

**GREAT MINDS THINK ALIKE: THE “TORTURE MEMO,”
OFFICE OF LEGAL COUNSEL, AND SHARING THE
BOSS’S MINDSET**

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In mid-June 2004, the Justice Department released publicly a series of legal memoranda written by its Office of Legal Counsel (OLC) that opined on the legality of coercive interrogation.¹ One of these—the 50-page, August 1, 2002 memo titled “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A,”² known informally as the “torture memo”³—became a lightning rod for criticism of the Bush Administration’s antiterrorism strategy in general and of its author, Boalt Hall law professor John Yoo, in particular.

A narrative soon emerged that went something like this: on leave from the University of California, Berkeley, John Yoo was working as an OLC lawyer when the 9/11 attacks gave him an opportunity to

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1. See Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14.

2. U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter OLC Interrogation Conduct Memo].

3. For a small sampling of references to the OLC Interrogation Conduct Memo as the “torture memo,” see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1072 (2008); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 188 n.470 (2008); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 478–79 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005).

advance his vision of a robust executive branch unfettered by the other two branches.⁴ Yoo happily aided the Bush Administration by justifying its extreme antiterrorism efforts.⁵ However, when Yoo's supervisor, Jay Bybee, was nominated to become a Ninth Circuit Judge, Yoo was passed over to replace Bybee.⁶ Instead, President Bush appointed another law professor, Jack Goldsmith, to head OLC.⁷ Though politically conservative himself, the narrative continues, Goldsmith determined that the Yoo memoranda were so legally flawed that he withdrew them and informed the Defense Department that it was not to rely on them.⁸ Thus, the narrative concludes, Goldsmith saved OLC and restored a degree of its credibility.⁹

To be sure, not everyone subscribes to this narrative. Jordan Paust, for example, lumps Goldsmith's work product with that of Yoo, Bybee, and others as having "substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation."¹⁰ Similarly, in his review of Jack Goldsmith's *The Terror Presidency*, David Cole applauds Goldsmith for withdrawing the Yoo-Bybee torture memo, but concludes that "Goldsmith's differences with [the Bush Administration] often turn out to be more about style and prudence than about substance."¹¹ Former OLC lawyer Marty Lederman concurs, arguing that "despite its admirable and considerable repudiation of the 2002 OLC Opinion, the new OLC Opinion does not in any significant way affect what the CIA has

4. See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); John Yoo, *Politics as Law? The Anti-Ballistic-Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001).

5. See *infra* Part I.A.

6. See *infra* Part I.A.

7. Frontline, Interview with Jack Goldsmith, <http://www.pbs.org/wgbh/pages/frontline/chenev/interviews/goldsmith.html> (last visited Mar. 8, 2009).

8. *Id.*

9. Indeed, the past few years have seen law students, activists, and even law professors calling for Yoo to be stripped of tenure and fired. See, e.g., Robert Gammon, *The Torture Professor: Why UC Berkeley Should Fire John Yoo, the Legal Scholar Whose Work Led to Abu Ghraib and Secret Spying on Americans*, EAST BAY EXPRESS (California), May 14, 2008; Jack L.B. Gohn, Commentary, *The Big Picture: Yoo's Disbarable Incompetence*, DAILY REC. (Baltimore), Apr. 28, 2008; Becky O'Malley, Editorial, *Time for the Law School to Clean House*, BERKELEY DAILY PLANET, Apr. 11, 2008. But see Ruth Marcus, Editorial, *Why John Yoo Must Stay*, WASH. POST, Apr. 16, 2008, at A15.

10. See, e.g., JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 30 (2007).

11. David Cole, *The Man Behind the Torture*, N.Y. REV. OF BOOKS, Dec. 6, 2007, at 39.

already been specifically authorized to do."¹² Nor is such skepticism limited to "liberal" critics.¹³ Yoo himself has argued that the superseding OLC memorandum on torture was "basically the same" as the one he authored, but without the advantage of "the bright lines the 2002 memo attempted to draw."¹⁴

In this Article, drawing upon recent books that John Yoo and Jack Goldsmith have written about their work in OLC,¹⁵ I analyze the specific condemnation that Yoo's work is not just substantively flawed, but also unethical and unprofessional in putting forth a piece of written advocacy as opposed to a neutral analysis. The latter criticism assumes, however, that neutral analysis not only exists but would be recognized as correct in all instances by liberals and conservatives. Given the indeterminate nature of law, this assumption cannot be valid in all instances. I analogize the OLC-Attorney General relationship to that between law clerks and judges, and use one case study (*Teague v. Lane*)¹⁶ to show that neutral analysis is instead displaced by ideological alignment between subordinate and supervisor. Finally, I conclude that the assertion of ethical or professional conduct standards is unlikely to restrain OLC lawyers the way that critics hope; instead, greater transparency, while not a panacea, is more likely to achieve that result. Therefore, Congress should pass the pending "OLC Reporting Act of 2008" bill.

I. THE OLC, 9/11, AND ANTITERRORISM OPINIONS

Today, when the President requires legal advice in his official capacity,¹⁷ the top two options are the White House Counsel and the

12. Marty Lederman, *Understanding the OLC Torture Memos (Part III)*, BALKINIZATION, Jan. 7, 2005, http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part_07.html. To be clear, Goldsmith did not write the memo that replaced the Yoo/Bybee memo; that was written by Daniel Levin after Goldsmith had left OLC.

13. See, e.g., Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL'Y 795, 818 (2008) (challenging Goldsmith's self-assessment of having conferred legal protection to purported terrorists and asking whether "the protagonist of our story was wearing a grey hat, rather than a white one").

14. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 171 (2006) ("Nothing of substance about the law had changed.").

15. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007); YOO, WAR BY OTHER MEANS, *supra* note 14.

16. 489 U.S. 282 (1989).

17. This is to be distinguished from legal advice in his individual capacity: for example, when Paula Jones sued President Bill Clinton for sexual harassment that allegedly occurred

Office of Legal Counsel. That such legal advice comes from executive branch officers, rather than the Supreme Court, is a direct consequence of the Court's interpretation of Article III's "case or controversy" requirement; advisory opinions about the potential legality of contemplated actions present neither a case nor a controversy.¹⁸ As Chief Justice Jay noted in declining to answer Secretary of State Jefferson's hypothetical questions about U.S. neutrality during the French-British wars, "the power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been purposely as well as expressly limited to the executive departments."¹⁹ There is undeniable structural validity to Jay's observation, given the text of Article II, but it would not be inconceivable to have a different system; some state and foreign courts, for example, are authorized to issue advisory opinions.²⁰ If the Drafters of the Constitution had thought it important enough to provide the President with a source of objective legal advice and analysis from *outside* the executive branch, they could have done so. They chose instead to have the President seek such advice from his own subordinates.

Located within the Department of Justice, the prestigious Office of Legal Counsel counts among its alumni an array of distinguished lawyers, judges, and law professors, including Justice Scalia and the late Chief Justice Rehnquist. As President Obama's nominee for head of the OLC Dawn Johnsen explains, "OLC functions as a kind of general counsel to the numerous other top lawyers in the executive branch who tend to send OLC their most difficult and consequential legal questions."²¹ OLC opinions are published as Opinions of the Attorney General.²²

prior to Clinton's becoming President, Clinton was represented by David Kendall, a private lawyer, whose fees were paid by the Clintons personally.

18. See *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

19. See Correspondence of the Justices (1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Johnston ed. 1891).

20. See MASS. CONST. pt. 2, ch. 3, art. 2; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 n.68 (2001); Louis Favoreau, *American and European Models of Constitutional Justice*, in COMPARATIVE AND PRIVATE LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 105, 113 (Clark ed. 1990).

21. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007).

22. 28 C.F.R. § 0.25 (2008).

