-Watergate hyper-legalization of warfare, and the attendant proliferation of criminal investigators, had become so ingrained and threatening that the very idea of acting extralegally was simply off the table, even in times of crisis. The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal.

Note the last sentence, “And the lawyers had to find some way to make what he did legal.” This approach to executive power and law convinced many in the legal community that the Bush Administration was never concerned with obedience to the rule of law. Rather, the administration used 9/11 as an excuse to justify certain unilateral foreign policy initiatives regardless of the restrictions of domestic and international law. This failure to accept the moral as well as legal status of interna-

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34 GOLDSMITH, supra note 9, at 81.

35 See, e.g., Zelikow, supra note 8; David Cole, *The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side*, 49 HOU’L. REV. 53 (2012). In regard to blame, Professor Cole writes:

Justice Department lawyers wrote legal memos that authorized what should have been unthinkable, twisting the law to conform to what the CIA wanted to do, rather than instructing the CIA to conform its conduct to law. The officials responsible for policy - including President George Bush, Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld - apparently failed even to ask the most rudimentary question of policy: not just whether it is legal to strip captives naked, slam them against walls, hit them repeatedly, force them into painful stress positions for hours at a time, and suffocate them through waterboard-
tional law led to the moral indignation and judgment in the legal academic community.\textsuperscript{36} Professor Wendel exemplified this moral indignation and rejection of the OLC memos. He wrote:

Spectacular scandals involving lawyers are certainly nothing new. Wrongdoing by lawyers brought about or exacerbated the Watergate crisis, the savings and loan collapse, the corporate accounting fiasco that brought the 1990s tech stock boom to a crashing halt, and innumerable less prominent harms. But for sheer audacity and shock value,

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it is hard to top the attempt by elite United States government lawyers
to evade domestic and international legal prohibitions on torture.\footnote{W. Bradley Wendel, Legal Ethics and the Separation of Law and Morals, 91 Cornell L. Rev. 1681, 1681 (2005-2006).}

Professor Wendel approached the condemnation of the OLC memos from a substantive (normative) rule of law perspective, maintaining that the memos are an example of lawyers focusing on the narrow question of the legality of their clients' wishes rather than on the moral right and wrong of their clients' wishes.\footnote{Professor Wendel writes "what one can say about the decision to engage in this analysis in the first place and the way a lawyer ought to think about advising on such a morally fraught subject as torture." Professor Wendel asserts that the moral consequences of an attorney's advice should be considered when: a lawyer [is] asked by a client to render an opinion on the permissibility of conduct that strikes most people as a clear moral wrong, or to assist in structuring transactions or relationships to further the legal interests of the client where moral objections may be raised to the client's ends. The general issue here is not limited to the torture memos, or even to advising by government lawyers, but includes lawyers representing individuals and corporations that are engaging in moral wrongdoing and seeking legal advice on how to avoid the legal consequences of their actions. One of the central questions for legal ethics is the role that moral considerations should play in legal counseling and planning. \textit{Id.} at 71.} This moral/legal ethics approach\footnote{See M. Katherine B. Darmer, Waterboarding and the Legacy of the Bybee-Yoo Torture and Power Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist, 12 Chap. L. Rev. (2009). See also Sheldon Gelman, Lawyers, Interrogators and the Historic Framework of Debate about Torture, 10 Conn. Pub. Int. L. J. 101 (2010); Michelle Querijero, Without Lawyers: An Ethical View of the Torture Memos, 23 Geo. J. Legal Ethics 241 (2010).} to the criticism of the OLC memos also places focus on the question of how otherwise well-trained and highly educated lawyers could produce legal opinions that determined enhanced interrogation was not torture, and was not prohibited by law. This moral/legal ethics approach assumes that the memos authorized torture outright, in the face of clear and unambiguous textual statutes. This approach confuses the legal question of torture with the political issue of torture. For example, in an exchange on the meaning of torture and whether waterboarding was indeed torture\footnote{Justice Dep't Office of Legal Counsel Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. (2008).} between Congressman Jerrell Nadler, Congressman Trent Franks, and Steven Bradbury, the Principal Deputy Assistant Attorney General for the OLC, Congressmen Nadler posed to Bradbury the following question:
The convention and the Federal torture statute defined torture to be “an act specifically designed to inflict severe physical or mental pain or suffering.” I fail to see how the agonizing pain of not being able to breathe as your lungs fill with water and oxygen is denied your body cannot be considered severe physical pain. And I fail to see how feeling that you are drowning and about to die cannot be considered severe mental pain and suffering.

It is certainly specifically designed—waterboarding, that is—to inflict both severe mental and physical pain and suffering so that the prisoner will speak.

Now, in your legal opinion, is waterboarding a violation of the Federal torture statute?  

Trying to give political context to the legal meaning of torture, Congressman Franks asserted that the legal definition of torture is governed by context. By analogy he posed the following:

Let me just first offer a little illustration that I hope gives some idea as to why some of us separate waterboarding from torture, and why we do believe that circumstances in certain situations do change whether or not something shocks the conscience—and by way of just an illustration I hope that is relevant to most people. If a neighbor is invited over for dinner and insults the hostess on the dessert, and the husband of the home takes a baseball bat and beats his skull in for such an insult, I think that the courts would look negatively upon that. However, if a criminal breaks in at night and is attempting to rape his 4-year-old daughter and he does the same thing, it changes the way the courts look at the same situation. So I want to put to rest the idea that there aren’t effects on the circumstances, given the nature of any act. That’s very fundamental and I’m astonished that we don’t understand that.  

Both congressmen clearly had differing approaches to the meaning and purpose of the torture statute. Nadler proposed that waterboarding is torture because it causes “agonizing pain”, while Congressman Franks proposed, by his analogy, that waterboarding is not torture if it is used to prevent a horrible crime, analogizing a terrorist attack with the attempted rape of a 4-year-old girl. The problem is that, as Bradbury

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41 Id. at 14.
42 Id. at 17.
points out, neither approach is in line with what the torture statute actually requires.

But under, strictly speaking, just under the anti-torture statute, as we've said in our December 2004 opinion, there are three basic concepts: severe physical pain, severe physical suffering, and severe mental pain or suffering, which is specifically defined in the statute.

And if something subject to strict safeguards, limitations and conditions does not involve severe physical pain or severe physical suffering—and severe physical suffering, we said in our December 2004 opinion, has to take account both the intensity of the discomfort or distress involved and the duration. Something can be quite distressing or uncomfortable, even frightening, but if it doesn't involve severe or physical pain and it doesn't last very long, it may not constitute severe physical suffering. That would be—that would be the analysis.

