Office of the Attorney General
Washington, D. C. 20530

January 19, 2009

Mr. H. Marshall Jarrett
Counsel
Office of Professional Responsibility
United States Department of Justice

Re: OPR Report Regarding the Office of Legal Counsel's Memoranda on Issues Relating to the CIA's Use of Enhanced Interrogation Techniques on Suspected Terrorists

Dear Mr. Jarrett:

On December 31, 2008, we, and certain members of our staff, met with you, James Meade, and Tamara Kessler to discuss the Office of Professional Responsibility's (OPR) draft report regarding the Office of Legal Counsel's (OLC) Memoranda on Issues Relating to the CIA's Use of Enhanced Interrogation Techniques on Suspected Terrorists ("Draft Report"). That meeting occurred following your provision midday on December 23, 2008, of the 191-page, highly-classified Draft Report to the Office of the Attorney General (OAG). On December 23, you indicated that if OAG had any classification concerns regarding the Draft Report, those concerns should be provided by January 2, 2009. You further provided that, with respect to previously agreed-upon opportunities for OAG and ODAG review and comment on the report prior to its actual release, you contemplated publicly releasing a unclassified version of the report on January 12, 2009. On December 31, you explained that, until a day or two earlier, you were unaware that OPR attorneys had promised subjects of the report, through their counsel, the chance to review and comment on the report before it was publicly released. You further explained that as of December 31 neither the subjects of the report nor their counsel had yet seen it.

In the wake of the December 31 meeting, you have informed us that given OPR's need to review and consider the preliminary concerns we expressed at the December 31 meeting, the further issues raised in a January 7, 2009 OLC letter to you (which we believe deserves close review), and any comments provided after subjects of the report and their attorneys review the Draft Report, the report will not be finalized before the end of the current Administration. You have similarly concluded that your office will not be able to determine its final position before the end of the current Administration on whether professional misconduct referrals, which are presently contemplated in the Draft Report, are ultimately appropriate. Because the report will not be concluded during our tenure, we have memorialized our concerns in this letter.

We understand that under longstanding Department practice, the Department makes no decision regarding a bar referral or publication of such a report in any form or forum until the Department's own internal review process is completed. Under Department practice, this process includes a chance for the subjects to review the report and to contest OPR findings against them. We also understand that for at least the last decade and spanning Administrations of both political parties, Associate Deputy Attorney General David Margolis has been the final decisionmaker within the Department with respect to findings against former Department employees. In that regard, to the extent OPR ultimately determines that, in its view, misconduct referrals are appropriate for former OLC attorneys Jay Bybee or John Yoo, we ask that this letter be shared with the appropriate members of the Office of the Attorney General and the Office of the Deputy Attorney General, and further that it be available in any DOJ appeal process to all parties involved in that process, including the subjects of any appeal and their attorneys. Finally, to the extent the Department would ultimately make any bar referrals, at the conclusion of internal review by Department leadership offices, we ask that this letter be included in any version of the final Report forwarded to bar authorities or released to Congress or the public.

I. PROCESS CONCERNS

We appreciate OPR's effort to provide us with an opportunity to review and comment on the Draft Report before the end of this Administration. Nevertheless, the time proposed for our review was unrealistically and, with all respect, unacceptably, short. This is particularly true given the length of the OPR investigation, which has been ongoing for nearly four and a half years, the fact that OAG has been asking about progress on the Draft Report since at least the early summer of 2008, and the length and classification level of the Draft Report itself. More specifically, the Draft Report is nearly 200 single-spaced pages long and is classified at the sensitive compartmented information level, greatly complicating the ability of anyone—including the Attorney General himself—to review it. Notwithstanding these complications, the Draft Report was not provided to OAG or ODAG until December 23, 2008, and you asked for comments prior to January 12, 2009, the date you originally proposed to release the report to Congress and the public. Even if this period did not include the Christmas and New Year's holidays, it would have been insufficient for us to conduct a thorough review, given our other responsibilities within the Department and the additional responsibilities attendant to trying to ensure a smooth transition to a new Administration. Our concerns with this rushed process were exacerbated by the number of errors and other issues—discussed more fully below—that we identified in the abbreviated review we were able to undertake.