The White House Counsel—officially, Counsel to the President—on the other hand, sits within the White House. A relatively modern development, the White House Counsel differs from OLC in having a much smaller staff, fewer resources, and a smaller mandate. Instead of providing analytical legal responses to specific inquiries, the White House Counsel serves more generally to monitor potential conflicts of interest within the White House,²³ to help vet judicial and cabinet nominees,²⁴ and to provide an informal channel between the President and the Attorney General.²⁵

A. *The Characters*

On September 11, 2001, OLC was headed by Assistant Attorney General Jay S. Bybee, a former constitutional law professor at Louisiana State University²⁶ and later the University of Nevada at Las Vegas, who had also served as a Justice Department lawyer and the White House Counsel in the Reagan and Bush Administrations respectively.²⁷ The Deputy Attorney General in charge of foreign affairs and national security for the office was John Yoo, a law professor on leave from the University of California, Berkeley, where he specialized in constitutional and foreign relations law.²⁸ John Ashcroft, a former United States Senator, was the Attorney General, and Alberto Gonzales, a former Texas Supreme Court Justice, served as White House Counsel.²⁹

Over the next year, Bybee and Yoo authored a number of legal memoranda on topics such as the application of the War Crimes Act and the Geneva Conventions to the global war on terrorism,³⁰ and the

23. Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 209–10 (2002).

24. *Id.*

25. Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 80–81 (1993).

26. PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 74 (2008).

27. YOO, *WAR BY OTHER MEANS*, *supra* note 14, at 19–20.

28. *Id.* at 20.

29. Gonzales was later nominated and confirmed to replace Ashcroft as Attorney General. Gonzales resigned in 2007 and was replaced by former federal district judge Michael Mukasey.

30. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def., *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>; U.S. Dep't

legal limits on interrogation of suspected al Qaeda and Taliban detainees.³¹ These memos collectively provided legal justifications for the Bush Administration's aggressive antiterrorism policies.

President Bush then nominated Bybee in mid-2002 to fill a vacancy on the U.S. Court of Appeals for the Ninth Circuit, and the Senate confirmed him on March 13, 2003.³² On October 6, 2003, Jack Goldsmith replaced Bybee as the head of OLC.³³ Goldsmith had been a law professor at the University of Chicago, a Department of Defense lawyer in the Bush Administration, and most recently a law professor at the University of Virginia.³⁴ After nine months in OLC, Goldsmith resigned to resume his academic career, moving to a tenured position at Harvard Law School. No one was confirmed to replace Goldsmith; OLC was headed by Acting Assistant Attorney General Stephen Bradbury for the duration of the Bush Administration.

B. *The "Torture Memo"*

Because the professionalism and independence criticisms of John Yoo's work are intertwined with criticisms of the merits of his analysis, it will be useful to examine the most controversial OLC memorandum that he authored—the so-called torture memo.³⁵ Addressed to then-White House Counsel Alberto Gonzales, the memo

of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020207.pdf>.

31. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for William J. Haynes, II, Gen. Counsel, Dep't of Def., Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf>; Letter from John Yoo, Deputy Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>; OLC Interrogation Conduct Memo, *supra* note 2.

32. Henry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES, Mar. 14, 2003, at B6.

33. GOLDSMITH, *supra* note 15, at 17–18. According to Goldsmith, John Yoo was considered to replace Bybee, but was blocked by Attorney General John Ashcroft because Ashcroft felt that Yoo reported too often to White House Counsel Alberto Gonzales directly, instead of to him (Ashcroft). *Id.* at 24.

34. *Id.* at 20, 22.

35. OLC Interrogation Conduct Memo, *supra* note 2. Again, for a small sampling of references to the OLC Interrogation Conduct Memo as the "torture memo," see sources cited *supra* note 3.

was signed by Bybee, but generally understood to have been written by Yoo.³⁶

As can be gleaned from the title—"Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A"—the OLC memo attempted to provide legal guidance about "the meaning of 'torture' under the federal criminal laws."³⁷ Under federal law, it is a crime for any U.S. national to commit or attempt to commit torture outside the country.³⁸ Torture, in turn, is defined for the purpose of this statute as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."³⁹

According to Jack Goldsmith, the OLC memo departed from custom by addressing interrogation conduct and torture generally, as opposed to opining about the lawfulness of specific identified conduct.⁴⁰ For example, the legality of "waterboarding"—the controversial technique of inducing the sensation of drowning—is not addressed in the OLC memo.

The OLC memo first analyzed and interpreted two key phrases in section 2340: "specifically intended"⁴¹ and "severe pain or suffering."⁴² The memo concluded that the phrase "specifically intended" would require that any prosecution under the section must prove that the defendant had "specific intent" to violate the law, meaning that "the infliction of such pain must be the defendant's precise objective."⁴³ In other words, the OLC memo suggested that "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the

36. See, e.g., David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 263 n.75 (2008); Ellen Yaroshfsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 567 (2007); Johnsen, *supra* note 21, at 1583.

37. YOO, WAR BY OTHER MEANS, *supra* note 14, at 172.

38. 18 U.S.C. § 2340A (2000).

39. 18 U.S.C. § 2340(1) (2000). "Severe mental pain or suffering," in turn, is defined as "prolonged mental harm" resulting from any of four different causes, such as threats of imminent death. § 2340(2).

40. GOLDSMITH, *supra* note 15, at 150. A subsequent, classified OLC memo in fact did analyze specific interrogation practices. *Id.*

41. OLC Interrogation Conduct Memo, *supra* note 2, at 3.

42. *Id.* at 5.

43. *Id.* at 3.

requisite specific intent even though the defendant did not act in good faith.”⁴⁴

To this point, the OLC memo’s analysis is reasonably solid. It would require some intellectual gymnastics to construe section 2340A as imposing general intent when the text of the statute plainly indicates specific intent. One might quibble more with the memo’s conclusions about the content of specific intent, particularly where the memo states that “[a] good faith belief need not be a reasonable one,”⁴⁵ suggesting that a defendant could avoid conviction by showing that he acted in unreasonable good faith. The case that the OLC memo cites for this proposition, though, is *Cheek v. United States*.⁴⁶ While the court in *Cheek* did hold that an unreasonable good faith belief negates specific intent, that holding arguably rested on the inherent complexity of the tax code and the conclusion that the taxpayer should be given the benefit of the doubt in criminal cases.⁴⁷ One could readily distinguish the torture statute on the ground that the laws against torture are not hyper-technical the way the tax code is.

As to the definition of “severe pain and suffering,” the OLC memo searched for another instance of the same phrase, and found it in federal statutes “defining an emergency medical condition for the purpose of providing health benefits.”⁴⁸ A representative example of such statutes is 42 U.S.C. § 1395w-22(d)(3)(B), where such a condition is defined as:

[M]anifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.⁴⁹

44. *Id.* at 4.

45. *Id.* at 5.

46. 498 U.S. 192 (1991).

47. *Id.* at 200. A similar case is *Ratzlaf v. United States*, 510 U.S. 135 (1994), in which the Court held that conviction under the federal anti-structuring statute required proof that the defendant knew not only what he was doing, but also that the law prohibited his conduct. The rationale for requiring knowledge of the statutory prohibition of structuring itself was, again, the highly technical nature of the anti-structuring laws. (Congress later amended the statute to delete the Court-imposed requirement.)

48. OLC Interrogation Conduct Memo, *supra* note 2, at 5–6 (citing 8 U.S.C. § 1369; 42 U.S.C. §§ 1395w-22, 1395x, 1395dd, 1396b, 1396u-2).

49. 42 U.S.C. § 1395w-22(d)(3)(B)(2000).

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Recognizing that these statutes did not address torture, the OLC memo nevertheless opined that they provided useful guidance toward interpreting the phrase "severe pain or suffering."⁵⁰ The OLC memo concluded that, because emergency benefits would accrue only to those suffering damage "ris[ing] to the level of death, organ failure, or the permanent impairment of a significant body function," torture too would require the infliction of pain "ris[ing] to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."⁵¹

In its most controversial sections, the OLC Interrogation Conduct Memo discussed potential defenses to violations of section 2340A. In one part, the OLC memo concluded that a criminal statute such as section 2340A could not constitutionally restrict the "President's complete authority over the conduct of war."⁵² This conclusion followed from the inherent powers thesis, which John Yoo advanced in an early law review article and developed further in a book published after he left OLC to return to Boalt Hall.⁵³ Finally, the OLC memo raised the applicability of the necessity defense against any prosecution under section 2340A, drawing upon the Model Penal Code to opine that "under the current circumstances the necessity defense could be successfully maintained."⁵⁴

50. OLC Interrogation Conduct Memo, *supra* note 2, at 6.

51. *Id.*

52. *Id.* at 34.

53. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); Yoo, *The Continuation of Politics by Other Means*, *supra* note 4.

54. OLC Interrogation Conduct Memo, *supra* note 2, at 40.

C. *Public Criticism of the "Torture Memo"*

Criticism of the OLC memo has been overwhelming.⁵⁵ Some have gone so far as to call for Yoo and Bybee to be prosecuted as war criminals for aiding and abetting violations of international law.⁵⁶ In addition, Yoo faced a virulent condemnation calling for his dismissal from Boalt Hall, despite his tenure.⁵⁷ The demands for Yoo's dismissal were sufficiently serious that Boalt Hall Dean Christopher Edley issued a public statement noting his fundamental disagreement with Yoo's legal analysis, yet declining to take any action against Yoo: "Absent very substantial evidence [that Yoo engaged in professional misconduct relevant to his teaching or committed a crime], no university worthy of distinction should even contemplate dismissing a faculty member."⁵⁸ Finally, in perhaps the ultimate indignity for Yoo, the legal clinic at his alma mater (Yale) filed a lawsuit against him (among other defendants) on behalf of suspected "dirty bomber" Jose Padilla, accusing Yoo of having aided the government in unlawfully torturing Padilla by writing the legal opinions supporting such action.⁵⁹

55. For a small sampling, see Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 49 (2006) ("Torture cannot be limited to the degree of suffering associated with organ failure, given that psychic pain or mental suffering is explicitly within the definition."); A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1237-38 (2006) (rejecting the OLC memo's definition in favor of "a commonsense meaning of torture"); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1307-08 (2005) (challenging the OLC memo's conclusion that the pain *must* rise to the level of that experienced during organ failure, as well as the ability to determine such level of pain); Johnsen, *supra* note 21, at 1583-84 (arguing that the memo "relentlessly seeks to circumvent all legal limits on the CIA's ability to engage in torture, and it simply ignores arguments to the contrary"); David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 636 (2006) (describing the memo as "a truly astounding opinion . . . that treated the torture prohibition as if it were a tax code, and as if the main function of the lawyer was not to ensure that the letter and spirit of the law be honored, but to find loopholes in the code"); John Barry, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (describing reaction of military lawyers).

56. See SANDS, *supra* note 26, at 205; Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349 (2007).

57. See, e.g., Paul Campos, Editorial, *A Tortured Defense*, DENVER ROCKY MOUNTAIN NEWS, Apr. 16, 2008, at 31.

58. See Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, Apr. 10, 2008, <http://www.law.berkeley.edu/news/2008/edley041008.html>.

59. See, e.g., Bob Egelko, *UC Berkeley Lawyer Who Justified Harsh Treatment of Detainees Sued*, S.F. CHRON., Jan. 5, 2008, at B3.

One avenue of criticism challenged the substantive validity of the legal analysis contained within the memo. The interpretative strategy of defining "severe pain and suffering" as equivalent to that caused by organ failure, for example, was attacked on the ground that the health benefit statutes were hardly analogous to section 2340A;⁶⁰ one concerned eligibility for a discretionary government benefit, while the other concerned limits on the government's ability to extract information from detainees. Moreover, even if the health benefit statutes were contextually relevant, the sections relied upon by the OLC memo do not define severe pain; rather, they use severe pain as illustrative of the types of conditions qualifying one for the discretionary benefit. In other words, the pain resulting from organ failure might be a sufficient, but not necessary, condition to qualify for government benefits. The OLC Interrogation Conduct Memo, on the other hand, reads pain resulting from organ failure as the necessary standard for torture.

A second line of attack against Yoo is that he breached the relevant rules of professional responsibility.⁶¹ The strong form of this argument does not rely on Yoo's then-status as a government lawyer, while the weak form of the argument ascribes special ethical and professional responsibilities because of that status. It is this line of attack that I shall focus on in this Article.

Several rules of the ABA Model Rules of Professional Conduct underlie this criticism:

Rule 1.1 Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁶²

Rule 2.1 Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.⁶³

60. GOLDSMITH, *supra* note 15, at 145.

61. See, e.g., Lawyers' Statement on Bush Administration Torture Memos 2, available at <http://physiciansforhumanrights.org/library/documents/non-phr/lawyers-statement-on-bush.pdf> [hereinafter Lawyers' Statement] ("The lawyers who prepared and approved these memoranda have failed to meet their professional obligations."). See also Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, NEWSWEEK, Feb. 23, 2009, available at <http://www.newsweek.com/id/184801>.

62. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

63. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008).

Admittedly, it is sometimes difficult to see the difference between this criticism and the merits-based criticism described earlier. For example, the widely circulated “Lawyers’ Statement on Bush Administration Torture Memos,” while agreeing that a lawyer has a duty to help a client achieve a desired lawful goal, contends that “the lawyer has a simultaneous duty . . . to uphold the law.”⁶⁴ This argument necessarily rests on an assumption that Yoo and Bybee failed to advise the Bush Administration correctly about the scope of acts prohibited by 18 U.S.C. § 2340A and by other applicable laws and treaties. If one were to concede that Yoo and Bybee’s arguments were at least colorable, then this particular attack might fail, even if one thought the arguments were morally reprehensible.

A more nuanced criticism, while not conceding the ultimate plausibility of the OLC Interrogation Conduct Memo’s conclusions, is that Yoo and Bybee provided professionally deficient advice by failing to discuss adverse authority.⁶⁵ For example, in the section of the memo focusing on the Commander in Chief Clause’s “override” of legislation purporting to limit the President’s wartime interrogation powers, there is no mention, much less analysis, of the *Steel Seizure Case*,⁶⁶ in which Justice Jackson laid out his famous three-zone framework for evaluating separation of powers conflicts between the President and Congress.⁶⁷ By contrast, the publicly released Department of Justice white paper justifying the National Security

64. Lawyers’ Statement, *supra* note 61, at 2.

65. *Cf.* Johnsen, *supra* note 21, at 1583–84 (criticizing the memo because it “fails . . . to cite highly relevant precedent, regulations, and even constitutional provisions”); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 649 (2005).

66. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952).

67. However, a 1995 OLC memo written by Assistant Attorney General Walter Dellinger for the Clinton Administration opined that the President had constitutional authority to send U.S. troops into Bosnia absent congressional authorization, and did so without mentioning the *Steel Seizure Case*. See U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for Counsel to the President, Proposed Deployment of United States Armed Forces into Bosnia (Nov. 30, 1995), available at <http://www.usdoj.gov/olc/bosnia2.htm> [hereinafter Proposed Deployment of United States Armed Forces into Bosnia Memo]. Admittedly, the Dellinger-authored memo was considering presidential action in the face of congressional silence, whereas the Yoo-authored memo was considering presidential action in the face of congressional prohibition. This distinction might well argue for different outcomes, but in terms of the applicability of the *Steel Seizure Case*, it is immaterial: one would simply be put into category two (the zone of twilight), and the other into category three (the nadir of Presidential power). If John Yoo were professionally deficient for not citing the *Steel Seizure Case*, wouldn’t the same be true of Walter Dellinger?

Agency's (NSA's) warrantless electronic surveillance,⁶⁸ while relying on the Commander in Chief Clause, did discuss the *Steel Seizure Case*.⁶⁹ There, the Justice Department argued that the NSA's surveillance program was authorized under the President's inherent powers as augmented by Congress through the September 18, 2001, Authorization for Use of Military Force,⁷⁰ thus putting the program into the top category in the *Steel Seizure Case*.⁷¹

Finally, some critics have argued that, as a government lawyer, Yoo should not have acted as a private lawyer would have. In his written account of his time at OLC, Yoo encapsulates his view of his professional responsibilities as a government lawyer in a single sentence: "What the law forbids and what policy makers choose to do are entirely different things, and analyzing the laws is what the Department of Justice and the OLC exist to do."⁷² Goldsmith's expressed view is similar:

When appropriate, I put on my counselor's hat and added my two cents about the wisdom of counterterrorism policies. But ultimately my role as the head of OLC was not to decide whether these policies were wise. It was to make sure that the policies were implemented lawfully. . . . OLC's ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.⁷³

Critics disagree, contending that private lawyers are free to construct non-frivolous arguments to support their clients' desired lawful goals; government lawyers, however, have a duty to provide their best assessment of the law, even if it does not support their

68. For a more detailed account of the NSA program based on Pulitzer Prize winning journalism, see ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 137–85 (2008).

