U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

January 5, 2010

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MEMORANDUM FOR THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL

FROM: David Margolis
Associate Deputy Attorney General

SUBJECT: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists

DISCUSSION:

On July 29, 2009, the Office of Professional Responsibility (OPR) issued a final report entitled *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists.* OPR concluded that former Office of Legal Counsel (OLC) attorneys John Yoo and Jay Bybee engaged in professional misconduct by failing to provide "thorough, candid, and objective" analysis in memoranda regarding the interrogation of detained terrorist suspects. Consistent with OPR's usual procedures, OPR indicated its intent to refer its finding of misconduct to the state bar disciplinary authorities in the jurisdictions where Bybee and Yoo are members.

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In keeping with usual Department practice,[1] I invited Bybee and Yoo to submit responses to OPR's final report. They submitted those responses on October 9, 2009, and the matter is now ripe for decision. My task is a narrow one. The OPR report addresses a number of topics without reaching misconduct findings against any Department attorney. I did not review OPR's analysis of those topics. For example, during the course of its investigation, OPR reviewed prosecutive declinations regarding interrogations of certain detainees, but I have not examined its analysis of those issues. In addition, OPR reviewed and analyzed several memoranda authored by former OLC attorney Steve Bradbury. Because that review did not result in a finding of misconduct or poor judgment, I have not reviewed that analysis. Rather, my review was strictly limited to the findings of misconduct against Yoo and Bybee.

For the reasons stated below, I do not adopt OPR's findings of misconduct. This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, 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 and based on the additional analysis set forth below, 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.

I. Historical and procedural background

The terrorist attacks of September 11, 2001, engaged the United States in an unprecedented conflict involving a non-sovereign enemy. As a result of the unprecedented nature of the conflict, it has been the job of OLC to determine the legal contours of our nation's efforts to combat the terrorist threat. For example, on September 25, 2001, OLC issued a Memorandum Opinion for the Deputy Counsel to the President, *President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 2001 WL 34726560 (2001), and on October 23, 2001, OLC issued a Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, 2001 WL 36190674 (2001). The latter opinion notes, "The situation in which these issues arise is unprecedented in recent American history." *Id.* at *2. These were but the first of many opinions OLC issued regarding the response to September 11, 2001. These opinions fulfilled the role of OLC to identify the legal parameters within which policy-makers could make choices

[1]Beginning in the 1990s, I have been the Department of Justice official who has resolved challenges to negative OPR findings against former Department attorneys, most often in the context of proposed bar referrals.

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about how to respond to the terrorist threat.

In April 2002, the Central Intelligence Agency (CIA) asked OLC for an opinion regarding the contours of the torture statute. This inquiry was prompted by the arrest of Abu Zubaydah. The CIA represented that Zubaydah was one of the highest ranking members of the al Qaeda terrorist organization. In response to this request and to a subsequent request for approval of use of specific interrogation techniques on Zubaydah, on August 1, 2002, OLC issued, under the signature of Jay Bybee, who was then the Assistant Attorney General for OLC, two memoranda–an unclassified memorandum titled, "Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*" (the unclassified Bybee memo) and a classified memorandum titled, "Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*" (the classified Bybee memo). In response to a request from the Department of Defense, on March 14, 2003, OLC issued another interrogation memorandum signed by then OLC Deputy Assistant Attorney General John Yoo titled, "Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*" (the Yoo memo).

A June 7, 2004 Wall Street Journal article reported, "Bush administration lawyers contended last year that the president wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department." Josh Bravin, *Pentagon Report Set Framework For Use of Torture*, Wall Street Journal, June 7, 2004, at A1. The next day, the Washington Post reported that it had obtained a copy of an August 2002 memorandum regarding the torture statute and that the legal reasoning in the August 2002 memorandum had been used in a 2003 Pentagon report on assessing interrogation rules. Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2009, available at http://www.washingtonpost.com/ac2/wp-dyn/A23373-2004Jun7. Within weeks, Congressman Frank Wolf wrote a letter to OPR requesting an investigation of "the circumstances surrounding the drafting of" the August 2002 memorandum. Letter, Wolf to OPR, June 21, 2004. OPR ultimately agreed to Congressman Wolf's request and launched a full investigation on October 25, 2004. OPR final report at 5. Although Congressman Wolf's request was limited to the leaked unclassified Bybee memo, OPR examined *inter alia* the drafting of the unclassified Bybee memo, the classified Bybee memo, and the Yoo memo. Although it is not common–especially in light of its limited resources–for OPR to commence an investigation subsequent to the departure of a subject attorney, it is not without precedent nor prohibited by any Department rule. By comparison, when an attorney departs subsequent to the commencement of an investigation, OPR cannot close that investigation without approval from the Office of the Deputy Attorney General. Factors weighed in determining whether to close such an investigation include the status of the investigation at the

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time of departure, how much time OPR has devoted to it, and whether the alleged conduct has broader implications for the Department than merely meeting the goal of holding the departed attorney accountable for his conduct.

On December 23, 2008, OPR provided then Attorney General Michael Mukasey a 191-page draft report advising of its intent to release a redacted, unclassified version of the report to the public on January 12, 2009. A memorandum from OPR to Mukasey invited a "sensitivity" review, requesting response by January 2, 2009. Memorandum, OPR to Mukasey, December 23, 2008. OPR also requested a meeting with the Attorney General prior to the anticipated January 12, 2009 public release "to discuss any comments [he] may have concerning the report." *Id.*

OPR advised Mukasey, "Consistent with our standard practice with regard to finalizing such reports, we are asking that the Department conduct a sensitivity review to determine whether it believes anything in the unclassified version of the report cannot be released publicly." *Id.* OPR's Policies and Procedures set forth the circumstances for public release of OPR findings and provide that the decision whether to release OPR findings rests with the Attorney General and Deputy Attorney General. *See* Office of Professional Responsibility Policies and Procedures ¶12 *available at* http://www.usdoj.gov/opr/polandproc.htm. OPR's procedures also provided, "OPR's findings in certain cases may be publicly disclosed. The Department may consider disclosing the final disposition, after all available administrative reviews have been completed . . . ." *Id.*[2]

There is some disagreement about whether OPR advised the subjects that they would have an opportunity to review and comment on a draft of the report prior to its release. Because the subjects have now had a chance to review and comment on both the second draft and the final report, I need not resolve any difference in understanding between OPR and the subjects regarding the representations that OPR made to the subjects. In its final report, OPR represented, "In order to best accomplish OPR's mission, we allowed the subjects of the investigation to review and comment on a draft of this report prior to its issuance." OPR final report at 14. However, on December 23, 2008, OPR advised Attorney General Mukasey in writing of its intention to release the report to Congress and the public on January 12, 2009. OPR's December 23, 2008 memorandum to Mukasey made no mention of review by the subjects, and the time

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[2] Beginning in 2007, OPR conducted a joint investigation into the removal of nine United States Attorneys and hiring practices of the former administration, and those reports were publicly released prior to any review by the subjects. However, those investigations primarily fell within the investigative purview of the Inspector General and were handled in a manner more consistent with statutory authorities of the Inspector General, which are inapplicable to OPR acting solely on its own. *See* 5 U.S.C. App. 3.

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frame for OPR's intended release would have precluded any meaningful opportunity for such review. Hence, it is apparent that absent the intervention of the Offices of the Attorney General and the Deputy Attorney General, OPR would not have shared the draft with the subjects prior to its release to Congress and the public.

In the meantime, Mukasey and then-Deputy Attorney General Mark Filip were considering how to respond substantively to the draft report. I did not at that time review the draft report nor did I provide any input into Mukasey and Filip's assessment of it. On December 31, 2008, Mukasey and Filip and members of their staffs met with OPR attorneys to provide the substantive comment that OPR invited. *See* Letter, Mukasey and Filip to OPR, Jan. 19, 2009 (Mukasey/Filip letter). I was not present at that meeting. Subsequent to that meeting, OPR advised Mukasey and Filip:

> [G]iven OPR's need to review and consider the preliminary concerns [the Attorney General and Deputy Attorney General] expressed at the December 31 meeting, the further issues raised in a January 7, 2009 OLC letter to [OPR] . . . , and any comments provided after subjects of the report and their attorneys review the Draft Report, the report will not be finalized before the end of the current Administration.

Mukasey/Filip letter at 1. As a result of having been so advised, Mukasey and Filip memorialized their concerns in a January 19, 2009 letter to OPR.

The Mukasey/Filip letter identified a number of "process concerns." More specifically, the letter observed:

> We appreciate OPR's effort to provide us with an opportunity to review and comment on the Draft Report before the end of this Administration. Nevertheless, the time proposed for our review was unrealistically and, with all respect, unacceptably, short. This is particularly true given the length of the OPR investigation, which has been ongoing for nearly four and a half years, the fact that [the Office of the Attorney General (OAG)] has been asking about progress on the Draft Report since at least the early summer of 2008, and the length and classification level of the Draft Report itself. More specifically, the Draft Report is nearly 200 single-spaced pages long and is classified at the sensitive compartmented information level, greatly complicating the ability of anyone including the Attorney General himself–to review it. Notwithstanding these complications, the Draft Report was not provided to OAG or [the Office of the Deputy Attorney General] until December 23, 2008, and you asked for comments prior to January 12, 2009, the date you originally proposed to release the report to

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> Congress and the public. Even if this period did not include the Christmas and New Year's holidays, it would have been insufficient for us to conduct a thorough review, given our other responsibilities within the Department and the additional responsibilities attendant to trying to ensure a smooth transition to a new Administration. Our concerns with this rushed process were exacerbated by the number of errors and other issues-discussed more fully below-that we identified in the abbreviated review we were able to undertake.

Mukasey/Filip letter at 2.

In addition to lodging these process concerns, Mukasey and Filip, while agreeing that the subject memoranda contained errors, criticized the substance and conclusions of the draft report. Primary among their criticisms was their "strong disagreement and surprise that the Draft Report proceeds seemingly without any consideration of the context in which the OLC opinions were prepared and, equally important, the time available to prepare them." *Id.* at 4. In addition to this general observation, Mukasey and Filip set forth specific substantive criticisms of the particulars of OPR's draft report.

After considering the comments of Mukasey and Filip as well as a response from OLC, OPR issued its second draft report. In a departure from standard practice and without explanation, OPR in its initial two drafts analyzed the conduct of the attorneys without application of OPR's own standard analytical framework. *See* http://www.usdoj.gov/opr/framework.pdf. This departure was not insignificant. I have held my current position within the Department for nearly seventeen years. During that time, I have reviewed almost every OPR report of investigation. OPR developed its framework over a decade ago and to the best of my recollection has applied it virtually without exception since that time.[3]

In accordance with the understanding reached subsequent to disclosure of the first draft to then Attorney General Mukasey, OPR provided its second draft to Yoo and Bybee, and invited them to respond to the report within sixty days. At that time, OPR was able to provide the subjects the classified report and a redacted unclassified version of the report. Consistent with its

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[3]At the time OPR issued its second draft, the only exceptions of which I was aware were the three reports that OPR and the Office of Inspector General issued regarding the removal of United States Attorneys and the Department's hiring practices during the previous administration. As noted earlier, those reports primarily examined matters governed by federal statutes and regulations within the investigative purview of the Inspector General. Those reports did not examine whether the underlying conduct implicated applicable Rules of Professional Conduct.

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usual practice, OPR also provided Yoo and Bybee the transcript of their own interviews with OPR, but did not provide additional documents that OPR obtained or generated during the course of its investigation.

Yoo and Bybee timely submitted their responses to the report on May 4, 2009.[4] Yoo's and Bybee's responses were harshly critical of the second draft and in particular strongly criticized OPR's failure to apply its analytical framework. For example, Yoo responded:

> [T]he conclusion in the Draft Report that Professor Yoo "committed professional misconduct" is reached in direct and outrageous violation of OPR's own formal Policies and Procedures setting forth the standards for reaching such a determination. Those Policies and Procedures are explicit in stating that a violation of bar rules is not enough to reach this conclusion; there must also exist *scienter* on the part of the attorneys involved. Yet OPR has reached its conclusions without any regard *at all* to this requirement, not even lip service.

Yoo response to second draft at 8 (emphasis in original). Bybee likewise strongly criticized OPR's failure to reference its own framework, noting:

> OPR is not supposed to make up new standards to govern particular cases. Instead, its investigations have been guided by published policies designed to ensure that ethics inquiries do not threaten to impede the deliberative process, impair the proper functioning of the Executive Branch, and expose public servants to the risk of partisan retribution. In this report, OPR nonetheless fails to cite or apply the published standards of professional conduct as outlined in its July 2005 Analytical Framework and its July 2008 Policies and Procedures.

Bybee response to second draft at 18.[5] In addition to criticizing OPR's failure to apply its analytical framework, Bybee and Yoo responded to each criticism that OPR lodged against the pertinent memoranda.

On July 29, 2009, OPR issued its final report. There are substantial differences between

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[4]Subsequent to the completion of the second draft and prior to the submission of the responses, OPR's leadership changed hands for reasons unrelated to this matter.

[5]The dates reflect the most recent revisions of the policies and the framework. However, those policies and the framework have existed in essentially the same format for a decade or more.

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the first draft of the report, which OPR was prepared to publish in January 2009, and the final report. For example, unlike in either of the earlier drafts, OPR referenced its analytical framework in its final report. Anticipating this possibility, Yoo commented in his response to the second draft:

> OPR may, of course, now seek to cobble together an after-the-fact finding of the requisite scienter in an effort to "fix" this gaping hole in its analysis. . . .
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> [S]uch a repair job will only highlight the fact that OPR reached its conclusion without worrying much about whether that conclusion was justified by proper process and analysis. This reality is underscored by the fact that OPR was apparently intent in January of this year on publicly releasing an earlier draft of the report without even awaiting proper review. *See* Mukasey Letter at 3. OPR goes to great lengths to criticize what it asserts was ends-driven legal reasoning in the Bybee Memoranda, but dressing up OPR's Draft Report with newly concocted postmortem "findings" will but prove that OPR has itself engaged in exactly this alleged sin.

Yoo response to second draft at 9. It is true that OPR declined to apply the analytical framework, or to explain its failure to do so, or to cite the existence of the framework in either of the first two drafts or its December 23, 2008 cover memorandum to Mukasey. A reasonable explanation for those decisions would be that they are evidence that the facts of this case do not fit a traditional misconduct analysis and do not demonstrate a violation of a known and unambiguous obligation. On the other hand, OPR has advised that it did not apply the analytical framework in its first two drafts in an effort to facilitate public release of the report.

Application of the framework is not the only substantive change in the final report. A couple of other examples highlight the extent to which OPR's analysis continued to evolve. In each of the first two drafts, OPR criticized Yoo and Bybee's reference to medical benefits statutes to help elucidate the meaning of the term "severe pain."[6] OPR examined Yoo and Bybee's reliance on *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 100 (1991) as justification for their examination of whether and how Congress had used the term "severe pain" in statutes wholly unrelated to the torture statute. OPR observed, "[T]he sole authority cited in the Bybee Memo–the *Casey* case–for turning to the medical benefits statutes was premised upon the *in pari materia* doctrine." *Id.* at 141. OPR concluded, "We know of no authority, and the Bybee Memo cited none, in support of the proposition that identical words or

[6]The torture statute actually contains the phrase "severe physical or mental pain or suffering." 18 U.S.C. §2340. The medical benefits statute is discussed in a section of the memo captioned, "Severe Pain or Suffering." Unclassified Bybee memo at 5-6.

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phrases in two unrelated statutes are relevant in interpreting an ambiguous term." OPR second draft at 140.

In their responses to the second draft, Yoo and Bybee commented on these conclusions. Yoo argued first that *Casey* itself was an example of comparing words in unrelated statutes to divine meaning in a particular statute. Yoo response to second draft at 25. Second, Yoo and Bybee noted that OPR criticized them for failing to cite J. Sutherland, Statutory Construction § 5201 (3d F. Horack ed. 1943), a source cited by the Court in *Casey*. They pointed out, however, that a different section of Sutherland (and numerous cited cases) makes clear that consideration of similar language in unrelated statutes is a permissible form of statutory construction. Yoo response to second draft at 26-27; Bybee response to second draft at 39-40. In its final report, OPR withdrew its observation that the *Casey* case "was premised upon the *in pari materia* doctrine." *See* OPR final report at 181. And, in direct opposition to its second draft, OPR's final report stated, "Interpreting ambiguous statutory language by analogy to unrelated but similar legislation is a recognized technique of statutory construction." *Id.* at 182. Nonetheless, OPR persisted in criticizing a different aspect of Yoo and Bybee's references to the medical benefits statutes:

> The fact that the medical benefits statutes were neither related, similar, nor analogous to the torture statute, coupled with the fact that they did not in fact define, explain or interpret the meaning of "severe pain," undermined their utility in interpreting the torture statute and led us to conclude that the Bybee Memo's reliance on those statutes was unreasonable.

OPR final report at 184.