Furthermore, because OPR waited until the closing days of this Administration to share its Draft Report for comment, you have informed us that it will not be able to revise the report, as OPR determines is appropriate, in potential response to the issues that we have identified before the Administration ends. You similarly will be unable even to receive, much less evaluate, comments from Messrs. Bybee and Yoo and their counsel, as well as others you criticize within that time period. You indicate that you will not even be able to determine during this Administration whether some of the most serious aspects of the Draft Report—namely, its proposed and unprecedented bar referrals of former OLC attorneys Bybee and Yoo for professional misconduct under D.C. Bar Rules 1.1 and 2.1—will be included in the final report.

This has regrettably undermined, if not eliminated, our ability to review OPR's considered findings.

To justify this truncated timeline, you noted in our December 31 meeting that you had attempted to establish a timeline for review and comment similar to that which OPR and the Office of Inspector General (OIG) established for review of the report concerning the firings of United States Attorneys. That explanation falls short in at least one very material respect. OPR and OIG kept our offices apprised of the progress and substance of the United States Attorneys investigation for many months leading up to our first review of that report. That same consultation did not occur in this matter.

In addition, we were troubled to learn that, despite the fact that OPR investigators had agreed to allow the two main subjects of the Draft Report—John Yoo and Jay Bybee—to review and comment on the draft, no plans had been made as of December 31 (or some twelve days before a suggested public release) for such a review to take place. Indeed, it appears, with all respect, that such a review might not have occurred at all had staff in our offices not raised the issue with you in late December 2008. We are pleased that OPR intends to keep the commitment it made during the investigation to provide Messrs. Yoo and Bybee and their counsel with a copy of the Draft Report for review and comment. We further agree that the review process going forward inside DOJ should include an opportunity for both to exercise their full and standard appellate rights, if applicable, within DOJ before any professional bar referrals would be made or before any report were made public—the latter of which, you have stated and we agree, is itself tantamount to a bar referral.

II. SUBSTANTIVE COMMENTS AND CONCERNS

As discussed at our December 31 meeting, we have numerous questions about and concerns with some of the findings, and conclusions in the Draft Report. We recognize that it is OPR's responsibility to reach an independent conclusion and make recommendations. As you know, we both have been strong defenders of OPR and its mission. Nonetheless, we are concerned that the current proposed findings of professional misconduct, recommendation for reconsideration of prosecutorial declinations, and request that the Department review certain memoranda signed by Steven Bradbury, are based on factual errors, legal analysis by commentators and scholars with unstated potential biases, unsupported speculation about the motives of Messrs. Bybee and Yoo, and a misunderstanding of certain significant Department of Justice and Executive Branch interagency practices. We summarize below our leading concerns with the Draft Report's unclassified analysis and recommendations.

A. Findings of Professional Misconduct

The key finding of the Draft Report is that, in drafting certain OLC memoranda related to potential interrogations of suspected terrorists, former OLC attorneys John Yoo and Jay Bybee "failed to meet their responsibilities under D.C. Rule of Professional Conduct 1.1 to provide competent representation to their client, the United States, and failed to fulfill their duty to

exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1." [Draft Report at 8.][1]

In addressing these proposed findings, we begin by sketching out certain key areas of agreement. As we have stated publicly and repeatedly, we agree that important aspects of the opinions under review were incorrect or inadequately supported, and that those aspects should have been—and have been—corrected by the Department.[2] The flaws in the opinions under review include, for example, the Bybee Memo's analysis of severe pain, its conclusions concerning certain affirmative defenses, and its conclusion that the statute's terms do not apply to the Commander in Chief and those acting pursuant to his direction. *See supra* note 2.