69. U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 2 (Jan. 19, 2006), available at <http://epic.org/privacy/terrorism/fisa/doj11906wp.pdf> ("The AUMF places the President at the zenith of his powers in authorizing the NSA activities.").

70. Pub. L. No. 107-40, 115 Stat. 224 (2001).

71. Proposed Deployment of United States Armed Forces into Bosnia Memo, *supra* note 67. This is not to say that the Justice Department's analysis was unquestionably correct. See Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. OF BOOKS, Feb. 9, 2006, available at <http://www.nybooks.com/articles/18650>.

72. YOO, *WAR BY OTHER MEANS*, *supra* note 14, at 172.

73. GOLDSMITH, *supra* note 15, at 147–48.

clients' desired goals.⁷⁴ Thus, Brian Tamanaha criticizes the OLC memo as "a supreme example of lawyers exploiting 'any gap, ambiguity, technicality, or loophole, any non-obviously-and-totally-implausible interpretation of the law or facts' in order to allow the greatest possible leeway for the U.S. interrogation of prisoners."⁷⁵ To take the easiest counterexample, a criminal defense attorney would probably be praised, not condemned, for coming up with ingenious arguments.

Moreover, not everyone subscribes to the no-holds-barred understanding of the duty of zealous advocacy. Interests beyond those of the client, such advocates argue, are legitimate considerations.⁷⁶ Recently, the Arizona Supreme Court changed that state's legal rules by replacing "zealously" with "honorably" in describing the lawyer's duty to advocate on behalf of the client—arguably vindicating the views of legal philosophers who believe that a lawyer should "no longer push aside his own moral qualms secure in the belief that the adversarial process would lead to a just result."⁷⁷ This de-emphasis of zealotry in representation by any lawyer is still in its early days, and it remains to be seen whether it can fully displace the traditional approach.⁷⁸

II. SOME THOUGHTS ON GOVERNMENT LAWYERS

As noted above, many of Yoo's critics have espoused a view that government lawyers are held to a different standard of professional conduct than private lawyers. There are a number of ways in which one might envision a broad obligation that government lawyers owe to the general public: (1) government lawyers need to maintain a

74. See, e.g., Stephen Gillers, *Tortured Reasoning*, AM. L., June 14, 2004, available at <http://www.law.com/jsp/article.jsp?id=1086989271507>; Edley, *The Torture Memos and Academic Freedom*, *supra* note 58.

75. Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 SYRACUSE J. INT'L L. & COM. 131, 147 (2005).

76. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 49–79 (2003); Sherrill Wm. Colvin, *Professionalism: Redefining the Lawyer's Role*, RES GESTAE, June 2004, at 5 ("[T]he lawyer's duty of zealous advocacy is constrained by a responsibility, not just to the client, but also to society. . . . Other considerations must be taken into account, including preservation of the legal system as a venerable means to dispense justice.").

77. Lincoln Caplan, *The Good Advocate*, LEGAL AFF., May–June 2004, at 1.

78. It is hard to see, for example, how criminal defense lawyers could defend guilty clients effectively under such an approach, unless one dilutes the meaning of "honestly" to the point that it resembles "zealously."

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degree of independence from political leaders; (2) just as prosecutors have a duty to see that justice is done (as opposed merely to securing a conviction), so too do government lawyers; and (3) elected government lawyers such as Attorneys General or district attorneys answer directly to the public.

A. *Government Lawyers and Independence*

As Jack Goldsmith explains, OLC has traditionally attempted to maintain a degree of independence from the White House; faced with the pressure of bending to the President’s will, OLC “developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch.”⁷⁹ This position is perhaps best articulated by a group of former OLC lawyers (largely from the Clinton Administration) who wrote in 2004, that “OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desirable policies.”⁸⁰ Boalt Hall Dean Christopher Edley put it another way; even as he defended Yoo against calls for firing, Edley stated that “government lawyers have a larger, higher client than their political supervisors; there are circumstances when a fair reading of the law must—perhaps as an ethical matter?—provide a bulwark to political and bureaucratic discretion.”⁸¹

Yet, even as Goldsmith indicated agreement with and approval of the OLC’s norm of independence, he later described an apparently different mindset:

Michael Hayden, former NSA Director General and now the Director of the CIA, would often say that he was “troubled if [he was] not using the full authority allowed by law” after 9/11, and that he was “going to live on the edge,” where his “spikes will have chalk on them.” . . . I agreed with [Hayden’s view]. My job was to make sure the President could act right up to the chalk line of legality.⁸²

79. GOLDSMITH, *supra* note 15, at 33.

80. AM. CONST. SOC’Y FOR L. AND POL’Y, PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 1 (Dec. 21, 2004), *available at* http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf [hereinafter PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL].

81. Edley, *The Torture Memos and Academic Freedom*, *supra* note 58.

82. GOLDSMITH, *supra* note 15, at 78.

To be clear, Goldsmith's rhetorical point was that, despite his intention to "live on the edge" and to get "chalk" on his "spikes," he could not prepare a legal opinion justifying the Bush Administration's desire to strip Iraqi nationals of Geneva Convention protection, notwithstanding apparent membership in the terrorist group al Qaeda in Iraq. Substantively, this suggests how extreme of a position Vice President Cheney and his Chief of Staff, David Addington, were pushing. Nonetheless, the expressed mindset here was that Goldsmith wanted to find a way to justify the President's course of action and that he would have done so if he could have stayed on the chalk, so to speak.

Criticism of John Yoo must take into account the fact that he was a political appointee, not a career lawyer within OLC. Dean Edley's observation that "government lawyers have a larger, higher client than their political supervisors" seems to gloss over Yoo's actual status; he was hired to help carry out the Bush Administration's legal agenda.⁸³ Of course, even political appointees cannot be totally dependent on the political officials; Goldsmith, for example, wanted to justify Cheney and Addington's conclusion regarding Iraqi insurgents, but was unable to do so.

OLC is not the only sub-department to face this tension between political appointments and independence; so too does the Solicitor General's Office, which represents the United States before the Supreme Court. A consistent theme through Lincoln Caplan's account of the Solicitor General's Office, *The Tenth Justice*,⁸⁴ is the "paradox" of independence that an executive branch lawyer needs to exhibit even as he or she "serve[s] at the pleasure of the President."⁸⁵

But it is hardly clear that this kind of "independence" was at issue in Yoo's execution of his duties. For example, one of the more notable instances of White House interference with the Solicitor General's Office took place during the *Bob Jones University* case.⁸⁶ Bob Jones University, a private school offering fundamentalist Christian-based instruction for kindergarten through graduate school students, lost its non-profit tax-exempt status in 1970 because it violated an IRS regulation stating that private schools with racially

83. Just to be clear, I do not mean this in a pejorative sense.

84. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

85. *Id.* at 33.

86. *See id.* at 51-64.

discriminatory policies were not “charitable” entities within the meaning of section 501(c)(3) of the Code;⁸⁷ the school had refused to accept African-American students completely until 1971, when it began to accept applications from married African-Americans—so long as they were married to other African-Americans.⁸⁸ Bob Jones University brought suit to challenge the IRS’s authority to issue that regulation, arguing that it exceeded the agency’s delegated powers and that it violated the school’s First Amendment rights.⁸⁹ The district court ruled in favor of the university, but the Fourth Circuit reversed,⁹⁰ and the university sought review by the Supreme Court.