Another example of a shift in OPR's reasoning occurred in its analysis of the Bybee memo's discussion of the necessity defense. OPR has challenged the strength of the Bybee memo's assertion that the necessity defense might be available to an individual accused of violating the torture statute. In its first two drafts, OPR criticized the Bybee memo for failing to consider whether the United States Sentencing Guidelines (U.S.S.G.) provision dealing with necessity as a possible basis for a reduced sentence might have constituted a Congressional "determination of values" regarding the extent to which the common law defense of necessity would be available to defendants charged with violations of federal criminal statutes. OPR first draft at 166; OPR second draft at 174-75. Part K of the United States Sentencing Guidelines includes provisions related to departures from applicable guideline ranges. Section 5K2.11 includes a policy statement stating, "Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing." Regarding this provision, OPR observed:

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> While it can be argued that the guidelines do not constitute a legislative determination with respect to the entire body of federal criminal law, much of which predates Congress's creation of the United States Sentencing Commission in 1984 or the implementation of the Sentencing Guidelines in 1987, a thorough discussion of the necessity defense would have considered the relevance of U.S.S.G. § 5K2.11. If, as the Bybee Memo contended, Congress was aware of the Model Penal Code's definition of the necessity defense when it enacted the torture statute, thereby making a "determination of values" that the defense was available, Bybee Memo at 41, n. 23, it is equally reasonable to conclude that lawmakers were aware of the Sentencing Guidelines and intended that the defense's factors should be addressed at sentencing, rather than as a defense to criminal liability.

OPR first draft at 166; OPR second draft at 175. Section 5K2.11 was enacted in 1987, and OPR did not cite a case that had considered the possibility that Section 5K2.11 abrogated the necessity defense. Bybee observed:

> [I]t is simply ridiculous to assert that the Guidelines—created by the Sentencing Commission—constitute a legislative determination with respect to the entire body of federal criminal law. And OPR's support for this particular criticism comes from one *state* court decision issued in 1966, nearly twenty years before the Sentencing Guidelines were adopted.

Bybee response to second draft at 76 (emphasis in original). A search of cases decided since 1987 reveals literally hundreds of cases addressing the necessity defense but none that suggest that the defense was abrogated by the guidelines. In OPR's final report, the analysis of the Bybee memo's treatment of the necessity defense contains no reference to the Sentencing Guidelines.

On the face of things, it may seem unfair to comment upon changes to the OPR report that resulted from its considering subjects' responses that I recommended that they solicit and review. However, as more fully set forth below, these changes are relevant to my evaluation of a final analysis that purports to have found a violation of a known and unambiguous obligation or standard–a different standard than the one OPR applied in its first two drafts.

II. OPR's findings

In its final analysis, OPR found that John Yoo intentionally violated his "duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" with respect to five documents: the unclassified Bybee memo, the classified Bybee memo, the Yoo memo, a July 13, 2009 letter from John Yoo to Acting CIA General Counsel John Rizzo, and a letter from Yoo to then White House Counsel Alberto Gonzales, dated August 1, 2002. OPR final report at

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11, 251-54. OPR also found that Bybee recklessly disregarded that same duty by agreeing to sign and issue the unclassified Bybee memo and the classified Bybee memo. *Id.* at 11, 255-57.

A. OPR 's analytical framework and OPR's failure to properly identify an applicable known, unambiguous standard

OPR's analytical framework establishes as a starting point that "OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy." *Id.* at 18. OPR makes its determinations based on the preponderance of evidence even though most state bar disciplinary authorities, including the District of Columbia, apply the more stringent clear and convincing evidence standard. *See* OPR final report at 13 n.13 and D.C. Court of Appeals Board of Professional Responsibility Rule 11.5. Pennsylvania applies a hybrid standard. *See Office of Disciplinary Counsel v. Duffield*, 537 Pa. 484, 494 (1994) ("Evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof of such conduct is clear and satisfactory.")

OPR investigations can result in two types of misconduct findings. OPR finds intentional misconduct when an "attorney (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural and probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits." *Id.* OPR finds reckless misconduct when:

> (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

Id. at 18-19.

Thus, in addition to requiring identification of a known, unambiguous obligation, a finding of professional misconduct also requires that the obligation unambiguously apply. Based on this standard, a review of OPR findings begins with an assessment of whether OPR has

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identified a known, unambiguous obligation that applied to Yoo and Bybee's issuance of the pertinent memoranda. 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,[7] DCRPC 1.1, an OLC Best Practices Memo issued on May 16, 2005,[8] 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. *Id.* at 21-24. In addition to gleaning its applied standard from the listed sources, OPR also declared:

> Moreover, we looked at the circumstances surrounding these particular requests for legal advice, to assess whether the requirements of the applicable professional rules and Department regulations were met. In doing so, we began with the premise that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir.), *cert. denied*, 507 U.S. 1017 (1993). *See also, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). We thus determined that Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct.

Id. at 24-25 (footnote omitted). The confluence of OPR's determination that the above-referenced sources imposed a duty to provide analysis that was thorough, candid, and objective, and its observations about the *jus cogens* norm led OPR to hold Yoo and Bybee to the highest standard of thoroughness, candor and objectivity in its analysis of the subject memoranda. OPR may well have defined the standard to which the Department may decide (or perhaps even has

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[7]Yoo contends that OPR erred in its determination that DCRPC 2.1 governed his conduct because he is and was only a member of the Pennsylvania bar and because choice of law analysis dictates that OPR should have applied the Pennsylvania Rules of Professional Conduct (PRPC) to analyze his conduct. This choice of law question is more than academic because at the time, DCRPC 2.1 provided, "In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice," whereas PRPC 2.1 provided, "In representing a client, a lawyer *should* exercise independent professional judgment and render candid advice." Because I do not adopt OPR's findings for different reasons, I need not resolve this legal question.

[8]Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions, authored by Steven G. Bradbury, Principal Deputy Assistant Attorney General, May 16, 2005.

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decided) to hold OLC attorneys who author opinions about important matters, but the pertinent question is whether this standard is properly applied to determine whether OLC attorneys complied with the standards imposed on them by Rules of Professional Conduct. 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 attorneys' conduct, then its misconduct analysis fails on that basis.

As with other issues noted above, OPR's description of the standard applicable to OLC attorneys providing opinions on important matters evolved from first draft to final report. In the first two drafts OPR concluded, without application of the analytical framework, that Yoo and Bybee violated DCRPC 1.1 (competence) and 2.1 (advisor). OPR first draft at 8; OPR second draft at 9. In its final report, OPR referenced both rules, but it is not clear that it found a violation of either.

OPR described its conclusions in the second draft by stating:

> Based on the results of our investigation, we concluded that former AAG Jay S. Bybee and former Deputy AAG John Yoo failed to meet their responsibilities under D.C. Rule of Professional Conduct 1.1 to provide competent representation to their client, the United States, and failed to fulfill their duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1.

OPR second draft at 9. Thus in the drafts, OPR found professional misconduct without any discussion of whether the applicable standards were known and unambiguous or any analysis of whether the alleged violations were knowing or reckless. In other words, the misconduct findings in the drafts were not tethered to OPR's analytical framework.

In the final report, however, OPR concluded:

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

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OPR final report at 11. While OPR did insert its analytical framework into its final analysis, its findings of professional misconduct do not specify the rule or rules of professional conduct that were violated.

With respect to Rule 2.1 itself, OPR's description of what was required by that rule likewise changed from the drafts to the final report. In the drafts, OPR described its Rule 2.1 analysis as follows:

> Although a number of courts have found attorneys to have violated Rule 2.1, the reported decisions and professional literature provided little guidance for application of the standard in this context. We therefore approached our Rule 2.1 analysis by considering, as a threshold matter, whether there was evidence that the client desired a particular result or outcome, and whether the attorney was aware of the desired result. If so, we looked for the following acts or omissions by the attorney, all of which we considered evidence that the attorney failed to meet the obligations of Rule 2.1:
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> 1. Exaggerating or misstating the significance of authority that supported the desired result;
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> 2. Ignoring adverse authority or failing to discuss it accurately and fairly;
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> 3. Using convoluted and counterintuitive arguments to support the desired result, while ignoring more straightforward and reasonable arguments contrary to the desired result;
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> 4. Adopting inconsistent reasoning or arguments to favor the desired result;
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> 5. Advancing frivolous or erroneous arguments to support the desired result.

OPR first draft at 126-27; OPR second draft at 134-35.

In response to the second draft, Bybee complained that after observing that the case law and professional literature provided little guidance regarding Rule 2.1, "OPR accordingly deems it appropriate to make up its own standard without including a single citation to any source, primary or secondary." Bybee response to second draft at 31. Both subjects objected to OPR's consideration of the "threshold matter" of whether the attorneys were aware of the result that the client wanted. Both Yoo and Bybee reasoned that lawyers almost always know which answer to a legal question is consistent with the wishes of the client. Yoo response to second draft at 15-16; Bybee response to second draft at 5-6 (*citing* Levin declaration ¶8 and Guiding Principles at

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5).[9] The Guiding Principles provision that Bybee cited provides, "Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, *OLC must take account of the administration's goals and assist in their accomplishment within the law.*" Guiding Principles at 5 (emphasis added). Former OLC Acting AAG Dan Levin told OPR the same thing in an interview conducted prior to OPR's completion of the first draft. OPR asked Levin, "Is it implicit in a situation like this that you're trying to accommodate the client?" Levin at 62. He responded, "Well, I think you're always trying to find a legal way for them to do what they want to do." *Id.* Another one of those Guiding Principles provides:

> OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but should also reflect the institutional traditions and competencies of the executive branch *as well as the views of the President who currently holds office.*

Guiding Principles at 3 (emphasis added). In the final report, OPR (correctly, I believe) no longer characterized the attorney's knowledge of the client's desired result as a threshold matter under its Rule 2.1 analysis. The section of the OPR final report corresponding to the draft section quoted above reads:

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

OPR final report at 22. Thus, not only did OPR abandon the threshold matter of the attorneys' awareness of the client's desired result, but it also abandoned the five factors that it had used to evaluate whether Yoo and Bybee had met their Rule 2.1 obligation. In their place, OPR added consideration of the Best Practices Memo[10] and the Guiding Principles. The consideration of these documents raises several concerns. First and foremost, neither of them existed at the time

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[9]OPR's first two drafts did not cite the Guiding Principles. Bybee's response cited them to refute OPR's criticism regarding Yoo and Bybee's awareness of the result desired by the client. Thereafter, OPR cited the Guiding Principles as support for the standard articulated in its third and final report.

[10]OPR had also referenced the Best Practices Memo in its earlier drafts to elucidate the obligations under Rule 2.1.

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Yoo and Bybee worked at OLC. Second, OPR's analysis relied on a memo setting forth *best* practices to divine minimally acceptable professional obligations. Third, OPR made *no* reference to the Guiding Principles in either of its first two drafts even though they pre-dated OPR's drafts. Bybee himself cited the Guiding Principles in his response to the second draft to refute the notion that an attorney's knowledge of his client's desired outcome suggests something sinister. *See* Bybee response to second draft at 5. Then, OPR relied in part on those principles to assist in defining minimally acceptable professional obligations.

OPR acknowledged that the Best Practices Memo and the Guiding Principles did not exist when Yoo and Bybee issued the interrogation memoranda. Nonetheless, OPR justified its *ex post facto* application of the Best Practices Memo to Yoo and Bybee's conduct on the ground that Bradbury told OPR that he wrote the Best Practices to "'reaffirm traditional practices in order to address some of the shortcomings of the past.'" OPR final report at 15 n.16. Further, OPR asserted that the Guiding Principles reflected that "OLC attorneys from prior administrations share Bradbury's view of the mission and role of the OLC." *Id.* at 16. However, former OLC attorneys whom OPR interviewed provided information that questions the appropriateness of applying these broad, generally applicable principles to determine whether Yoo and Bybee's work on these matters constituted professional misconduct.

OPR was encouraged both before and after the issuance of the first draft to consider the conduct of Yoo and Bybee in light of the circumstances that then existed. The unclassified and classified Bybee memos were issued on August 1, 2002, less then a year after September 11, 2001. While this circumstance in and of itself suggests that Yoo and Bybee acted at a time when the terrorist threat was quite palpable, OPR was also made aware of specific information indicating that American lives were particularly at risk at that time. OPR's first two drafts did not mention these circumstances. Mukasey and Filip remarked on this issue in their January 19, 2009 letter. They wrote:

> We respectfully but strongly believe that any review of the Bybee and Yoo OLC opinions for professional competence must be informed by this context. It is one thing for people, including us personally, to evaluate in a period of relative calm whether the analysis in the OLC opinions is more sound than subsequent analyses (and criticisms) offered by OLC or other legal commentators. It is quite another to be asked to address such matters alone, and to begin writing without the benefit of extensive subsequent review and commentary, for an Executive Branch and Nation trying to formulate a plan to ensure that the September 11 attacks would not be repeated.

Mukasey/Filip letter at 5. In its second draft, OPR again declined to address the impact of the circumstances outlined by Mukasey and Filip. Rather, OPR addressed this concern merely in

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terms of time pressure and dismissed it on the ground that "none of the attorneys involved in the writing process asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work." OPR second draft at 179 n.167. OPR also noted that "after the issuance of the Bybee Memos, the OLC had approximately six additional months to produce the Yoo Memo, which incorporated the Bybee Memo nearly verbatim." *Id.*

I generally agree with OPR's decision to rely on Yoo's and others' refusal to suggest that their work product was negatively impacted by time pressures. However, the broader question that Mukasey and Filip raised relates to the strict application of standards like those articulated in the Best Practices Memo and Guiding Principles to these circumstances. In other words, given the small group of individuals authorized to have access to these memoranda, the very limited (non-public) audience for which the memos were intended, and the pressing national security concerns, was it appropriate to criticize Yoo and Bybee's failure to point out, for example, that four of seventeen judges on the European Court of Human Rights dissented from the majority's decision that certain interrogation methods were not torture? *See* OPR final report at 192 (addressing the unclassified Bybee memo's treatment of *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A)(1978)).

Furthermore, information in the record from other former OLC attorneys raises doubts about the appropriateness of applying generally applicable principles or best practices to the circumstances of this matter. Bradbury told OPR:

> I will say, although I know your focus is on these classified opinions, I don't think it's quite–it shouldn't be understood that everything in here is a rigid requirement that must be followed in every case because there will always be circumstances where you are addressing a very sensitive classified program, and access to the program on a need-to-know basis is necessarily very restricted, and we're put under certain limitations.

Bradbury Pt. I at 5-6.[11]

Former OLC Assistant Attorney General Jack Goldsmith, who succeeded Bybee, made the decision to withdraw the Yoo memo. OPR interviewed Goldsmith during the course of its investigation and asked Goldsmith to define the standard that he thought should be applied to the interrogation memoranda. The exchange was lengthy, but instructive:

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[11]Bradbury's OPR interview occurred in three sessions on September 27, 2007 (Part I), January 10, 2008 (Part II), and January 15, 2008 (Part III).

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Q: One of the things I'm trying to figure out, we're trying to deal with is sort of, what is an OLC opinion and what is it supposed to be. . . . [W]hat is the role of OLC and was there a line that was crossed here in that regard[?]

A: That's a very difficult question for me to answer. I taught a course on this last term, called "Lawyering for the President." I can tell you this, that there is without getting into whether John crossed the line, there is debate about what the proper role of OLC is. There's debate among former heads of the office and academics and people about what exactly, what interpretive stance OLC should take. So, there are multiple questions.

To what extent should OLC be trying to give neutral, independent court-like advice, or should OLC be more like giving an attorney's advice to a client about what you can get away with and what you are allowed to do and what your risks are, something in between. What are the sources of interpretation? Is OLC bound by Supreme Court decisions? Is OLC–can the Executive Branch take an independent role in interpreting the Constitution and the statutes? You know, when and why and under what circumstances?

Does it matter whether the opinion is classified or not? Does it matter whether there can be open debate on it? Does it matter whether it's published?

These are all questions for which, you know, one day I'm going to write a book and they're difficult questions. So, I'll just say that as a general matter, point one.

Q: That's fair enough.

A: But, as a general matter, I think, with all those caveats and I want those caveats on the record, in a general matter we're supposed to be–I think the answer is that it is clear that OLC is supposed to serve some independent role within the Executive Branch to try to provide independent advice.

Now, no head of the office had ever done that fully, and I can give you a lot of examples. And there are many times in the history of not just OLC but Attorney Generals [sic] giving opinions to the President in the history of the country where Attorney Generals [sic] gave advice which was, you know, more of, here's an argument to cover what you've done, rather than my best independent view on the merits.

I'll give you an example that may seem academic. When Lincoln suspended the writ of habeas corpus it was very controversial. His arguments were fairly weak. He told Congress that he thought he had the power to do it and he said, my Attorney General will be providing you an opinion within weeks. And Attorney General Bates provided an opinion and it was pathetically weak.

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Justice Jackson, when he was the Attorney General, for the destroyers for bases deal, wrote what many view in retrospect as, in terms of interpreting the statutes concerning neutrality and the international law of neutrality and whether the destroyer for bases deal violated those, wrote what many people after the fact said was an extremely weak unconvincing opinion.

So, I can give you lots of examples like that from different Administrations.

I can also give you examples through different Administrations of heads of the office and AGs saying no, you can't do that. I think it's extremely difficult to say in the abstract, and this may seem like a cop-out, but when you combine all this with, you know, the threat reports that were being done and everything, I don't know whether anyone crossed the line. I certainly couldn't say that myself. I don't even know what the standard is.

But, you know, I guess I would say to you that the difference here– this is my fault. The difference here from Bates' opinion or Justice Jackson's, both of them very bad opinions, the difference is that you had someone in the office say no, those were wrong. So, you've got opinions where I say these are in some respects erroneous.