Under the mental side, Congress was very careful in the torture statute to have a very precise definition of severe mental pain or suffering. It requires predicate conditions be met. And then, moreover, as we said in our opinion in December 2004, reading many cases, court cases under the Torture Victims Protect Act, it requires an intent to cause prolonged mental harm. Now that's a mental disorder that is extended or continuing over time. And if you've got a body of experience with a particular procedure that's been carefully monitored that indicates that you would not expect that there would be prolonged mental harm from a procedure, you could conclude that it is not torture under the precise terms of that statute.43

The exchange between Congressman Franks and Nadler is a debate on what each thought the torture law should prohibit not what it actually prohibits. The law does not distinguish between the purpose or the motive of the person using the technique, and waterboarding does not inflect short term "agonizing pain" or severe physical pain or severe mental suffering; it is designed to cause emotional panic and fear of drowning.44 It may cause a lasting memory of panic, but it

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43 Id. at 18-19.
44 The process is described as follows:
   In this procedure, the individual is bound securely on an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air now is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This
does not cause severe mental suffering as defined by the anti-torture statute.\[45\]

Regardless of the utility of waterboarding as an effective tool of interrogation or the level of harshness inherent in it, the law against torture is not a general prohibition against the use of harsh interrogation techniques utilized by government agencies. The anti-torture statute and the CAT govern a specific and limited class of interrogation techniques. The anti-torture statute, which prohibits acts “specifically intended to inflict severe physical or mental pain or suffering”\[46\], does not cover all actions that can be viewed as inhumane. Even if one believes that waterboarding is prohibited by Article 16 of the CAT, which prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”, or Common Article 3(c), which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”, both by definition do not include all acts that rise to the level of torture, but rather they specifically apply to actions that don’t rise to the level of torture.\[47\] The anti-torture act was designed to address one specific aspect of the dogs of war, not every aspect.

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\[45\] Although the use of waterboarding causes a fear of imminent death, it does not cause lasting physical or mental injury, which is required to be classified as torture under federal law. See 18 U.S.C. § 2340 (specifically prohibiting acts that inflict “severe mental pain or suffering” and such pain or suffering is defined as “prolonged mental harm caused by . . . . the threat of imminent death”) (emphasis added). See also CIA Interrogation memo, supra note 15, at 11, 15. If waterboarding is by definition an act of torture then every Naval and Air Force pilot, SEAL and other special forces personnel, and other select members of the military have been systematically tortured for decades by the Pentagon because waterboarding is a tool used in SERE (Survival, Evasion, Resistance, Escape) training to prepare military personnel to withstand interrogation. See id. at 15.

\[46\] See supra note 17.

\[47\] See supra note 16, 17 and 30.
Waterboarding may be “cruel, inhuman or degrading” or an “outrage upon personal dignity, in particular humiliating and degrading” but such a categorization, by definition, means waterboarding is not torture. Torture is not an all-encompassing concept of all types of harsh interrogation techniques but rather it is a specific type of interrogation. The failure to make this distinction is another error made by the legal community’s general condemnation of the OLC opinions.

One explanation for the ease with which legal scholarship has assumed that the memos per se authorized torture is in the moralistic definition they hold of torture, being the infliction of pain (any level of pain) to secure information. Professor Hadfield commenting on the memos concluded in the cases of Yoo and Bybee that

48 CAT Article 16 supra note 16.
49 Common Article 3(c) supra note 30.

The Convention’s definition of “torture” does not include all acts of mistreatment causing mental or physical suffering, but only those of a severe nature. According to the State Department’s section-by-section analysis of CAT included in President Reagan’s transmittal of the Convention to the Senate for its advice and consent, the Convention’s definition of torture was intended to be interpreted in a “relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned.” For example, the State Department suggested that rough treatment falling into the category of police brutality, “while deplorable, does not amount to ‘torture’” for purposes of the Convention, which is “usually reserved for extreme, deliberate, and unusually cruel practices ... [such as] sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.” This understanding of torture as a severe form of mistreatment is further made clear by CAT Article 16, which obligates Convention parties to “prevent in any territory under [their] jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to acts of torture,” thereby indicating that not all forms of inhumane treatment constitute torture.

CRS Convention Against Torture, supra note 17, at 2 (internal citations omitted). See also id. at 19-23.
51 See, e.g., Waldron, supra note 19, who starts with the complaint:

In recently published memoranda, Justice Department lawyers have suggested that it is not in all circumstances wrong or unlawful to inflict pain in the course of interrogating terrorist suspects. Also, at least one legal scholar has suggested that the United States might institute a system of judicial torture warrants, to permit coercive interrogation in cases where it might yield information that will save lives.

The shocking nature of these suggestions forces us to think afresh about the legal prohibition on torture. This Article argues that the prohibition on torture is not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system.
These lawyers began with the objective of justifying torture. They concluded that they were obligated to justify torture, and then they set out to do so. Whoever was ultimately responsible for requesting the Torture Memo apparently had such an objective, and the lawyers, apparently, accepted that position as a morally acceptable starting point. They made a bad moral conclusion, and I believe it drove them to make a bad legal argument.\(^5\)

Professor Hatfield proceeded to argue that the memos were examples of a larger problem in the legal profession - that lawyers are not trained to think morally and to answer legal questions with a normative rule of law perspective. He asserts:

Beginning in law school, we learn to lay aside our moral sense when facing complicated, high-stakes issues. We are taught to accept a division between lawyers' morality and clients' morality, and the primary principle of zealous advocacy, as if these were part of the natural order. As lawyers, we spend our days reasoning backwards from the conclusion we ultimately want to reach for our clients, rather than forwards from principles we discover by "digging" into the law.\(^5\)

While Professor Hatfield's broad assertion that lawyers "who are officers of the American judicial system are deficient in moral reasoning" and

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53 Id. at 4-5.
that the OLC memos assumed the techniques were \textit{per se} torture and sought to justify torture on its face is somewhat overstated, his point on how private lawyers are trained and how they reason supports the rejection of the \textit{Private Lawyer} model as an adequate model for OLC legal opinion writing.\footnote{Arthur H. Garrison, \textit{The Role of the OLC in Providing Legal Advice to the Commander-in-Chief after September 11Th: The Choices Made by the Bush Administration Office of Legal Counsel}, 33J NAT'L ASS'N ADMIN. L. JUD. (forthcoming 2013).} The President must be given the best view of the law not provided an opinion that supports the political needs or desires of the President after a policy is implemented, because the President is not a private client whose only interests are his own in an adversarial situation. The President is the guardian of the law within our system of government,\footnote{Arthur H. Garrison, \textit{The Opinions by the Attorney General and the Office of Legal Counsel: The How and Why They are Significant}, 76 ALB. L. REV. (forthcoming 2013).} and the OLC is the institutional guardian of the law within the executive branch, providing the best view of the law to the President.\footnote{William P. Barr, \textit{Attorney General's Remarks}, Benjamin N. Cardozo School of Law, November 15, 1992. 15 \textit{CARDozo L. REV.} 31 (1993).} Otherwise, the results of both of their actions will be as Professor Hatfield proposes, without a "moral center". But the moral center is not what the OLC thinks is the correct moral output or outcome. The moral center to be protected by the OLC and the President is the value and purpose of the rule of law and correctly determining what the law requires, regardless of the policy consequences.