Acting Solicitor General Lawrence Wallace supported the university’s request that the Supreme Court hear the case because he thought it important that the Court provide a uniform precedent applicable beyond the instant parties, but he disagreed with the university’s argument on the merits.⁹¹ Once the Supreme Court agreed to hear the case, however, a number of Department of Justice attorneys, including the Deputy Attorney General and the Assistant Attorney General for Civil Rights, set about reversing Wallace’s position on the merits.⁹² They drafted a brief on the merits that supported the university’s argument that the IRS had exceeded its scope of delegated authority. When Wallace refused to sign the brief, one Justice Department lawyer sought to have him sanctioned or fired.⁹³ Wallace subsequently signed the brief at the urging of the Solicitor General but included a footnote stating that “[t]he Acting Solicitor General fully subscribes to the position set forth on question number two, only,”⁹⁴ thus allowing him to distance the Solicitor

87. *Bob Jones Univ. v. United States*, 461 U.S. 574, 578–80 (1983) (quoting 26 C.F.R. 1.501(c)(3)-1; Rev. Rul. 71-447, 1971-2 Cum. Bull. 230).

88. *Id.* at 580. One of the central tenets of the school was that interracial marriages were forbidden by the Bible.

89. *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 895–96 (D.S.C. 1978), *rev’d*, 639 F.2d 147 (4th Cir. 1980).

90. *Id.* at 890.

91. CAPLAN, *supra* note 84, at 54. Wallace was the Acting Solicitor General because Solicitor General Rex Lee had recused himself from the case due to his past representation of a client in a similar type of case. *Id.* at 51. For a somewhat less sympathetic impression of Wallace’s position, see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT* 28 (1991).

92. CAPLAN, *supra* note 84, at 55.

93. *Id.* at 58.

94. Brief for the United States at 1, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81).

General's Office from the substantive argument in favor of Bob Jones University.

Ultimately, the Supreme Court vindicated Wallace, holding 8–1 that the IRS had appropriately exercised interpretative power delegated by Congress in the complex area of taxation.⁹⁵ Beyond the Court's lopsided vote, further evidence of the extreme nature of the Justice Department group's view can be seen in its subsequent impact on the careers of those lawyers. Bradford Reynolds, then the Assistant Attorney General for Civil Rights, had been groomed to become either the Solicitor General or the Associate Attorney General, but he ended up being too controversial to get either position.⁹⁶ A more junior lawyer, Carolyn Kuhl, later became a California state court judge, but Senate Democrats effectively killed her nomination to the Ninth Circuit by President George W. Bush in no small part due to her having weighed in favor of Bob Jones University at that time.⁹⁷

Described in this way, the manner in which the political appointees of the Reagan Administration interfered with the Solicitor General's Office certainly sounds troubling. When we speak of "independence," it is easy to see *whose* independence we mean in this case: that of Lawrence Wallace, the government employee tasked with exercising his professional judgment to determine the most plausible legal position for the United States to take.

But to be clear, the problematic nature of the interference lies not so much in the political judgment to side with Bob Jones University, because a non-frivolous argument could perhaps have been made that the "exceeded scope of delegated authority" was consistent with the Reagan Administration's philosophical goal of decentralizing and deregulating the federal government.⁹⁸ Indeed, while Wallace did not appreciate being sand-bagged, he offered no objection to having the pro-Bob Jones University brief on the merits filed with the Court; he simply did not want to sign it himself, suggesting instead that the

95. *Bob Jones Univ.*, 461 U.S. at 596–602.

96. FRIED, *supra* note 91, at 31.

97. See, e.g., Editorial, *Another Unworthy Judicial Nominee*, N.Y. TIMES, Apr. 24, 2004, at A30.

98. This is not to say that the Justice Department argument was the more plausible view. Wallace seemed to have the better argument that the IRS's interpretation of the "charitable" requirement had existed since 1970 and Congress had never enacted legislation to overturn that interpretation, suggesting that Congress therefore agreed with it.

Deputy Attorney General could sign the brief on behalf of the United States.⁹⁹

With regard to Yoo, there have been no claims that he was pressured into reaching the conclusions that he set forth in the OLC memos.¹⁰⁰ Of course, pressure need not always be explicit in nature, but in this instance, Yoo's prolific record prior to his joining OLC makes it easy to see that the analysis of presidential power in the OLC Interrogation Conduct Memo closely followed his academic writing.¹⁰¹

B. Prosecutors and "Doing Justice"

Prosecutors are subject to more ethical and constitutional rules than are lawyers for private clients. Both the ABA Model Rules of Professional Responsibility and Supreme Court precedent obligate prosecutors to turn over exculpatory evidence on their own volition.¹⁰² Civil lawyers have no such obligation to disclose evidence favorable to the other side in the absence of discovery. Nor do criminal defense lawyers have any duty to disclose the existence of inculpatory evidence to the government, so long as they neither have obstructed access to that evidence nor are in possession of it. Prosecutors are also more restricted ethically from commenting freely in public about pending cases than are other lawyers.¹⁰³

As a subclass of government lawyers, prosecutors are therefore demonstrably different from private lawyers. Recognition of this fact

99. CAPLAN, *supra* note 84, at 51.

100. Of course, one might contrast Yoo's experience with Goldsmith's, about which Goldsmith writes of constant run-ins with Vice President Cheney's Counsel, David Addington. Indeed, Goldsmith had so many conflicts with Addington that the index to THE TERROR PRESIDENCY contains a sub-entry under "Addington" labeled "clashes between Goldsmith and." GOLDSMITH, *supra* note 15, at 251.

101. See Yoo, *The Continuation of Politics by Other Means*, *supra* note 4.

102. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008); Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . .").

103. Compare MODEL RULES OF PROF'L CONDUCT R. 3.8(f) ("[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."), with MODEL RULES OF PROF'L CONDUCT R. 3.6 ("A lawyer who . . . shall not make an extrajudicial statement that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

fuels the argument that government lawyers such as OLC attorneys are also different from private lawyers. Before jumping to that conclusion, however, one must consider *why* prosecutors are different from private lawyers. As the Model Rules of Professional Responsibility note, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹⁰⁴ Or, as the Supreme Court explained in *Berger v. United States*, the prosecutor is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”¹⁰⁵

In other words, prosecutors are subject to these special ethical and constitutional restraints because their clients—the “people” or the “United States”—have defined their interest not as winning the case by any otherwise legal means, but as seeking justice.¹⁰⁶ Whether the government similarly defines OLC’s goal in such nuanced terms is less clear. The statement by a group of former OLC lawyers, as well as Jack Goldsmith’s written account, does suggest that there is an institutional norm in favor of independence and accuracy.¹⁰⁷ On the other hand, this is but an internal norm, not a constitutional directive. A prosecutor violates the Constitution when he or she fails to disclose exculpatory evidence to the defendant, and therefore, no executive can countermand that requirement. It is far less clear that the President would be unable to direct OLC to provide more advocacy-styled legal analysis.

C. *Elected Versus Appointed Government Lawyers*

Another factor to consider is whether the government lawyer was elected or appointed. In many states, the Attorney General is an elected position, whereas the U.S. Attorney General is a cabinet-level appointment. The elected government lawyer can legitimately claim “independence” from the Chief Executive, because the source of the lawyer’s authority comes from the electors directly.

The appointed government lawyer, on the other hand, draws authority from the appointing officer. As the Court explained in *Myers v. United States*, “the President alone and unaided could not

104. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

105. 295 U.S. 78, 88 (1935).

106. STANDARDS FOR CRIMINAL JUSTICE, standard 3-1.2(c) (1993).

107. See PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL, *supra* note 80; GOLDSMITH, *supra* note 15, at 33.

execute the laws [but] must execute them by the assistance of subordinates.”¹⁰⁸ Thus, in that case, the Court struck down a statute that conditioned the President’s firing of federal postmasters on the Senate’s consent, because the President must be able to “remov[e] those for whom he cannot continue to be responsible.”¹⁰⁹ The linchpin of the Court’s reasoning was the foundation of what has been called the “unitary executive”:

[T]he discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. . . . The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay.¹¹⁰

The Supreme Court then limited *Myers* in *Humphrey’s Executor v. United States*,¹¹¹ when it upheld a statute that restricted the President to firing Federal Trade Commissioners only for “inefficiency, neglect of duty, or malfeasance in office.”¹¹² The Court distinguished *Myers* on the ground that the Postmaster was “merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive.”¹¹³ The FTC, on the other hand—being an administrative agency “created by Congress to carry into effect legislative policies embodied in the statute”—“acts in part quasi-legislatively and in part quasi-judicially,” and therefore must be insulated from the President.¹¹⁴

The most recent pronouncement on the independence of appointed lawyers comes from *Morrison v. Olson*,¹¹⁵ in which the Court upheld, by an 8–1 vote, the constitutionality of the independent counsel established by the Ethics in Government Act of 1978.¹¹⁶ The impetus for the Ethics in Government Act was the so-called “Saturday Night Massacre” in 1973, when Attorney General Elliot Richardson

108. *Myers v. United States*, 272 U.S. 52, 117 (1926).