Justice Jackson didn't have that problem, and his opinion was terrible. And Bates' was terrible. And I guess in my preaching moments I would say whatever standard you bring to bear here, it should apply to Justice Jackson and Attorney General Bates as well. I'm serious.

My only point is I don't know what the standard is. And, again, I'm not trying to tell you how to do your job, but I don't know what the criteria are for whether it crossed the line.

Goldsmith at 63-66. After at least one news report indicated that OPR had found Yoo and Bybee to have engaged in misconduct, Goldsmith sent me an unsolicited memorandum regarding the matter, which I forwarded to OPR prior to issuance of its final report. In his memorandum, Goldsmith acknowledged that he had not seen the draft report, but he reiterated the point he made in his interview with OPR. After discussing among other things the historical examples mentioned in his interview, Goldsmith wrote:

I mention these historical examples in order to suggest that OPR should exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis. Any standard that would have landed Robert Jackson in trouble cannot be the right standard. It is especially inappropriate, I believe, for OPR to infer misconduct or bad faith from legal

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> errors, even clear legal errors, committed in this context. OPR is not looking at the OLC opinions with the same time constraints as the lawyers who wrote the opinions; instead, OPR has taken nearly five years and still has not rendered judgment. The OLC lawyers did not have this luxury. Perhaps more important, OPR is looking at the OLC opinions not in the context of threat and danger in which they were written, but rather in what former Deputy Attorney General James Comey once described as "the perfect, and brutally unfair, vision of hindsight."

Goldsmith memo to Margolis, June 5, 2009, at 4 (footnotes omitted).

Pat Philbin, who was a Deputy Assistant Attorney General at OLC when the Bybee memoranda were issued, described for OPR the "context of threat and danger." He told OPR:

> [redacted] And to use sort of a technical term, everyone was freaked out about it, because they thought we really were going to suffer a significant attack.
>
> And it was in the context of that and a relatively recent capture of a particular individual [redacted] that the sort of great urgency for this issue arose.

Philbin at 9-10. In describing his understanding at the time about what the administration wanted from OLC in regards to the opinion on the interrogation techniques, Philbin advised:

> I think generally there was a sense that this is urgent because of the [redacted] and urgent because a lot of people are going to die if we don't prevent this attack. And so I think not just for this, but generally in the war on terrorism the view was, you know, call it straight down the middle, but don't be building in a buffer of well, we'd rather not actually go to sort of the black letter of where it limits the law, or we'd rather just stay further away.

Id. at 15-16. Again, OPR considered whether Yoo and Bybee had met the highest standard of thoroughness, candor and objectivity, but when it questioned Philbin about whether OLC should bring the opposing points of view to the Attorney General's attention, Philbin responded that if he was aware that there might be significant disagreement with an answer to a legal question posed to OLC, he would want to inform the Attorney General of that although he did not think he

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would put that in an opinion. *Id.* at 26-28.

Adam Ciongoli was Counselor to Attorney General Ashcroft and the lawyer in the Office of the Attorney General who had oversight responsibilities for OLC. In that capacity, he reviewed the unclassified Bybee memo prior to Bybee's signing it. Ciongoli told OPR that he thought the unclassified Bybee memo "could have been written differently if people had known that it was going to become a public document. . . . It is not the kind of opinion you want leaked because it is not written for sound bites or as a scholarly article." Ciongoli at 38.

In its final report, in a single paragraph, OPR addressed the threat context issue raised by Goldsmith during his interview and by Mukasey and Filip in their letter to OPR and described by Philbin in his interview. OPR concluded:

> [S]ituations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear. Accordingly, we concluded that the extraordinary circumstances that surrounded the drafting of the Bybee and Yoo Memos did not excuse or justify the lack of thoroughness, objectivity, and candor reflected in those documents.

OPR final report at 254. People of substantial intellect and integrity advocated that OPR's "review of the Bybee and Yoo OLC opinions for professional competence must be informed by this context," Mukasey/Filip letter at 5, and that OPR "exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis." Goldsmith memo at 4. Yet OPR dismissed this issue in a paragraph with no discussion of those positions, no attempt to address those historic events that challenge their conclusion including the Jackson and Bates examples to which Goldsmith directed them, and no mention that Philbin had explained the belief at the time that "people are going to die if we don't prevent this attack." Philbin at 15. Yet in this context, OPR found Yoo and Bybee to have engaged in misconduct not because they were wrong, but because they were not thorough. *See* OPR final report at 160 ("We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result.").

Furthermore, there are other Rules of Professional Conduct that are relevant to the standard to be applied in this case. DCRPC 1.2 addresses the scope of an attorney's representation, and provides, "A lawyer shall abide by a client's decisions concerning the objectives of the representation . . . ." DCRPC 1.2(a). The Rule sets forth two pertinent exceptions to this general statement. First, the Rule provides that "A government lawyer's authority and control over decisions concerning the representation may, by statute o[r] regulation, be expanded beyond the limits imposed by paragraph[] (a) . . . ." The general functions of the

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Office of Legal Counsel are described in 28 C.F.R. §0.25, and that regulation does not appear to re-allocate the authority or control over decisions concerning OLC's representation of the United States. The regulation, among other things, provides that OLC assists the Attorney General in his role as legal advisor to the President and the Cabinet and permits OLC to issue both formal and informal opinions. Rule 1.2 and Section 0.25 support the Guiding Principles' assertion that "OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but should also reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office." Guiding Principles at 3.

DCRPC 1.2(e) provides:

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

The commentary to this rule provides further guidance:

> A lawyer is required to provide an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

DCRPC 1.2 cmt. 6. This rule arguably applies precisely to the task that OLC undertook. Furthermore, the DC Rules provide, "In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition and outcome of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question." DCRPC, Scope ¶5. Rule 1.2(e) provides more specific guidance to Yoo and Bybee's task than the more general Rule 2.1. Rule 1.2(e) requires good faith and prohibits a lawyer from counseling the client to engage in conduct that the lawyer *knows* to be illegal. The DC Rules define "knowledge" as actual knowledge, although it can be inferred from circumstances. DCPRC, Terminology ¶6. This rule can be reconciled with Rule 2.1 only if Rule 2.1's obligation of candor and exercise of independent professional judgment prohibit a lawyer from providing advice to the client that the

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lawyer knows to be wrong or that is issued in bad faith.

DCRPC 1.4 addresses communications between the lawyer and the client. It provides, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." DCRPC 1.4(b). The commentary provides, "The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations," and "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of the representation." *Id.* cmt. 2 and 3. This rule seems particularly relevant since OPR criticized, in some instances, Yoo and Bybee's failure *in the memos* to consider and refute countervailing arguments. Rule 1.1 provides that legal representation requires that degree of thoroughness reasonably necessary for the representation. Arguably, then Rule 1.1 requires that Yoo and Bybee consider countervailing arguments but not necessarily that they communicate each of those countervailing arguments to the client, much less that they do so in a written opinion. Rule 2.1 requires candor and exercise of independent professional judgment, but it is not at all clear that Rule 2.1 requires communication of every considered and rejected argument to the client as part of the giving of advice.

OPR did not explicitly consider the implications of Rules 1.2 or 1.4 when fashioning its standard. Further, as Yoo and Bybee observed in their responses, OPR did not rely on any cases from the District of Columbia to support its standard.[12] In his response, Yoo cited *In re Stanton*, 470 A.2d 281 (D.C. 1983). In that case, a bar hearing committee had found that an attorney intentionally failed to pursue his client's lawful objectives because after the client rejected his advice that she not plead guilty to pending charges, he refused to assist her in the plea. On review, the Board on Professional Responsibility adopted the finding of misconduct but took pains to reject the suggestion of the hearing committee that the correctness of the attorney's advice to the client regarding the plea was at all relevant. In so doing, the Board wrote:

> [W]e can hardly conceive of a good faith opinion of a lawyer concerning a legal matter which would be "so far fetched as to justify a finding of 'neglect' or of 'intentionally' failing to pursue a client's objective."
>
> A lawyer is duty-bound to exercise his best professional judgment on behalf of his client. Only where total inattention or incompetence is made out on the part of the lawyer in reaching the decision should we ever be in the business of

[12]OPR cited *In re Ford*, 797 A.2d 1231 (D.C. 2002) observing that Rule 1.1 requires proof of a serious deficiency. OPR final report at 23 n.25. It does not appear that OPR's analytical standard incorporated this holding, however.

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assessing the correctness of the lawyer's advice to his client.

Id. at 287. This assertion occurred in a different context than OPR considered and addresses the predecessor to Rule 1.3, which prohibits an intentional failure to pursue the client's objectives. Nonetheless, OPR seemed in one respect to have adhered to the *Stanton* approach when it said, "We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result." OPR final report at 160. However, OPR later concluded, "[T]he Bybee Memo's conclusion that the torture statute 'does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority' was wrong and most certainly did not constitute thorough, objective, and candid legal advice." OPR final report at 201.

OPR asserted that reported decisions and professional literature provided little guidance regarding the application of Rule 2.1. Although the opinions of the District of Columbia courts are not instructive and the District of Columbia Court of Appeals has apparently never found a violation of Rule 2.1, examination of cases from other jurisdictions is useful. Those cases reveal two general trends regarding Rule 2.1. First, violations of Rule 2.1 generally are accompanied by violations of other bar rules. Second, those cases almost uniformly involve lawyers whose independence is compromised by their own interest or by an inappropriate (often sexual) relationship with the client. *See e.g. In re Coffey's Case*, 880 A.2d 403 (N.H. 2008) (Attorney who charged excessive fee to client and then caused her to transfer property to satisfy the fee even though she lacked the mental capacity to make an informed decision found to have violated Rule 1.7 (conflicts) and Rule 2.1); *State ex rel. Oklahoma Bar Ass'n v. Groshon*, 82 P.3d 99 (Okla. 2003) (Attorney who made inappropriate sexual advances to client found to have violated Rules 1.1, 1.7, 1.8, 2.1, and 8.4); *In re Harper*, 571 S.E.2d 292 (S.C. 2002) (Attorney whose client invested in development in which attorney had interest failed to advise client about financial troubles, including bankruptcy filing, of a creditor to whom she had loaned money and was found to have violated Rules 1.1, 1.2, 1.3, 1.4, 1.7, 1.8, 2.1, and 8.4.); *In re Courtney*, 538 S.E.2d 652 (S.C. 2000) (Attorney who engaged in sexual relations with client in divorce action found to have violated Rules 1.1-1.4, 1.7, 1.8, 2.1, 3.3, 3.4, 4.1, and 8.4); *In re Discipline of Dorothy*, 605 N.W.2d 493 (S.D. 2000) (Attorney who charged client excessive fees and costs for handling routine child custody and support issues found to have violated Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 2.1 and 8.4); *Musick v. Musick*, 453 S.E.2d 361 (W.Va. 1994) (Attorney who engaged in sexual relations with client failed to maintain the emotional detachment necessary for a lawyer to render sound, competent and independent advice); *Case of Bourdon*, 565 A.2d 1052 (N.H. 1989) (Same). OPR has not cited, and I have not located, any case in any jurisdiction that reaches a finding of a violation of Rule 2.1 where an attorney provided the client advice free of any discernible conflict or in which a court considered an alleged violation of Rule 2.1 that was not collateral to violations of other Rules of Conduct.

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Finally, OPR relied in part on DCRPC 1.1, which requires attorneys to provide competent representation, to impose on the Rule 2.1 obligation a duty to be thorough as well. Rule 1.1 requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Once again, however, OPR evaluated only what Yoo and Bybee included in the memoranda to determine whether Yoo and Bybee were thorough, and the requirement to be thorough does not necessarily require that any memorandum setting forth the attorney's opinion communicate to the client every countervailing argument and every non-controlling fact. *See* DCRPC 1.2. In addition, the District of Columbia Board of Professional Responsibility has observed that proof of a violation of Rule 1.1 requires a "serious deficiency" in the representation, which has "generally been found in cases where the attorney makes an error that prejudices or could have prejudiced a client and the error was caused by lack of competence." *In re Evans*, 902 A.2d 69-70 (D.C. 2006).

While I agree with OPR that the Department expects its attorneys to provide thorough, objective, and candid legal advice as a performance matter, OPR has converted this high expectation into a minimum standard for assessing professional misconduct. OPR's work in this case was no less important than the work Yoo and Bybee performed in 2002 although it lacked the urgency that their tasks occasioned. OPR's report relates to the topic of torture no less than the memos that it investigated. Yet, OPR intended in January of this year to release publicly a draft report that has since undergone substantial analytical changes including the unexplained addition of the analytical framework that was absent in the first two drafts. After responding to the second draft and then receiving a materially altered final report, the subjects perceived that OPR was "dead-set" on finding misconduct and accused OPR of engaging in precisely the type of "one-sided" analysis that OPR condemned and of "cherry-picking" the record. Bybee response to final report at 4, 136; Yoo response to final report at 91.

My task, however, is not to analyze OPR's work other than for purposes of determining whether to adopt its findings. The fact that OPR's standard for analysis changed from a second draft, which issued four and a half years after it began its investigation, to the final report in and of itself likely establishes that the standard that it ultimately applied was neither known nor unambiguous. There are, however, similarities between OPR's description of the standards that it applied in the drafts and in the final report even though the drafts specifically reached findings of violations of identified bar rules and the final report reached a finding of violation of an obligation to be thorough, candid, and objective. Nonetheless, the evolution of the analytical standard combined with the fact it was gleaned in part from a "best practices" memo issued after these events, the fact that OPR's analysis failed to address other potentially applicable rules and opinions from the District of Columbia, and the fact that evidence in the record calls into question the appropriateness of applying broad standards of conduct reflected in after-the-fact "best practices" to attorneys answering novel and difficult legal questions for a limited audience at a time of national crisis lead me to conclude that the standard at which OPR arrived in its final

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report, to wit the highest standard of thoroughness, candor and objectivity, is not unambiguously established by law, policy, rule, or the record and fails to distinguish between the Department's expectations of its attorneys and the less stringent minimal requirements established by Rules of Professional Conduct.

Although I have found that OPR failed to identify a known and unambiguous applicable standard, the DC Rules obviously impose obligations on attorneys subject to its provisions. Rule 2.1 on its face requires that attorneys exercise independent professional judgment and render candid advice. Rule 1.2 also requires that an attorney not counsel his client to engage in conduct that the attorney knows to be illegal. *See also* DCRPC 3.3(a)(2). The commentary provides, "A client is entitled to straightforward advice expressing the lawyer's honest assessment." *Id.* cmt. 1. Although the DC Rules do not define "candor," DCRPC 3.3 sets forth an attorney's obligation of candor toward a tribunal. That rule provides, "A lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a tribunal. . . ." DCRPC 3.3(a)(1). Although Rule 3.3 on its face likewise requires a knowing violation, an attorney who recklessly disregards his duty of candor may also have committed a violation. Rule 8.4 prohibits attorneys from engaging in conduct involving dishonesty. In reference to Rules 3.3(a)(2) and 8.4, the District of Columbia Court of Appeals stated, "We agree . . . that it was necessary to show either knowing *or reckless* dishonesty for a violation of either rule to arise . . . ." *In re Evans*, 902 A.2d at 73 (emphasis added). *Evans* appears to be the only District of Columbia Court of Appeals opinion that applies a reckless standard to Rule 3.3. Prior cases applied the reckless standard in assessing conduct under Rule 8.4, but the first application of the reckless standard to Rule 8.4 occurred after the Yoo memo was issued. *See In re Romansky*, 825 A.2d 311, 316 (D.C. 2003) ("Although we have suggested that a showing of recklessness can sustain a violation of [Rule 8.4(c)], we have yet to squarely apply the standard in cases such as this.") It seems likely that an attorney's duty of candor toward his client as an advisor would be no higher than his duty of candor to the court, and therefore the requirement of candor in Rule 2.1 at most prohibits an attorney from knowingly or recklessly making a false statement of material fact or law to a client. The court has defined recklessness as "conscious indifference to the consequences of [one's] behavior," or "conscious disregard of [a] risk." *Id.* (citations omitted). The requirement in Rule 2.1 that an attorney exercise independent professional judgment must be read in conjunction with other obligations of the attorney and cannot mean that the attorney is supposed to exercise judgment independent of the client's objectives, but rather that the attorney should not provide dishonest advice to satisfy the client's objectives nor should the attorney provide advice when the attorney is encumbered by a conflicting personal interest or an inappropriate relationship with the client. A contrary reading would directly conflict with Rule 1.2. Based on the foregoing, I conclude that the DC Rules created an unambiguous obligation on Yoo and Bybee not to provide advice to their client that was knowingly or recklessly false or issued in bad faith. While the OLC best practices may require more, failure to meet those standards should result in poor evaluations or administrative disciplinary action, but not bar referrals.

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DCRPC 1.1 also unambiguously requires an attorney's work to be competent, including the appropriate level of thoroughness, but Yoo and Bybee's legal work violated this rule only if it contained serious deficiencies that prejudiced or could have prejudiced the client, that is the Executive Branch of the United States. Separate and apart from this requirement, Yoo and Bybee were unambiguously required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." DCRPC 1.4.