Professor Wendel comes to a similar conclusion in his response to Professor Hatfield.\footnote{W. Bradley Wendel, \textit{Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)}, 104 NW. U. L. REV. COLLOQUIY 58 (2009).} While agreeing with Professor Hatfield that the OLC memos were an ethical disaster, Professor Wendel asserts that the disaster was the result of poor legal craftsmanship, not the lack of moral conscience.\footnote{Id. See also Scott A. Fredricks, \textit{The Irresponsible Lawyer: Why We Have An Amoral Profession}, 11 TEX. REV. L. & POL. 133 (2006).} Professor Wendel finds significant fault in the memos using a Medicare reimbursement statute to define severe pain in a criminal law statute and the failure to consider the purpose of the Geneva Convention. Professor Wendel correctly observes that the "whole point of the Geneva scheme is to create a baseline . . . with increasing protections afforded to certain classes of persons, such as prisoners of war."\footnote{Wendel, \textit{supra} note 57, at 69.} The problem with this conclusion, however, is that the use of enhanced tech-
niques, *per se*, does not *per se* violate that baseline. As I have critiqued

The United States is a signatory to the 1987 U. N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which in Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . ." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (I), U.N. Doc. A/RES/39/47 (Dec. 10, 1984). Article 16 requires, "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (XXVI), U.N. Doc. A/RES/39/47 (Dec. 10, 1984) (emphasis added). But when the United States ratified the treaty on October 21, 1994, it made clear:

[T]he United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

The baseline for what constitutes "cruel, inhuman or degrading treatment or punishment" is much broader than what constitutes "cruel and unusual punishment" under the Fifth, Eighth, and Fourteenth Amendments. This legal distinction has been completely lost on the legal community critiques of the methods authorized by the OLC.

The CAT prohibits any "cruel, inhuman, or degrading treatment." Common Article 3 of the Geneva Conventions bars any "cruel" or "humiliating" treatment. Even if you think stripping a suspect naked, slamming him into walls, forcing him into painful stress positions, and waterboarding him is not torture, can anyone claim with a straight face that these tactics are not cruel, not inhuman, not degrading, and not humiliating?

Cole, *supra* note 35, at 61. For an observation regarding Congressional action regarding Article 16 of the CAT, see the Congressional Research Service observation:

Following ratification of CAT, Congress did not adopt implementing legislation with respect to CAT Article 16, which requires each CAT party to prohibit cruel, inhuman, and degrading treatment or punishment in "any territory under its jurisdiction." There has recently been debate over whether Congress's failure to pass legislation implementing CAT Article 16 was due to an oversight or whether Congress believed that the United States agreed to bind itself to CAT Article 16 only to the extent that it was already required to refrain from cruel, inhuman, and degrading treatment or punishment under the U.S. Constitution and any existing statutes covering such offenses.

As previously mentioned, the Senate made its advice and consent to CAT ratification contingent upon the reservation that the cruel, inhuman, and degrading treatment or punishment prohibited by CAT 16 covered only those forms of treatment or punishment prohibited under the U.S. Constitution. Given this understanding, U.S. obligations under Article 16 can be interpreted in one of two ways.
in another article, the majority of the interrogation techniques in the *CIA Interrogation Memo* and the *Military Interrogation Memo* consisted of non-physical methods that are used in police departments all across the United States, including psychological subterfuge, varying levels of verbal manipulation, promises of positive and negative consequences for cooperation or the lack thereof. Only a minority of the techniques involved physical techniques which included room and temperature manipulation, food rationing, use of minimal physical force, the use of stress positions and waterboarding. The problem with Professor Wendel’s broad assertion that the OLC approved techniques that facially authorized and supported torture is that he does not make distinctions between the application of the techniques vs. assessment of

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61 See Garrison, supra note 15.

62 See Memorandum from the Gen. Counsel of the Navy to Inspector Gen., Dep’t of the Navy (June 18, 2004), [hereinafter Mora Memo] available at http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20040707-1.pdf Alberto Mora, General Counsel to the Navy, asserted that the techniques were too broad, were unsupervised, and, in application, could reach levels of torture because of the phenomenon called “force drift.” Id. at 4. See also Office of the Inspector Gen., CIA, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)* (2004) [hereinafter CIA report]. The Counter Terrorism Center (CTC) was tasked with conducting interrogations and used contract and CIA interrogators to secure actionable intelligence from captured detainees. An example of force drift and deviation of application of techniques from what was authorized by the OLC and CIA policy was noted in the CIA report.
the legality of the 10 techniques\textsuperscript{63} that were reviewed in the \textit{CIA Interrogation memo}, the 18 techniques\textsuperscript{64} that were approved in the \textit{Rumsfeld}

OIG's review of the videotapes revealed that the waterboard technique employed at [redacted] was different from the technique as described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE School and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast; the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique differed from that used in SERE training and explained that the Agency's technique is different because it is "for real" and is more poignant and convincing.

This Review heard allegations of the use of unauthorized techniques [redacted] The most significant, the handgun and power drill incident, discussed below, is the subject of a separate OIG investigation. In addition, individuals interviewed during the Review identified other techniques that caused concern because DoJ had not specifically approved them. These included the making of threats, blowing cigar smoke, employing certain stress positions, the use of a stiff brush on a detainee, and stepping on a detainee's ankle shackles. For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination regarding the facts. Thus, although these allegations are illustrative of the nature of the concerns held by individuals associated with the CTC Program and the need for clear guidance, they did not warrant separate investigations or administrative action.

\textit{Id.} at 37, 41. The handgun and power drill incident occurred between December 28, 2002 and January 1, 2003 to a detainee. The interrogator "raked" the empty handgun over the detainee's head, and, during the same day, entered the cell of the detainee and "revved" the power drill to frighten the detainee while he was hooded and naked in the cell. \textit{Id.} at 41-42. The event was not authorized by CIA headquarters, but upon the OIG learning of the incident, referred it to the DOJ. "[O]n 11 September 2003, DoJ declined to prosecute and turned these matters over to CIA for disposition. These incidents are the subject of a separate OIG Report of Investigation." \textit{Id.} at 41-42.

\textsuperscript{63} The memo concluded that the following ten techniques did not violate Section 2340A: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard. . . [All of which would] be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique.

\textit{CIA Interrogation memo, supra} note 15, at 2.

\textsuperscript{64} The techniques were divided into three categories and were to be used based on the level of resistance provided by the detainee.

Category One: (1) Yelling at detainees, (2) Deception techniques which included allowing a detainee to think he was being interrogated by a person from a nation known for harsh treatment of detainees and the use of multiple interrogators;

Category Two: (3) Use of stress positions (long term standing - max being four hours), (4) Use of false reports, (5) Isolation for a max of 30 days, (6) Use of interrogation locations outside of standardized booths, (7) Deprivation of light and sound, (8) Use of hood over the head of detainee while being interrogated or transported, (9)
December 2002 memo\textsuperscript{65}, or the 35 techniques that were approved in the DOD Working Group Report in April 2003.\textsuperscript{66} There is a difference between the question of whether the techniques were lawful and whether they were lawfully implemented. There is no doubt that abuses occurred\textsuperscript{67} under the CIA interrogations between 2001 and 2003 as the CIA Report shows. However, the reaction of the legal community does not acknowledge that most of the objectionable techniques and abuses,

Use of 20 hour interrogations, (10) Removal of items of comfort including religious items, (11) Switching food of detainees from hot rations to MREs, (12) Removal of clothing, (13) Forced grooming including shaving of facial hair, (14) Using detainee phobias to induce stress; Category Three: (15) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, (16) Exposure to cold weather or water under medical supervision, (17) Use of wet towel and dripping of water to induce the misperception of suffocation (waterboarding) and (18) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.