109. *Id.*

110. *Id.* at 134.

111. 295 U.S. 602 (1935).

112. *Id.* at 631–32 (upholding 15 U.S.C. § 41 (1914)).

113. *Id.* at 628–29.

114. *Id.*

115. 487 U.S. 654 (1988).

116. *Id.* at 659–60 (upholding 28 U.S.C. §§ 49, 591–99 (1982)).

and Deputy Attorney General William Ruckelshaus resigned rather than carry out President Nixon's order to fire Watergate Special Prosecutor Archibald Cox.¹¹⁷ Solicitor General Robert Bork then stepped up as Acting Attorney General and fired Cox.¹¹⁸ Cox's firing set off a furor that galvanized the effort to impeach President Nixon; years later, the Senate failed to confirm Bork's appointment to the Supreme Court in part because of lingering questions about his judgment in light of his actions that Saturday night.¹¹⁹ Cox was subject to summary dismissal because he held an ad hoc position as a special prosecutor and served at the pleasure of the Attorney General, who appointed him. Accordingly, Congress lodged the power to appoint the independent counsel with a panel of federal judges selected by the Chief Justice of the Supreme Court.¹²⁰ Congress further provided that the independent counsel could be removed from office by the Attorney General only for cause.

The Court concluded that the "good cause" removal restriction did not impermissibly infringe on the President's constitutional duty to execute the laws, essentially because the independent counsel's duties were sufficiently limited so as not to require the President's "control [of] the exercise of [her] discretion."¹²¹ *Myers* was different, the Court explained, because there Congress was seeking to aggrandize itself at the President's expense; here, there was no indication that Congress itself sought to exercise removal power over the independent counsel.¹²² In a prophetic but lonely dissent, Justice Scalia argued that the independent counsel was a potential source of extreme mischief and that the Framers intended the executive branch to be unitary, answering only to the President: "[W]hen crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable

117. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 69–70 (1976).

118. See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1.

119. See, e.g., Gerald M. Boyd, *Bork Picked for High Court; Reagan Cites His "Restraint"; Confirmation Fight Looms*, N.Y. TIMES, July 2, 1987, at A1. Because of the uproar over Cox's firing, the Nixon Justice Department felt compelled to appoint a new special prosecutor, Leon Jaworski, who pursued the investigation of the Watergate scandal to the end of the affair. See generally WOODWARD & BERNSTEIN, *supra* note 117.

120. Per the Appointments Clause of the Constitution, Congress can provide that "inferior officers" be appointed by the President, cabinet heads, or federal judges. U.S. CONST. art. II, § 2, cl. 2.

121. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

122. *Id.* at 654.

sense of proportion, the President pays the cost in political damage to his administration.”¹²³

Whether or not *Morrison* was correctly decided, it deals with a significantly differently situated government lawyer than an OLC attorney. The independent counsel, though an inferior officer in the executive branch, stood essentially in an adversarial position; indeed, the very justification for the independent counsel was the need to remain free from undue influence and pressure by the President and the Attorney General. If the independent counsel was not protected from dismissal except for cause, then she would be superfluous, since the Attorney General could do exactly what the independent counsel could do: investigate possible wrongdoing in the executive branch, subject to being dismissed without cause by the President.

OLC lawyers, by contrast, do not investigate alleged executive branch wrongdoing; rather, they are in the business of giving legal advice to federal agencies and executive branch officials. The relationship between OLC lawyers and the executive branch is thus intimate, not adversarial, and *Morrison*'s endorsement of the independent counsel's independence from the President need not dictate similar independence on the part of OLC lawyers.

III. LAW CLERKS AND JUDGES

Although demonstrably different from the relationship between OLC lawyer and the White House in some important ways, the relationship between law clerk and judge provides some further insight into the complicated nature of subordinate “independence” and the normative judgment that government lawyers should serve the public interest, not merely the White House.

A. *Law Clerks and Independence*

As is generally known, law clerks assist judges in all manner of judicial duties,¹²⁴ including, as Judge Posner describes it, serving as

123. *Id.* at 728–29 (Scalia, J., dissenting). Justice Scalia's dissent gained a considerable following after perceived excesses in Independent Counsel Kenneth Starr's investigation of President Clinton's false and misleading responses under oath in the sexual harassment lawsuit brought by Paula Jones. When the Ethics in Government Act expired, Congress opted not to re-enact it.

124. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 3 (2006).

“judicial ghostwriter[s]” on legal opinions.¹²⁵ Though law clerks are not the secret brains behind the Justices, they “are not merely surrogates or agents,” and arguably clerks are playing too large a role in “judging.”¹²⁶

In *Closed Chambers*, his controversial exposé of the Supreme Court,¹²⁷ former Justice Blackmun law clerk Edward Lazarus described a bitter divide between liberal and conservative law clerks (the latter having organized themselves in a “cabal”) during the 1988–1989 term that largely mirrored the divide between the Justices.¹²⁸ Lazarus’ account of the in-Court evolution of the *Teague* doctrine best illustrates the law clerk-Justice dynamic.

In *Teague v. Lane*,¹²⁹ the Court held that “new” rules of criminal procedure would not apply retroactively to benefit habeas petitioners.¹³⁰ Prior to *Teague*, the Court had decided whether a criminal procedure decision would apply retroactively—that is, to prisoners who could have, but generally failed to have, raised the issue in their own appeals, and now sought to benefit in post-conviction proceedings—on an ad hoc basis. For example, after the Court decided in *Mapp v. Ohio*¹³¹ to enforce the exclusionary rule in state court convictions, it held in *Linkletter v. Walker*¹³² that state prisoners who had been subjected to unconstitutional searches could not claim the benefit of the exclusionary rule. In other words, *Mapp* was not retroactive. More generally, whether a given decision would apply retroactively would depend on the application of a three-factor test.¹³³ A few years later, Justice Harlan came to decry the Court’s retroactivity jurisprudence as inconsistent and arbitrary, with some prisoners benefiting solely because their cases, among all others that could have been taken, happened to be the ones that the Court actually selected to decide.¹³⁴ Justice Harlan proposed making all

125. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 143 (1996).

126. WARD & WEIDEN, *supra* note 124, at 246, 249.

127. EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1998).

128. *Id.* at 251–87.

129. 489 U.S. 288 (1989).

130. *Id.* at 301.

131. 367 U.S. 643 (1961).

132. 381 U.S. 618 (1965).

133. *Id.* at 636.

134. *See* *Desist v. United States*, 394 U.S. 244, 258–59 (1969) (Harlan, J., concurring); *Mackey v. United States*, 401 U.S. 667, 667 (1971) (Harlan, J., dissenting).

criminal procedure decisions fully retroactive for cases still on direct appeal, and, with two narrow exceptions, non-retroactive for cases on collateral review. Not until 1987, however, did the Court adopt the first part of Justice Harlan’s proposal in *Batson v. Kentucky*.¹³⁵

According to Lazarus, a conservative law clerk named Andrew McBride came up with the idea of using Teague’s case as the vehicle to implement the second part of Justice Harlan’s proposal—the non-retroactivity rule for habeas cases.¹³⁶ Justice O’Connor, for whom McBride clerked, liked the idea but was skeptical about resolving the case through an approach neither briefed nor raised by the parties. When Chief Justice Rehnquist learned about the proposal (through a copy of the bench memo given by McBride to one of his law clerks), he supported the plan, and enough Justices signed on to produce an opinion.¹³⁷

The point is not whether *Teague* was correctly decided,¹³⁸ but rather that (1) the Court was clearly divided over how best to address the retroactivity issue; and (2) the law clerks—at least, McBride and the unnamed clerk in Chief Justice Rehnquist’s chambers—were of a similar, if not more eager, mindset as the Justices for whom they clerked.