B. OPR's criticisms of the memoranda

My determination that OPR failed to identify and apply a known, unambiguous obligation necessarily leads me not to adopt its ultimate findings. However, because I determined that Yoo and Bybee had an unambiguous obligation not to provide advice to their client that was knowingly or recklessly false or issued in bad faith, to provide competent representation, and to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, I examined the specific criticisms identified by OPR to determine whether they violated those standards. My purpose is not to provide a definitive conclusion as to whether a particular criticism is valid because those assessments are in many instances a matter of judgment and mine is only one more opinion. Rather, my purpose was to determine whether the evidence establishes that Yoo and Bybee intentionally or recklessly provided false advice to their client or failed to meet other obligations.

In addressing these issues, I have cited liberally from the testimony provided to OPR focusing on testimony that does not appear in the final report. I recognize that different individuals combing through the record would find portions that support the outcome towards which the individual is predisposed. While I have had access to all of the transcribed testimony, I have not reviewed all of the documents available to OPR. OPR has not denied such access, but OPR has referenced those portions of the record on which its conclusions rely, and my access to the testimony and other select documents was sufficient to allow me to look behind those conclusions. Finally, because OPR's investigations typically involve interviews with percipient witnesses, the testimony available to me included exclusively officials who served in the prior administration. In evaluating their testimony, I considered what biases they may have brought to the interview and whether their testimony appeared credible based on their entire interview.

OPR's first draft cited a number of law review and newspaper articles critical of the unclassified Bybee memo that appeared after the memo leaked in 2004. Mukasey and Filip questioned OPR's reliance on those critics in their January 19, 2009 letter. In response to that letter, in its second draft, OPR observed, "Although we refer to works of legal commentary in this report, we did not base our legal conclusions on any of those sources." OPR second draft at 8. OPR made a similar assertion in connection with its citation of the views of former Department officials: "Similarly, although we report the views of some former Department

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officials regarding the merits of the Bybee and Yoo Memos conclusions, we did not base our findings on their comments." *Id.* at 8-9. I agree that OPR should generally reach its own conclusions about the matters under review, but when applying an analytical framework that considers whether a result is unambiguously prohibited or requires a determination of whether conduct is objectively unreasonable, the views of the witnesses who are properly interviewed as part of OPR's investigation, while not controlling, are relevant. For this reason, I have in some instances cited the views of former Department officials in order to evaluate whether the results reflected in the memoranda evidence misconduct.

1. The unclassified Bybee memo

a. Specific intent

OPR observed that "OLC's advice concerning the specific intent element of the torture statute was incomplete in that it failed to note the ambiguity and complexity of this area of the law." OPR final report at 160. More specifically, OPR concluded that "[s]ome of the Bybee Memo's analysis was oversimplified to the point of being misleading." *Id.* at 171. In its discussion of this subject, OPR faulted the memo for citing *Ratzlaf v. United States*, 510 U.S. 135 (1994) in which the Court addressed the federal statutes prohibiting structuring financial transactions to avoid various reporting requirements, 18 U.S.C. §§5322 and 5324. Under this scheme, Section 5324(a)(3) sets forth the prohibition on structuring transactions to avoid the reporting requirements, and Section 5322(a) provides the criminal penalty for a person who "willfully violat[es]" the prohibition. The Court held that this statutory scheme requires that the government prove that the defendant knew the structuring in which he engaged was illegal. *Ratzlaf*, 510 U.S. at 149.

In the beginning of its discussion of specific intent, the unclassified Bybee memo observed:

> For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied.

Unclassified Bybee memo at 3 (parenthetical in original). OPR wrote that this passage "clearly implied that the Court had considered the meaning of specific intent and had concluded that it required an express purpose to disobey the law on the part of the defendant." OPR final report at 171. However, the referenced passage restricted application of the Court's holding to the "statute at issue" in that case. Furthermore, the very next sentence of the memo stated, "Here, because

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Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective." Unclassified Bybee memo at 3. This sentence seems to refute any implication that an interrogator must act with specific intent to violate the torture statute in order to be guilty of that offense. Yoo justified citation to *Ratzlaf* as merely "'an example of a statute that was construed to require specific intent . . . .'" OPR final report at 172 (citation omitted). Bybee noted to OPR that "the Bybee memo did not 'seek to extend *Ratzlaf* to other statutory regimes' . . . ." *Id.* (citations omitted). In fact, the memo nowhere else mentions *Ratzlaf*. Different observers might view the citation to *Ratzalf* as an illustrative example, an improper implication, or irrelevant and unnecessary. Finally, in the classified Bybee memo, Yoo and Bybee wrote, "To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. . . . As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering." Classified Bybee memo at 16. For these reasons, I disagree that the memo suggests that an interrogator would have to specifically intend to violate the law.

OPR also observed that the "meaning of specific intent may vary from statute to statute," and in support of this proposition cited cases interpreting 18 U.S.C. §§664 and 656. Section 664 creates a criminal violation for "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another" the property of an employee welfare benefit plan or employee pension benefit plan. Section 656 defines an offense for any bank employee who "embezzles, abstracts, purloins or willfully misapplies" the bank's money. According to OPR, courts interpreting these statutes have differed regarding the specific intent required by the quoted language. Unlike those two statutes and the vast majority of federal criminal statutes, however, the torture statute actually defines the specific intent required to establish a violation. Section 2340 defines torture as those acts "specifically intended to inflict severe physical or mental pain or suffering." Thus, while a criminal law treatise should probably discuss the meaning of "specific intent" in various contexts, some might view such a discussion as irrelevant at best and confusing at worst in a memo discussing the elements of a statute that itself sets forth the required specific intent.[13]

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[13]I recognize that the Levin memo notes that the term "specific intent" is ambiguous. However, the memo cited a Supreme Court case on specific intent for the proposition that "purpose" corresponds loosely with specific intent, while "knowledge" corresponds with general intent. Levin memo at 10 *citing United States v. Bailey*, 444 U.S. 394, 405 (1980). The memo relies on an earlier opinion from the Court of Appeals for the proposition that knowledge alone may satisfy the specific intent requirement. *Id. citing United States v. Neiswender,* 590 F.2d 1269 (4th Cir. 1979). To the extent that those two cases conflict, the Supreme Court ruling controls, and that ruling is more consistent with the unclassified Bybee memo.

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Finally, with respect to specific intent, OPR characterized as "cursory" the cautionary language Yoo and Bybee included regarding specific intent and good faith. This assessment reflects little more than a subjective view. With respect to whether a defendant's knowledge that a prohibited result will occur is sufficient to prove his specific intent to bring about the result, the memo observed:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. . . . Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

Unclassified Bybee memo at 4. In its discussion of good faith, the memo asserted that a defendant who acts with the good faith belief that his conduct will not produce the prohibited result does not specifically intend the result even if his belief is unreasonable. *Id.* The memo advised, however:

> Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek* [*v. United States*, 498 U.S. 192 (1991)] , "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury . . . will find that the Government has carried its burden of proving" intent. *Id.* at 203-04.

Unclassified Bybee memo at 5. Once again, some readers might believe that the cautionary language was cursory. Others might find sufficient the statements that a jury would "in all likelihood" reject the argument that a defendant with knowledge of the likely results of his actions did not specifically intend those results and that it was "highly unlikely" that a defendant could successfully argue good faith based on an unreasonable belief.

In their responses to the second draft, Yoo and Bybee cited *Pierre v. Attorney General*,

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528 F.3d 180 (3rd Cir. 2008). In that case, the Third Circuit Court of Appeals, sitting *en banc*, undertook to "determine the level of intent required, under the Convention Against Torture (the 'CAT'), for an applicant to show that he is more likely than not to be tortured if sent to the proposed country of removal." *Id.* at 182. In so doing, the court considered an implementing regulation that provided, "'In order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. . . .' [8 C.F.R.] § 208.18(a)(5)." *Id.* at 186 (emphasis in original). The criminal torture statute defines "torture" as "an act by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . ." 18 U.S.C. §2340(1). Thus at least with respect to the issue of intent, the Third Circuit construed language identical to the language at issue in the OLC interrogation memoranda. The court concluded:

> [W]e hold that "for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act." *Auguste* [*v. Ridge*], 395 F.3d [123,] 145-46 [(3d Cir. 2005)]. Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result. Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture. Knowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent.

Id. at 189. This holding was endorsed by ten of the thirteen judges sitting on the *en banc* court. The three judges who concurred in the result but disagreed with the specific intent discussion noted, "In an August 1, 2002 memo to the White House Counsel, Jay Bybee, Assistant Attorney General, set forth an interpretation of 'specific intent' that is similar to that espoused by the majority." *Id.* at 193. They noted that the formulation had been "soundly repudiated" by OLC. *Id.*

This juxtaposition of the Third Circuit's virtual endorsement of the unclassified Bybee memo approach to specific intent despite OLC's previous rejection of it illustrates the difficulty in conducting the analysis OPR conducted in this case. Different lawyers answering previously undecided legal questions often will produce different answers. However, neither one of them has necessarily (or even probably) engaged in professional misconduct. In fact, in a different context, the Supreme Court has noted that an application of law may be incorrect but nonetheless objectively reasonable. *See e.g. Bell v. Cone*, 535 U.S. 685, 694 (2002) ("The focus of the . . . inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one."); *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("[A] federal habeas court may

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not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.") This phenomenon is perhaps most strikingly evidenced by the fact that the Supreme Court unanimously reversed approximately thirteen cases in its last term. Thus, a majority of judges on the courts of appeals in those cases and the attorneys who advocated affirmance of those decisions were so wrong that not even one Supreme Court justice agreed with them. Nonetheless, this recurring phenomenon produces neither impeachments nor bar referrals.

OPR dismissed *Pierre* because it was decided after the subject memoranda issued. At the very least, *Pierre* indicates that Yoo and Bybee's legal analysis of specific intent was not unambiguously prohibited by their duty to provide candid advice reflecting the exercise of independent professional judgment.

Based on all of the foregoing, I conclude that the analysis of specific intent did not evidence a violation of Rules 1.1, 1.4 or 2.1.

b. Severe pain

OPR criticized the unclassified Bybee memo definition of "severe pain." OPR reviewed the subject memoranda discretely. In other words, OPR analyzed the unclassified Bybee memo as a stand-alone document rather than considering that memo in combination with the contemporaneously issued classified Bybee memo, which addressed only specific techniques. OPR's approach might be proper for memoranda intended for public release or even for broader distribution within the government. However, the two memoranda are intertwined such that consideration of the entirety of the advice requires consideration of the contents of both memoranda in tandem.

As observed earlier, OPR originally found that the consideration of the medical benefits statute was improper because the statute was wholly unrelated to the torture statute. In its final report, OPR withdrew that criticism but concluded that the use of "severe pain" in the medical benefits statute provided little or no support for the conclusion that "'severe pain' in the torture statute must rise to the level of pain associated with 'death, organ failure, or serious impairment of body functions.'" OPR final report at 184.

This criticism is well founded. The medical benefits statute provides that "severe pain" is a symptom that may evidence an emergency medical condition. In order to constitute an emergency medical condition, severe pain along with other symptoms must lead a reasonably prudent person to believe that "'the absence of immediate medical attention [could] result in—(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily

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functions, or (iii) serious dysfunction of any bodily organ or part.'" Unclassified Bybee memo at 6 (*quoting* 42 U.S.C. §1395w-22(d)(3)(B)). The statutes do not define "severe pain." The statute's provision that severe pain may evidence the need for immediate medical attention to avoid organ failure does not suggest that pain that does not result in organ failure is not severe. While I understand OLC's desire to provide some objective guidance for what is inherently a subjective term, the formulation in the memo was confusing. As noted by others, organ failure and death are not necessarily preceded by significant pain, so the "level of pain associated with death, organ failure, or serious impairment of body functions" has no clear meaning. Of course, this reality suggests that the formulation was not helpful not that it was too restrictive.

Once again, however, the formulation may have been unhelpful, but several factors support a finding that the reference to the medical benefits statutes was not professional misconduct. First, the memo does not define "severe pain" as strictly limited to incidents resulting in organ failure or death. Rather, the memo advised that severe pain must rise to a "similarly high level," Unclassified Bybee memo at 6, and that victims must suffer pain that is "*of the kind* that is *equivalent to* the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." *Id.* at 13 (emphasis added). These qualifiers do not help much and could have been clearer, but the memo read carefully does not authorize interrogators to engage in any behavior that does not *in fact* cause serious physical injury, organ failure or death. More importantly, this definition was accompanied by the approval of specific techniques in the classified Bybee memo, and approval of the use of specific techniques to interrogate Zubaydah was the immediate purpose of the CIA's inquiry.

Furthermore, OLC issued a memo (the Levin memo) to replace the unclassified Bybee memo. The Levin memo rejected the unclassified Bybee memo formulation and undertook to provide alternative guidance with respect to the term "severe pain." Unlike the unclassified Bybee memo, the Levin memo was expressly written for public release. Levin memo at 1. Like the unclassified Bybee memo, the Levin memo began its discussion of severe pain with dictionary definitions of "severe." It then alluded to the ratification history of the CAT and cited a Senate report recommending consent to ratification of CAT in which the Senate Foreign Relations Committee observed that the term "torture" was "'usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.'" Levin memo at 3 (citation omitted). The Levin memo pointed out that torture is worse than cruel, inhuman and degrading treatment. *Id.* at 4. The Levin memo cited a number of cases in which courts had determined that certain actions constituted torture under the Torture Victims Protection Act, and identified those actions as: severe beatings; repeated threats of death and electric shock; sleep deprivation; extended shackling to a cot (at times with a towel over the nose and mouth and water poured down the nostrils); seven months of confinement in a

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suffocatingly hot and cramped cell; eight years of solitary or near-solitary confinement; severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; subjection to games of Russian roulette; cutting off fingers; pulling out fingernails; electric shocks to the testicles; beatings; pistol whipping; threats of imminent death; electric shocks; and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial. *Id.* at 5-6 (citations omitted).

The Levin memo reflected an improvement over the unclassified Bybee memo, but a critic could argue that the CIA could interpret the memo as authorizing any technique not expressly described. That criticism would be unfair for some of the same reasons that the definition of "severe pain" in the Bybee memo does not constitute misconduct, that is that the unclassified Bybee memo was only part of the communications between OLC and the CIA regarding interrogation techniques, and it was OLC's understanding that the CIA would not use these memos to authorize techniques beyond those authorized explicitly by OLC. This understanding is reflected in the classified Bybee memo that approved identified techniques under limited circumstances and advised that the guidance would not necessarily apply if those facts changed. For this reason, even if the memo's definition of severe pain constituted a serious deficiency, it was not likely to cause prejudice to the client because it was issued contemporaneously with the more restrictive classified Bybee memo and therefore does not constitute a result unambiguously prohibited by Rule 1.1.

Both the Levin and unclassified Bybee memos undertook to communicate that the torture statute prohibited only extreme, deliberate and unusually cruel practices. The Levin formulation was an improvement but almost any effort to provide prospective guidance on the meaning of a purely subjective term ran risks of misinterpretation. While the unclassified Bybee memo was not particularly helpful, I find that its issuance to a limited audience in conjunction with the narrower memo evidences a performance deficiency, but does not amount to professional misconduct.

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Based on the foregoing, I find that the discussion of severe pain, while flawed, does not evidence a violation of Rule 1.1, 1.4 or 2.1.

c. Ratification history of the Convention Against Torture

With respect to the unclassified Bybee memo's treatment of the ratification history of the Convention Against Torture (CAT) and its impact on the meaning of torture, OPR primarily criticized Yoo and Bybee's evaluation of disclosed facts. In other words, OPR did not suggest that Yoo and Bybee failed to report that the Reagan understanding was not accepted, and that the Bush understanding differed from the Reagan understanding. Rather, OPR claimed that Yoo and Bybee dismissed the differences as "rhetorical." OPR final report at 185. OPR cited certain portions of the Senate ratification history and Yoo and Bybee cited other parts, but the discussion in the memo, while fairly extensive, provided little actual guidance regarding the interpretation of the criminal statute other than to confirm the seemingly unremarkable proposition that "the prohibition against torture reaches only the most extreme acts." Unclassified Bybee memo at 19. As noted above, even the Senate Foreign Relations Committee report confirmed that the term

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torture was reserved for "extreme, deliberate and unusually cruel practices." Levin memo at 3. The main difference between the two understandings was the elimination of the Reagan understanding's clause limiting torture to acts causing "excruciating and agonizing" pain.

In discussion preceding the section on the ratification history, OLC cited dictionary sources to observe that torture generally involves "'excruciating pain'" or "'intense pain.'" Unclassified Bybee memo at 13. However, in the conclusion, OLC wrote, "Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure." *Id.* at 46. In the actual discussion of the ratification history, OLC observed, "Accordingly, we believe that the two definitions submitted by the Reagan and Bush administrations had the same purpose in terms of articulating a legal standard, namely, ensuring that the prohibition against torture reaches only the most extreme acts." Unclassified Bybee memo at 19. Because OLC's final definition of severe pain did not include those terms, and because the conclusion that torture reaches only the most extreme acts echoes the Senate report, I do not find that this discussion represented a serious deficiency in the memo or evidenced a knowing or reckless misrepresentation of fact or law.

d. United States Judicial interpretations

OPR also criticized the unclassified Bybee memo's discussion of judicial decisions. First, OPR pointed out that the memo failed to address cases interpreting the CAT regulations, which are applied in the context of the prohibition on deporting aliens to a country in which they may be subject to torture. OPR final report at 186-87. OPR noted, however, that this criticism was fairly minor and "the case law and the CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment." *Id.* at 187. OPR observed nonetheless that "we note the omission here because of our determination that OLC's interpretation of the torture statute in the context of the CIA interrogations program demanded the highest level of thoroughness, objectivity, and candor." *Id.* This conclusion illustrates clearly why the OPR standard is unworkable as a minimum standard of professional conduct. While generally criticizing the authors for slanting their opinions in favor of a restrictive view of what constitutes torture, OPR simultaneously criticized them for failing to cite opinions that support at least one of their conclusions. This criticism is particularly harsh for a memo intended for a limited audience and crafted in a finite amount of time during a national security emergency. While the standard OPR applies might work as a matter of Department expectations when there are no time constraints and no pending national security emergencies resolution of which may depend on the memo, it is not realistic to suggest that a memo for a small group of sophisticated attorneys in a time of national crisis fell short of professional obligations for failure to cite additional supportive cases.