\textsuperscript{65} Memorandum from Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def. on Counter-Resistance Techniques (November 27, 2002), in THE TORTURE PAPERS, supra note 64, at 236.


\textsuperscript{67} "The EITs used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights. This divergence has been a cause of concern to some Agency personnel involved with the Program." CIA Report, supra note 23 at 91. The report cited and sometimes confirmed incidences of techniques including the use of handguns and drills, threats of beatings, mock executions, threats to female family members of detainees, blowing smoke in the face of detainees to create sickness, use of stress positions, use of stiff brushes and shackles, waterboarding (outside of OLC / DOJ authorization), use of pressure point holds, use of cold cells, water dousing, hard takedowns, and beatings. \textit{Id.} at 40-82. The report made clear that various CIA officers "of various grade levels" had concern that although some the techniques that were authorized by the DoJ were not in line with historical practice, long standing policies of the United States, the State Department, and senior governmental officials including present and past presidential administrations and were concerned that criminal liability could ensue based on actions taken, either in the U.S. or abroad. \textit{Id.} at 101-102.
outside of waterboarding, were all unauthorized by the OLC opinions.\textsuperscript{68} Nor does the literature admit that (1) Common Article 3 was only applicable to the military (at least up until 2006 and the passage of The Detainee Treatment Act)\textsuperscript{69} through the UCMJ,\textsuperscript{70} not to interrogations conducted by the CIA and that (2) the CAT prohibition against "acts of cruel, inhuman or degrading treatment or punishment" is defined by the meaning of the Due Process Clause and Cruel and Unusual Treatment clauses of the Fifth, Eighth and Fourteenth Amendments, which provide a much more narrow range of protection than what the international

\textsuperscript{68} See, Mora Memo, supra note 62 at 3-5. See also CIA Report, supra note 62 which reported that “During the interrogations of two detainees, the waterboard was used in a manner inconsistent with the written DOJ legal opinion of 1 August 2002.” Id. at 103. “One key Al-Qaeda terrorist was subjected to the waterboard at least 183 times [redacted] and was denied sleep for a period of 180 hours. In this and another instance, the technique of application and volume of water used differed from the DOJ opinion.” Id. at 104.

The CIA Report made clear that different techniques were developed over time and had been verbally approved by the Attorney General. Id. at 101. But the report concluded that “some Agency officers are aware of interrogation activities that were outside or beyond the scope of the written DOJ opinion.” Id. at 102. The report concluded that “the Agency—especially in the early months of the Program—failed to provide adequate staffing, guidance, and support to those involved with the detention and interrogation of detainees . . . . Unauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used. . . .” Id. at 102. The report concluded that the lack of proper procedures and guidelines for interrogations was a key failure of the CIA and explanation for the abuses. Id. at 103.

\textsuperscript{69} Also known as the McCain Amendment to the 2006 Defense Department Appropriation Bill, the Detainee Treatment Act prohibited the entire class of techniques approved by the OLC and President Bush on territory governed by the military.

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

P.L. 109-163, 119 Stat 3475, Title XIV § 1402(a), 1403(a) and 1403(d) (2006) respectively. See generally Arthur H. Garrison, The Office of Legal Counsel “Torture Memos”: A Content Analysis of What the OLC Got Right and What They Got Wrong, 49(5) CRIM. L. BULL. (forthcoming 2013).

community provides in defining torture, and cruel and inhumane treatment.\textsuperscript{71} The distinction matters in determining the errors within the memos.

But aside from this disagreement, Professor Wendel is correct that the moral center that must anchor the work of attorneys is the law and not the social, political and moral ideals of attorneys\textsuperscript{72} because such an appeal leaves one vulnerable to advocating for a Kritocracy.\textsuperscript{73} Defending the proposition that lawyers are no more able to determine what is and is not moral than any other person, both within and outside of the political realm, Professor Wendel concluded that what makes attorneys useful in the body politic is that they can answer what is and is not lawful. Professor Wendel asserts that the expectation of society regarding government lawyers is that the law will be interpreted in good faith, with an eye toward recovering the substantive meaning of a statute, treaty, or line of cases. Violating this expectation is the essence of the unethical conduct of lawyers like Yoo and Bybee. In the absence of a commitment to honoring the expectations of citizens that laws will be interpreted in good faith, lawyers cannot be regarded as doing anything of moral value qua lawyers. Instead, they become merely government officials seeking to exercise unrestrained power, and that is antithetical to the rule of law.\textsuperscript{74}

“The important feature of government lawyering”, one that is particularly essential for OLC opinion writing, is “the obligations of [OLC] lawyers [to act as] legal advisors, not political or moral consultants. The good decision-making qualities of their role are related to the virtue of

\textsuperscript{71} See Christopher L. Peretti, Aligning the Eighth Amendment with International Norms to Develop a Stronger Standard for Challenging the Prison Rape Epidemic, 21 EMORY INT’L L. REV. 759, 768-69 (2007); J. Trevor Ulbrick, Tortured Logic: The (I)legality of United States Interrogation Practices in the War on Terror, 4 NW. U. J. INT’L HUMAN RIGHTS 210, 222-23 (2005) (both concurring and complaining that the CAT is defined by the Eighth Amendment and the Eighth Amendment provides a level of protection that is below the protections of international definitions of torture and cruel and inhuman treatment). See also Garrison, supra note 15; Arthur H. Garrison, The Opinions by the Attorney General and the Office of Legal Counsel: The How and Why They are Significant, 76 ALB. L. REV. (forthcoming 2013).

\textsuperscript{72} To buttress his point, Professor Wendel writes on the flaw of lawyers being guided by their consciences rather than what the law requires, with the observation that the “last thing lawyers like Jay Bybee and John Yoo should be encouraged to do is act on their sincere moral convictions in violation of the requirements of law.” Wendel, supra note 57, at 60.

\textsuperscript{73} This is a rule by an oligarchy of lawyers and judges.

\textsuperscript{74} Wendel, supra note 57, at 70.
legality, not to other virtues of government." This virtue is paramount to the OLC because it involves providing the best view of the law to the President, both of whom are constitutionally and statutorily required to make sure the rule of law prevails over the political laws of necessity.

