Note

The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield

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And let me just add one thing. And this is a stark contrast here because we are nation [sic] of laws, and we are a nation of values. The terrorists follow no rules. They follow no laws. We will wage and win this war on terrorism and defeat the terrorists. And we will do so in a way that's consistent with our values and our laws, and consistent with the direction the President laid out.[1]

—Scott McClellan, Spokesman to President George W. Bush, June 22, 2004

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1 Press Briefing, White House Counsel Judge Alberto Gonzales, Dep't of Defense ("DoD") Gen. Counsel William Haynes, DoD Deputy Gen. Counsel Daniel Dell'Orto, and Army Deputy Chief of Staff for Intelligence Gen. Keith Alexander (June 22, 2004) [hereinafter Press Briefing], *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html.

Introduction

On September 11, 2001, nineteen men, each a member of al-Qaeda,[2] hijacked and crashed four airplanes, killing nearly 3,000 Americans. Early reports indicated that more attacks were imminent.[3] Lawyers in the Office of Legal Counsel ("OLC") at the Department of Justice were tasked by the Bush Administration with crafting the legal opinions that would shape the contours of this country's response.[4] This was not unusual, as the OLC has been interpreting what the law is for the executive branch since its inception. With little to no oversight,[5] an ability to render classified binding opinions on the executive branch, and a vulnerable nation on the brink, the OLC had free rein to act as it saw fit.

Two OLC opinions, written in the wake of the September 11 attacks, are illustrative of the need for increased oversight in the OLC. The first (the "Status Memo") is a memorandum detailing whether the federal courts would have jurisdiction to hear habeas petitions filed by prisoners housed at Guantanamo Bay.[6] The second (the "Torture Memo") is a memorandum on the standards of conduct by which interrogators investigating individuals involved in the war on terror would be guided.[7] The differences between the two opinions are revealing: the Status Memo is balanced, cites relevant case law for both sides of the argument, and eventually concludes that while it believes the federal courts would not have jurisdiction, it is a close case on

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2 NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 235 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf.

3 *See* Steven Lee Myers & Elizabeth Becker, *After the Attacks: The Pentagon; Defense Department Says 126 Are Missing, Raising Total of Crash Victims to 190*, N.Y. TIMES, Sept. 14, 2001, at A17 (highlighting the frustration of rescue workers at the Pentagon who had to evacuate repeatedly "when authorities believed a second attack was imminent").

4 *See* Tim Golden, *Threats and Responses: Tough Justice; After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 ("In the days after the Sept. 11 attacks, [former deputy White House counsel] Mr. [Timothy] Flanigan sought advice from the Justice Department's Office of Legal Counsel on 'the legality of the use of military force to prevent or deter terrorist activity inside the United States,' according to a previously undisclosed department memorandum that was reviewed by The New York Times.").

5 *See* Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies*, N.Y. TIMES, Aug. 28, 2007, at A1 ("[Vice President Dick Cheney and his top aide David Addington] pushed for a radical rewriting of American policies on such critical issues as surveillance and detention of terrorism suspects after the Sept. 11 attacks, with virtually no oversight or input from Congress or the courts.").

6 *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–37 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]; *see also infra* Part II.A.

7 *See* THE TORTURE PAPERS, *supra* note 6, at 172–217; *see also infra* Part II.B.

which reasonable judges could disagree.[8] Conversely, the Torture Memo is legally flawed;[9] lacks relevant case law; and was widely criticized by legal scholars, many of whom believed the Memo's authors never expected the Memo to be made public.[10]

In the Torture Memo, the President's Commander in Chief powers are exaggerated,[11] novel defenses for interrogators are created out of thin air,[12] and the definition of "torture" is narrowly crafted to ensure that American conduct, if ever investigated, would not legally be considered "torture."[13] Only a handful of lawyers, nearly all of whom lacked expertise in wartime powers, ever laid eyes on this opinion before it became binding on the entire executive branch.[14] The Torture Memo, however, was eventually declassified, and the outcry was instantaneous.[15]

Although this situation was extraordinary, it revealed a flaw in our constitutional system of checks and balances, where the OLC was able, without oversight, to legalize a policy in a way that was harmful to America's interests at home and abroad. Going forward, increased oversight is required to ensure that the past is not prologue. A layer of oversight must be added to the OLC to ensure that its legal advice

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8 THE TORTURE PAPERS, *supra* note 6, at 33–34, 37.

9 *See* discussion *infra* Part II.B.1.a–b.

10 *See* Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 462 (2005) ("The legal analysis in the [Torture Memo] was so indefensible that it could not—and did not—withstand public scrutiny.").

11 The Torture Memo concluded that "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." THE TORTURE PAPERS, *supra* note 6, at 207. However, the Torture Memo failed even to mention *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), one of the most influential opinions on presidential wartime authority when facing congressional disapproval. THE TORTURE PAPERS, *supra* note 6, at 172–217.

12 *See* THE TORTURE PAPERS, *supra* note 6, at 207–13 (stating for the first time that "necessity" and "self-defense" are potential defenses for interrogators accused of torturing prisoners).

13 Harold Hongju Koh, Dean of Yale Law School and former OLC attorney, argues that the OLC's definition of torture is so narrow that the following acts, all of which the United States accused the Saddam Hussein regime in Iraq of doing, would not have qualified under the definition: "branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons, and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives." Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006).

14 *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 167–69 (2007) (listing the lawyers in the chain of command who lacked expertise on the subject of war powers).

15 *See* Clark, *supra* note 10, at 462–63 n.37.

is "an accurate and honest appraisal of applicable law."[16] To accomplish this, the OLC must begin publishing the majority of its opinions, with exceptions for those that truly require confidentiality.[17] These changes will help ensure that even in times of national crisis, the structure of the OLC will have the proper mechanisms in place to prevent a similar abuse of power from occurring in the future.

In Part I, this Note discusses the background of the OLC and its role in shaping the legal course of this country. It looks at the ethical considerations with which the OLC must deal and the minimal oversight mechanisms currently in place. In Part II, the Note examines the Status Memo and the Torture Memo, which provide a juxtaposition between proper and improper opinion writing. And in Part III, the Note examines the lack of oversight at the OLC, and proposes a solution to fix this lack of oversight.

I. The OLC

A. Background on the OLC

The OLC, located in the Department of Justice in the executive branch, is often referred to as the "Attorney General's lawyer."[18] The OLC is tasked with writing legal opinions on behalf of the Attorney General, and it provides its own written opinions in response to requests from the White House Counsel, various agencies of the executive branch, and offices within the Department of Justice.[19] The OLC also provides legal advice to the executive branch "on all constitutional questions and [assists in] reviewing pending legislation for constitutionality."[20]

The OLC derives its authority from both Congress and the Attorney General. The Attorney General has delegated to the OLC responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, and as-

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16 *See* Memorandum from Walter E. Dellinger, former Assistant Attorney Gen., et al., to John Ashcroft, Attorney Gen., et al. (Dec. 21, 2004), *reprinted in* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 app. at 1602–11 (2007).

17 *See infra* Part III.A.1–2.

18 Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 337 (1993).

19 USDOJ: Office of Legal Counsel Homepage, http://www.usdoj.gov/olc/ (last visited Jan. 9, 2009).

20 *Id.*

sisting the Attorney General in the performance of his function as legal adviser to the President.[21]

The importance of the OLC cannot be overstated; it has been called "the most important legal office in the federal government."[22] When the OLC issues an opinion, it is the binding interpretation for the entire executive branch.[23] This signifies that everyone in the executive branch, including the legal staffs of other offices (e.g., the Department of Defense), must abide by the OLC's rulings. Thus, the OLC is the definitive arbiter on critical legal issues.[24]

According to Theodore Olson, a former Assistant Attorney General and head of the OLC, the role of the OLC is to determine for the Attorney General and the President how the courts will rule on a given matter:

> [I]t is not our function to prepare an advocate's brief or simply to find support for what we or our clients might like the law to be; rather, OLC seeks to make the clearest statement of what we believe the law provides and how the courts would resolve the matter. . . . The Attorney General is interested in having us provide *as objective a view as possible*.[25]

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21 *See* 28 U.S.C. § 510 (2006); 28 C.F.R. § 0.25 (2007); USDOJ: OLC: Memorandums and Opinions, http://www.usdoj.gov/olc/opinions.htm (last visited Jan. 9, 2009).

22 *See Frontline: Cheney's Law; Interview with Charlie Savage* (PBS television broadcast Oct. 16, 2007) (transcript available at http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/savage.html). Charlie Savage is the Pulitzer Prize-winning author of *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. *See also* Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 645 (2005) ("The OLC of the United States Department of Justice is the most important legal office in the United States government, for it authoritatively determines the executive branch's legal position on matters not in litigation.").

23 *See* Kmiec, *supra* note 18, at 368–69 (quoting Exec. Order No. 2,877 (1918)) ("[A]ny opinion or ruling by the Attorney General upon any question of law arising in any department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus or offices therewith concerned.").

24 An important example of this involves the Department of Defense and the Judge Advocate General Corps ("JAG Corps"). *See* Posting of Marty Lederman to Balkinization, http://balkin.blogspot.com/2005/07/heroes-of-pentagons-interrogation.html (July 27, 2005, 08:10 EST). In 2002, as the United States was interrogating prisoners at Guantanamo Bay, Secretary of Defense Donald Rumsfeld ordered that interrogators use specific techniques that had previously been determined illegal. *Id.* Lawyers in the Department of Defense and the JAG Corps did not agree with this analysis; however, their protests were effectively ended by an OLC memorandum, issued on March 14, 2003, stating definitively what the law was with respect to interrogation techniques. *Id.*

25 Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 727 (2005) (quotations omitted).