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OPR also criticized Yoo and Bybee's treatment of cases interpreting torture under the Torture Victims Protection Act. OPR observed that Yoo and Bybee included in the body of the memo the case that involved the most extreme conduct while other cases involving less extreme conduct were relegated to the appendix. OPR also concluded that the memo inaccurately alleged that the TVPA cases "'generally do not approach [the lowest] boundary [of what constitutes torture].'" OPR final report at 188 (*quoting* Unclassified Bybee memo at 27). To support the latter conclusion, OPR relied on two cases, *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19 (D.D.C. 2001) and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F.Supp.2d 78 (D.D.C. 2001), *aff'd in part, rev'd in part* 326 F.3d 230 (D.C. Cir. 2003).

In *Daliberti*, the court heard evidence on the four plaintiffs' motion for a default judgment after counsel for the Republic of Iraq withdrew from the case. The evidence showed that Plaintiff 1was kidnaped by Iraqi authorities while he was working in Kuwait close to the Iraqi border. He was held for five days in a small cell with no lights, window, water, or toilet facilities. *Daliberti*, 146 F.Supp.2d at 22. While incarcerated, he was interrogated, accused of espionage, and threatened with physical torture such as "cutting off his fingers, pulling out his fingernails, or shocking him electrically in his testicles." *Id.* Plaintiff 2 was kidnaped at an Iraqi checkpoint on the Kuwaiti-Iraqi border. *Id.* He was taken blindfolded and at gunpoint to Baghdad where he was convicted of illegally entering Iraq and sentenced to 7 or 8 years in prison. *Id.* He was then held in a vermin-infested cell that contained one toilet for 200 prisoners and denied treatment for a serious heart condition. *Id.* Plaintiffs 3 and 4 were arrested after they accidentally crossed into Iraq from Kuwait. *Id.* at 23. They were convicted of illegal entry and sentenced to eight years. *Id.* While in captivity they were in constant fear of their lives, heard other prisoners being beaten, and were denied adequate food, water, toilet facilities, and medical treatment. At one point an Iraqi guard attempted to execute Plaintiff 3 but was restrained by another guard. *Id.* The court concluded that each of the plaintiffs was a victim of torture and hostage taking. *Id.* at 24. In *Simpson*, the plaintiff alleged that she and her husband were forcibly removed from a cruise ship that had taken safe harbor in Libya, held captive for three months, and threatened with death if they left. The court denied the defendant's motion to dismiss the complaint for failure to state a claim under the TVPA.

OPR correctly observed that some of the acts underlying the findings in those cases are not clearly torture. On the other hand, both cases are consistent with the unclassified Bybee memo's representation that the courts generally had not conducted in depth analysis of the elements of torture. *Simpson* was of limited utility because the opinion resolved a motion for failure to state a claim observing that "the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Simpson*, 180 F.Supp.2d at 82. For this reason alone, Yoo and

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Bybee's relegation of *Simpson* to the appendix was not unambiguously prohibited.[14] While the conduct in *Daliberti* was not as extreme as the conduct in *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D.Ga. 2002), some of the treatment of plaintiffs was severe. Yoo and Bybee's statement that the cases generally involved conduct that did not approach the lowest boundary of what constitutes torture is debatable. However, the body of the unclassified Bybee memo referred the reader to the appendix for a summary of the other TVPA cases, and the appendix accurately described the facts of *Daliberti*. For this reason, the memo's statement about what the cases "generally" involved was not unambiguously prohibited.

e. International decisions

(1) *Ireland v. United Kingdom*

The unclassified Bybee memo discussed two international decisions that addressed interrogations. In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A)(1978), the European Court of Human Rights reviewed an opinion of the European Commission on Human Rights and concluded that wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink did not constitute torture. OPR final report at 191. OPR "found that the Bybee memo ignored several important facts surrounding the decision." *Id.* After discussing those facts, OPR concluded, "A thorough, objective, and candid examination of *Ireland v. U.K.* would have mentioned some or all of th[os]e . . . facts." *Id.* at 192.

OPR first noted that the memo failed to point out that the United Kingdom (UK) had not contested the Commission's findings that the techniques were torture. In that regard, the UK argued that the Court lacked authority to consider the Commission's findings because the UK did not contest them. The European Court rejected this argument and nonetheless considered and reversed the Commission's finding. OPR presumably viewed the UK's acceptance of the Commission's ruling as diminishing the significance of the Court's holding in some sense, perhaps by making its ruling gratuitous or *dicta*. A contrary argument could be made that the European Court's decision to first consider and then reverse the Commission's findings despite there being no objection from the UK strengthens the import of the ruling. This contrary argument finds some support in the opinion itself. Responding to the UK's contention that the Court should not review the Commission's ruling, the Court observed:

Nevertheless, the Court considers that the responsibilities assigned to it within the

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[14] *Simpson* was reversed by the Court of Appeals for the District of Columbia and cited in Levin's memo as an example of conduct that did not constitute torture. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.2d 230 (D.C. Cir. 2003) and Levin memo at 5.

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> framework of the Convention [for the Protection of Human Rights and Fundamental Freedoms] extend to pronouncing on the non-contested allegations of violation of Article 3 (art. 3). The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19).

Ireland v. UK, at ¶ 154. Thus, because the UK's acceptance of the Commission's findings does not unequivocally undermine the import of the Court's holding, I am unpersuaded that Rule 1.1, 1.4 or 2.1 unambiguously required Yoo and Bybee to discuss that point.

OPR also pointed out that the unclassified Bybee memo failed to note that the Commission's majority and minority committee reports found that the five techniques in question violated domestic law. *See Ireland v. UK* at ¶ 100. However, the European Court of Human Rights was aware of and tacitly agreed with the committees' findings yet nonetheless concluded that the five techniques at issue were not torture. The Court observed:

> The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Id. at ¶ 167. Taking notice of the committees' findings regarding domestic law might have been relevant to the policy-makers' decision regarding whether to employ the techniques at issue in the classified Bybee memo. However, those findings seem to have little or no tendency to undermine or weaken the European Court's holding since the court itself recognized that the techniques likely violated domestic law yet nonetheless found that the techniques were not torture. Therefore, I am again unpersuaded Rule 1.1, 1.4 or 2.1 unambiguously required Yoo and Bybee to note the committees' findings regarding domestic law. This conclusion is even more evident given OPR's acknowledgment that an advising attorney's decision not to refer to moral, economic, social and political considerations is not subject to disciplinary review. OPR final report at 21 n.23.

OPR also observed that four judges out of the seventeen-judge European Court dissented from the ruling and suggested that Yoo and Bybee should have mentioned those dissenters. OPR final report at 192. I am aware of no Rule of Professional Conduct that requires attorneys to set

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forth the number of dissenters when citing a judicial decision from an appellate level court, and OPR cited none. Neither Rule 1.1, 1.4 nor 2.1 unambiguously required it.

Finally, regarding *Ireland v. UK*, OPR also criticized Yoo and Bybee for failing to cite additional international decisions. OPR final report at 192. OPR observed that all but one of those decisions supported the "uncontroversial conclusion that the term 'torture' should be applied to more severe forms of cruel, inhuman and degrading treatment." *Id.* n. 147. Once again, OPR's criticism of Yoo's failure to cite additional supportive cases seems inconsistent with its overarching observation that Yoo "put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and that he therefore committed intentional professional misconduct." *Id.* at 254. Nonetheless, OPR identified one case that purportedly undermines the holding in *Ireland v. UK*.

In *Selmouni v. France*, (25803/94) [1999] ECHR 66 at ¶ 101 (28 July 1999), the European Court of Human Rights observed that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future." However, that observation made no specific reference to *Ireland v. UK* nor the five techniques at issue in that case. On the other hand, *Selmouni* cited *Ireland v. UK* with apparent approval:

> In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v. the United Kingdom* judgment cited above . . .).

Selmouni at ¶ 96. Based on this apparent endorsement of the broad holding of *Ireland v. UK* and the lack of specific relation between the court's cautionary language in paragraph 101 and the *Ireland v. UK* decision, neither Rule 1.1, 1.4 nor 2.1 unambiguously required citation to *Selmouni*.

In sum with regard to the unclassified Bybee memo's analysis of *Ireland v. UK*, OPR's suggestions that the memo should have discussed the UK's lack of opposition to the Commission's ruling, the majority and minority committees' conclusions regarding domestic law, the number of dissenters, *Selmouni v. France*, and other similar factors outlined by OPR may be reasonable. However, failure to discuss those matters did not produce a result that was unambiguously prohibited. Rather, those suggestions appear to be little more than OPR's substitution of its own judgment for the judgment of Yoo and Bybee on those points. While

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OPR's judgment calls are certainly entitled to consideration, the mere fact that OPR made the judgment does not prove that contrary judgments are not also reasonable. Absent an unambiguously applicable standard that requires the course that OPR deems best, those OPR judgments do not establish the boundaries of misconduct.

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

OPR also criticized Yoo and Bybee's discussion of *Public Committee Against Torture in Israel v. Israel*, 38 LL.M. 1471 (1999) (*PCATI v. Israel*). In that case, the Israeli Supreme Court answered three specific questions. The court first held that the Israeli General Security Service (GSS) has authority to conduct interrogations of terrorist suspects. *Id.* at ¶21. Second, the court held that GSS's authority to conduct interrogations did not include the authority to engage in certain coercive techniques described in the opinion. *Id.* at ¶32. Third, the court held that the necessity defense cannot be used to authorize in advance certain types of interrogations. *Id.* at ¶36. While noting that the question was not squarely before it, the court also observed, "[W]e are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity defense' if criminally indicted." *Id.* at ¶35.

The techniques before the court included shaking, waiting in the Shabach position, the frog crouch, excessively tight handcuffs, and sleep deprivation. The unclassified Bybee memo asserted that the opinion is "best read as indicating that the acts at issue did not constitute torture." Unclassified Bybee memo at 30. OPR concluded that this assessment "was not based on the language of the opinion." OPR final report at 195.

While it is certainly far from obvious that *PCATI v. Israel* is "best read" as indicating that the acts at issue did not constitute torture, there is arguably *a* reading of the opinion that supports the inference Yoo and Bybee drew. The petitioners in *PCATI v. Israel* contended that the subject techniques constituted torture. *Id.* at ¶14. The state contended that the actions were not torture. *Id.* at ¶15. Although it decided that GSS was authorized to conduct interrogations, the court concluded that "a GSS investigator . . . is subject to the same restrictions applicable to police interrogators." *Id.* at ¶32. The court, therefore, next considered whether conditions of necessity could be used *ex ante* to authorize non-ordinary interrogation techniques. *Id.* at ¶35. The court concluded that the concepts of the necessity defense could not serve to authorize physical interrogations in advance and that physical interrogations must be authorized by the legislature or else the GSS, like the police, lacked such authority. *Id.* at ¶38. The court did not state that such legislation would violate international obligations with respect to techniques at issue; rather, the court observed:

> The "necessity" defense cannot constitute the basis for rules regarding an interrogation. It cannot constitute a source of authority on which the individual

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> investigator can rely on [sic] for the purpose of applying physical means in an investigation. The power to enact rules and to act according to them requires legislative authorization. In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation. Naturally, such considerations did not come before the legislature when the "necessity" defense was enacted.

Id. at ¶37. Although the reference to "social, ethical and political problems" could be read to include possible violations of international obligations, the court did not explicitly reference those obligations. Contrarily, in the face of a contention that the techniques at issue constituted torture, the court's failure to mention explicitly that such legislation would conflict with international obligations could be read to suggest that the court viewed the techniques as not absolutely prohibited by treaty, and therefore not torture.[15]

While this conclusion is far from inescapable, it is also not entirely implausible. The fact that the court suggested that the necessity defense might be available to a criminally-charged interrogator adds marginally to such a conclusion. The Israeli court noted that Israel's treaty obligations forbade interrogations involving torture, cruel and inhuman treatment, and degrading treatment, and that "[t]hese prohibitions are absolute." *Id.* at ¶23. Yet, the court observed, "[T]here is no doubt that shaking is not to be resorted to in cases outside the bounds of 'necessity' or as part of an 'ordinary' investigation." *Id.* Further, the court concluded, "Our decision does not negate the possibility that the 'necessity defense' will be available to GSS investigators . . . ." *Id.* at ¶40.

Yoo and Bybee relied heavily on the court's *dicta* that the necessity defense might be available to a criminally-charged interrogator to reach their conclusion that the opinion is "best read" as indicating that the court did not believe the techniques at question constituted torture. While this argument makes some sense, Yoo and Bybee failed to make the distinction between a defense to a crime and a justification in advance. In other words, the CAT obligates nations not to engage in torture and provides that "[n]o exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture." Unclassified Bybee memo at 31, *quoting* CAT Art. 2(2). However, an individual's assertion of necessity as a defense to a criminal charge may not be precluded by a prohibition on state assertion that exceptional circumstances warranted state-

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[15]The unclassified Bybee memo was internally inconsistent on this point because the memo stated that the court concluded that the techniques were cruel and inhuman, Unclassified Bybee memo at 30, but the Israeli court noted that the prohibition on torture, cruel and inhuman treatment, and degrading treatment was absolute. *PCATI v. Israel*, at ¶23.

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sanctioned torture. After all, the United States would bring the criminal charge in the first instance thereby indicating that the actions were not authorized by the state, and an individual's assertion of necessity would presumably be disputed by the government. Under these circumstances, a judicial determination that an individual could properly assert the common law defense of necessity would not necessarily undermine the United States' treaty obligations. In other words, the Israeli court's assumption that the necessity defense would be available to a criminally-charged interrogator does not necessarily lead to the conclusion that the court believed that the techniques were not torturous.

The memo also asserted that the Israeli "court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture." Unclassified Bybee memo at 30. However, the court described shaking as follows:

> The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion . . . , the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

PCATI v. Israel at ¶9. This description contradicts the memo's assertion and suggests an exaggerated effort to support the "best read" interpretation.

Although the analysis of *PCATI v. Israel* is flawed, I do not find that it in and of itself supports a finding of misconduct. First, Yoo and Bybee disclosed that the court did not expressly resolve the torture question. Second, they disclosed that their "best read" analysis was inferential based on the court's assertion that the necessity defense would be available to an interrogator. They failed, however, to point out that that question was not actually before the court. Third, however, the holding in the case, while perhaps relevant to policy-makers, had likely no relevance to the construction of a United States criminal statute. Fourth, the techniques at issue bore little resemblance to the CIA's proposal with the exception of sleep deprivation, which had been determined not to be torture by the European Court of Human Rights. Fifth, there is a reading, however strained, of the opinion that supports Yoo and Bybee's conclusion, although characterizing it as the "best read" interpretation was inappropriate. For these reasons, I find that even if the analysis represented a serious deficiency, it was not likely to have resulted in prejudice to the client, and therefore, in and of itself, does not constitute a violation of Rule 1.1. I will later address the Rule 1.4 and 2.1 implications in the context of all of the other valid criticisms.

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f. Commander-in-Chief power

OPR's analysis of the Commander-in-Chief section of the unclassified Bybee memo relied on four primary criticisms. First, OPR noted (1) the advice was incomplete and one-sided; (2) Yoo should have disclosed that his view was a minority view; (3) Yoo knew the section might be "used in an effort to provide immunity to CIA officers engaged in acts that might be construed as torture;" and (4) Yoo should have stated more explicitly that a direct Presidential order was required to trigger the Commander-in-Chief clause. *Id.* at 252.

With respect to the first two points, OPR reported that Pat Philbin "told us that he thought the Commander-in-Chief section was aggressive and went beyond what OLC had previously said about executive power, and that he told Yoo to take it out of the Bybee memo." *Id.* The report also cited a passage from Goldsmith's book, *The Terror Presidency*, and cited Bradbury, Goldsmith, and "commentators and other legal scholars" who criticized Yoo and Bybee's failure to cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *The Terror Presidency*, Goldsmith wrote that Yoo and Bybee's broad conclusion "has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law." OPR final report at 203 (*quoting The Terror Presidency* at 148). Goldsmith withdrew the Yoo memo because he determined that it contained "unnecessary, overbroad, and in some respects erroneous" advice. Goldsmith at 55.