Tasked with analyzing Teague’s constitutional claims, how should Andrew McBride have proceeded? To say that he should have given his “best” or “most accurate” analysis is unhelpful and superficial, since the retroactivity problem that *Teague* addressed was one that had plagued the Court for more than 20 years with no generally accepted resolution.¹³⁹ Rather, it is useful to recognize that

What emerges from today’s decisions is that in the realm of constitutional adjudication in the criminal field, the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view.

Mackey, 401 U.S. at 667.

135. 476 U.S. 79 (1986).

136. LAZARUS, *supra* note 127, at 499–501.

137. *Id.* at 501.

138. Cf. Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998) (acknowledging the problem *Teague* was responding to but criticizing the non-retroactivity doctrine).

139. Since neither party raised nor briefed the retroactivity point, one might argue that McBride should not have raised it *sua sponte* (an argument reinforced by Justice O’Connor’s initial reluctance to adopt the approach). Yet, when liberal law clerks made the same argument to McBride, he pointed out that the exclusionary rule holding of *Mapp* also had been neither raised nor briefed by the parties. LAZARUS, *supra* note 127, at 501.

one's underlying beliefs about the purpose of habeas corpus will heavily influence how one thinks the problem should be addressed. Those who believe that federal courts are inherently superior to state courts at deciding questions of federal law will be inclined to view the non-retroactivity rule as an unnecessary procedural roadblock. On the other hand, those who believe that state courts are equivalent to federal courts, or at least adequate, at resolving federal questions, will be likely to see the *Teague* rule as reinforcing the "Legal Process" school of thought.¹⁴⁰ Unless one can persuasively argue that the parity debate can be settled one way or the other,¹⁴¹ it seems impossible to maintain that the non-retroactivity rule is "best" or "worst" as a baseline principle.¹⁴²

Once we accept that judges can legitimately differ on basic legal philosophies, the question turns to whether judges screen law clerk applicants on their legal philosophies. One federal appellate judge has written that "[m]ost judges will not screen for ideology,"¹⁴³ and a survey of federal district judges suggested the same indifference to ideology.¹⁴⁴ At the Supreme Court level, however, the evidence appears otherwise,¹⁴⁵ particularly given the rise of "feeder" judges who send ideological clerks to like-minded Justices.¹⁴⁶ One empirical study found "remarkable congruence" between the ideological

140. The classic argument is set forth in Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

141. Cf. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 273 (1988) (suggesting that "[a]lthough parity is an empirical question, no empirical answer seems possible").

142. I say "as a baseline principle" to mean the general concept of having a gatekeeping doctrine to cut off claims from prisoners seeking habeas review of their convictions based on new Court decisions. I do not mean the specific execution of the gatekeeping doctrine in the form of *Teague*, which, of course, one could criticize on various doctrinal grounds. See generally Yin, *supra* note 138.

143. Ruggero J. Aldisert et al., *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 846 (2006).

144. Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 634 (2008) (noting result of survey of district judges ranking "political ideology" as the least important factor in hiring).

145. See TODD C. PEPPERS, COURTIFIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 32 (2006); Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001); Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 2d 57, 58 (1998) (describing a 9th Circuit judge as "not interested in hiring conservatives . . . not even interested in hiring people who are moderately liberal").

146. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 957 (2007).

composition of law clerks and those of their Justices,¹⁴⁷ whether due to self-selection by clerks or, less commonly, overt discussion during interviews. The Federalist Society’s growing influence in sending its members to conservative judges further reinforces the alignment of ideology between clerks and judges.¹⁴⁸

To be clear, I do not mean to suggest that liberal judges hire only liberal law clerks and that conservative judges hire only conservative law clerks. Indeed, there is reason to believe that the ideological congruence has lessened with the relatively recent expectation that potential clerks apply to all Justices.¹⁴⁹ But it is equally important to keep in mind that much of the previous discussion has equated *political* ideology with judicial philosophy, when the two might not be identical.¹⁵⁰ A judge’s belief about the appropriate degree of deference to decisions by the political branches may be a more important determinant of that judge’s decisions than his or her political party membership; thus, a judge may prefer a law clerk who shares his or her judicial philosophy more than one who shares his or her political ideology, at least if the judge believes in more deference to the elected branches than less. In other words, evidence about the impact of political ideology on law clerk hiring may understate the alignment between law clerks and judges on how decisions are actually reached in the chambers.

If judges—at least Supreme Court Justices—tend to hire law clerks of similar political or, more importantly, judicial views, with the result that the law clerks generate bench memos—like McBride’s *Teague* analysis—that reinforce the judges’ own views, then the law clerk-judge relationship might be analogized to that of the OLC

147. WARD & WEIDEN, *supra* note 124.

148. See Neil A. Lewis, *A Conservative Legal Group Thrives in Bush’s Washington*, N.Y. TIMES, Apr. 18, 2001, at A1 (quoting an unnamed federal judge who says “he gives preference to students who list membership in the Federalist Society on their applications”). One can also see further evidence of such alignment in the uproar following a 2004 article in VANITY FAIR in which a number of former law clerks from the Court’s October 2000 term spoke to the magazine about behind-the-scenes decision making in *Bush v. Gore*, with the law clerks for liberal justices decrying the process and result, and conservative law clerks depicted as defending it. See generally Charles Lane, *In Court Clerks’ Breach, a Provocative Precedent*, WASH. POST, Oct. 17, 2004, at D01.

149. WARD & WEIDEN, *supra* note 124, at 106–07. On the other hand, it appears that ideologically aligned clerks may have gained influence with their Justices relative to other clerks. *Id.* at 107. But see Ditslear & Baum, *supra* note 145, at 876 (finding ideological alignment strongest from 1993 to 1998).

150. See, e.g., J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981) (discussing philosophy of judicial restraint).

lawyer-Attorney General. Thus, even if OLC attempts to provide advice as if it were an independent court within the executive branch, the fact that judges can have legitimately different judicial philosophies and, in turn, select law clerks in part based on compatibility with those philosophies suggests that independence in this context may be narrower than expected.

B. Law Clerks Versus OLC Lawyers

Still, law clerks are not OLC lawyers, and judges are not political cabinet heads. The differences between law clerks and OLC lawyers are worth exploring to understand the limits of the analogy.

1. Experience and Expertise

OLC lawyers are generally elite lawyers who have completed prestigious clerkships and have experience in federal statutory and constitutional analysis.¹⁵¹ The political appointees in OLC during the early Bush Administration—Yoo, Bybee, and Goldsmith—were all tenured law professors with expertise not just in constitutional law but also foreign relations. Law clerks, on the other hand, often have had no legal experience apart from internships over the summer or during the school year, although some, including those at the Supreme Court, have had a prior year of clerking. Accordingly, one could argue that the OLC lawyer is entitled to a greater degree of independence than is the law clerk, who, after all, is writing a bench memorandum only for use in chambers.

This distinction is certainly important when it comes to determining how free the supervising entity (i.e., the Attorney General or the federal judge) should feel about overriding the subordinate's written analysis and recommendation. The Attorney General (and President) should be wary of overruling OLC, since it is often the case that the OLC lawyer will have more legal expertise than the Attorney General (or President) does in the particular area of law.¹⁵² The judge, on the other hand, need not feel wary about overriding the law clerk. However, this distinction does not have bearing on whether the law clerk is likely to share the judge's mindset

151. See, e.g., YOO, WAR BY OTHER MEANS, *supra* note 14, at 19 (describing how many of the OLC lawyers knew one another previously from clerkships and law school).

152. Contrast, for example, John Ashcroft's prior experience as a U.S. Senator with John Yoo's academic research in presidential powers and foreign relations. On matters relating to the legality of the war on terrorism, Yoo no doubt had much greater relative expertise.

and thereby produce bench memos that reinforce the judge's viewpoint.