William Barr, a former head of the OLC and a former Attorney General under the first President Bush, concurred in this assessment.[26] He stated that the OLC must "reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable [to the administration]."[27]

Although this proposition sounds simple in concept, in reality it is laden with problems. The OLC consists of lawyers who are appointed by the President, in part because of a shared ideology.[28] Thus, when a President seeks legal advice with a certain result in mind, an OLC attorney must deal with competing loyalties: his ethical obligation to discern the law, and his desire to serve the President who appointed him in the first place.

B. The OLC's Ethical Considerations[29]

Government lawyers have always faced the issue of competing loyalties: are they appointed to uphold the Constitution for the populace, or to serve the current administration by helping it accomplish its objectives? This issue is even more pronounced for lawyers in the OLC. Robert Jackson, who served as Attorney General under President Franklin Delano Roosevelt, believed that a government lawyer's responsibility is different from that of a private defense attorney in a criminal trial.[30] Specifically, a government attorney is not "quite as free to advocate an untenable position," even if his client desires it, because he "is the legal officer of the United States" and has "a responsibility to others than the President."[31] The Torture Memo presents this issue clearly: the OLC had to choose between determin-

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26 GOLDSMITH, *supra* note 14, at 33–34.

27 *Id.*

28 Each president, upon taking office, appoints his own head of the OLC, who must be approved by Congress. *See* Johnsen, *supra* note 16, at 1606.

29 The ethical role of an OLC lawyer, generally, is outside the scope of this Note. For a detailed analysis of such a role, see generally Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 464–67 (2005) (positing that the authors of the Torture Memo violated their ethical obligations by failing to note that the actions they were authorizing were probably illegal); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 1 (2006) (arguing that government lawyers should adopt the "public interest" approach to lawyering, rather than the "agency" approach, which mirrors the type of relationship a defense attorney has with a client).

30 GOLDSMITH, *supra* note 14, at 35.

31 *Id.*

ing what the law on torture and interrogation was, and advocating a position that the White House sought.[32]

According to one scholar, the OLC's Torture Memo (along with others) crossed the line demarcating ethical advice from pure advocacy.[33] "[The OLC attorneys] did not enable the client to make an intelligent and informed decision on the basis of real, not fanciful, law. To this extent, the [Torture Memo] writers failed their clients by not fully and frankly explicating the law."[34] Furthermore, he believes that the OLC violated the rules of professional responsibility in drafting the Torture Memo.[35]

C. The OLC's Oversight Mechanisms

Currently, the OLC is subject to oversight within the executive branch by the Department of Justice's Office of Professional Responsibility ("OPR").[36] The OPR reports directly to the Attorney General and Deputy Attorney General.[37] The OPR "has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to . . . provide legal advice."[38]

Theoretically, the OPR would provide a sufficient check on lawyers in the OLC to ensure that they would abide by the OLC's best practices.[39] In reality, the OPR has been described as a "paper tiger, which is most often used to create the appearance of investigation to clear its own attorneys."[40] Critics argue that OPR investigations are merely for show, and are used "to give the appearance of investigation without any substantive action."[41]

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32 *See* THE TORTURE PAPERS, *supra* note 6, at 218–22.

33 Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 216 (2006).

34 *Id.*

35 *See id.* at 215.

36 *See* Office of Professional Responsibility, Policies and Procedures, http://www.usdoj.gov/opr/polandproc.htm (last visited Jan. 9, 2009).

37 *See* 28 C.F.R. § 0.39(a) (2007).

38 *See* Office of Professional Responsibility, *supra* note 36 ("OPR's authority and jurisdiction derive from the Attorney General's authority under 5 U.S.C. § 301, 28 U.S.C. §§ 509–510, 28 C.F.R. § 0.39, Attorney General Order 1931-94, and USAM § 1-4.100, et seq.").

39 *See* Johnsen, *supra* note 16, at 1602–11 (including as an appendix the "best practices" that eighteen former OLC attorneys advocate should always be used).

40 Jonathan Turley, Res Ipsa Loquitur, http://jonathanturley.org/2008/02/23/no-crime-just-bad-counsel-mukasey-starts-internal-ethics-review-on-the-torture-memos (Feb. 23, 2008, 09:03 EST). *But see* Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, NEWSWEEK, Feb. 23, 2009, at 9 (stating that a draft of the OPR's report had been completed and "some former Bush officials are furious about the OPR's initial findings and question the premise of the probe").

41 Turley, *supra* note 40.

On February 22, 2008, the OPR publicly announced that it had launched an investigation into some of the OLC's past actions, including the Torture Memo.[42] Senator Richard Durbin of Illinois and Senator Sheldon Whitehouse of Rhode Island initiated the investigation.[43] Senator Whitehouse questioned how techniques like waterboarding could have been considered legal by the OLC: "The argument is that no one who relies in good faith on the Department's past advice should be subject to criminal investigations for actions taken in reliance on that advice, which raises the question within the question: How did that advice come to be given in the first place?"[44] While the OPR investigation is just beginning, Senator Whitehouse's concern regarding potential liability for agents who relied on OLC opinions is significant. It is unclear if the OLC has the power to provide interrogators on the frontlines with total preemptive immunity;[45] however, this is what the OLC was attempting to accomplish.

The Torture Memo is significant because it sought to provide legal protection for those who had previously used unapproved, enhanced interrogation techniques.[46] In other words, the CIA and the Defense Department were looking for a "golden shield"[47] to protect their agents from future prosecution.[48] According to Jack Goldsmith, the head of the OLC from October 2003 to June 2004:

> [The] OLC could provide the legal cover needed to overcome law-induced bureaucratic risk-aversion. "It is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turns out to be wrong," a senior Justice Department prosecutor once told me. OLC speaks for the Justice Department, and it is the Justice Department that prosecutes violations of criminal law. If OLC interprets a law to allow a proposed action, then the Justice Department won't prosecute those who rely on the OLC ruling. Even independent counsels would have trouble going after someone who reasonably relied on one . . . . It is one of the most momentous and dangerous powers

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42 *See* Scott Shane, *Waterboarding Focus of Inquiry by Justice Dept.*, N.Y. TIMES, Feb. 23, 2008, at A1.

43 *Id.*

44 Press Release, Senator Sheldon Whitehouse, Whitehouse Criticizes Justice Department Advice Condoning Torture (Feb. 13, 2008), *available at* http://whitehouse.senate.gov/newsroom/multimedia/view/?id=29cd1958-9bd4-4ffd-a342-d1c28dbfa1da.

45 *See* GOLDSMITH, *supra* note 14, at 144.

46 *See id.* at 164.

47 *Id.* at 144.

48 *Id.* at 96–97.

> in the government: the power to dispense get-out-of-jail-free cards.[49]

It is unclear how a "golden shield" defense would operate in a trial because it has never been used. There are two major issues with a soldier potentially asserting the golden shield defense. First, the U.S. government wants to avoid having its soldiers and interrogators use the "following orders" defense, as it was used by Nazi officers in Nuremberg.[50] Second, any decision on immunity is better made *before* rather than after the action is taken. To resolve these issues, this Note proposes that Congress condition its request for more oversight on its ability to grant immunity.[51]

II. A Tale of Two Memos

The stunning attacks of September 11 had a significant effect on the psyche of not just American citizens, but also the government. Prior to September 11, the CIA[52] and the FBI[53] operated out of a mode of caution, behaving in a risk-averse manner.[54] After Septem-

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49 *Id.*

50 Attorney General Mukasey testified at a DOJ oversight hearing that for an interrogator, the Nuremberg defense would not be acceptable: "It was a response, at Nuremberg, that was found unlawful . . . ." *See* Paul Kiel, *Whitehouse to Mukasey: Why Not Investigate Torture?*, TPMMuckraker, Jan. 30, 2008, http://tpmmuckraker.talkingpointsmemo.com/2008/01/whitehouse_to_mukasey_why_not.php (quoting transcript from DOJ oversight hearing). Mukasey attempted to distinguish the defense of torture from the Nuremberg defense by stating, "No, it's—I had authorization, and let's take a look at the authorization, at the circumstances under which it was given, at what was done, at a whole wide range of variables . . . ." *Id.* This does not, however, appear satisfactory.

51 *See infra* Part III.B.2.

52 A *Washington Post* article offered an example of the pre-9/11 mindset that partially explains the Clinton Administration's reluctance to capture Bin Laden in 1996. Simply, they were overly concerned with the logistics of where to imprison him, and the risk of going into the Sudan without explicit authority: "Clinton administration officials maintain emphatically that they had no such option in 1996. In the legal, political and intelligence environment of the time, they said, there was no choice but to allow bin Laden to depart Sudan unmolested." *See* Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts to Capture Bin Laden or Have Him Killed*, Wash. Post, Oct. 3, 2001, at A1.

53 *See generally* Stephen Dycus, William C. Banks & Peter Raven-Hansen, Counterterrorism Law 143–74 (2007).