Thus, we do not quarrel with the Draft Report's conclusion that the opinions contained errors, and little would be gained by expanding this letter and attempting to address whether each error you propose is a subject of perfect concurrence among all of us or not. The subjects and issues covered by the lengthy OLC opinions, if addressed in common-law fashion in the courts, likely would play out over dozens of opinions and factual scenarios. Experience counsels that where lawyers or judges analyze issues over dozens of legal opinions and factual scenarios, there often are consensus opinions, and sometimes there are dissents and concurrences of various sorts. Regardless of whether we collectively or individually might agree with each of your proffered errors, the relevant point, we think, is that we concur that the OLC opinions at issue as originally issued contained multiple, material errors. We further fully endorse the idea that OLC should promptly revise identified errors in its opinions, or refine them as appropriate, and we believe that the revision and correction process that has occurred with respect to the OLC opinions at issue was a good development for the Department and its efforts.

Nonetheless, in addressing the proposed professional misconduct referrals, we must begin by noting our strong disagreement and surprise that the Draft Report proceeds seemingly without any consideration of the context in which the OLC opinions were prepared and, equally important, the time available to prepare them. We were not in the Department at that time, and we can only imagine the virtually incomparable and extended pressure that was on Messrs. Bybee and Yoo to analyze and prepare not only the OLC opinions at issue, but also many other opinions of the utmost importance. This is the sort of pressure that we would wish on no American, ever, and certainly no member of the Department of Justice.

This, of course, is not to say that the standards of professional competence and ethical propriety did not apply. They did. However, when one typically analyzes competence or negligence in the law, it is decidedly a context-dependent matter. As judges, we surely came to appreciate that when attorneys were given twelve hours to prepare a brief in the context of a TRO hearing, that brief was much more likely to contain citation errors, or misstatements of fact or law, than if an attorney was given thirty days to prepare that same brief in the context of a

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[1] All references to the Draft Report are to the unclassified version provided to us on December 23, 2008.

[2] *See, e.g.*, Michael B. Mukasey, Questions for the Record (QFR) from Sen. Kennedy at 2 (Oct. 30, 2007) (describing the 2002 Bybee Memo as a "mistake" and disagreeing with the memo's conclusions that "necessity" or "self-defense" may justify a violation of the torture statute, and that the Commander in Chief has the constitutional authority to direct acts of torture); Mark Filip, QFR from Sen. Kennedy at 5-6 (Jan. 18, 2008) (criticizing the Bybee Memo as a "flawed legal document" and specifically disagreeing with aspects of the memo's analysis).

dispositive motion. Similarly, if a trial proceeded straight to closing argument one hour after the last witness was heard and the jury was dismissed for lunch, those closing arguments were surely going to have more misstatements of fact, and objectionable argument, than if the attorneys were given overnight or a weekend to prepare. This was true of all attorneys—including extraordinarily earnest and gifted DOJ attorneys—and it was true in cases whose subject matters were routine and even simplistic as compared to the issues raised in the OLC opinions at issue.

We respectfully but strongly believe that any review of the Bybee and Yoo OLC opinions for professional competence must be informed by this context. It is one thing for people, including us personally, to evaluate in a period of relative calm whether the analysis in the OLC opinions is more sound than subsequent analyses (and criticisms) offered by OLC or other legal commentators. It is quite another to be asked to address such matters alone, and to begin writing without the benefit of extensive subsequent review and commentary, for an Executive Branch and Nation trying to formulate a plan to ensure that the September 11 attacks would not be repeated. The fact that work began on the two principal opinions under review in the Spring of 2002, and the opinions were completed in sixteen weeks, while Messrs. Bybee and Yoo worked on other matters of utmost importance, further underscores the enormous time pressure that existed in the real-world context in which they were asked to perform.