While the report includes these assessments, OPR interviewed other Department attorneys who saw the ultimate issue less clearly. Philbin told OPR, "It wasn't that I thought it was plainly wrong and you can't defend it at all. . . . My solution to that was not try to figure out to the end whether, is this right and can we really–but just take it out, because it's unnecessary for that." Philbin at 17-18. Philbin later offered, "[I]t's an aggressive view of the clause to say Congress can't regulate at all the steps the President takes in dealing with enemy combatants. It's aggressive. I think it's a very tough question whether it's wrong. I'm not sure that it is wrong." *Id.* at 22-23. Ciongoli likewise told OPR he thought the Commander-in-Chief section was aggressive but defensible. Ciongoli at 23. OPR asked Levin, who issued the memo superseding the unclassified Bybee memo, why he did not repudiate the Commander-in-Chief section, and he replied, "[B]ecause it was unnecessary to address and it's an extraordinarily complicated question." Levin at 40. While he clearly thought that the issue need not have been addressed, he also told OPR, "I don't think I would say there is no commander-in-chief override if the circumstances are extreme enough." *Id.* Ultimately, Philbin advised Bybee that he could sign the memo with the Commander-in-Chief section in it. Philbin explained:

> But given the situation and the time pressures, and they are telling us this has to be signed tonight–this was like at 9 o'clock, 10 o'clock at night on the day it was signed–my conclusion is that's *dicta*. That's not what's supporting this

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> conclusion. I wouldn't put it in there. But I think it is permissible, it's okay for you to sign it.

Id. at 19. Philbin also made the point that the unclassified Bybee memo and the classified Bybee memo should be read together because these memos were intended to address the specific techniques discussed in the classified Bybee memo. Although the unclassified Bybee memo was capable of broad application, the classified Bybee memo addressed specific techniques applied to a specific individual under specific circumstances and advised the CIA, "If these facts were to change, this advice would not necessarily apply." Classified Bybee memo at 1.

The memo's discussion of this topic is decidedly one-sided and conclusory. Furthermore, none of the witnesses told OPR that the conclusion was anything less than aggressive, and the memo itself does not disclose that the position taken is the subject of considerable dispute. On the other hand, the memo was intended only for high level officials within the White House, the CIA, and, with respect to the Yoo memo, the Department of Defense. These officials included the White House Counsel, the General Counsel for the CIA, and the General Counsel for the Department of Defense. They were most likely aware that Yoo's assessment of the Commander-in-Chief authority represented the most aggressive view on the topic. As noted earlier, it is not clear that the Rules of Professional Responsibility or existing Department policy unambiguously required Yoo to raise in the memos counterpoints to his conclusion given the limited and sophisticated audience for which they were intended and Yoo's well known belief that his ultimate conclusion was correct. Without question, it would have been a "best practice" to disclose contrary viewpoints, but it is not at all clear in this context that a known, unambiguous obligation required those disclosures such that failure to include those viewpoints represented professional misconduct. In other words, if the client wants bottom-line advice (and there is some evidence that is what the CIA wanted, *see* Attachment 1 to Bybee's response to the final report, Letter, Mahoney to Rizzo, at 1), must the lawyer provide the pros and cons nonetheless? The commentary to DCRPC 2.1 provides, "In presenting advice, a lawyer . . . may put advice in as acceptable a form as honesty permits." Rule 1.4 provides that a lawyer "should fulfill reasonable client expectations for information . . . ." OLC differs from private counsel with respect to the import of its decisions on government actions and authorities. Nonetheless, it was less than clear at that time that Yoo was obligated as a matter of professional responsibility to disclose those viewpoints that contradicted his firmly held belief in the scope of Commander-in-Chief authority. In other words, while best practices may suggest it, no rule of professional conduct unambiguously required OLC attorneys to refute every counter-argument in every opinion.

OPR also found that Yoo knew that this broad interpretation of the Commander-in-Chief authority could be used to immunize CIA interrogators. OPR based this conclusion on the fact that the Commander-in-Chief and defenses section of the report were added after the Department

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refused the CIA's request for advance declinations of criminal prosecutions of CIA interrogators. OPR final report at 252. OPR also found, "Yoo was aware that, absent the requirement of a direct presidential order, the Commander-in-Chief section could become 'this kind of general immunity from everything anybody ever did.'" *Id.* Among other things, OPR cited comments from Goldsmith's book expressing concern that "the opinions could be interpreted as if they were designed to confer immunity for bad acts." OPR final report at 197, *quoting The Terror Presidency* at 149-50. Philbin told OPR, on the other hand, that while he did not think the Commander-in-Chief section should have been included, he did not think the memo provided any sort of immunity. Philbin at 22. He reasoned that OLC was providing guidance about "a specific question about a specific person and doing specific things," and in that context, he did not think the Commander-in-Chief section of the memo provided any immunity. *Id.* Goldsmith is correct that the memo "could be interpreted as if [it was] designed to confer immunity" on CIA interrogators. The unclassified Bybee memo issued, however, in connection with the CIA's request for an opinion regarding the legality of certain specific techniques under specific circumstances. The CIA's request for OLC guidance strongly suggested that the CIA was disinclined to authorize additional specific techniques absent OLC approval. The request to OLC and the denied request for declination show that the CIA was, as it should have been, seeking maximum protection for its employees before embarking on what it knew would be a controversial program that was, in its view, necessary to protect American lives. Thus, the CIA likely well knew that the passage of time would bring personnel changes within the Department of Justice and that these interrogations would be viewed with "the perfect, and brutally unfair, vision of hindsight." In his book, Goldsmith described historical "cycles of timidity and aggression" based on cited examples that led him to observe, "The executive branch and Congress pressure the [intelligence] community to engage in controversial actions on the edge of the law, and then fail to protect it from recriminations when things go awry." *The Terror Presidency* at 163.

OPR's finding seemed to depend on a concern that the CIA was asking for maximum license when the evidence in the record suggests that they were asking for maximum protection. The following exchange with Philbin illustrates the point:

> Q Aside from whether it might be accurate in terms of the statute, did you have any concerns about how the client would interpret and use the memo?
>
> A I'm not sure–
>
> Q In other words, you're giving it to someone who's trying to figure out– aside from the specific techniques, there's a possibility that the memo will be used generally to make their own policy decisions about what they can do. Did you have a concern that–
>
> A That's an assumption I would disagree with.

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Q Okay. I'd like to hear that.
A It was clear in everyone's mind that all that's happening is this, and they aren't going to do a thing different from this without asking us. I mean, that's the mindset you get from CIA is, we want to be covered. And so we're going to be covered on this specifically, and that's all it was, and not, here's some general parameters, go forth and make up the rest of it on your own.

Philbin at 38-39. Philbin also told OPR that he was not aware of any concern on the part of the CIA about how employees might be protected if they engaged in behavior beyond the approved techniques. *Id.* at 43. Philbin was unaware that the CIA was pressing or pushing for a specific answer from OLC. He believed that the need was to identify the legal line and not to usurp "the policymaker's prerogative of going up to that line." *Id.*

[redacted] was the OLC attorney who assisted Yoo with researching and writing the unclassified Bybee memo. OPR asked her if she was aware of how hard the CIA was pushing the declination question. She advised that she did not know how hard they were pushing it, but that the sense she got from the CIA was

> that their concern was what they don't want to have happen is have someone do something in the field that someone sort of haphazardly says is okay, or they give an okay. And then have them discredited as an officer in the CIA 10 years later because someone comes back and says, you engaged in illegal conduct.

[redacted] at 44.

Yoo himself denied that there was any pressure from the White House or the CIA for a particular result. Yoo testified:

Q . . . Was there anything that you felt indicated that you should take an aggressive attitude in interpreting the law?
A Not from the White House, or not from certainly those meetings that we're talking about now.
Q What about the CIA?
A Certainly not from the CIA. I mean, I don't, I don't actually think of them as being particularly aggressive. And certainly on the legal issues, you know–for example, they never came to us and tried to suggest how they would read the statute, for example. . . . I think in this one, everybody really was sort of taking our lead on it, because I think also of the lack of authorities, lack of any interpretation. But also I had never felt that

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anybody was pushing us in one direction or another.

Yoo Pt. I at 37-38. In Yoo's testimony to OPR, he was inconsistent about the purpose of the Commander-in-Chief and defenses section. For example, Yoo testified:

- Q And then at some point the CIA kind of came back and said, well, what if we go across the line, you know, even given what you've approved, what if we step across the line.
  A Yeah.
  Q Was the idea of these defenses and the Commander-in-Chief a reaction to that sentiment?
  A Well, I know– well, I mean, they wanted, you know, this declination from the Criminal Division which we couldn't provide. So, it wouldn't be–I mean, I just don't remember whether that was a response to a specific–it kind of makes sense that it would have been that we could have said, look, you know, we can talk about what happens if you go over the line, but we're not saying we would approve what went–you know, anything that happened, but I don't have any real–like, for example, I don't remember sitting in a meeting and saying, oh, well, we can't provide a declination, but we could do this. But it makes sense, although I don't have any memory of it.

Yoo Pt. II at 6-7.

- A And then we have this other pressure about the CIA wanting a declination letter, and their concern that–which I think is understandable–their concern that the general memo and the statute itself are still ambiguous about exactly what you do with specific interrogation methods.

  And so, no, I can completely see the inference that one thing we decided to do in response was to talk about what would happen if you did violate the statute, even though you are not intending to violate the statute.

Id. at 31.

- A . . . But I don't think we were trying to give them sort of immunity or declination.

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Id. at 36.

- A . . . But, you know, I think there's no doubt that we, in response to a separate declination, that we tried to inform them about the other doctrines that would apply in that situation. Because the only reason they would want a declination letter is for areas where they might go beyond the opinion.

Id. at 37.

- (Discussing OPR's question regarding whether the unclassified Bybee memo articulated that the Commander-in-Chief authorization would require a Presidential order)
  A . . . I do know we talked about it and that was sort of the conclusion we came to is that this was something the President would have to approve, and that it wasn't something that could just be claimed by everybody lower down, because then it would sort of be this kind of general immunity from everything that everybody did.
  Q Right. Well, I guess that's what I'm asking you, if the fact that it's not in the written opinion, do you think it ends up reading like it is sort of a general immunity for anybody to claim it?
  A I don't know. I mean, I would have thought, you know, what we might have thought was perfectly clear for people who work in this area might appear to other people, people not in the area that that was the case. But that wasn't our intention, and I know that wasn't the advice we would have given them orally.
  * * *
  A So, you know, they're written for people who work in the area and are sort of familiar with the sort of general background.

Id. at 38-39.

- Q So, your understanding of the meaning of that section is not that it would apply to a routine interrogation in the field someone is using to gain–say a military or a CIA person is in the field trying to interrogate a prisoner to get information about conduct of the war, and–
  A No.
  Q –violates the statute, goes over the line and violates the statute,

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that–

A No, no, the necessity and self-defense–

Q –the DOJ would be able to prosecute an individual based on your opinion?

A Yeah, unless there was, unless they had some kind of direct, you know, there was some direct chain of orders that–you know, because the President also doesn't draft the orders for how they are specifically carried out. But those orders have to be within the President's original directive.

Q Okay.

A Yeah, for that Commander-in-Chief argument, that's right.

Q And do you think that the way it's written, given that that's not specifically stated, could end up being a bar to prosecution, that someone could rise it effectively under your–

A I don't think so.

Q –memo?

A I don't think so because the CIA, I mean, the CIA . . . is very familiar with this doctrine . . . .

Id. at 41-42.

Q So, it's your recollection that those sections were the result of discussions, idea sessions between you and Jay and Pat probably?

A Uh-huh. Yeah . . . . I do remember talking about it with Pat and Jay a number of times, this Commander-in-Chief issue, the defenses issue, because–and this also went to my earlier concern about the clarity of the definition, the interpretation of a statute, because my concern was that if the statute was interpreted in such a vague way, you know, I thought it was entirely possible that it would be applied incorrectly. And so what I wanted to know was what would happen if that would happen. And I'm pretty sure, I would not be surprised that the CIA had mentioned this also, not the Commander-in-Chief arguments or defenses, but I'm sure they would have asked, you know, what would happen if the interpretation–what would happen if we interpret it incorrectly, you know, applied it incorrectly.

Q Did that have an influence on you, in terms of adding the Commander-in-Chief section and the defenses section, or was it in response to something that the CIA asked you about, or–

A Yeah, I'm pretty sure they–as I say, I'm pretty sure they raised this

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issue. You know, if the definition is so vague, what happens if we go over the line.

Q. Okay.

A You know, I don't think they would have said–they wouldn't have said it this way. They would not have said, can't you include a discussion of the Commander-in-Chief power. Or could you include a discussion of the necessity defense. That wouldn't be the way they would–I'm sure what they would say rather would be, you know, what happens if the statute's vague and, you know, somebody misapplies it in good faith?

* * *

A Now, the defenses issue I was aware from very early on because it's discussed in all the legal literature–not all, but a lot of the legal literature about this question of interrogation, and it's discussed in Israeli opinions, does discuss this question of the necessity defense. And so I thought it was ultimately something we were going to have to discuss . . . .

Id. at 60-63.

In Bybee's testimony before OPR, he was not at all equivocal on the issue of whether the memo was intended to provide advance declination. He echoed Philbin's observation that the two August 1, 2002 memos were intended to be read together. He told OPR:

> I think that anybody who read those two memos and read them together as they were intended to be read, would–especially would take away from the classified memorandum that if anybody was planning on doing anything differently from the assumptions that they had provided to OLC that they ought to come back for very, very specific advice and that going out and sort of making up your own rules, based on that advice or trying to second guess how OLC would see different situations than were described to us would be a really dangerous thing to do.
>
> This is–that the CIA was again very, very careful in providing the very specific questions, and we were equally specific in answering them . . . .

Bybee at 115.

Finally, John Rizzo, who was Acting General Counsel at the CIA at the time the August 1, 2002 memos were issued and the named recipient of the classified memo, confirmed what other witnesses had said about the CIA's intention in seeking OLC's guidance. Rizzo was given an opportunity to respond to the second draft. In that draft, OPR observed:

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> [W]e found ample evidence that the CIA did not expect just an objective, candid discussion of the meaning of the torture statute. Rather, as John Rizzo candidly admitted, the agency was seeking maximum legal protection for its officers and at one point Rizzo even asked the Department for an advance declination of criminal prosecution.

OPR second draft at 182. Rizzo strongly objected to this finding regarding the CIA's expectations, yet OPR nonetheless included it in the final report. *Id.* at 226. In his response, in reference to the above-quoted section of the second draft, Rizzo wrote:

> This section of the Report erroneously concludes that the CIA's interest in providing maximum legal protection meant that the CIA did not want objective, thorough analysis of the torture statute. Nothing could be further from the truth. As I indicated on numerous occasions, CIA looked to the Department for legal guidance to ensure its compliance with the torture statute and other applicable law. If the Department had instructed CIA that any of the enhanced interrogation techniques were not legally permissible, the CIA would not have used those techniques. . . . The report suggests that providing maximum legal protection for CIA officers and obtaining objective analysis of the enhanced techniques were mutually exclusive propositions–they were not. The only practical way to provide the CIA with the maximum legal protection it sought was to objectively interpret the torture statute and other applicable law and apply the law to the various enhanced interrogation techniques. If CIA had asked the Department to provide anything other than an objective analysis of the law and the techniques we would have undercut the very protections we sought for our officers. This theme in the report is simply not accurate, and it literally makes no sense.

Rizzo April 8, 2009 response at 4.

Among the difficulties in assessing these memos now over seven years after their issuance is that the context is lost. In order to assess the memos accurately, it is important to consider what the individuals who were involved in the process said about their thinking at the time. Nonetheless, in the hands of capable attorneys, virtually every fact cuts both ways. For example, John Rizzo contends that seeking maximum legal protection for CIA officers was a good thing, and that desire led him to seek guidance from the office within the Department tasked with giving it. *See* 28 C.F.R. § 0.25. The innocent explanation for his inquiry would be that before the CIA advised its officers to engage in coercive techniques, the agency and the individuals should understand the potential risks associated with that activity. The torture statute expresses its prohibitions in terms of imprecise degrees of injury such as "severe" pain and "prolonged" mental suffering, and the assessment of whether these techniques constituted torture

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would often be in the eyes of the beholder. Knowing that the techniques for which they sought authorization were close to the statutory line, the agency wanted to eliminate as much as possible its officers' exposure to criminal liability for engaging in interrogation techniques that the agency believed necessary for the protection of American lives.

From OPR's much later perspective, Rizzo's effort to seek maximum legal protection was suspicious and suggested an intent on behalf of the CIA to obtain maximum license to engage in torturous interrogation techniques with impunity, and Yoo was their willing facilitator. Although the evidence regarding which of these interpretations reflects reality is to some extent in conflict, I am unpersuaded that the preponderance of the evidence supports the sinister alternative. First, the conclusion assumes bad faith on the part of too many people–Yoo, Bybee, Philbin, Ashcroft, Rizzo, and the CIA interrogators in the field, among others. Second, and perhaps most persuasively, the only memo actually directed to Rizzo at the CIA was the classified Bybee memo that confined its scope to specific enumerated techniques applied to a particular individual under particular circumstances and instructed that the advice would not apply if the facts change. The classified Bybee memo relied on the facts that (1) the interrogation team was certain that Zubaydah had information he refused to divulge, (2) the information pertained to terrorist networks overseas and plans to conduct attacks within the United States or against American interest overseas, (3) Zubaydah seemed unwilling to disclose this information, and (4) intelligence reflected a level of "chatter" consistent with that which preceded the September 11 attacks. Classified Bybee memo at 1. In hindsight, the concerns underlying the classified Bybee memo *may have been* overblown, but I certainly am not willing to conclude that, less than one year after 9/11, the officials responsible for preventing another attack took the threat *too* seriously. Finally, I agree that the unclassified Bybee memo and the Yoo memo can be interpreted as providing a broad grant of immunity to CIA interrogators. However, the memos speak in terms of defenses that "could be raised" rather than circumstances that would authorize the agency to engage in torturous acts. In other words, rightly or wrongly, the memo answers the question not explicitly before the court in *PCATI v. Israel*, that is whether the defenses could be raised by an interrogator charged with a criminal offense. The memos do not purport to describe circumstances in which the CIA could authorize torture in advance, and the preponderant evidence suggests that the CIA did not intend to use the memos that way. As Bybee noted, given the restrictive language in the classified Bybee memo, any effort to construe the memo as authorization to engage in techniques beyond the specifically approved techniques would have been "a really dangerous thing to do."