54 Jack Goldsmith detailed the cyclical nature of intelligence activity and risk aversion in his book:

> The executive branch and Congress pressure the community to engage in controversial action at the edges of the law, and then fail to protect it from recriminations when things go awry. This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become

ber 11, a sense of urgency existed, as many believed another attack was imminent.[55] Anxiety over the unknown led to fundamental changes regarding how to stop attacks on the homeland.[56]

On September 18, 2001, Congress authorized the use of military force against those who had attacked America one week earlier.[57] With the United States officially at war, it became clear that numerous legal issues would have to be analyzed, including those surrounding the housing, treatment, and status of detainees captured on the battlefield. The Executive, as Commander in Chief of the armed forces, was forced to make tough decisions, and for this, President George W. Bush turned to the OLC for guidance. Due to the timing and nature of these critical issues, the OLC would soon become the epicenter of executive power.[58]

A. The Status Memo

After September 11, 2001, the OLC was faced with novel legal issues.[59] One of the most important issues involved the legal rights of battlefield detainees.[60] On December 28, 2001, the OLC issued the Status Memo regarding whether federal courts would have jurisdiction over habeas petitions filed by detainees held in Guantanamo Bay, Cuba.[61] This was a complex legal question because, although Guantanamo Bay is part of Cuba's soverign territory, the United States controls Guantanamo Bay under a lease agreement with Cuba.[62]

> too risk averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity . . . .

GOLDSMITH, *supra* note 14, at 163.

55 *See id.* at 11 (stating that 9/11 "created enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11").

56 *Id*. John Yoo, author of the Torture Memo, had this to say about the new post-9/11 paradigm: "And one thing on 9/11 I think I immediately realized was that this was going to be a war, and criminal justice and law enforcement ways of thinking about terrorism were not necessarily going to work anymore." *Frontline: The Torture Question; Interview with John Yoo* (PBS television broadcast July 19, 2005) (transcript available at http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html).

57 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

58 *See* GOLDSMITH, *supra* note 14, at 129–30 ("[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.").

59 *See* Golden, *supra* note 4.

60 THE TORTURE PAPERS, *supra* note 6, at 29–37.

61 *Id.*

62 *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 16–23, 1903, T.S. No. 418, 6 Bevans 1113.

In the Status Memo, OLC attorneys John Yoo and Patrick Philbin wrote that in the OLC's opinion, U.S. federal courts would not have jurisdiction over a habeas petition filed by a Guantanamo Bay prisoner, citing numerous cases that indicated as much.[63] Despite Yoo and Philbin's conclusion, the Memo noted that there was a legitimate case to be made for the other side:

> We conclude that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]. Nonetheless, *we cannot say with absolute certainty* that any such petition would be dismissed for lack of jurisdiction. A detainee could make a *non-frivolous argument* that jurisdiction does exist over aliens detained at [Guantanamo Bay], and we have found no decisions that clearly foreclose the existence of habeas jurisdiction there.[64]

To conclude the Memo, Yoo and Philbin offered one final caveat: "Because the issue has not yet been definitively resolved by the courts . . . we caution that there is some possibility that a district court would entertain such an application."[65]

The Status Memo is an example of a proper OLC opinion. It was balanced, it provided legal arguments based on precedent, and it acknowledged its shortcomings.[66] Critically, the opinion reflected the clear understanding by those in the OLC that the war in Afghanistan, where the United States was facing a nonstate actor (al-Qaeda), presented complex and unprecedented legal challenges.[67]

Although the Status Memo serves as an example of thorough OLC analysis, the authors had a compelling incentive not to overreach: the legal question of whether federal courts have jurisdiction over detainees jailed at Guantanamo Bay was an issue that the courts

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63 *See* THE TORTURE PAPERS, *supra* note 6, at 29–30 (citing Eraden v. 30th Judicial Circuit Court of Ky., 410 U.S. 434, 495, 498 (1973); Johnson v. Eisentrager, 33 U.S. 763 (1950); Kinnell v. Warner, 356 F. Supp. 779, 780–81 (D. Haw. 1973)).

64 *See id*. at 29 (emphasis added).

65 *Id.* at 37. The Status Memo also provides case law that would support a federal district court's finding that it did have jurisdiction. *See id.* at 34–35.

66 *See id*.

67 The unique nature of the battle against al-Qaeda in Afghanistan has to do with the question of what to do with the detainees, not with striking at terrorists rather than states. *See, e.g.*, President William J. Clinton, Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998) (stating that the purpose of the air strikes was "to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today").

would almost certainly, at some point, have to adjudicate.[68] Because the OLC knew its work would eventually be reviewed (and its reasoning either confirmed or rejected by the Supreme Court), the authors could not be careless with their opinion. It was less clear whether the Torture Memo, which dealt with covert CIA interrogations of enemy combatants, some in top secret black site prisons the existence of which the government would not even confirm,[69] would ever come to light.[70]

B. The Torture Memo

A paramount legal concern in the war on terror was how far interrogators could go during the detainment and questioning of enemy combatants.[71] Corollary issues abounded: Would the Geneva Conventions apply to members of al-Qaeda and the Taliban?[72] Would detainees be considered "enemy combatants" or "prisoners of war"?[73] And would the rules governing prisoners in the custody of the Department of Defense be different from the rules governing prisoners in the custody of the CIA?[74]

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68 *See* Clark, *supra* note 10, at 469–70 n.63. On June 12, 2008, the Supreme Court decided *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and held that prisoners at Guantanamo Bay could seek habeas relief through federal district courts. *Id.* at 2262.

69 *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 ("The existence and locations of the facilities—referred to as 'black sites' in classified White House, CIA, Justice Department and congressional documents—are known to only a handful of officials in the United States and, usually, only to the president and a few top intelligence officers in each host country.").

70 While outside the scope of this Note, Dana Priest's article raises questions about whether anyone would ever find out about prisoners whisked away to "black site" prisons; even Congress was instructed by the Administration not to look into them due to national security concerns.

> The CIA and the White House, citing national security concerns and the value of the program, have dissuaded Congress from demanding that the agency answer questions in open testimony about the conditions under which captives are held. Virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long.

Id.

71 *See* Jay S. Bybee, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A*, *in* THE TORTURE PAPERS, *supra* note 6, at 172–217.

72 *See* Jay S. Bybee, *Application of Treaties and Law to al Qaeda and Taliban Detainees*, *in* THE TORTURE PAPERS, *supra* note 6, at 81–117.

73 Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001).

74 There were clear differences in the rules between what the Department of Defense and the CIA could do. "But while the policies apply to all Defense Department employees and

On August 1, 2002, the OLC issued a classified opinion to White House Counsel Alberto R. Gonzalez, written substantially by John Yoo,[75] giving the binding executive interpretation of the interrogation methods that could be used in the field. The Memo detailed not only whether such techniques would be legal, but also whether those administering them would be subject to legal prosecution for injuring or killing prisoners.[76]

The Torture Memo, as written, was classified by the OLC.[77] The *Washington Post*, however, obtained the Memo through a leak and posted it to its Web site on June 13, 2004.[78] On June 22, 2004, in the midst of the Abu Ghraib scandal,[79] the White House declassified the opinion to the public.[80] The outrage over the Torture Memo was instantaneous.[81]

1. The Legal Flaws in the Torture Memo

a. The Torture Criteria

The part of the Torture Memo that received the most critical attention was the narrow definition of what constitutes torture under U.S. law.[82] According to the Convention Against Torture,[83] which is codified in U.S. law, it is a criminal offense for any person "outside

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contractors, there are no safeguards in the event a CIA employee takes custody of a detainee and moves him into a separate, nonmilitary, facility." *See* Josh White, *New Rules of Interrogation Forbid Use of Harsh Tactics*, WASH. POST, Sept. 7, 2006, at A1.

75 David Johnston & Neil A. Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1.

76 *See* THE TORTURE PAPERS, *supra* note 6, at 172–217.

77 *See* New York Times, A Guide to the Memos on Torture, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Jan. 9, 2009) (providing links to various memos regarding the war on terror that were all previously classified).

78 Dana Priest, *Justice Dept. Memo Says Torture "May Be Justified,"* WASH. POST, June 13, 2004, at A1.

79 The Abu Ghraib scandal began when numerous photographs of American troops sexually humiliating Iraqi prisoners were broadcast to the world on the television program *60 Minutes II*. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 43; Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

80 *See* Press Briefing, *supra* note 1 (announcing the declassification of the Torture Memo).

81 *See supra* note 10 and accompanying text.

82 *See, e.g.*, Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A1.

83 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. The Convention Against Torture seeks to protect human rights around the world. The U.S. ratified the Convention in 1994, but did so with a variety of reservations. *See* THE TORTURE PAPERS, *supra* note 6, at 288–90.

the United States [to] commit[ ] or attempt[ ] to commit torture."[84] Section 2340 defines the act of torture as: "[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[85]

According to the Torture Memo, "severe pain," as used in the statute, must rise to a level of pain "that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture."[86]

The OLC thus wrote out of the statute any conduct that fell short of the "death, organ failure, or serious impairment of body functions" standard. This standard was narrow enough to effectively make much of what Saddam Hussein did to his people, condemned by human rights groups around the world, legal under U.S. law.[87]

Not only did the Torture Memo set the bar high for conduct that would necessarily be considered torture, but it also read into the statute a level of mens rea that would make any prosecution of violators nearly impossible. One of the statute's definitions of "severe mental pain or suffering" is "the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering."[88] The OLC, in defining intent, wrote:

> A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. . . .
>
> A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture.[89]

Much like the analysis that wrote out of the statute acts that fell short of causing "death, organ failure, or serious impairment of bodily

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84 18 U.S.C. § 2340A (2006).

85 *Id.* § 2340(1).

86 THE TORTURE PAPERS, *supra* note 6, at 176.

87 *See* Koh, *supra* note 13, at 1165.

88 18 U.S.C. § 2340(2).