THE OLC OPINIONS: EXAMPLES OF THE VIOLATION OF PROFESSIONAL ETHICS

Professors Hadfield and Wendel characterized the OLC memos written by Yoo and Jay Bybee in moral terms and the professors were not alone in concluding that the memos broke both the standards of legal ethics and professional responsibility. Professor Clark makes the argument that both Yoo and Bybee violated the District of Columbia (hereinafter “D.C. Rules of Professional Conduct”), specifically because they “failed to give candid legal advice, violating D.C. Rule 2.1, and they failed to inform their clients about the state of the law of torture, violating D.C. Rule 1.4.” Professor Clark proposes that the memos’ violation of the rules of professional responsibility is two-fold. For one, Yoo and Bybee did not provide non-biased and neutral legal advice, instead telling their client, the White House, what it wanted to hear. Also, Yoo and Bybee did not inform their client that the legal propositions being provided could be countered by other legal arguments and that the position on the President’s power as Commander in Chief was at the extreme end of legal scholarship and theory within the legal academic community. Keeping in line with the legal community’s general pro-

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75 Id. See also Joseph Levitt, Professionalism and Power: Flawed Decision Making by the OLC Exposes a Bar that is Losing Its Moxie, 1 CALIF. L. REV. CIRCUIT 33 (2010). Professor Wendel concludes “The right way to criticize John Yoo, Jay Bybee, Stephen Bradbury, and other lawyers in the Bush OLC is with reference to the value of legality. In these terms, their advice was an unmitigated fiasco. Professor Hatfield is correct to call this an ethical disaster, but our response should be to insist that lawyers pay more attention to the internal norms of the good lawyering craft, not to be more responsive to the demands of individual conscience.” Wendel, supra note 57 at 70. Professor Wendel is correct that the focus of criticism should be on the legality of the memos not the moral aspects of conscience. But the legal critics should reflect the distinctions in the law and not confuse what the law actually requires and what it does not, and good lawyering craft has nothing to do with what one wants the law to mean. The law makes distinctions between torture, cruel, inhuman and degrading treatment, and outrages upon personal dignity. The latter two concepts don’t define the former.

76 Clark, supra note 19, at 468.

77 Id. at 465-467. See also Lopez, supra note 21; Angell, supra note 21; Note, Rethinking the Professional Responsibilities of Federal Agency Lawyers, 115 HARV. L. REV. 1170 (2001-2002); Querijero, supra note 39.
position that the memos violated the duty of attorneys to enforce and protect the law by constraining government power, a group of 130 lawyers, scholars, former judges, and presidents of various local bar associations signed a statement condemning the August 2002 memo, asserting that the "lawyers who prepared and approved these memoranda have failed to meet their professional responsibilities" because they failed to uphold the law by telling their client what they cannot do under the law. The Lawyers' Statement on Bush Administration's Torture Memos argued that the Public Interest model to government lawyering required that "[e]nforcement of all of our laws . . . binds all lawyers especially lawyers in government service. Their ultimate client is not the President or the Central Intelligence Agency, or any other department of government but the American people." Another commenter, applying the Public Interest model, concluded that the August 2002 memo violated ethical standards because "government lawyers[s], therefore, as steward[s] of the people and in support of the Constitution, must consider those words – justice, domestic tranquility, common defense, general welfare, liberty – in other words, the public interest, in the course of discharging [their] duties" in determining the meaning and application of the law.

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80 Lawyers' Statement, supra note78. See also Note, supra note77, at 1176.

81 Querijero, supra note 39, at 267. Leaving aside how one would apply ambiguous and subjective terms like domestic tranquility, liberty, justice, and common welfare to specifically defining the meaning of a criminal statute, Querijero makes an important moral point regarding why a nation as a whole and lawyers specifically need to protect the rule of law in both good and bad times.

But how we approach governance and the rule of law in times of war, when things are unsettled, and enemies threaten our way of life, speaks to our Nation's character, and tells us whether we really are a the Nation we believe ourselves to be.

Consequently, a government lawyer must undertake legal analysis with the public interest in mind and not be afraid to challenge a proposed government policy that runs contrary to that interest, even if an argument could be made to justify it. Id. at 269. Although both propositions are true, especially when discussing the role of OLC attorneys, this kind of moralistic approach without the grounding of respecting the limits of what the law requires as the basis for determining how to protect the rule of law leads to the proposition that the law is what ever the claimant says it is because the claimant asserts that he/
As discussed below, the U.S. Associate Deputy Attorney General issued an opinion on the quality of the August 2002 and the CIA Interrogations memos in January 2010 and concluded:

I would be remiss in not observing, however, that these memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel. . . . 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. These memoranda suggest that he failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice.

The above analysis leads me to conclude the same thing that many others have concluded, to wit that these memos contained some significant flaws.82

Professor George C. Harris agreed with this conclusion, asserting that the opinions

(1) engage largely in advocacy rather than advice, let alone quasi-judicial decision making with regard to the questions they address; (2) fail to describe fairly the opposing points of view . . . (3) provide narrow and technical answers to legal questions posed, without identifying other relevant authority or larger, non-legal concerns; and (4) fail to identify and describe prior Executive Branch statements bearing on the questions presented.83

she is protecting liberty and justice. But without the definition of law, with all of its limitations, what one person says is justice another says in tyranny. It should be remembered that Yoo and Bybee equally thought that they were interpreting the law in the interest of the public. Disagreement with their legal analysis, per se, cannot form the basis for determining that they failed to meet their professional, legal, and ethical obligations.


83 Harris, supra note 19, at 431.
These assessments of the OLC opinions have found advocacy before the bar of justice. In the case of Padilla v. Yoo\textsuperscript{84} in the Ninth Circuit Court of Appeals, six legal ethics professors filed an amicus brief,\textsuperscript{85} asserting that “Yoo, as with all private and government attorneys, must abide by certain professional responsibilities, including the duty to provide candid, honest, objective and perhaps unfavorable counsel to one’s client.”\textsuperscript{86} Because “[e]thical rules are designed to preserve the integrity of the legal profession and to ensure that client interests are advanced within the bounds of the law,”\textsuperscript{87} to the extent that these rules are not observed, the legal practice and the rule of law are undermined. If it is true that “Yoo did not merely give ‘wrong’ advice in performing customary legal duties, but that he acted outside of his legal role altogether by participating directly in the formulation of policy that gave rise to the deprivation of Plaintiffs’ constitutional rights and by creating legal cover for unlawful detention and interrogation policies”, Yoo violated his professional responsibilities.\textsuperscript{88} The United States Department of Justice Office of Professional Responsibility (OPR) came to the same conclusion.\textsuperscript{89}

The OPR formally opened an investigation on October 25, 2004 regarding the preparation of the August 2002 and CIA Interrogation memos and submitted a 191-page report to the Attorney General on December 23, 2008, followed by a final report on July 29, 2009. According to the OPR, the D.C. Rules of Professional Conduct impose a duty on attorneys, private and government, practicing in the District of Columbia (D.C.) to provide competent representation to their clients, including competent “analysis of precedent,” which requires that an attorney be able to identify all relevant primary authority, distinguish between controlling and persuasive authority case law,\textsuperscript{90} and assess the

\textsuperscript{84} Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012). This was a 1983 civil rights law suit brought by Jose Padilla against John Yoo, asserting that Yoo acted as a policy maker regarding the detention of Padilla as an enemy combatant in violation of his civil rights under the Fourth, Fifth, and Fourteenth Amendments. \textit{Id.}

\textsuperscript{85} Brief of \textit{Amici Curiae} Legal Ethics Scholars in support of Plaintiffs-Appellees and Affirmance, Padilla v. Yoo, 678 F.3d 748 (9th 2012)(No. 09-16478).

\textsuperscript{86} \textit{Id.} at 3.

\textsuperscript{87} \textit{Id.} at 6.