Furthermore, OPR has pointed to no additional interrogation methods that the CIA implemented without OLC approval. To the contrary, the OPR final report reflects that when unapproved techniques were used by CIA interrogators, the CIA's Deputy Director of Operations notified the CIA Office of Inspector General, which conducted a review of the techniques and, where appropriate, made referrals to the Department of Justice.

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Finally, OPR criticized the unclassified Bybee memo and Yoo memo for failing to specifically state that the Commander-in-Chief authority depends on an order from the President himself. As Yoo noted, however, the audience for these memos likely was well aware of that restriction, and Bybee offered that the memo was not intended to address that specific question. Bybee told OPR that the memo was more directing the recipients' attention to the issue and that a more complete discussion would have required 50 pages and caused further delay. Bybee at 89. He noted that if he had known the memo was going to be released and not restricted to "an audience of sophisticated lawyers down the street," then he would have wanted it drafted differently. *Id.* at 92. While not explicitly saying that the authority described must be executed through a direct order from the President, the memo generally described the authority as the President's authority. The section is titled, "The President's Commander-in-Chief Power," and in its introductory paragraph noted, "As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy." Unclassified Bybee memo at 31. While the memo failed to explicitly state that the President himself must issue such an order, it also provided no suggestion that someone other than the President could exercise his Commander-in-Chief authority to direct otherwise illegal activity. Once again, while a more complete discussion of the question would have been an improvement, the decision to add the section came only approximately two weeks prior to the date on which the CIA said it needed a decision. OPR final report at 52-53. That reality along with the limited intended audience for the memo suggest that neither Rule 1.1, 1.4, nor 2.1 unambiguously required that OLC explicitly address that issue in the memos.

In sum, based on the foregoing, although it is apparent that the Commander-in-Chief section was not perfect, it does not reflect professional misconduct. The memo was issued for a limited purpose and accompanied by a companion memo that constrained its scope and reduced the risk–to the extent that any actually existed–that the CIA would use the memo as broad license to engage in unauthorized interrogation practices.

g. Criminal defenses to torture

(1) The necessity defense

OPR also questioned Yoo and Bybee's determination that the necessity defense could be available to interrogators charged with violations of the torture statute. Those criticisms included Yoo and Bybee's failure to cite *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), failure to conduct an element-by-element analysis of the defense, and failure to analyze correctly the ratification history of the Convention Against Torture (CAT).

The memo would have been more complete if it had included a citation to and description

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of *Oakland Cannabis*. In that case, the Court speculated whether the common law defense of necessity would ever be available to someone charged with a statutory crime that does not provide for it, but ultimately declined to resolve the question. *Id.* at 490-91. The unclassified Bybee memo cited *United States v. Bailey*, 444 U.S. 394 (1980) for the proposition that "the Supreme Court has recognized the defense." Unclassified Bybee memo at 40. However, citing *Bailey*, the Court observed in *Oakland Cannabis* only that "we recognize that this Court has discussed the possibility of a necessity defense without altogether rejecting it." *Oakland Cannabis*, 532 U.S. at 490.

On the other hand, the Court's speculation in *Oakland Cannabis* was *dicta* because the Court resolved the issue before it not by abrogating the defense in all cases, but by specifically holding only that the medical necessity defense to distribution of marijuana was precluded by statute. *Id.* at 491. Thus, while *Oakland Cannabis* speculated about the viability of the common law necessity defense, the law in every relevant circuit recognized it. OPR noted, "Opinions discussing and setting forth the elements and limitations of the necessity defense were available from every federal judicial circuit except the Federal Circuit (which does not hear criminal cases)." OPR final report at 209. Although a more complete description of the law might have been helpful to the intended audience, the controlling law in each circuit permitted the defense under appropriate, albeit narrow, circumstances. Of note, courts considering the necessity defense since *Oakland Cannabis* have not taken the bait and rejected the defense. To the contrary, in *Raich v. Gonzales*, 500 F.3d 850, 858 n. 4 (9th Cir. 2007), the court observed, "We do not believe that the *Oakland Cannabis dicta* abolishes more than a century of common law necessity jurisprudence." *See also United States v. Al-Rekabi*, 454 F.3d 1113, 1122 (10th Cir. 2006) and *United States v. Alston*, 526 F.3d 91, 94 (3rd Cir. 2008). In sum, the failure to cite Supreme Court *dicta* that contradicted "a century of common law necessity jurisprudence" does not constitute misconduct.

OPR criticized the unclassified Bybee memo's alleged failure to conduct an element-by-element analysis of the defense. However, while not in the format OPR suggested, the memo did discuss the factors typically part of any formulation of the defense of necessity including, most importantly, that "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Unclassified Bybee memo at 40.

The more difficult question on this subject is not whether the necessity defense remained generally viable at the time the memo was written, but whether it would be available to a defendant charged with violation of 18 U.S.C. §2340A. The memo and OPR's report engage in lengthy analyses of how the ratification history of the CAT might impact that question. The significance of the ratification history boils down to whether, when Congress passed the torture statute, it failed to address explicitly the CAT provision providing that no extraordinary circumstances can justify torture because it did not want to or because it did not need to.

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Because the question remains open until a court decides it, either interpretation is possible. OPR made a strong case that the ratification history of the CAT suggests that any Congressional effort to implement CAT would necessarily preclude application of the defense. OPR final report at 216-17. Yoo and Bybee, on the other hand, contend that Congress was aware of the CAT provision that no exceptional circumstances could be invoked to justify torture and that its failure to prohibit defenses in the statute evidences its rejection of the CAT restriction so far as it applied to make the necessity defense unavailable to an individual defendant.

In OPR's analysis, it asserted in support of its position that "the treaty explicitly stated . . . that necessity was not a defense to torture." OPR final report at 216 *citing* CAT art. 2(2). But the treaty does not say that the necessity defense would not be available to an individual charged with a crime. Rather, it says that a state may assert no exceptional circumstance as a justification for torture. In this sense, OPR seeks to "have it both ways" with respect to the Israeli case in the opposite way Yoo and Bybee did. OPR argued that the Israeli court's statements that the necessity defense might be available to a criminally-charged GSS interrogator did not evidence that the Israeli court thought the techniques at issue were not torture. Here, however, OPR contended that the treaty prohibited necessity as a defense to torturous acts. As the Israeli court noted, the defense of "justification" depends on prior state authorization of the actions underlying a criminal charge, whereas the defense of necessity "involv[es] an individual reacting to a given set of facts." *See PCATI v. Israel*, at ¶¶35-37. This distinction makes a difference to the analysis of both *PCATI v. Israel* and the statutory history of the torture statute.

Yoo and Bybee conflated the concepts as well. They concluded that the necessity defense might be available to an interrogator charged with torture, but found that the Israeli case was best read as concluding that the interrogation techniques at issue were not torture because the court said the necessity defense would be available. Yoo and Bybee's contention that the necessity defense would be available to a CIA interrogator based in part on Congress's failure to adopt the purpose portion of the CAT definition provides some basis to explain the inconsistency. Nonetheless, the memo would have been more complete if it had discussed this seeming contradiction.

OPR's criticism of Yoo and Bybee's conclusion regarding the necessity defense also relied on the statement in *Oakland Cannabis Buyers* that the Court rejected "the Cooperative's intimation that elimination of the [necessity] defense requires an explicit statement." OPR final report at 216, *citing Oakland Cannabis Buyers*, 532 U.S. at 491 n.4. However, in that case, the defendants sought to assert a defense of medical necessity to a marijuana distribution charge. Congress included marijuana on Schedule I, which lists by its own terms drugs that have no currently accepted medical use in the United States. *See* 21 U.S.C. §812. The Court relied on this provision to conclude that the medical necessity defense was not available. For this reason, the Court's observation that Congress need not explicitly eliminate the necessity defense has

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little relevance to the availability of the defense in the torture context.

The Supreme Court has recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *Bailey*, 444 U.S. at 415 n.11. The Anglo-Saxon background against which Congress passed the torture statute provided for the defense of necessity, and it is at least plausible that Congress's failure to specifically preclude its application to the torture statute evidenced a determination of values.[16] Further complicating this discussion is the reality that any court that interprets this statute will do so in the context of a criminal prosecution. The Supreme Court has recognized the longstanding principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota v. United States*, 471 U.S. 419, 427 (1985). In this context, the Supreme Court has considered and relied on statutory history to construe a criminal statute narrowly against the government. *See e.g. Flores-Figueroa v. United States*, 129 S.Ct. 1886 (2009); *United States v. Granderson*, 511 U.S. 39 (1994); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992); and *United States v. R.L.C.*, 503 U.S. 291(1992). However, the Court has also noted:

> It is true that the need for fair warning will make it "rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text," *Crandon v. United States*, 494 U.S. 152, 160, 110 S.Ct. 997,1002-03,108 L.Ed.2d 132 (1990), and that "general declarations of policy," whether in the text or the legislative history, will not support construction of an ambiguous criminal statute against the defendant, *Hughey v. United States*, 495 U.S. 411, 422,110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990). But lenity does not always require the "narrowest" construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.

United States v. R.L.C., 503 U.S. 291, 306 n. 6 (1992). How the Court might view the statutory history is even further complicated because the necessity defense is not part of the statute but arises from common law. Although OPR may ultimately prove correct, until a court resolves the issue, OPR's interpretation of the ratification history reflects a mere difference of opinion. Furthermore, the distinction discussed in *PCATI v. Israel* likewise applies here. The CAT clearly prohibits a government from authorizing torture in advance based on exceptional circumstances,

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[16]As noted above, although the question was not precisely before the court, the Israeli court was "prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the 'necessity defense' if criminally indicted." *PCATI v. Israel,* at ¶35.

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but that prohibition does not necessarily lead to the conclusion that an individual criminal defendant could not raise necessity as a defense to a torture charge. Once again, Yoo and Bybee's analysis of the CAT provisions as they relate to the availability of the necessity defense does not reflect a violation of Rule 1.1, 1.4 or 2.1.

(2) Self Defense

With respect to the issue of self-defense or more accurately "defense of others," OPR first criticized Yoo and Bybee for citing secondary sources rather than primary sources to describe the defense. The memo cited well-respected sources regarding a longstanding common law defense, and nothing about the particular formulation of the defense reflected in those sources suggests that citing them is professional misconduct or resulted in an inaccurate general description of the defense.

Second, OPR criticized the memo for overstating the number of "leading scholarly commentators" on the issue of whether self-defense can apply to torture. In the unclassified Bybee memo, Yoo referred to "commentators" but named only one. In the Yoo memo, he added a second commentator, and OPR contended that the article on which Yoo relied does not actually support the defense. Whether one commentator or many support the availability of self-defense in the torture context is of little actual consequence and would probably have been better left out of the memos altogether, but the issue is simply too inconsequential to support a finding of misconduct in and of itself.

Realistically, this issue seems to simply come down to (1) whether Congress intended to and did eliminate the defense and (2) if not, whether the facts of a particular case support the defense. Yoo and Bybee flagged that the defense usually applies when the otherwise prohibited force is directed at the actor who intends to injure or kill third parties rather than at someone who has information about that actor. OPR's final report disclosed no case that addresses that issue. OPR noted, and I agree, that the discussion of self-defense in many ways overlaps the discussion of the necessity defense. Under Yoo and Bybee's analysis, it is difficult to conjure a hypothetical interrogation in which defense of others would apply but necessity would not. Yet, although OPR was critical of the support that Yoo and Bybee cited for their conclusion, it did not cite contrary case law that refuted the conclusion. In the absence of judicial precedent to the contrary, OLC's conclusion that interrogators would be able in certain circumstances to assert defense of others in response to a criminal charge was not unambiguously prohibited.

OLC also suggested that an interrogator might be able to augment such a defense to torture charges based on *In re Neagle*, 135 U.S. 1 (1890). In that case, the Court ordered the release of Deputy United States Marshal Neagle, who the state charged with murder after he killed an assailant who attacked a federal judge. The Supreme Court held that Neagle was

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entitled to *habeas corpus* relief because he was acting under the authority of the United States. *Neagle*, 10 S.Ct. 658, 672. The unclassified Bybee memo opined:

> If the right to defend the national government can be raised as a defense in an individual prosecution, as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated Section 2340A was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack.

Unclassified Bybee memo at 45. This supposition is similar to the public authority defense. The public authority defense applies when the defendant engages in criminal conduct at the request of a government official. *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009). When defendants have claimed to act under the authority of the CIA, courts have sometimes referred to the defense as "the CIA defense." *See United States v. Pitt*, 193 F.3d 751, 756 n.3 (3d Cir. 1999) (citing cases). The CIA defense differs from the typical public authority defense because the claimed authorization is apparent rather than real. *See id.* This is in part because the CIA cannot authorize individuals to violate the Constitution or statutes. *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir. 1989). Courts generally reject apparent authority as a viable theory of defense. *See United States v. Fulcher*, 250 F.3d 254 (4th Cir. 2001) (accumulating cases).

Torture is illegal, and the CIA cannot authorize conduct that violates a statute. The CIA sought OLC's opinion in order to assure that it did not authorize torturous acts. The CIA authorized only the techniques approved by OLC. Therefore, it is not likely that a CIA employee who used an unauthorized interrogation technique and was later charged with torture could claim that he was "fulfilling the Executive Branch's authority to protect the federal government and the nation, from attack." Had the United States Marshals Service told Neagle that he could not use lethal force under any circumstances, he may have been able to assert defense of others as a defense to the murder charge, but he could not claim he was exercising his official authority. The Court found in *Neagle* that the authority to use lethal force to protect Judge Field was implied, and OLC has found other authorities implied as a result of *Neagle*. *See e.g. Authority of FBI Agents Serving as Special Deputy United States Marshals, to Pursue Non-federal Fugitives*, 19 USAG 33, 1995 WL 944018 (February 21, 1995) and *Use of Federal Employees for Olympic Security*, 20 USAG 200, 1996 WL 33101196 (May 17, 1996). In the latter opinion, citing an earlier decision, OLC observed that the authority to punish an offense suggests inherent authority to take reasonable and necessary steps to prevent an offense. *Use of Federal Employees for Olympic Security*, 1996 WL at *6 n.3. Thus, a CIA employee who engaged in *authorized* interrogation techniques and who was later charged with torture might raise a defense loosely based on *Neagle*. However, an authority explicitly withheld cannot also be implied. Thus, Yoo

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and Bybee's contention that *Neagle* suggests the availability of a defense to charges arising out of expressly prohibited interrogation techniques seems wrong, particularly since the CAT treaty permits no justification for torture.

2. The Classified Bybee memo

a. Failure to discuss history surrounding use of water in interrogations

OPR first criticized the classified Bybee memorandum's discussion of waterboarding for failure to cite the United States' history surrounding the use of water in interrogations. OPR claimed the classified Bybee memo should have discussed *In re Estate of Marcos Litigation*, 910 F.Supp. 1460 (D.Haw. 1995) and *United States v. Lee*, 744 F.3d 1124 (5th Cir. 1984). In the former, the court considered damage claims from Filipino victims of the oppressive Marcos regime. The court listed fourteen interrogation methods it described as forms of torture. *Marcos*, 910 F.Supp. at 1463. The court's description of one of those techniques is similar to the waterboard. Subsequent to a jury trial during which the jury found in favor of 22 named plaintiffs, the court appointed a special master to depose a sampling of class members in the Philippines in an effort to develop a basis for the jury to determine damages for the class. *See Hilao v. Marcos*, 107 F.3d 767, 772 (9th Cir. 1996). The Special Master deposed 137 class members, approximately three of whom had been subjected to a waterboard-like procedure. In two of the cases, the waterboard-like procedure was part of a course of conduct that included other clearly torturous acts. In the third, the plaintiff, at 8:00 pm,

> was taken to a forest, stripped, forced to lie on a table, had his hands and feet held down, and had soapy water poured into his nose and mouth which made him feel like he was drowning. This treatment lasted until 4:00 am, during which time [plaintiff] lost consciousness "many times," felt chest pains, and cried. He testified that he never screamed because there was water in his mouth. After he would pass out, the soldiers would revive [plaintiff] which he said felt like "somebody was pushing the water out of his stomach." [Plaintiff] testified, "I experienced a lot of sufferings during that time. I wish that it would be better for them to kill me than to bear what they were actually doing to me at that time."