89 THE TORTURE PAPERS, *supra* note 6, at 178–79.

functions," this analysis seemed to set the bar even higher when it came to causing "severe mental pain or suffering." So long as a violator believed what he was doing would not cause lasting harm, the Torture Memo asserted that it would not be possible for him to be prosecuted for *intentionally* causing severe mental pain or suffering. Although this definition of torture offered interrogators a great deal of leeway, the OLC did not stop there. Other novel defenses were included in the Torture Memo.

b. Possible Defenses

The Torture Memo went on to develop *even further* defenses if a violator were ever charged with breaking the law. The Torture Memo's emphasis on excusing illegal behavior, by providing a number of ready-made excuses for an interrogator if he were ever to face charges (however unlikely), was most apparent in the Memo's section titled "Defenses." The authors wrote:

> Even if an interrogation method, however, might arguably cross the line drawn in Section 2340, and application of the statute was not held to be an unconstitutional infringement on the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability.[90]

Included in this part of the Memo were sections on the Commander in Chief power,[91] necessity,[92] and self-defense.[93] Necessity is a common-law defense that is based on the theory that although an individual has committed a crime, he is legally excused because he had no choice in the matter and hence acted out of necessity.[94]

For the necessity defense, the Torture Memo stated that the potential for spectacular attacks, coupled with an increased likelihood of an attack's success, "could support such a defense."[95] This, however, is a novel application of the necessity justification, and its implications are troubling. Due to the nature of al-Qaeda's threat, as well as their propensity for large scale attacks causing mass fatalities, there would be no way to balance these concerns. If, on one end of the scale, there

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90 *Id.* at 207.

91 *Id.* at 204–07.

92 *Id.* at 207–09.

93 *Id.* at 209–13.

94 *See generally* John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 398–99 (1999).

95 THE TORTURE PAPERS, *supra* note 6, at 209.

were the potential for 3,000 deaths, is there any line that could reasonably be drawn that would limit what an interrogator could do under the *necessity* doctrine?

With regard to self-defense, the Memo stated that an interrogator, working on behalf of the American people, could claim self-defense in certain circumstances for torturing a detainee:

> The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. . . . If an attack appears increasingly likely, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that an attack is increasingly certain, then the necessity for the interrogation will be reasonable. The increasing certainty of an attack will also satisfy the imminence requirement. Finally the fact that previous al Qaeda attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent such deaths.[96]

Thus, interrogators who harm detainees, in violation of U.S. law, could still utilize this catchall provision that excuses an interrogator's behavior when acting to protect the country. This interpretation of self-defense, according to one scholar, would turn post-Nuremberg law on its head:

> Insofar as these memoranda imply that those facing the possibility of criminal convictions can avoid such charges on the basis of self-defense, necessity, or because their Commander-in-Chief ordered them to defend the nation against terrorism, these contentions torture beyond recognition relevant defenses under international criminal law. Whatever may be the case under *In re Neagle*, a 1890 U.S. Supreme Court case on which the memoranda writers rely, the premise that a government official charged with a war crime can claim that he was acting pursuant to "self-defense" because he was protecting not himself or another individual but the "United States Government," is a perversion of both pre- and post-Nuremberg law.[97]

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96 *Id.* at 211.

97 Alvarez, *supra* note 33, at 191.

The Torture Memo also included a provision that is notable for its novelty and far-ranging implications:

> Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. 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 . . . . Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.[98]

This is a last resort argument that would legitimize *literally* any action taken by interrogators in the war on terror. By arguing that there are no limits on what the President may do, the Torture Memo undermined its own credibility by failing to mention *Youngstown Sheet & Tube Co. v. Sawyer*,[99] the most important Supreme Court decision on this topic. The notion that the President could simply ignore any and all limitations by Congress is an idea that is fundamentally at odds with the structure of the American government.

Needless to say, the legal analysis in the Torture Memo was not looked upon favorably by the legal community, particularly by those who had previously occupied positions at the OLC.[100] More importantly, the effects of the Torture Memo were wide-ranging and long lasting.

2. Effects of the Torture Memo

The OLC rendered the Torture Memo on August 1, 2002. Effective on that date, the executive's view of torture, and the threshold level of pain that an interrogator must reach to have "tortured" someone under U.S. law, was established.[101] What is unclear, however, is the effect that this Memo had in the field of war.[102]

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98 THE TORTURE PAPERS, *supra* note 6, at 200.

99 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

100 *See* Liptak, *supra* note 82.

101 *See* THE TORTURE PAPERS, *supra* note 6, at 173–83.

102 On April 2, 2008, another John Yoo memo, this one focusing on the military's use of harsh interrogation techniques (rather than the CIA's), was declassified. *See* David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES, Apr. 3, 2008, at A1. According to one attorney, "[t]he memo helped to build a culture that, in the absence of leadership from the highest ranks of the Pentagon, allowed the abuses at Abu Ghraib and elsewhere." *Id.*

According to some, the Torture Memo allowed interrogators in the field to take an "aggressive approach."[103] There is disagreement about whether this "aggressive approach" was tantamount to torture.[104] One report, produced by Human Rights Watch, hypothesized that the abuses at Abu Ghraib and other locations were not the result of a few rogue subordinates; rather, they were related to "decisions made by the Bush administration to bend, ignore, or cast rules aside."[105]

The abuse of Iraqi prisoners of war has been well documented, even if it is impossible to prove there was a direct causation between OLC memos and the egregious behavior that took place in some Iraqi prisons.[106] Notwithstanding the lack of evidence of direct causation, due to the shock of the Abu Ghraib photos,[107] the reaction in America to the disclosure of the Torture Memo was fierce.

Jack Goldsmith, the former head of the OLC who ultimately made the decision to disavow the Torture Memo, summarized the controversial Memo this way: "[V]iolent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority."[108] According to John Dean, former counsel to President Nixon, "[t]his document is the most alarming bit of classified information to surface during wartime since the 1971 leak of the Pentagon Papers relating to the war in Vietnam."[109] Legal scholars almost uniformly condemned the Torture Memo.[110]

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103 *See* Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3.

104 *See generally* Alvarez, *supra* note 33; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005).

105 HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB (2004), http://www.hrw.org/sites/default/files/reports/usa0604.pdf.

106 *See* THE TORTURE PAPERS, *supra* note 6, at 405.

107 *See generally* Seymour M. Hersh, *Chain of Command*, THE NEW YORKER, May 17, 2004.

108 GOLDSMITH, *supra* note 14, at 144.

109 John W. Dean, *The Torture Memo by Judge Jay S. Bybee That Haunted Alberto Gonzalez's Confirmation Hearings*, FINDLAW, Jan. 14, 2005, http://writ.news.findlaw.com/dean/20050114.html.

110 *See, e.g.*, Liptak, *supra* note 82 (a sampling of the criticism called the memo "embarrassing," "abominable," "one-sided," and "egregiously bad"). However, two scholars did go on record defending the Torture Memo as "standard lawyerly fare" from an office "whose jurisprudence has traditionally been highly pro-executive." Eric A. Posner & Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22.

John Yoo, the author of the Memo, has maintained that the analysis contained therein was proper.[111] According to Yoo, his legal interpretation had everything to do with determining what international and domestic law allowed interrogators to do, not whether such actions would be *morally* acceptable to the American people: "It would be inappropriate for a lawyer to say, 'The law means A, but I'm going to say B because to interpret it as A would violate American values . . . . A lawyer's job is if the law says A, the law says A."[112]

Other advocates of the Memo argued that while one can disagree with the Memo's conclusions, its legal reasoning is not as egregious as numerous scholars have posited. Because the Torture Memo was limited to "interrogation (1) outside the U.S. (2) of identified enemy combatants (3) concerning the enemy's plans of attack," its findings were extremely narrow and fell within the President's Commander in Chief powers.[113] This argument is not sound. First, in 2004, there was little process available to detainees, so it is unclear whether individuals being held were actually "enemy combatants" rather than foreigners caught in the wrong place at the wrong time.[114] Second, even if the strong Commander in Chief argument were based on an extreme view of executive power, the Torture Memo failed to disclose how radical the view really was.

Based on legal scholars' reaction to the Torture Memo, it is important to determine how a flawed opinion, binding on the executive branch, was produced with very few questions asked. An examination of the nature and structure of the OLC and the context surrounding the Torture Memo reveals that a number of factors coalesced to produce the circumstances necessary for this miscarriage of justice.

3. Causes of the Legal Flaws

a. Lock-in

Lock-in describes a circumstance where the OLC is asked by the executive branch to give a legal opinion on an event or practice *after*

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111 According to Yoo, "[t]he worst thing you could do, now that people are critical of your views, is to run and hide. I agree with the work I did. I have an obligation to explain it . . . . I'm one of the few people who is willing to defend decisions I made in government." Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping*, WASH. POST, Dec. 26, 2005, at A3.

112 *Id.* (quotations omitted).

113 Posner and Vermeule, *supra* note 110.

114 It was not until June 2004 that the Supreme Court held that U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantanamo Bay. *See* Rasul v. Bush, 542 U.S. 466, 484 (2004).

that event or practice has occurred.[115] The Torture Memo was not the first example of the OLC having to issue a ruling on controversial behavior *after* the behavior had occurred. During the Oliver North scandal, the OLC was not asked by President Reagan for an opinion on Mr. North's behavior for two years.[116] According to one legal scholar:

> It will never be known whether OLC would have written the same legal position, had it been consulted early in the affair when the government was not already locked into its legal position. But when our government commits itself to a political position and then becomes locked in, with a weak legal opinion or no legal opinion at the front end, the OLC legal opinion that finally issues will be suspect precisely because we can no longer be certain that its result has not been "precooked."[117]

For the war on terror, the Bush Administration tasked the OLC with interpreting how far interrogators could go after numerous interrogations had already occurred.[118] Thus, an opinion by the OLC that previous CIA action was illegal could have had serious legal ramifications for officers in the field.[119] Fearing this result, it is possible that the OLC drafted an opinion as broadly as possible to try and inoculate those in the field, and in office, from prosecution.[120] Right before the Bush Administration's term expired, both President Bush[121] and Vice

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115 Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 516–17 (1993).