\textsuperscript{88} \textit{Id.}


\textsuperscript{90} \textit{Id.} at 121-22.
strengths and weaknesses of the client's position and identify any counter arguments.\textsuperscript{91} Because the OLC opinions were sought to address a legal question, "the OLC attorneys were not acting as advocates, but advisors, and had a duty under D.C. Rule 2.1 ("Advisor"), to provide candid, realistic advice."\textsuperscript{92} The OPR concluded that the \textit{August 2002} and the \textit{CIA Interrogation} memos were not in compliance with the D.C. Standards of Professional Conduct.\textsuperscript{93}

The OPR final report recommendation that Yoo and Bybee be referred to the D.C. Bar Disciplinary Committee was overruled by the DOJ Associate Deputy Attorney General David Margolis.\textsuperscript{94} Margolis overruled the OPR in large part because the OPR did not apply a clear standard or test to establish attorney misconduct in its first two drafts\textsuperscript{95} (the second was provided to Yoo and Bybee for comment) and the final draft withdrew certain characterizations of inadequate legal analysis in

\textsuperscript{91} \textit{Id.} at 124.

\textsuperscript{92} \textit{Id.} at 125.

\textsuperscript{93} The OPR concluded:

\textit{[O]ur review of the Bybee and the Yoo Memo revealed numerous failures of scholarship and analysis in violations of Rules 1.1 and 2.1. While it may be that no single one of those failures, considered in isolation, would compel a finding of less than competent representation, we concluded that the many instances of unsupported arguments, incomplete analysis, failure to discuss adverse authority, and mischaracterization of precedent compelled the conclusion that the authors of the Bybee Memo and the Yoo Memo failed to meet their obligations under Rule 1.1. and thus committed misconduct.}

\textit{...}

\textit{We also found evidence that the authors of the Bybee Memo and the Yoo Memo tailored their analysis to reach the result desired by the client. In many instances, the authors exaggerated or misstated the significance of cited legal authority, failed to acknowledge or fairly present adverse authority, took inconsistent approaches to favor the desired result, and advanced convoluted or frivolous arguments. Accordingly, we concluded that they also violated their duty under Rule 2.1 to provide a straightforward, candid and realistic assessment of the law.}

\textit{Id.} at 127. \textit{See id.} at 127–80 for a detailed analysis of the \textit{August 2002} and the \textit{CIA Interrogation} memos.

\textsuperscript{94} The Associate Deputy Attorney General wrote:

\textit{I do not adopt OPR's finding of misconduct. ... OPR's own analytical framework defines 'professional misconduct' such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard. For this reason ... I cannot adopt OPR's findings of misconduct, and I will not authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed.}

\textit{Margolis Opinion, supra note82, at 2.}

\textsuperscript{95} \textit{Id.} at 8.
response to the comments submitted by Yoo and Bybee. Specifically, Margolis wrote that:

In its final report, OPR’s misconduct findings do not identify a violation of a specific bar rule. Rather, OPR gleaned the “duty to exercise independent legal judgment and render thorough, objective, and candid legal advice” from several sources including D.C. Rule of Professional Conduct (DCRPC or DC Rule) 2.1, DCRPC 1.1, an OLC best Practices Memo issued on May 16, 2005, and a document entitled “principles to Guide the Office of Legal Counsel” (Guiding Principles), which a number of former OLC attorneys endorsed in December 2004.96

The first problem with the source of the OPR’s test is that two of the standards date after the August 2002 and the CIA Interrogation memos were drafted.97 In any event, Margolis concluded that if “OPR has failed to identify properly a ‘known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy’ or has failed to establish that the obligation unambiguously applied to the attorney’s conduct, then its misconduct analysis fails on that basis.”98 Margolis, when reviewing D.C. Rule 1.1 and 2.1, concluded that these rules, in context with sequent subsections, require a finding that an attorney knowingly provided advice that he knew was incorrect or, in other words, provided legal opinions in bad faith.99 Thus, poor lawyering or making errors in legal analysis do not rise to the level of disbarment when the poor lawyering provides plausibly arguable legal conclusions.100

Margolis accepted the OPR’s reliance on the rule that attorneys must not knowingly or recklessly provide advice in bad faith, and, after reviewing the substance of the August 2002 and the CIA Interrogation memos, concluded that while many parts of the memos, at best, contained flawed legal analysis and legal conclusions for the client and at worst were simply wrong, there was no basis to establish that the opinions were written in bad faith.101 While it is true that Rule 1.1 requires

96 Id. at 12.
97 OPR defended using a rule ex post facto by asserting that the principles in both documents were well known during the time Yoo and Bybee were at OLC. Id. at 16.
98 Id. at 13.
99 Id. at 22-23.
100 Id. at 23-24, 26.
101 Id. at 64.
attorneys to provide competent advice, Margolis observed that the “District of Columbia courts have held proof of violation of Rule 1.1 requires a serious deficiency defined as ‘an error that prejudices or could have prejudiced a client . . . caused by lack of competence.’”\(^{102}\) Although the memo had clear errors, the assertions made by Yoo and Bybee are at least legally plausible and as such are not within the boundaries of a violation of the ethical rules governing the legal profession. Although Margolis is correct that poor lawyering, if one determines that is what the August 2002 and CIA interrogation memos represent, does not rise to conduct worthy of disbarment, his observations that the “memos were written for a limited audience and were part of a dialogue with the CIA” and were never intended for public review, and that the errors were not prejudicial to the CIA\(^{103}\) are somewhat beside the point. An opinion by the OLC is not the same as a legal opinion by other attorneys within the executive branch.\(^{104}\) The OLC exercises the power to interpret the law in a manner that binds the entire executive branch and is taken as dispositive of the legality of a policy initiative.\(^{105}\) The OLC carries the power of the Attorney General to act as a quasi-judicial officer, second only to the President, when interpreting the law within the executive branch.\(^{106}\) The OLC is obligated to get the law right because it matters when the OLC gets it wrong, regardless of whether the error actually causes a party to suffer prejudice. But Margolis’s conclusion that “[a]lthough the memos reflect error, . . . the number and magnitude of those errors are [not] sufficient to prove that Yoo and Bybee violated Rule 1.1”\(^{107}\) is correct.\(^{108}\)

\(^{102}\) Id.

\(^{103}\) Id. at 65.


\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Margolis Opinion, supra note 82.

\(^{108}\) Margolis concluded that although Yoo and Bybee did not violate a clear ethical obligations or standards, the memos demonstrated poor judgment and the CIA Interrogation memo consistently took an expansive view of executive authority and narrowly construed the torture statute while often failing to expose (much less refute) countervailing arguments and overstating the certainty of its conclusions. Even though the memorandum was intended for a limited audience, Yoo and Bybee certainly could have foreseen that the memorandum would someday be exposed to a broader audience, and their failure to provide a more balanced analysis of the issues created doubts about the bona fides of their conclusions. . . . Thus I conclude that Yoo and Bybee exercised poor judg-
The OLC Opinions: the Failure to Comply with Institutional Regulations and Procedures

In addition to the moral indignation and the violation of legal ethics approaches to condemning the August 2002 and CIA Interrogation memos, a third approach focuses on the operational and agency lapses that resulted in the memos. The Office of the Inspector General (OIG) report regarding the legal advice provided by the OLC and OLC operations in preparation of the memos as related to the Terrorist Surveillance Program (TSP)\textsuperscript{109} concluded that:

[It was extraordinary and inappropriate that a single DOJ attorney, John Yoo, was relied upon to conduct the initial legal assessment of the PSP, and that the lack of oversight and review of Yoo's work, as customarily is the practice of the OLC, contributed to a legal analysis of the PSP that at a minimum was factually flawed. Deficiencies in the legal memoranda became apparent once additional DOJ attorneys were read into the program in 2003 and when those attorneys sought a greater understanding of the PSP's operation. The DOJ OIG concluded that the White House's strict controls over DOJ access to the PSP undermined DOJ's ability to perform its critical legal function during the PSP's early phase of operation.