2. *Binding Effect of Opinion*

A second distinction between a law clerk and an OLC lawyer has to do with the binding effect of their work product. As noted above, a law clerk prepares the bench memorandum for internal consumption, and while it may ultimately lead to a written opinion that has the force of law through the Circuit or the country (if from the Supreme Court), that decision is issued by the judge only when the judge is satisfied not just with the analysis but also with the expression of the analysis. An OLC opinion, on the other hand, binds the executive branch; in the case of the OLC Interrogation Conduct Memo, government agents who act in reliance on its analysis can claim some measure of qualified immunity in the event that they are subsequently sued by their interrogation victims.¹⁵³ The Attorney General can override the OLC opinion, but this is generally more public than a judge's decision not to follow a law clerk's recommendation. Additionally, as Dawn Johnsen notes, OLC often opines on matters that may well evade judicial review, or that, if subject to judicial review, would be reviewed under a deferential standard.¹⁵⁴ She therefore argues that in such situations, "the proper OLC inquiry is not simply whether the executive branch can get away with it, in the sense of avoiding judicial condemnation."¹⁵⁵

Put another way, the law clerk may feel a degree of freedom to test out a novel theory of law, secure in the knowledge that the judge can freely disregard it.¹⁵⁶ Thus, Justice O'Connor's law clerk Andrew McBride was free to propose implementing Justice Harlan's non-retroactivity principle, because it would be up to Justice O'Connor to

153. See Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93 (2008).

154. Johnsen, *supra* note 21, at 1577.

155. *Id.* at 1587. Professor Johnsen also acknowledges that Presidents can, and occasionally do legitimately adopt a legal position at odds with those of the Court. *Id.* at 1589. Her criticism of the Bush Administration specifically rests on its overuse and abuse of the President's authority to non-enforce statutes believed to be unconstitutional and the "vague and abbreviated explanations" given to justify non-enforcement. *Id.* at 1593-95.

156. *But see* David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May-June 2005, at 26 (arguing that Justice Blackmun essentially rubberstamped the work of his law clerks); *cf.* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005) (presenting a different picture of Justice Blackmun's reliance on law clerks).

decide whether to do so. The OLC lawyer, on the other hand, may feel more constrained because the opinion that he or she writes will be, absent overruling by the Attorney General, the end result that dictates the legal boundaries of action for a government agency.

That there may be more normative constraints on the OLC lawyer's freedom to experiment with legal doctrine and theory, however, does not mean that the OLC lawyer has no freedom at all to do so. Moreover, the OLC lawyer's prior experience may well mean that the OLC lawyer feels more certain and less experimental about his or her legal conclusions than would a law clerk.

IV. IMPLICATIONS: TRANSPARENCY TO THE RESCUE?

My analysis undoubtedly has a pessimistic edge: ethical or professional conduct restraints are not likely to be successful restraints on OLC lawyers, because those lawyers will either not recognize or not agree as to the applicability of the ethical restraints. If anything, presidential administrations that are most in need of having their policy preferences tempered by cautious legal analysis are least likely to get such analysis if they are intent on hiring like-minded lawyers to fill the political positions in OLC. Even if one accepts the "bad Yoo, good Goldsmith" narrative, one must keep in mind that Goldsmith left OLC after only nine months.¹⁵⁷

Recent research by Dan Kahan and Donald Braman may shed some light on the nature of the problem. According to Kahan and Braman, the cultural division of the country into "red states" and "blue states" is reflected in a heuristic bias where voters, among others, process information about public policy matters through their "cultural commitments."¹⁵⁸ As a result, voters not only look to experts or other public figures with whom they agree about cultural values, they accept or discount empirical data based on whether it conforms to or conflicts with those same cultural values.¹⁵⁹ Since law is at its heart a humanities-based, as opposed to science-based, discipline, the persuasiveness of legal analysis is not capable of absolute determination of being "right" or "wrong." This means that

157. See Kmiec, *supra* note 13, at 824 (questioning what Goldsmith was able to accomplish in those nine months in terms of altering the Bush Administration's substantive policy).

158. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006).

159. *Id.* at 150.

the sort of cultural heuristic bias identified by Kahan and Braman may operate even more strongly when it comes to legal analysis, since it is correspondingly easier to be persuaded by the analysis from the side that one favors.

A better approach is to rely on the political process, including public outcry, to discipline the OLC. One such approach is exemplified by S. 3501, or the "OLC Reporting Act of 2008," which was introduced by Senators Feingold (D-Wisc.) and Feinstein (D-Cal.).¹⁶⁰ This bill would require the Attorney General to disclose to Congress any "authoritative legal interpretation" from the Department of Justice (including the OLC) that concludes that (1) a federal statute would be unconstitutional as applied in a given situation, (2) a federal statute must be interpreted as not constraining the executive branch so as to avoid a constitutional problem with Article II, or (3) a federal statute must be construed as not constraining the executive branch during time of war.¹⁶¹ In effect, the OLC Reporting Act would force the executive branch to disclose in a timely fashion any OLC opinions that expand executive power at the expense of Congress or the courts, as opposed to disclosure two years down the road, as happened with the OLC Interrogation Conduct Memo.

What would greater transparency accomplish? For one thing, the firestorm of criticism heaped on the OLC after public disclosure of the OLC Interrogation Conduct Memo, followed by the Bush Administration's quick repudiation of the memo, suggest that the executive branch may still be responsive to public opinion, or at least outside criticism by legal experts. Had the OLC Interrogation Conduct Memo been disclosed immediately after its issuance and met with the same reaction,¹⁶² then it is likely that the memo would not have guided the executive branch for as long as it actually did.

Moreover, knowledge that OLC memos will be released to Congress (and perhaps to the public, especially if Congress is in control of the opposition party from that in the White House) may have a disciplining effect on the author. There would be a greater

160. OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (2008).

161. *Id.* Note that the Bush Administration's OLC has concluded that this bill would be unconstitutional. See Opinion of the Att'y General, Michael Mukasey, Constitutionality of the OLC Reporting Act of 2008 (Nov. 14, 2008), available at <http://www.usdoj.gov/olc/2008/olc-reporting-act.pdf>.

162. Of course, it is entirely possible that in mid-2002, with the awful memory of 9/11 less than a year in the past, the public may have been more accepting of a very narrow definition of torture.

incentive to engage in consultation with government lawyers in other agencies with primary or overlapping jurisdiction over the subject matter at hand; in the case of the OLC Interrogation Conduct Memo, for example, circulation of the draft version of the memo to Justice Department lawyers might have alerted OLC to some of the substantive criticisms that were subsequently leveled. This is not to say that OLC would necessarily feel obligated to accept conflicting suggestions from other agencies, particularly if those suggestions would alter the ultimate conclusion. However, the input of other agencies may well impact the content of the analysis.

By way of example, as noted above, the OLC Interrogation Conduct Memo did not cite, much less discuss the *Steel Seizure Case*. Had the memo received input from other agencies and had the absence of the *Steel Seizure Case* been raised, the memo may well have been rewritten to incorporate that observation. The ultimate conclusion may have remained the same, as OLC could have argued that, given the AUMF, the President's ability to order coercive interrogation lay in the top *Steel Seizure Case* category, as opposed to the bottom category. However, the analysis arguably would have been evenhanded in alerting the reader to the existence of potentially adverse authority.

CONCLUSION

The OLC has enjoyed a stellar reputation based not just on the impressive quality of lawyers who have populated the office, but also its internal ethos of providing the "best" legal advice to executive branch clients. Yet, for issues of first impression, OLC, like law clerks and judges, may not be able to give an obviously "correct" answer. Therefore, one cannot expect notions of professional responsibility and lawyerly obligations to the "public" to guard against the issuance of substantively disagreeable OLC opinions such as the OLC Interrogation Conduct Memo. Indeed, identifying exactly what was unprofessional or unethical—as opposed to unpersuasive or downright wrong—about the drafting of the OLC Interrogation Conduct Memo, when assessed against a case study of *Teague v. Lane*, turns out to be challenging. Greater transparency in the form of disclosure of OLC opinions, as called for by the OLC Reporting Act, while not a panacea, appears more likely to achieve the goal of curbing excessively pro-executive branch opinions.