116 *Id.*

117 *Id.*

118 Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, http://abcnews.go.com/wnt/investigation/story?id=1322866.

119 *See* GOLDSMITH, *supra* note 14, at 152. This would be the opposite situation of having a "golden shield." Rather, it would be a confirmation that what the person did is illegal, and now the OLC has indicated it is illegal. So, as unlikely as a prosecution would be with a "golden shield," one could hypothesize that the reverse would be true without it.

120 *See* Johnsen, *supra* note 16, at 1569–70. In April 2008, ABC News reported that President Bush, Vice President Cheney, and other Administration principals not only had knowledge of the "enhanced interrogation" program the CIA was running, but had approved it. *See* Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisers' Interrogation Talks*, ABC NEWS, Apr. 11, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=1. According to President Bush, "Well, we started to connect the dots in order to protect the American people. And yes, I'm aware our national security team met on this issue. And I approved." *Id.*

121 During a round of exit interviews, both President Bush and Vice President Cheney explicitly stated that they had no regrets over the United States' "enhanced interrogation" policies because they had legal authorization for them. According to President Bush: "And I'm in the Oval Office and I am told that we have captured Khalid Sheikh Mohammed and the profession-

President Cheney[122] stressed how important having legal justification was in their Administration's decision to implement its interrogation policy.

According to Douglas W. Kmiec, the former head of the OLC under President Ronald Reagan and President George Herbert Walker Bush, after September 11 the OLC lost its way. "[Their] approach changed dramatically with opinions on the war on terror . . . . The office became an advocate for the president's policies."[123] As the OLC drifted from providing objective advice to advocating for a certain result, it encountered significant problems.

b. Interpretation Versus Advocacy

One of the differences between government lawyers and private sector defense lawyers lies in the way they are required to interpret the law. For a lawyer in the OLC, interpreting a statute is supposed to be a good faith effort at discerning the law's most plausible meaning.[124] This is quite different from a defense attorney, whose job consists of defending clients by any nonfrivolous means possible, including the use of novel defense theories.[125] Author of the Torture Memo, John Yoo, maintains that he was doing the former,[126] and not the latter, and drafted the Torture Memo to lay out policy choices from which the Administration could choose, rather than to advocate

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als believe he has information necessary to secure the country. So I ask what tools are available for us to find information from him, and they gave me a list of tools. And I said, *are these tools deemed to be legal. And so we got legal opinions before any decision was made*. And I think when people study the history of this particular episode they'll find out we gained good information from Khalid Sheikh Mohammed in order to protect our country. *Everything this administration did was—had a legal basis to it, otherwise we would not have done it*." *See Fox News Sunday with Chris Wallace: Presidents Bush 41 and 43 on Fox News Sunday* (FOX television broadcast Jan. 12, 2009) (emphasis added) (transcript available at http://www.foxnews.com/story/0,2933,479174,00.html).

122 According to Vice President Cheney, when it came to the Administration's interrogation policies, "I can tell you that we had *all the legal authorization we needed to do it*, including the sign-off of the Justice Department." *See The News Hour with Jim Lehrer* (PBS television broadcast Jan. 14, 2009) (emphasis added) (transcript available at http://www.pbs.org/newshour/bb/politics/jan-june09/cheney_01-14.html).

123 Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A26 (quotations omitted).

124 *See* Johnsen, *supra* note 16, at 1604.

125 *See* Richard B. Bilder & Detlev F. Vagts, *Editorial Comments: Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 693 (2004) (arguing that government lawyers have different responsibilities than private attorneys).

126 *See Frontline: The Torture Question*, *supra* note 56 ("My job was only to say what's legally required. It wasn't to say, 'now that you know the job, you should do this as a matter of your discretion.' That wasn't our function.").

for one position over another.[127] This explanation, however, is not supported by the facts.[128] The Administration came to the OLC inquiring about specific tactics that could be used in interrogations, as well as about potential legal culpability.[129] Yoo's opinion was crafted in language that did not indicate how radical some of his suggestions were, and how unlikely they were to be accepted by a court.

Yoo's main contention is that he was only laying out the *possibilities* for the President and others to consider.[130] At least one scholar, however, disagrees: "[T]he content of the memos speaks to a culture of aggressive lawyering in which attorneys acted not as sober

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127 *Id.*

128 Marty Lederman is a former attorney at the OLC, who posts frequently on Jack Balkin's prominent blog "Balkinization." In a series of posts, Lederman concludes that the circumstances of the Torture Memo, and the aberration of normal OLC practice, leads to the inevitable conclusion that the purpose of the Torture Memo was not about providing options, but about green-lighting otherwise illegal conduct:

> These numerous departures from the traditional OLC practices and methods were not business as usual at OLC, even during the period in question. I happen to know first-hand . . . that Assistant Attorney General Bybee and many of the wonderful and dedicated attorneys in the Office . . . were producing fair-minded and rigorous Opinions fully consistent with the best traditions of the Office—even in cases where the Office was trying to push the legal envelope, or where its analysis was open to serious debate. In this light, it is hard to avoid the conclusion that the function of the 2002 Opinion on the torture statute was not to provide OLC's typically balanced and thorough view of the applicable law, nor to give readers (e.g., the White House Counsel and the CIA) a fair and candid assessment of the many . . . difficult questions associated with the various federal laws bearing on the issue. If those had been OLC's objectives, presumably it would have consulted more widely with others in the Executive branch with expertise on the various questions; would have tested, and strengthened, its analysis by insisting upon careful and skeptical preliminary review by others within and outside OLC; would have dealt more forthrightly in the Opinion itself with counterarguments and with the array of relevant judicial precedents and executive understandings; and would have placed the torture statute within a broader legal context in which there are many potentially relevant federal restrictions. The fact that the Office did not do such things leaves the unmistakable impression that OLC saw its role in this particular instance as instead providing legal cover for conduct of questionable legality—i.e., that the function of the 2002 Opinion was to signal a sort of 'green light' that might provide an immunity of sorts to government actors who would otherwise face serious legal exposure.

Posting of Marty Lederman to Balkinization, http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html (Jan. 7, 2005, 09:15 EST). At the time of this Note's publication, it is worth noting that Marty Lederman has accepted a position as Deputy Assistant Attorney General in the Obama Administration's Office of Legal Counsel. Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2009/01/marty-lederman-joins-office-of-legal.html (Jan. 20, 2009, 01:35 EST).

129 THE TORTURE PAPERS, *supra* note 6, at 207–13.

130 *See supra* notes 111–12 and accompanying text.

naysayers, but as the bricklayers of the administration's counterterror tactics—often endorsing flat-out noncompliance with international treaties and federal statutes under the auspices of national security."[131]

It is hard to disagree with the analysis above. The Torture Memo and its progeny were written in such a way as to cloak illegal behavior in lawyerly terms and justify a no-holds-barred approach by the Administration in its pursuit of al-Qaeda and Iraqi insurgents.[132]

4. Withdrawal of the Torture Memo

After Jack Goldsmith took over at the OLC, he came to realize that the Torture Memo was not defensible and would have to be withdrawn.[133] According to Goldsmith, there was "no precedent for overturning OLC opinions within a single administration. It appeared never to have been done, and certainly not on an important national security matter."[134] Despite the lack of precedent, in December 2003, just two months into his tenure as head of the OLC, Goldsmith concluded that the legal basis of the Torture Memo could not be supported and that it should be withdrawn.[135] He wanted to wait, however, until he could draft a replacement before officially withdrawing the Torture Memo.[136]

Goldsmith was unable to finish a replacement memo in time. The Abu Ghraib scandal broke in the spring of 2004, causing a firestorm for the Bush Administration.[137] One advocacy group, Human Rights Watch, published a scathing report on "The Road to Abu Ghraib," accusing the Bush administration and its lawyers of laying the groundwork for the abuse that occurred at Abu Ghraib and elsewhere.[138]

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131 Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 33 (2006) (quoting Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGAL TIMES, June 14, 2004, at 1.).

132 *See* Posting of Orin Kerr to Slate, http://www.slate.com/blogs/blogs/convictions/archive/2008/04/02/john-yoo-s-living-constitutionalism.aspx (Apr. 2, 2008, 01:47 EST) (stating that what was so striking about one of Yoo's memos was that it looked extremely "lawyerly," but that its major flaw was in the poor quality of its analysis).

133 GOLDSMITH, *supra* note 14, at 151.

134 *Id.* at 146.

135 *Id.*

136 *Id.* at 155–56.

137 *See generally* Hersh, *supra* note 79.

138 While this is outside the scope of the Note, the report makes a very strong case that the legal advisors to the Bush Administration, including OLC, played a significant role in undermining prisoners' human rights. *See generally* HUMAN RIGHTS WATCH, *supra* note 105. According to the report, legal opinions laid the way for abuses in at least four Iraqi prisons and in Afghani-

Once the scandal broke, Goldsmith faced enormous pressure not only to withdraw the Torture Memo immediately, but also to address the public's concerns regarding the United States' decision to authorize torture.[139]

The Torture Memo was ultimately replaced by another memorandum (the "Replacement Memo"),[140] written by Daniel Levin, the man who replaced Jack Goldsmith at the OLC. The Replacement Memo was different from the Torture Memo in several critical respects. First, the Replacement Memo explicitly disclaimed two of the more controversial aspects of the Torture Memo: "This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows."[141]

Second, the Replacement Memo addressed the Torture Memo's narrow definition associated with pain and torture: "[W]e disagree with statements in the [Torture Memo] limiting 'severe' pain under the statute to 'excruciating and agonizing' pain, or to pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'"[142]

Third, the Replacement Memo addressed the Torture Memo's suggestion that both necessity and self-defense could be used to excuse torture. According to the Replacement Memo, "[t]here is no exception under the statute permitting torture to be used for a good reason."[143] Thus, one of the most unprecedented and controversial aspects of the Torture Memo was rescinded.