In re Estate of Marcos, 1994 WL 874222, 35 (D.Haw. January 3, 1995). The special master validated this claim and recommended a damage award of $30,000. *Id.* While the Ninth Circuit Court of Appeals considered two separate appeals in the case, only one of the opinions discussed a specific interrogation, and it was not the interrogation described above. *See Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). On appeal, the court quoted and approved the district court's jury instruction regarding torture that tracked the TVPA language. *Id.* at 792-93. The

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Special Master apparently applied that same standard. A discussion of the *Marcos* case may have been helpful in some limited sense, but the only fact pattern that even resembled the procedure for which the CIA sought approval was found to constitute torture by a special master in an unpublished decision. Furthermore, it is even less clear that a discussion of this case was necessary in a memorandum written specifically to the CIA and for very limited distribution. Finally, Yoo and Bybee cited the Court of Appeals opinion in the appendix of the unclassified Bybee memo. Unclassified Bybee memo at 49. For these reasons, I am not persuaded that failure to cite this case evidences professional misconduct.

In *Lee*, the United States brought civil rights charges against law enforcement officers who subjected individuals in their custody to water torture. However, the opinion does not describe the technique nor conduct any analysis that would be useful as a predictor for how courts might construe Section 2340A in the future. In the Levin memo, written to replace the unclassified Bybee memo, Levin observed that Congress may have adopted a definition of torture that differed from the colloquial use of the term and noted that only the CAT definition was relevant to his analysis. Levin memo at 2. For these reasons, failure to cite *Lee* does not evidence professional misconduct.

OPR also described additional historical examples of "water torture," but the examples are distinguishable from the proposed technique and were not analyzed under language similar to the torture statute or the CAT. While citation to these examples may have provided useful historical context, it seems that such context would largely relate to the policy decision rather than to the legal question. For this reason, the Rules of Professional Conduct did not require reference to those historical incidents. *See* OPR final report at 21 n.23.

b. Failure to discuss distinctions between SERE training and interrogation

OPR next criticized the classified Bybee memo for failing to point out [redacted]

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A close reading of the unclassified Bybee memo demonstrates that the psychological impact of the proposed techniques mattered only to the approval of the waterboard. The torture statute proscribes acts "specifically intended to inflict severe physical or mental pain or suffering

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. . . ." 18 U.S.C. §2340(1). The statute defines "severe mental pain or suffering" as prolonged mental harm caused by one of certain enumerated acts listed in the statute. In the classified Bybee memo, Yoo and Bybee first considered whether the proposed techniques would cause severe physical pain. After concluding that the techniques would not cause severe pain, they turned to the issue of whether the proposed techniques would cause severe mental pain or suffering. As a threshold matter, however, they first determined that nine of the ten proposed techniques were not encompassed by the enumerated acts, and therefore there was no need to evaluate whether the acts would cause severe mental pain or suffering. They did determine that the waterboard constituted a threat of imminent death, which is one of the enumerated acts in the statute. Therefore, they next addressed whether the waterboard would result in prolonged mental harm. They wrote, "Based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard." Classified Bybee memo at 15.

[redacted] But Yoo and Bybee had determined that the waterboard did not cause severe *physical* pain and suffering, and the SERE training would seem to be directly relevant to that question. Therefore, the only remaining question for them was whether the waterboard would cause severe mental pain and suffering for Zubaydah.

They could determine that the waterboard would cause Zubaydah severe mental pain and suffering only if (1) it would cause severe mental pain and suffering on anyone to whom it was applied, or (2) it would cause severe mental pain and suffering on Zubaydah based on his particular psychological assessment. The SERE training–despite its differences with real world application of the waterboard–would be relevant to the threshold question of whether everyone subjected to the waterboard suffers severe mental pain or suffering. Because they determined that not everyone who undergoes the waterboard suffers severe physical pain or suffering, they next considered whether Zubaydah would suffer severe mental pain or suffering as a result of the waterboard. The CIA's psychological assessment [redacted] concluded that he would not experience any mental harm from the use of the techniques, and OLC relied on that conclusion. Classified Bybee memo at 7, 17. The memo continued, however, to attribute too much significance to the SERE training when it stated, "The continued use of these methods without mental health

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consequences to the trainees indicates that it is highly improbable that such consequences would result here." *Id.* at 17-18. The memo would more correctly have observed that Zubaydah's psychological assessment, combined with the SERE experience and the CIA's intention to have medical experts monitor the interrogation, made it highly improbable that Zubaydah would suffer mental health consequences. As drafted, however, the memo could be interpreted as concluding that the SERE experience alone virtually eliminated the need for an individualized assessment. [redacted] Because of the context, however, that erroneous (at worst) or poorly drafted (at best) observation was not critical to the approval of the techniques on Zubaydah.

c. Other criticisms

OPR faulted the classified Bybee memo for failing to discuss whether procedures used to effect sleep deprivation would cause severe physical or mental pain or suffering apart from the sleep deprivation itself. OPR pointed out that the Bradbury techniques memo[17] noted that the classified Bybee memo had not considered the mechanisms for effecting sleep deprivation. The Bradbury techniques memo concluded, however, that those mechanisms would not cause severe pain or suffering and approved sleep deprivation as an interrogation technique that would not violate the torture statute. Bradbury had the advantage of considering the reported experiences from prior interrogations involving sleep deprivation that would not have been available to Yoo and Bybee. *See* Bradbury techniques memo at 37 n.45. Furthermore, by way of example only, the European Court of Human Rights found that sleep deprivation was not torture but likewise did not explore the means used to keep a detainee awake. *See Ireland v. United Kingdom, supra.* The memo would have been more complete had OLC asked the CIA how it intended to keep a detainee awake and addressed those mechanisms.

Next, OPR claimed that the classified Bybee memo should have noted that a Supreme court case from 1944 quoted an American Bar Association (ABA) report describing sleep deprivation as "the most effective torture and certain to produce any confession desired." OPR final report at 236 *quoting Ashcraft v. Tennessee*, 322 U.S. 143, 151 n.6 (1944). As observed by Levin, colloquial uses of the term "torture" have little relevance to determining whether a particular technique violates the torture statute. Levin memo at 2. Furthermore, the actual question before the Court was weather Ashcraft's confession was compelled not whether the interrogation was torturous. The Court cited the referenced ABA report only as one account of

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[17]Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: Application of 18 U.S.C. §§ 2340-2540A to Certain Techniques That May Be Used. in the Interrogation of a High Value al Qaeda Detainee, May 10, 2005.

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the disputed events surrounding Ashcraft's interrogation. Although the Court found Ashcraft's confession was compelled, the Court itself did not describe the interrogation as torturous. *Id.* at 154. For these reasons, I am unpersuaded that the Rules of Professional Conduct required Yoo and Bybee to cite *Ashcraft* in the classified Bybee memo.

Finally, OPR faulted Yoo and Bybee for failing to consider how a detainee would be forced to maintain stress positions. Although the Bradbury techniques memo addressed the mechanisms used to keep someone awake, it did not address the mechanisms used to cause someone to maintain stress positions. OPR faulted Yoo and Bybee for failing to consider whether the "subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions." OPR final report at 237. First, it is implausible that the CIA would seek authority to use a stress position but fail to advise the CIA that the detainee would be beaten in order to maintain the position. Second, the torture statute itself prohibits certain types of threats that would cause prolonged mental harm including threats of imminent death, threats to inflict torturous pain, and threats of death or torturous pain to third parties. The memo listed those prohibited threats in its discussion of the techniques in question. Classified Bybee memo at 1. Finally, although the memo does not address the possibility that shackling could constitute torture, its broad prohibition on the infliction of severe pain communicated to the CIA that it could not inflict severe pain in an effort to maintain an approved stress position. For these reasons, the DCRPC did not unambiguously require Yoo and Bybee to address the mechanisms for maintaining approved stress positions.

3. Conclusion

In sum, I concluded that in the unclassified Bybee memo, Yoo and Bybee's discussion of severe pain, *PCATI v. Israel*, Commander-in-Chief authority, and self-defense (particularly the discussion of *In re Neagle*) were flawed. On the other hand, although the analyses of specific intent, the CAT ratification history, United States judicial interpretations, *Ireland v. United Kingdom*, and the necessity defense were debatable, those analyses generally were most susceptible to criticism because they slanted toward a narrow interpretation of the torture statute at every turn. I concluded above that the DC Rules, considered in total and not in isolation, obligated Yoo and Bybee not to knowingly or recklessly provide incorrect legal advice or to provide advice in bad faith. Further, Rule 1.1 unambiguously obligated them to provide competent advice. 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." *In re Evans*, 902 A.2d 69-70 (D.C. 2006).

With respect to Bybee, particularly in light of his supervisory role in the issuance of these memos, I conclude the preponderance of the evidence does not support a finding that he knowingly or recklessly provided incorrect advice or that he exercised bad faith. Also, there is

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little or no evidence to support a finding that Bybee exhibited conscious indifference to the consequences of his behavior. Yoo and Philbin were well-respected attorneys with stellar backgrounds both of whom had clerked for the United States Supreme Court. Although he engaged in significant review of the issues himself, his consultation with respected colleagues and the absence of any evidence suggesting that he issued the opinion in order to satisfy his client or that he was motivated by an improper purpose refutes any argument that he acted with conscious indifference to the consequences of his action.

Although Yoo and Bybee's errors were more than minor, I do not believe that they evidence serious deficiencies that could have prejudiced the client. This conclusion is largely supported by the reality that the memos were written for a limited audiance and were but part of the dialogue with the CIA. The most significant errors, which occurred in the unclassified Bybee memo, were not likely to cause prejudice because the classified Bybee memo issued contemporaneously and approved specified techniques against a specific individual and advised that the advice would not necessarily apply if the facts changed. The conclusions of the classified Bybee memo did not depend on necessity, self-defense, or Commander-in-Chief authority. Rather, those conclusions were based on analysis of the proposed techniques considered under the framework of the torture statute. Furthermore, although the CIA received the unclassified Bybee memo, the more limited classified Bybee memo was directed specifically to the General Counsel of the CIA. Echoing in some respects the holding in *Evans*, the Virginia Supreme Court has observed that discipline under Rule 1.1 is "not justified based on research that results in the wrong legal conclusion because incorrect legal research alone, although attorney error, is not clear and convincing evidence of incompetence for purposes of that Rule." *Barrett v. Virginia State Bar ex rel. Second District Committee*, 634 S.E.2d 341, 347 (Va. 2006). Although the memos reflect errors, I do not find that the number and magnitude of those errors are sufficient to prove that Yoo and Bybee violated Rule 1.1.

Finally, because OPR found that Yoo engaged in intentional misconduct, I more fully address his intent below.

C. Yoo's intent

The most striking criticism of the unclassified Bybee memo and the Yoo memo is that the memos resolved every legal question towards the most restrictive possible application of the torture statute. OPR concluded that the memos therefore evidenced Yoo's "desire to accommodate the client" and that the preponderance of evidence showed that Yoo knowingly failed to provide thorough, objective and candid advice regarding the Commander-in-Chief authority, specific intent, self-defense, and the ratification history of the CAT. OPR final report at 251-54. But John Yoo's expansive view of executive power did not begin when he was hired at OLC. OPR test drove its theory that Yoo was trying to please the client when it interviewed

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Adam Ciongoli. After suggesting that the unclassified Bybee memo was telling the client what it wanted to hear, OPR asked Ciongoli, "Is there anything in your encounters with John Yoo or dealings with John Yoo, what he told you, what he learned, that either would support that theory or contradict it?" Ciongoli at 39. Ciongoli responded:

> I would not subscribe to that theory regarding John. I think John believes very strongly in a particular view of the law. I think that view is reflected in his writing. . . . I think if [Yoo had] been asked to craft opinions that conflicted with that view of presidential power, he would have refused to draft them. So, I think that John–the fact that John's conclusion was that there was fairly, that there was fairly broad latitude in this context was not because the Agency or anyone else was seeking latitude, but because John believes there is very broad latitude.

Id. at 40. In his book, Goldsmith was highly critical of the opinions in keeping with his withdrawal of them. Yet, in his discussion of how the opinions came to be written, he observed that the unclassified Bybee memo was reviewed by only a small group of lawyers at the White House, the Justice Department, and the CIA. He stated, "All of these men wanted to push the law as far as it would allow. But none, I believe, thought he was violating the law. John Yoo certainly didn't." *The Terror Presidency* at 167. He further observed, "The poor quality of a handful of very important opinions is probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House, and Yoo's unusually expansive and self-confident conception of presidential power." *Id.* at 168.

Yoo, who acknowledged he was not an expert in criminal law, had the Assistant Attorney General for the Criminal Division Michael Chertoff review the unclassified Bybee memo. In response to questioning by OPR, Chertoff advised that there was nothing in his exchanges with Yoo on the memos that suggested that Yoo was anxious to accommodate the CIA. Chertoff at 9-10. Chertoff told OPR that after reviewing a draft he advised Yoo that the specific intent section was technically correct but the distinctions Yoo drew were not likely to be persuasive to a jury and that he should emphasize due diligence. *Id.* at 11-12. The final memo observed, "[W]hen a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent." Unclassified Bybee memo at 4. In the classified Bybee memo, Yoo concluded that the identified techniques did not appear to be specifically intended to inflict severe physical or mental pain and suffering, and observed, "This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures." Classified Bybee memo at 17.

It is also important that Yoo was required to and did consult with Pat Philbin regarding the unclassified Bybee memo. In an affidavit submitted to OPR, Jim Comey observed, "In all of

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my dealings with him, Mr. Philbin consistently demonstrated that he provided candid legal advice whether or not the advice was what the recipients wanted to hear and whether or not it would be welcome. Mr. Philbin did not tailor his advice to suit the wishes of his audience." Comey affidavit ¶ 3. In another affidavit, Jack Goldsmith described Philbin as "the most candid and critical lawyer that I met in my two years in government." Goldsmith affidavit ¶3. Ciongoli said of Philbin, "I have more confidence in Pat Philbin's legal ability than any lawyer I've ever met." Ciongoli at 35. Philbin's review of the memo and his final recommendation that Bybee could sign it strongly suggest that the memo at the very least set forth a defensible analysis of the law.

For all of the above reasons, I am not prepared to conclude that the circumstantial evidence much of which is contradicted by the witness testimony regarding Yoo's efforts establishes by a preponderance of evidence that Yoo intentionally or recklessly provided misleading advice to his client. It is a close question. I would be remiss in not observing, however, that these memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel. While I have declined to adopt OPR's findings of misconduct, 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. I do not believe the evidence establishes, however, that he set about to knowingly provide inaccurate legal advice to his client or that he acted with conscious indifference to the consequences of his action. In reaching this determination, I am mindful that at the time the memos were authored, the number of individuals with whom Yoo could consult was extremely limited, and his consultation with the Assistant Attorney General of the Criminal Division was a reasonable action given Yoo's own lack of criminal law experience.

III. Conclusion

The above analysis leads me to conclude the same thing that many others have concluded, to wit that these memos contained some significant flaws. But as all that glitters is not gold, all flaws do not constitute professional misconduct. Because the subject memoranda have now been publicly released, the number of flaws and the significance of them can be debated. The bar associations in the District of Columbia or Pennsylvania can choose to take up this matter, but the Department will make no referral. Now that the opinions that are the subject of OPR's investigation have been released, I recommend the release of as much of this decision memo, the OPR drafts and final report, and the responses from Yoo, Bybee, Mukasey and Filip, and Goldsmith that can be released consistent with classification or privacy concerns. OPR's findings and my decision are less important than the public's ability to make its own judgments

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about these documents and to learn lessons for the future. While some may view the public release of the OPR final report versus a referral to a state bar disciplinary authority as a distinction without a difference, the decision not to refer the matter to a state bar disciplinary authority results from adherence to traditional Department procedure. I firmly believe that Department attorneys are entitled to that much due process even in cases attracting significant public interest.

From my perspective of having reviewed OPR reports for nearly seventeen years, OPR's analysis in this case depends on an analytical standard that reflects the Department's high expectation of its OLC attorneys rather than the somewhat lower standards imposed by applicable Rules of Professional Conduct. However, my decision not to adopt OPR's misconduct finding should not be misread as an endorsement of the subjects' efforts. OPR's analytical framework permits a finding of poor judgment when a Department attorney

> chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard.

OPR final report at 19. I have found that Yoo and Bybee did not violate a clear obligation or standard. However, as I have noted, the standard that OPR identified is consistent with the action that the Department reasonably expects of its attorneys. In contradiction of that high standard, the unclassified Bybee 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. I appreciate Philbin's description of the task at hand, to wit to identify the line and not to build in a margin of comfort inside the line. However, this task did not necessarily demand a memorandum devoid of nuance, and I believe primarily that the unclassified Bybee memorandum overstates the certainty of its conclusions in a way the represents a "marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take." Thus, I conclude that Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments.

While OPR's final report includes additional criticisms of the other memos and letters that it reviewed, its misconduct finding against Yoo is grounded in the identified flaws in the unclassified and classified Bybee memos. *See* OPR final report at 251-54. Many of the

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criticisms of the other memos and letters derived from the criticisms of the unclassified Bybee memo. Furthermore, OPR did not specifically evaluate whether the legal work in the Yoo memo constituted misconduct separate and apart from the criticisms of the unclassified Bybee memo. For this reason and because OPR's findings of professional misconduct were based on a standard that was neither known nor unambiguous, I conclude that my poor judgment finding accounts for the entirety of Yoo's work in the subject memoranda.

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