The DOJ OIG also concluded that the circumstances plainly called for additional DOJ resources to be applied to the legal review of the program and that it was the Attorney General's responsibility to be aware of this need and to take steps to address it. Ashcroft's request during this period that his chief of staff David Ayres and Deputy Attorney General Larry Thompson be read into the program was not approved. However, the DOJ OIG could not determine whether Attorney General Ashcroft aggressively sought additional read-ins to assist with DOJ's legal review of the program during this period because Ashcroft did not agree to be interviewed.\textsuperscript{110}

\footnote{For an overall discussion of dispute between the White House and the Justice Department over the TSP including a timeline of the hospital incident, see \textit{Office of Inspectors General, Dep'ts of Defense, Justice, CIA, NSA, and Office of the Dir. of Nat'l Intelligence, Unclassified Report on the President's Surveillance Program}, at 19-30 (July 10, 2009). The OIG report refers to the TSP as the President's Surveillance Program (PSP).}

\footnote{Id. at 30.}
The OLC is part of the executive branch as well as an agency with its own internal power dynamics. The OIG report made clear that part of the explanation for the poor legal reasoning of the OLC memos was political interference with the authority structure within the Department of Justice, as well as the failure of the OLC to implement its own internal rules for preparing and submitting opinions to the White House. Specifically the OIG asserted that the OLC did not follow its own internal and historical procedures that govern how an opinion is drafted and submitted for interagency collaboration before issuance.\textsuperscript{111} Other commentators focus on the error of the OLC memos in relation to the role of the OLC and the administrative operations of OLC itself.\textsuperscript{112} According to Professor McGinnis, the OLC suffers from an integral dilemma because it is considered both the White House Counsel's lawyer and the Attorney General's lawyer, and it has the dual role of providing non-political, purely objective legal advice, while at the same time providing advice that is congenial to the views and ideologies of

\textsuperscript{111} Id at 10. The OIG explained that:

"From the outset of the program, access to the PSP for non-operational personnel was tightly restricted. Former White House Counsel and Attorney General Alberto Gonzales told the DOJ OIG that it was the President's decision to keep the program a "close hold." Gonzales stated that the President made the decision on all requests to "read in" any non-operational persons, including DOJ officials.

DOJ Office of Legal Counsel (OLC) Deputy Assistant Attorney General John Yoo was responsible for drafting the first series of legal memoranda supporting the program. Yoo was the only OLC official "read into" the PSP from the program's inception in October 2001 until Yoo left DOJ in May 2003. The only other non-FBI DOJ officials read into the program during this period were Attorney General Ashcroft and Counsel for Intelligence Policy James Baker.

Jay Bybee was OLC Assistant Attorney General from November 2001 through March 2003, and Yoo's supervisor. . . .

However, Bybee stated he was never read into the PSP and could shed no further light on how Yoo came to draft the OLC opinions on the program. He said that Yoo had responsibility for supervising the drafting of opinions related to other national security issues when the September 11 attacks occurred. . . . Bybee said that from these connections, in addition to Yoo's scholarship in the area of executive authority during wartime, it was not surprising that Yoo "became the White House's guy" on national security matters.

Id at 10-11.

\textsuperscript{112} See, e.g., Clark, supra note 19; Giballa, supra note 21; Gottlieb, supra note 10; Johnsen, All the President's Lawyers, supra note 19; Harold Hongju Koh, Protecting the Office of Legal Counsel From Itself, 15 CARDOZO L. REV. 513 (1993); Lipton, supra note 21; Lopez, supra note 21; Paust, supra note 10; Pillard, supra note 19; Scharf, supra note 10; Turner, supra note 21; Yin, supra note 21; Zelikow, supra note 8.
both the President and the Attorney General. In an effort to prevent the OLC from failing to provide policy makers with unbiased and neutral legal advice, the OLC has institutional rules to avoid providing legal opinions that are little more than policy approvals dressed up in the clothes of legal analysis.

In 2005, after the withdrawal of the August 2002 and CIA Interrogation memos, Steven G. Bradbury, Acting Assistant Attorney General for the OLC, issued a memorandum asserting what would govern as the best practices for OLC opinion writing. First in defending the purpose and value of OLC opinions, Bradbury made clear that:

[The] value of an OLC opinion depends on the strength of its analysis [and the OLC] has earned a reputation for giving candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the office.

The opinion goes on to explain that upon receiving a request for an opinion from:

[A]n executive agency whose head does not serve at the pleasure of the President . . . our practice is to receive in writing from that agency an agreement to be bound by our opinion [and] the requesting agency [must provide] a detailed memorandum setting forth the agency’s own analysis of the question.

OLC rules also allow for the OLC to solicit when “appropriate and helpful, and consistent with the confidentiality interests of the request-

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113 John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 CARDOZO L. REV. 375, 421-22 (1993). See Paul D. Clement, The Intra-Executive Separation of Powers Keynote Address, 2009 Randolph W. Thrower Symposium, 59 EMORY L.J. 311 (2009) (It is to this level of importance of the work of the OLC and the Assistant Attorney General who holds the position as director of the OLC that caused Solicitor General Clement to comment that the position should be elevated to the level of Associate Attorney General in order both to recognize the significance of the role and purpose of the office and increase its status within the hierarchy of the Justice Department and within the executive branch as a whole.).

114 Infra notes 115 and 121.


116 Id. at 1.

117 Id. at 1-2.
ing agency . . . the views of other agencies not directly involved . . . that have subject matter expertise or a special interest in the question presented."\textsuperscript{118} The memorandum further asserted that OLC opinions must answer only the question presented and not engage in broad discussion of the law outside of what is needed to address the question proposed and that questions relating to the Constitution and presidential power must "focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text and should be faithful to that historical understanding."\textsuperscript{119}

Bradbury in describing the approach of an OLC opinion concluded that:

\begin{quote}
[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 . . . we should take care to consider fully and address impartially the points raised on both sides . . . OLC's interest is simply to provide the correct answer on the law.\textsuperscript{120}
\end{quote}

In 2010, Acting Assistant Attorney General David J. Barron issued an opinion that "updates" the May 2005 opinion, making clear that the "OLC must provide advice based on its best understanding of what the law requires – not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration."\textsuperscript{121} More importantly, the "OLC should avoid giving unnecessary advice, such as where it appears that policymakers are likely to move in a different direction. . . . Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct. . . ."\textsuperscript{122}