The Replacement Memo, while providing a more balanced analysis and eliminating questionable assertions, maintained that the OLC's prior conclusions should stay intact: "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of

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stan. *Id.* Furthermore, the report documents America's use of "renditions" and "disappearances," all of which have been done pursuant to America's legal policy. *Id.* at 10–12.

139 *See* Press Briefing, *supra* note 1.

140 Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), http://www.usdoj.gov/olc/18usc23402340a2.htm [hereinafter Replacement Memo].

141 *Id.*

142 *Id.* (citations omitted).

143 *Id.*; *see also* Posting of Marty Lederman, *supra* note 128.

detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[144]

While it is unclear why the previous conclusions were maintained, it is possible that one of the same motivations that drove the OLC originally, lock-in, provided a similar motivation here. A major reworking of the Torture Memo, such that interrogators' previous conduct would now be considered torture (in violation of applicable law), might have increased pressure in Washington for a further investigation and possible criminal charges against overzealous interrogators.

Although the Replacement Memo was not a vast overhaul, considering its hedge on culpability, the Memo reflected the culmination of a more complete process of statutory interpretation, one that is more in line with how the OLC should be operating. According to Marty Lederman, a former OLC attorney, while the two Memos ended up in roughly the same place, "the differences between them are striking, and very important from a practical standpoint."[145] Lederman asserts that there are four major differences that make the Replacement Memo superior: (1) the methods of analysis; (2) its use of precedent; (3) its placement in the broader context of American law; and (4) its timely publishing.[146] The Replacement Memo thus serves as an example of the OLC using the proper methodology to complete its work. The greatest benefit a proper methodology provides is that it disseminates information into the public sphere, and it allows people inside and outside of government to evaluate the legal work the OLC is producing. If the following calls for oversight are heeded by the OLC, hopefully all its memoranda in the future will be produced using a similar methodology.

III. Proposed Methods of Oversight

The Torture Memo exposed serious deficiencies in how the OLC operates. For two years, interrogators were given erroneous legal advice regarding torture, with two adverse results. First, American interrogators behaved in ways contrary to traditional American values, possibly leading in part to the Abu Ghraib scandal[147] and to a decline in American reputation around the globe.[148] Second, agents on the

144 *See* Replacement Memo, *supra* note 140, at n.8.

145 *See* Posting of Marty Lederman, *supra* note 128.

146 *Id.*

147 *See* note 105 and accompanying text.

148 *See, e.g.*, Nicholas D. Kristof, Op-Ed., *When We Torture*, N.Y. TIMES, Feb. 14, 2008, at A35.

frontlines were given advice that, if followed, might be the basis for prosecution one day.[149] More importantly, when the Torture Memo was leaked to the public, it exposed the OLC to charges of acting as an enabler to the executive branch. John Yoo, the author of the Torture Memo, was known as "Dr. Yes" for his ability to author memos asserting exactly what the Bush Administration wanted to hear.[150] To ensure that this situation does not repeat itself in the future, it is critical for changes to be implemented at the OLC by mandating publication and increasing oversight.

A. Mandated Publishing

One explanation for the Torture Memo and its erroneous legal arguments was the OLC authors' belief that the Memo would remain secret forever. When he worked in the OLC, Harold Koh

> was often told that we should act as if every opinion might be [sic] some day be on the front page of the *New York Times*. Almost as soon as the [Torture Memo] made it to the front page of the *New York Times*, the Administration repudiated it, demonstrating how obviously wrong the opinion was.[151]

Furthermore, James B. Comey, a Deputy Attorney General in the OLC, told colleagues upon his departure from the OLC that they would all be "ashamed" when the world eventually found out about other opinions that are still classified today on enhanced interrogation techniques.[152] This suggests that OLC lawyers, operating in relative obscurity, felt somewhat protected by the general veil of secrecy surrounding their opinions.

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149 Earlier this Note argues that an OLC opinion would serve as a "golden shield" to protect an interrogator from prosecution. While it is unclear how this would play out (there is no precedent on record), at the very least poor legal advice serving as a "golden shield" would raise the possibility of an interrogator facing charges in the future. Since taking office, President Obama has stated that in regards to a potential investigation and prosecution of those who tortured, the fact that individuals had "golden shields" in the form of OLC memos is a factor he is taking into account, even as no final decision has been made. *See This Week with George Stephanopoulos* (ABC television broadcast Jan. 11, 2009) (transcript available at http://abcnews.go.com/print?id=6618199). "We have not made final decisions, but my instinct is for us to focus on how do we make sure that moving forward we are doing the right thing. That doesn't mean that if somebody has blatantly broken the law, that they are above the law. But my orientation's going to be to move forward." *Id.*

150 *See* Shane et al., *supra* note 123 ("[Yoo's] close alliance [with the Vice President's advisors] provoked John Ashcroft, then the attorney general, to refer privately to Mr. Yoo as Dr. Yes for his seeming eagerness to give the White House whatever legal justifications it desired, a Justice Department official recalled.").

151 Koh, *supra* note 22, at 655.

152 Shane et al., *supra* note 123.

For many opinions, some of which are already published on the OLC's Web site,[153] this will not be a controversial proposition. Publication has three advantages: (1) accessibility; (2) letting people see the factual predicate on which an opinion is based; and (3) eliminating people's ability to strip an OLC opinion of nuance in favor of saying "OLC says we can do it."[154] Koh provides a telling illustration of the problems associated with the absence of mandated publishing as he found an OLC opinion placed in the *Territorial Sea Journal* that was critical to a case he was trying on behalf of a group of Haitians seeking to enter the United States.[155] He was incredulous that on a matter "of such consequence,"[156] he literally had to be lucky to find the opinion.[157]

Secrecy in government facilitates abuse, and nowhere is the need for transparency more important than the OLC, whose opinions are binding on the entire executive branch. In a telling example, on April 2, 2008, the Bush Administration declassified a second Torture Memo.[158] In eighty-one pages, John Yoo presented legal arguments that effectively allowed military interrogators carte blanche to abuse prisoners without any fear of prosecution.[159] While the Memo was classified at the "secret" level, it is clear that there was no strategic rationale for classifying it beyond avoiding public scrutiny.[160] Accord-

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153 *See* USDOJ: OLC: Memorandums and Opinions, http://www.usdoj.gov/olc/opinions.htm (last visited Jan. 9, 2009). There is no rule right now regarding the publication of OLC opinions, as the OLC periodically posts some of its work on its Web site.

154 Koh, *supra* note 115, at 517.

155 *Id.* at 517–18.

156 *Id.* at 518.

157 *Id.* at 517 (stating that the citation of the opinion in question appeared in a draft paper Douglas Kmiec sent him in preparation for an upcoming conference).

158 *See* Dan Eggen & Josh White, *Memo: Laws Didn't Apply to Interrogators*, WASH. POST, Apr. 2, 2008, at A1.

159 Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003), *available at* http://www.fas.org/irp/agency/doj/olc-interrogation.pdf.

160 Steven Aftergood, a blogger for the Project on Government Secrecy, argues that classifying this opinion served no good purpose, and is an indication that secrecy is being used in the OLC for nefarious purposes. Posting of Steven Aftergood to Secrecy News, http://www.fas.org/blog/secrecy/2008/04/2003_olc_memo_on_interrogation_declassified.html (Apr. 2, 2008).

> From a secrecy policy point of view, the document itself exemplifies the political abuse of classification authority. Though it was classified at the Secret level, nothing in the document could possibly pose a threat to national security, particularly since it is presented as an interpretation of law rather than an operational plan. Instead, it seems self-evident that the legal memorandum was classified not to protect national security but to evade unwanted public controversy. What is arguably worse is that for years there was no oversight mechanism, in Congress or elsewhere, that was capable of identifying and correcting this abuse of secrecy author-

ing to J. William Leonard, the nation's top classification oversight official from 2002–2007, "There is no information contained in this document which gives an advantage to the enemy. The only possible rationale for making it secret was to keep it from the American people."[161]

To address this problem, the OLC should be required to publish all of its opinions, with a few limited exceptions. John F. Kennedy once said, "The very word 'secrecy' is repugnant in a free and open society."[162] Justice Potter Stewart, in *New York Times Co. v. United States*,[163] laid out the inherent dangers of secrecy in the realm of foreign affairs:

> I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. *For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.* I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.[164]

The proposal to require the OLC to publish its opinions has been advocated by many, including former heads of the OLC.[165]

> ity. (Had the ACLU not challenged the withholding of the document in court, it would undoubtedly remain inaccessible.) Consequently, one must assume similar abuses of classification are prevalent.

Id.

161 Posting of Steven Aftergood to Secrecy News, http://www.fas.org/blog/secrecy/2008/04/the_olc_torture_mem.html (Apr. 3, 2008).

162 President John F. Kennedy, Address Before the American Newspaper Publishers Association: The President and the Press, 1 PUB. PAPERS 334 (Apr. 27, 1961).