With respect to this critical threshold matter of context, we are compelled to note that OPR has taken some four and a half years to reach the stage where it shared its Draft Report. As the Draft Report acknowledges, and as was further confirmed at our December 31, 2008 meeting, OPR also has had the benefit of various articles compiling criticisms of the OLC opinions, and the Draft Report draws, sometimes substantially, from such articles. [*See, e.g.*, Draft Report at 2-3, 5 n.4, 129 nn.112-115, 145 n.128, 155, 156 n.142, 160 n.151 (citing various commentators).] OPR also had available the subsequent OLC revisions of various aspects of the Bybee and Yoo opinions, as well as various individuals' congressional testimony about them.

Rule 1.1 Finding—Professional Incompetence

With respect to its proposed finding of professional incompetence under Rule 1.1, we understand that OPR is aware of no direct evidence that either Bybee or Yoo believed that they were giving inaccurate advice.[3] Further, OPR bases its conclusions concerning putative professional incompetence on a collection of facts and findings, a number of which do not survive close scrutiny or are not presented in an even-handed manner, thereby calling into question the ultimate suggestion of professional misconduct.

First, in a number of instances, the Draft Report criticizes the OLC Memoranda for not discussing cases that are themselves not appropriate for citation or are inapposite. For example,

[3] Statement of J. Meade, Dec. 31 meeting. Jack Goldsmith also expressed this view in his book, THE TERROR PRESIDENCY (2007). In it, Professor (and former AAG for OLC) Goldsmith wrote: "All of these men wanted to push the law as far as it would allow. But none, I believe, thought he was violating the law. John Yoo certainly didn't. He has defended every element of the opinion to this day, and I believe he has done so in good faith. Yoo was indispensible after 9/11; few people had the knowledge, intelligence, and energy to craft the dozens of terrorism-related opinions he wrote." *Id.* at 167-68. Professor Goldsmith also described Jay Bybee as "a fine lawyer and judge." *Id.* at 169.

with respect to Rule 1.1, the Draft Report concludes that the Bybee Memo did not meet professional standards of competence based on a combination of seven factors. One of the seven factors is the Memo's analysis of judicial opinions by United States courts. [Draft Report at 141.] The Draft Report criticizes the Bybee Memo because it did not analyze federal case law "that has applied the [Convention Against Torture's (CAT)] definition of torture in the context of removal proceedings against aliens." [*Id.*] The Draft Report, after previously stressing that "the analysis of precedent is an essential element of competent legal advice" [*id.* at 122], suggests that the Bybee Memo should have identified and discussed three listed cases, including *Kourteva v. I.N.S.*, 151 F. Supp. 2d 1126 (N.D. Cal. 2001), and *Khanuja v. I.N.S.*, 11 Fed. Appx. 824 (9th Cir. 2001). [Draft Report at 142.] However, under Ninth Circuit rules, it would have been improper—indeed even potentially sanctionable[4]—for an attorney to cite *Khanuja*, which is an unpublished Ninth Circuit opinion, as the cite for it to "Fed. Appx." clearly suggests. The opinion on its face, when printed from any standard legal research service, expressly states that it was not selected for publication. It further expressly cautions, on the face of the opinion, that any reader should consult Ninth Circuit Rule 36-3 before citing it. Ninth Circuit Rule 36-3 has long prohibited citation of unpublished opinions for almost all purposes, including the purposes for which *Khanuja* is offered in the Draft Report. In addition, *Kourteva* is a district court case that discusses the relevant issue only in dictum. As such, it could not, and should not, be relied upon as precedent. OPR's conclusion that the Bybee Memo is sanctionable under Rule 1.1 in part because it failed to cite these cases, the citation of one of which would have been potentially sanctionable under the rules of the issuing court, is troubling. We expect that any final Report will omit this conclusion because it is completely unfounded.