Both memoranda were written under the assumption that new policies were not being implemented but rather they were being reaffirmed. Both in hindsight and through a reading of the rules on their face, these rules do not fully protect the OLC from the politics of the Administration. First, the rules only require lower level agencies to provide formal requests and legal analysis before the OLC makes an independent deter-

\begin{footnotes}
\item[118] Id. at 2.
\item[119] Id.
\item[120] Id. at 3.
\item[121] Memorandum from David J. Barron to Att'y of the Office: on Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010).
\item[122] Id. at 3.
\end{footnotes}
mination on the law in question. OLC internal rules do not require the submission of detailed analysis when a request comes from the White House Counsel's office or agencies/departments whose head serves at the pleasure of the President, which includes among others all cabinet secretaries. Because the OLC responds, or at least the rules don't prohibit it from responding, to informal requests for opinions from any agency head that serves at the pleasure of the President, including the CIA, the Vice-President's Office, and the White House staff which includes the White House Counsel's office, such offices are "able to obtain opinions without first providing their own legal analysis [which also allows for the] greater willingness [of the OLC] to supply the White House with oral advice," which the OLC does not provide to other agencies. The ability of key political offices of the executive branch to seek and secure advice, when others must provide their own view of the law first, allows the OLC to treat requests from the White House as clients rather than inter-agency litigants seeking a final determination of disputed views of the law. It is the latter approach that frees the OLC from political pressures and allows it to function in a quasi-judicial manner. The OLC rules should require the latter approach to apply to requests from the White House and agency heads that serve at the pleasure of the President.

These rules, both before and after 9/11, fail to provide enough protection for the agreed goal of the OLC. Professor Koh observed, before the events of September 11th, that the rules that the OLC uses are not self imposed to preserve its:

[P]olitical capital, but rather that they exist to protect OLC from itself. . . . The procedural and jurisdictional rules . . . exist to counter OLC's own understandable desire to please its principal client, the President, by telling him what he wants to hear. . . . Upon reflection each of the unfortunate episodes I have mentioned . . . came about precisely because OLC violated its own rules, thus falling prey to three predictable problems that plague a law office blessed with willful clients who tend to act first and consult counsel later.

Professor Koh is correct that the OLC must be protected from falling to the pressure of pleasing its client. The exception within the OLC rules

123 McGinnis, supra note113, at 429
124 Id.
125 Koh, supra note 112 at 515.
for the key political branches almost guarantees the result sought to be avoided. Both Yoo and Goldsmith wrote of the pressure in the months after 9/11 to address the new War on Terror and the pressure imposed by David Addington, General Counsel to the Vice President, and the White House to authorize policies already in operation.126 Had the OLC rules required the White House to justify its enhanced techniques policies in a formal memorandum, although the result might have been the same, the required time in writing and submitting such justifications and having the OLC act in its traditional quasi-judicial role of determining the law based on formal written arguments may at least have slowed down the policy and resulted in more reasonable OLC determinations.

Professor Koh writes that the three plagues brought by clients who act first and then seek legal opinions later are (1) lock-in, (2) opacity, and (3) overruling.127 Lock-in occurs when the government commits to an action or policy and after implementation seeks an opinion on the legality of the action after the fact,128 which is what happened with the CIA and Military Interrogation memos. Leaving aside whether the OLC administratively or politically could have told Addington, the CIA, and the Vice-President, much less President Bush, that it would not provide an opinion on the “enhanced techniques” policies after they had been implemented, as a legal policy matter, Professor Koh is correct that any OLC opinion supporting a policy ex post facto has less credibility because it is seen as “precooked” and politically motivated. Opacity results when the OLC provides an opinion that cannot be “publically examined or tested”129 because it lacks the customary politically independent legal judgment that supports the value of the opinion. The significant public, political, and legal blowback that occurred after the publication of opinions along with the rare overruling of the opinions in

126 See Ashcroft, supra note 8; Yoo, supra note 9; Goldsmith, supra note 9.
127 Koh, supra note 112, at 515-16.
128 As Professor Harris observes, “[t]he Administration’s war model for pursuit of terrorism suspects was activated quickly in the weeks following the 9/11 attacks. By early October of 2001, the United States had begun military operations in Afghanistan [and] By December of 2001 ... thousands of surrendering Taliban soldiers and others ... were turned over to the U.S. military for detention and interrogation.” Aggressive interrogation “were underway by late 2001 – before the OLC completed its January 2002 memo addressing whether al Qaeda and Taliban detainees were subject to the protections of the Geneva Convention, and long before the OLC drafted its August 2002 memo on the applicability of legal prohibitions on torture.” Harris, supra note 19, at 443-44.
129 Koh, supra note 112, at 515-16.
toto are the results of a process that was not in line with the normal OLC opinion making system.

CONCLUSION

It is well settled that the August 2002 and the CIA Interrogation memos have been almost uniformly rejected by the legal community and abandoned by the OLC itself. The legal and academic communities have condemned the memos on numerous grounds: that the OLC, indulged in advocacy not advice, that it interpreted the law in order to support a policy after it had been implemented, that it failed to provide policy makers with opposing points of view regarding both international and domestic law, that it disregarded the views of the State Department and the Judge Advocates General, that it failed to properly cite relevant legal authority, that it failed to properly cite prior OLC opinions and presidential positions on torture, and that it elevated the political legal theories of presidential power to the level of official legal analysis with the force of OLC pronouncement. On these observations this article is in concurrence.

The opinions clearly sought to provide legally arguable or facially plausible legal analysis to achieve a desired result. But the desired result was the defense of plenary, if not exclusive presidential power, to determine how to address the post 9/11 world, not to establish the legality of torture per se or to defend acts that it knew were on the level of torture. The memos did not authorize torture and the OLC was correct that the proposed interrogation methods did not reach prohibited conduct under the federal Anti-Torture Act. The error of the OLC was (1) its approach to its role and defense of presidential power as plenary over Congress and the courts and (2) the isolation of key policymakers and

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131 See generally Koh, supra note 112; Harris, supra note 19; Johnsen, All the President’s Lawyers, supra note 19; Clark, supra note 19; Johnsen, Faithfully Executing the Laws, supra note 19; Pillard, supra note 19; Scharf, supra note 10; Sudha Setty, No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win, 57 Kan. L. Rev. 579 (2009).
decision-makers within the executive and military legal community in order to defend the policy of the White House.\textsuperscript{132} This article supports the general conclusion by the academic and legal communities that the two "torture memos" did not seek to provide the best view of the law regardless of political consequences, which is the role of the OLC.\textsuperscript{133} Although in agreement that the OLC opinions did not meet its traditional standards in no small measure because of the political approach taken by the OLC in writing them, this article does not find that the OLC memos rise to the level of conduct worthy of disbarment under the Rules of Professional Conduct. This article, in concurrence with the Margolis Opinion, asserts that poor legal reasoning does not equate with failure to meet professional obligations. This article submits that the righteous indignation over the torture question and failure to meet professional responsibility fail to place the Bush Administration OLC in a proper historical and legal framework and fail to address the true failures of the opinions.\textsuperscript{134} It matters what the OLC tells the President because the President holds the power of the Commander in Chief. As with all those who hold the power to decide whether and when to go to war, to govern how the war will be implemented, to decide who the enemy is, to determine how the enemy will be treated, and to define why the war must be fought, "if the cause be not good, the king himself hath a heavy reckoning to make [to those who fight and die at his word and] if these men do not die well, it will be a black matter for the king that led them to it."\textsuperscript{135}

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\textsuperscript{132} See supra note 18.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} William Shakespeare, Henry V, act 4, sc. 1.
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