163 N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

164 *Id.* at 729 (Stewart, J., concurring) (emphasis added).

165 *See* Johnsen, *supra* note 16, at 1607–08. Dawn Johnsen, one of the loudest critics of the OLC during the Bush Administration, has advocated for the publication of OLC opinions. *Id.* At the time of this Note's publication, Dawn Johnsen has been named by President Obama as the new head of OLC, pending congressional approval. *See* Ben Smith, *Obama's Legal Team: Bush's Legal Foes*, POLITICO, Jan. 26, 2009, http://dyn.politico.com/printstory.cfm?uuid=087DD63B-18FE-70B2-A805C734305F6FF1. It is thus increasingly likely that many of the changes she has advocated in the past, and those that this Note has proposed, will be implemented in the near future.

1. Process for Classification

In certain situations, an opinion may have to remain confidential for national security purposes, but mechanisms can be designed to deal with this scenario. First, in order to deem a memorandum classified as a matter of national security, another agency in the executive branch with expertise on the subject should be required to sign off on such a classification. The Torture Memo exposed an instance of the OLC acting secretively not only for national security purposes, but also because it knew the Torture Memo could not withstand scrutiny.[166] Thus, only opinions dealing with operational matters that give aide to the enemy should be classified. Opinions that consist solely of legal reasoning on questions of law clearly would not pass that test.

If there is a disagreement between those in the OLC who choose to classify something and those in the other executive agency who believe it should be published, then the decision should be sent back to the OLC to review the potential for publishing a redacted version of the opinion. For example, consider a memo from the OLC on the different interrogation techniques allowable under the law. While it would be harmful for the OLC to publish specific activities, and thus alert the country's enemies as to interrogation tactics, publishing the legal analysis that gives the President this authority would not be harmful. Publishing would restore legitimacy to the work the OLC is doing and help remove the taint the Torture Memo has left on the office.

2. Exceptions

There are a few necessary exceptions to a rule requiring publication, and the former OLC attorneys who wrote a series of guidelines for the OLC are clear on them:

> [O]rdinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation.[167]

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166 *See, e.g.*, Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007 (Magazine), *available at* http://www.nytimes.com/2007/09/09/magazine/09rosen.html (quoting Jack Goldsmith as stating: "Before I arrived in O.L.C., not even N.S.A. lawyers were allowed to see the Justice Department's legal analysis of what N.S.A. was doing.").

167 Johnsen, *supra* note 16, at 1608.

This reasoning stems directly from the attorney-client privilege and the need for candor in government. It is imperative that the executive branch seek information on potential action that may or may not be legal (or constitutional), and this type of inquiry should not be discouraged. This exception is only to be applied when the President does not go ahead with the policy in question. If the OLC were to opine that something is illegal or unconstitutional, and the President were to disregard that advice and proceed with the action anyway, this type of opinion should be made public.[168]

If the OLC tells a President he can ignore a statute, and the President follows that advice, that opinion should be available to the public. One of the foundations of American governance is that nobody is above the law; advice that a statute should not be enforced contradicts this maxim. The Torture Memo asserted that violations of U.S. law would probably be excused by certain defenses, including necessity and self-defense.[169] Additionally, the Torture Memo argued that "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."[170] The OLC thus told the President that he does not have to enforce any congressional statutes that infringe on his Commander in Chief power. For both the purposes of good government and accountability, this type of claim should be made in public, rather than in secret, so Americans know how the President is interpreting the laws.

3. Oversight of Secret Opinions

Increased oversight at the OLC is most important for opinions that are classified as secret pursuant to the above procedures, and are unlikely to ever be heard in a court of law. According to former OLC attorneys:

> [T]he absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by ex-

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168 *See id.* at 1598 (hypothesizing that if a bomb were to go off in the United States, and the President sought advice on whether he could torture and unilaterally wiretap leaders of right-wing militias, and the OLC opined "no," whether or not this advice would eventually be published would depend on the President's actions. "If, however, the White House acted contrary to OLC advice or if OLC issued an opinion interpreting the relevant law to allow the torture and warrantless wiretapping, the public would have a strong interest in seeing the OLC opinion in an appropriate, timely manner.").

169 *See supra* Part II.1.a–b.

170 THE TORTURE PAPERS, *supra* note 6, at 207.

> tension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.[171]

How can oversight be ensured?

First, memos that are both secret and unlikely to be heard in court must be reviewed by others with an expertise in the field. In 2002, there were two major issues with the OLC: first, almost nobody outside a group of five attorneys was allowed to read the secret opinions,[172] and second, there was a lack of expertise in the office on matters of national security.[173] As Goldsmith later confessed, "I eventually came to believe that [the immense secrecy surrounding these memoranda] was done [not for confidentiality, but] to control outcomes in the opinions and minimize resistance to them."[174]

For opinions that are classified as secret, at least one other legal department in the federal government, with a similar level of expertise, should be asked to review a secret opinion in order to take a

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171 Johnsen, *supra* note 16, at 1605.

172 According to Jack Goldsmith, White House Counsel Alberto Gonzalez "made it a practice to limit readership of controversial legal opinions to a very small group of lawyers." GOLDSMITH, *supra* note 14, at 167.

173 Goldsmith writes in his book:

> Yoo's superiors probably failed to supervise him adequately for two reasons: under pressure to push the envelope, they liked the answers he gave; and lacking relevant expertise, they deferred to his judgment. Yoo was a war powers scholar at a prestigious law school. He also had enormous personal charm, and he was extremely persuasive in explaining his views. On the surface, the interrogation opinions appeared thorough and scholarly. It was thus not easy for the men under pressure in the summer of 2002 to critically analyze Yoo's opinion. Jay Bybee, who actually signed the August 2002 opinion, is a fine lawyer and judge. But he had no training in issues of war or interrogation, and he tended to approve Yoo's draft opinions on these topics with minimal critical input. Nor were Yoo's boss, Attorney General John Ashcroft, or the normal recipient of the opinion, White House Counsel Alberto Gonzales, in positions to raise informed questions. Ashcroft had come to the Justice Department from thirty years in politics, and Gonzales had been a corporate lawyer and state judge before coming to the White House. [David] Addington, of course, was a very informed observer. But he possessed nearly the same characteristics that led Yoo to be so incautious and aggressive in the interrogation context.

Id. at 169.

174 *Id.* at 167; *see also* Posting of Marty Lederman, *supra* note 128 ("The 2002 Opinion was not made public until long after it was leaked and provoked a public outcry—even though the Opinion presumably served as the basis for the United States' most far-reaching and troubling conduct in the treatment of detainees. There was no obvious reason for the secrecy; and as is now apparent, if OLC had disseminated the 2002 Opinion at the outset—at least throughout the government, if not to the public—the Office would have been made aware much earlier of the weaknesses and gaps in its analysis, and it would not have taken more than two years for the Office to make much-needed corrections. . . . OLC published its superseding Opinion, in contrast, the evening it was issued.").

substantive look at the legal work in question. According to Jack Goldsmith, this process was traditionally how things worked;[175] when the Bush Administration started "push[ing] the envelope,"[176] however, nearly all outside opinion was shut out under the guise of preventing leaks.[177] It is now apparent that the concern stemmed more from a fear of objections than from the national security concern of a leak.[178] Based on the declassification of the Torture Memo, along with the subsequent declassification of another memo on torture,[179] there was no national security purpose for keeping the memos secret.

The reason an outside review of memos labeled as classified is important is that in times of crisis, proper oversight mechanisms *need* to be in place. It is in times of emergency when the country is most vulnerable to decisions that it might later regret.[180] Based on the legal reasoning exposed in both the Torture Memo and the released Yoo opinion from March 2003, it is reasonable to surmise that other opinions written in the aftermath of September 11 are similarly flawed.[181] Currently, there are a number of classified memoranda that have been referenced in declassified OLC opinions, but have never been declassified themselves.[182] What these memoranda assert, and whether President Bush decided to follow them, are currently unknown. In a recently declassified opinion, however, there is a footnote indicating that the Fourth Amendment's protection against unreasonable searches and seizures is not applicable to domestic military operations related to the war on terror.[183] Because this would be a novel asser-

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175 *See* GOLDSMITH, *supra* note 14, at 166 ("On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise.").

176 *Id.*

177 *Id.* at 167.

178 *Id.*

179 *See supra* note 159 and accompanying text.

180 *See* John W. Dean, *Presidential Powers in Times of Emergency: Could Terrorism Result in a Constitutional Dictator?*, FINDLAW, June 7, 2002, http://writ.lp.findlaw.com/dean/20020607.html.

181 In the Yoo opinion that was released on April 2, 2008, there is a footnote referencing an opinion from October 23, 2001, which argued that the Fourth Amendment did not apply to domestic searches in the war on terror. *See* Pamela Hess & Lara Jakes Jordan, *Disavowed Justice Department Legal Memo: Constitutional Protections Did Not Apply*, ASSOCIATED PRESS, Apr. 3, 2008.

182 ProPublica, an independent, non-profit newsroom that produces investigative journalism, has listed at least three dozen memoranda from the Bush Administration which are still undisclosed. *See* Dan Nguyen & Christopher Weaver, *The Missing Memos*, PROPUBLICA, Jan. 28, 2009, http://www.propublica.org/special/missing-memos.

183 *See* Memorandum from John C. Yoo, *supra* note 159, at n.10.

tion of authority, the American public should be able to evaluate the merits of such a legal argument.

Different agencies of government have personnel with different expertise, so it will be incumbent upon those in the OLC to determine which department, and which individual in the department, has the required security clearance and knowledge to review an opinion. Thus, when an opinion has been deemed classified, before it can be forwarded outside of the OLC, it would have to go to another agency for approval.