Similarly, the Draft Report criticizes the Bybee Memo's discussion of a potential good faith defense to a putative violation of the torture statute as "overly simplistic." [Draft Report at 137.] Among other things, relying on a Fourth Circuit case, *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983), it faults the Bybee Memo for not advising that a court "might refuse to extend the good faith defense to a crime of violence such as torture." [Draft Report at 138.] But *Wilson* contains no language suggesting that a good faith defense is unavailable for crimes of violence. Rather, it holds that the defendant in that particular case had not made the factual showing necessary to warrant instructing the jury on the defense. *See Wilson*, 721 F.2d at 974-75 ("The District Court properly denied appellant's requested [good faith] instruction on the ground that there was insufficient evidence to justify it.").

To be clear, we do not, of course, suggest that because of these errors OPR has engaged in misconduct or that the Draft Report reflects professional incompetence. It is a lengthy document, addressing complex issues, and we presume and believe that any errors were the product of good faith. Nonetheless, we do note the clear errors identified above to show the importance, with all respect, of context. Even after four and a half years to research, write, edit, and shepardize the Draft Report, it contains, just pages into its legal analysis, errors of the sort the Draft Report itself repeatedly identifies as being part of basic legal competence under Rule

[4] *See Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam) ("Because Ninth Circuit Rule 36-3 prohibits the citation of unpublished dispositions in almost all circumstances, we issued an order to show cause why sanctions should not be imposed for counsel's violation of our rule."); *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (describing issuance of show cause order regarding why sanctions should not be imposed for violation of Rule 36-3).

1.1. [*See* Draft Report at 122-23.] If mistakes like this happen even in the most relaxed circumstances, some consideration should be made when they occur in the circumstances in which OLC was asked to provide its advice.[5]

The Draft Report also faults the Bybee Memo because its "analysis began with the assertion that Congress's use of the phrase 'severe pain' elsewhere in the United States Code [in a statute pertaining to health-care benefits] can shed light on its meaning" in the torture statute. [Draft Report at 129 (internal quotations omitted).] The Draft Report concludes that it was "unreasonable" to rely on that language because the health care statute was unrelated to the torture statute. [*Id.* at 132.]

While we have both stated our disagreement—rendered with the benefit of substantial subsequent legal work by OLC and others—with the Bybee Memo's conclusions about the meaning of "severe pain," the Draft Report's stated criticism ignores that the Bybee Memo's analysis actually begins not by looking to the health care statute, but by evaluating three separate dictionary definitions of the word "severe." [Bybee Memo at 5.] Even more to the point, it is common practice for lawyers to look to other sources for guidance in interpretation when there is no direct precedent, which is how the Bybee Memo indicated it used the definition in the health-care statute. [Draft Report at 129; Bybee Memo at 5.] In Mr. Bybee's own words: "We're struggling here to try and give some meaning that we can work with because we had an application that we were also required to make at this time, and we couldn't discuss this just simply as a philosophical nicety; we had real questions before us." [Draft Report at 132.] Furthermore, the Bybee Memo itself alluded to the remote nature of the statutory definitional analogy [Bybee Memo at 6], which reflects that it presented the argument in guarded terms, as is best done.

Throughout its criticism of the Bybee Memorandum, the Draft Report relies on commentary from others to substantiate the Memorandum's errors, but does not contain sufficient information to allow the reader to evaluate these sources readily. For example, the Draft Report bolsters its critique at several points by quoting articles or papers written by, among others, Professor David Luban. Thus, to support its conclusion that "[a]t various points, the [Bybee] memorandum advanced novel legal theories, ignored relevant authority, failed to adequately support its conclusions, and misinterpreted case law," [Draft Report at 156] the Draft Report cites an article written by Professor Luban. [*Id.* at 156 n.142; *see also id.* at 129 n.112.] As reflected in the Draft Report itself, and as confirmed in our meeting, the Draft Report draws substantially from Professor Luban's work. At no point, however, does the Draft Report inform the reader why Professor Luban and other critics of the OLC memoranda should be considered