The question that the reviewer should have to answer is whether the work he or she is analyzing is an "accurate and honest appraisal of applicable law."[184] If it is, then there is no problem with the opinion, and the second agency will sign off on it. If it is not, then the reviewer should prepare a minority report. What is most critical is that both the Attorney General and the President—who might not be an attorney—understand exactly what their lawyers are saying. For a controversial decision, it should not be sufficient for someone in the OLC like John Yoo to write an inaccurate legal memo that asserts one thing, while the law and precedent say another, with the eventual decisionmaker—the President—only viewing the flawed opinion. The minority report will serve two purposes: first, it will encourage lawyers to avoid dressing up a shoddy opinion in "legalese" to make it look legitimate when in reality it is not; and second, it will ensure that the opinion truly is a full and fair accounting of the law.

The most important by-product from mandated review of secret opinions will be that lawyers in the OLC will no longer be able to hide behind a wall of total confidentiality.[185] Rather than acting as if the OLC is above the law and answerable to no one, the knowledge that every classified opinion will be reviewed by someone with an expertise in the field should give pause to any OLC attorney who lacks independence and serves as a yes-man for the President.

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184 This is the standard that former OLC attorneys advocate should be the baseline for any opinions drafted at the OLC. *See* Johnsen, *supra* note 16, at 1604.

185 *See* Clark, *supra* note 10, at 469–70 ("Perhaps Yoo and Bybee thought that they would never have to explain their legal advice because the [Torture Memo] would never be made public. Perhaps they thought that Bush administration actions based on their advice would never come to light.").

B. Mechanisms for Implementing Changes

1. Self-Imposed by Executive

The easiest way to implement such a change in OLC requirements would be for the President to impose them on the OLC. The OLC's authority stems from the Attorney General, who has delegated some of his power to the OLC.[186] The Attorney General is in the executive branch, which means that the President has the authority to order these changes.

It is unlikely that the executive branch would self-impose constraints on the OLC, because Executives from both parties have historically exhibited a strong desire to protect the levers of power.[187] One of the reasons lawyers at the OLC were able to write documents like the Torture Memo without anyone objecting was because the results were in line with what the Bush Administration wanted to hear.[188] Thus, it was unlikely that the Bush Administration would make any changes during its final year in office, and as it turned out, the Bush Administration ended on January 20, 2009, without making any changes.

Nevertheless, in light of the OPR's publicly announced investigation of the OLC's conduct,[189] and the release of another John Yoo memorandum on torture,[190] the lack of oversight at the OLC could come to the forefront of the public's attention.[191] Thus, it is possible that through public pressure, President Bush could be persuaded to mandate these changes himself.[192]

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186 *See* 28 C.F.R. § 0.25 (2007).

187 *See* Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84, 84 (2006) ("Which President was advised by his lawyers that he had the constitutional authority to refuse to comply with federal statutes enacted by Congress? Which President also openly violated a federal statute in the exercise of his Commander-in-Chief power? The answer is not George W. Bush, but Bill Clinton. Like every modern President, Clinton defended his inherent and exclusive constitutional powers as Commander in Chief from congressional interference."). *But see* Smith, *supra* note 165 (stating that according to one Bush aide, the lawyers who will lead the OLC under President Obama have "alarmingly narrow views of executive power").

188 The assertions in the Torture Memo, instead of being an objective look at the law, were more like "arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is." Clark, *supra* note 10, at 458.

189 *See supra* Part I.C.

190 *See supra* note 159.

191 As previously classified opinions come to light, the lack of oversight at the OLC has garnered more attention. *See, e.g.*, Editorial, *The President's Lawyers: Those Who Interpret the Law for the Administration Should Be More Accountable for Their Decisions*, WASH. POST, Mar. 11, 2008, at A18; Editorial, *There Were Orders to Follow*, N.Y. TIMES, Apr. 4, 2008, at A22.

192 This never occurred at the conclusion of the Bush Administration.

2. Congressional Mandate

Alternatively, Congress could step into the void and legislate. Any potential congressional interference, however, would be fraught with separation of powers concerns, which would have to be dealt with directly. First, the President is entitled to advice from his advisors.[193] Second, a great deal of deference is owed to the President when he is operating in the field of foreign affairs.[194] Any attempt by Congress to limit either of these two powers will most likely be met with resistance.[195]

Congress could circumvent these concerns. One of the most noteworthy aspects of the Torture Memo is the emphasis the authors placed on ensuring that those who violated the law, pursuant to OLC advice, would not be subject to prosecution.[196] Jack Goldsmith referred to this concept as a "golden shield," because it would effectively prevent someone from facing prosecution.[197] This theory, however, has never been tested, and it is quite possible that in another administration interrogators could face charges stemming from their actions.[198] For agents in the field, this is an untenable situation[199]: they are faced with the choice to either follow orders and potentially face prosecution down the road, or disobey orders and face charges of insubordination.

Under the Constitution, Congress has the power to "make all laws which shall be necessary and proper" for it to fulfill its constitutional duties.[200] Additionally, Congress has the power to legislate with

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193 U.S. CONST. art. II, § 2.

194 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936) (holding that deference is owed to the President in the field of foreign affairs because he is the sole organ responsible for conducting the country's foreign policy).

195 Recently, however, political scientists and historians have found that Congress has more power to assist in the conducting of war than it seemingly asserts. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699 n.19 (2008).

196 *See* GOLDSMITH, *supra* note 14, at 144.

197 *Id.*

198 For an analogous situation, there is currently an investigation into the CIA's destruction of tapes that had recorded interrogations of high-value detainees. One of the main questions the investigation is trying to answer is whether the White House explicitly or implicitly authorized the destruction. *See generally* Joby Warrick & Walter Pincus, *Station Chief Made Appeal to Destroy CIA Tapes*, WASH. POST, Jan. 16, 2008, at A1.

199 According to one scholar, agents in the field need legal approval; without it, there is a fear of future legal retribution. "At least since Watergate, our lower level operatives have learned that they risk being left high and dry unless they secure legal authorizations for their dirty deeds." Alvarez, *supra* note 33, at 177–78.

200 U.S. CONST. art. I, § 8, cl. 18.

regards to immunity, even retroactively.[201] For Congress to legislate changes to the OLC without infringing on the executive's authority and triggering separation of powers concerns, Congress would have to make its legislation conditional. Thus, in exchange for granting retroactive immunity to interrogators who followed OLC advice, Congress could demand that the OLC *must* have another agency concur with its opinions before they are published. This grant of immunity would not offend separation of powers principles because the executive branch would be voluntarily agreeing to the changes requested by Congress, rather than having the changes forced on them. If the executive branch decides that immunity for its agents is not that important, then it does not have to agree to the conditions.[202]

The President would most likely argue that he has a right to receive legal advice from the officers of his choosing, without Congress mandating who must sign off on such advice. According to Todd Peterson, a constitutional law scholar and former OLC attorney, the Supreme Court has not always accepted this argument.[203] He argues that the Supreme Court assesses the validity of Congress's interference with the President by determining how much the legislative restriction interferes with the ability of the President to carry out his duties.[204] Furthermore, stating conditions upon which immunity is based would make the decision to place conditions on the OLC entirely incumbent on the executive branch. The executive branch's choice would be sim-

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201 The Supreme Court has held that Congress has the power to immunize officials from prosecution. Brown v. Walker, 161 U.S. 591, 601 (1896) (addressing Congress's ability to immunize those coming before them to provide testimony).

202 Of course this would leave the agents in the field without immunity.

203 Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1256–58 (2003) ("In general, the Supreme Court has assessed the validity of legislative interference with the President's constitutional prerogatives by weighing the extent to which the legislative restriction interferes with the ability of the President to carry out his assigned constitutional duties. For example, in *Morrison v. Olson*, the Court rejected a constitutional challenge to restrictions on the President's ability to remove or supervise the actions of independent counsels appointed under the Ethics in Government Act. The Court stated that in resolving this question it had to ensure 'that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.' Thus, the Court adopted a balancing test that weighed the need for Congress's legislative enactment against the impact on the President's constitutional prerogatives, with a focus on the practical realities of the restriction rather than a formalistic division of authority between the branches. The Supreme Court summarized this practical approach by concluding that the 'real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.'").

204 *Id.*

ple: to gain immunity for its agents in the field, the executive branch would have to concede to oversight. Conversely, its agents could continue to operate under a fear of possible prosecution. Faced with this choice, the executive branch would have a large incentive to accept the deal.

Whether through self-imposed changes or immunity-induced legislation, it is imperative for the government to improve the oversight of the OLC. Agents in the field should not be relying on "golden shields" in the form of confidential and untested legal arguments; rather, they should have confidence that the opinions the OLC is producing will stand up to scrutiny.

Conclusion

In times of uncertainty, it is vitally important to have proper mechanisms in place to ensure that government does not abuse its power. When the OLC secretly assured agents halfway around the world that almost any form of interrogation, no matter how harmful or torturous, was legal, or at the very least could be excused for a litany of reasons, the OLC abused its authority. And were it not for a leak of the Torture Memo, nobody outside of that small office would ever have known.

Thus, changes must be made to avoid the possibility of OLC officers acting with the belief that their work will stay secret forever. More effective oversight at the OLC is imperative to help ensure that the quality of the work produced there is on par with what we expect out of good government. By publishing almost all legal opinions, and having those that are confidential reviewed by at least one other agency, the OLC will ensure that this type of wanton disregard for the law, even in a time of turmoil, will not be tolerated.