[5] While the Draft Report does not do so, it likely could and should offer reform proposals or analyses concerning the process by which Bybee and Yoo were required to prepare or did prepare the OLC opinions under review, which process was more restrictive than OLC's usual practices. We appreciate that the matters at issue were very sensitive, and that appropriate adjustments to general OLC opinion-writing processes must be made under such circumstances, but it seems clear to us that the restrictive nature of the process at the time helped to create some of the errors in the OLC opinions under review. In this regard, OLC has since issued "best practices" sorts of guidance to try to address this subject and improve its internal opinion-generating processes. *See* Memorandum for Attorneys of the Office from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Opinions* (May 16, 2005). OPR's review could certainly produce helpful advice on whether the new OLC policies would seem to be optimal or effective going forward.

authoritative, or why their work was favored over other academics and commentators who have defended the work or approaches of OLC, Bybee, and Yoo during this period of time.[6]

Even more important, given the substantial reliance of the Draft Report on this source, notwithstanding that OPR had over four years to work on the draft, the Draft Report does not sufficiently relate the background of Professor Luban so that a reader would easily appreciate his potential strengths, weaknesses, and biases. We are not personally familiar with all of Professor Luban's work, and have nothing bad to say about him, but commentators, like witnesses, typically have certain seeming biases that are conveyed so as to inform a reader or jury or decision-maker. Thus, for example, it would appear at least worth mentioning that, while Professor Luban seems to be a very thoughtful and prolific scholar, he is a trained philosopher, not an attorney, and he has not practiced law. *See* David Luban, LEGAL ETHICS AND HUMAN DIGNITY 12 (2007). He also appears to be a longtime—to be sure, thoughtful and sincere, but longtime—critic of the Bush Administration and of the War on Terror in general.[7] These facts about Professor Luban do not make him wrong necessarily, of course, but they seemingly would be related in a report where his views are cited as authority for the contention that Mr. Bybee, now a federal appellate judge, and John Yoo, a tenured professor at the University of California Boalt School of Law, were professionally incompetent in their work at OLC. Of course, legal arguments should stand or fall on their own merit and not by virtue of who advances them. The Draft Report, however, appears to rely substantially on others' analyses, such that the identities and potential predispositions of the authors of these arguments are at least relevant to the reader.

The Draft Report also repeatedly quotes from interviews with Steve Bradbury and Jack Goldsmith. Often it does so in a way that suggests that Mr. Bradbury and Mr. Goldsmith would agree with the conclusion that Yoo and Bybee committed misconduct or even were professionally incompetent. [*See, e.g.,* Draft Report at 128 n.111.] To the extent that was the intent of the Draft Report, we recommend that you consider asking Bradbury and Goldsmith whether they believe either Mr. Yoo or Mr. Bybee committed professional misconduct. Since attorneys typically have an obligation to refer another attorney to relevant bar authorities where they believe another lawyer has committed an ethical failing, it would appear that neither Mr. Goldsmith nor Mr. Bradbury believes Mr. Yoo or Mr. Bybee violated ethical canons. Instead, we suspect that both would state that, despite their disagreement with aspects of the Yoo and Bybee memos, they do not believe that Mr. Yoo or Mr. Bybee committed professional misconduct.[8]

The Draft Report also takes issue with the Bybee Memo's discussion of a potential necessity defense, a discussion with which we have also disagreed in the past. Nevertheless,

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[6] *See* Eric Posner and Adrian Vermeule, *A 'Torture' Memo And its Tortuous Critics*, WALL STREET JOURNAL, Jul. 6, 2004 at A.22; *see also* Jeffrey K. Shapiro, *Legal Ethics and Other Perspectives*, in THE TORTURE DEBATE IN AMERICA 229 (Karen J. Greenberg ed., 2006); Jeffrey K. Shapiro and Lee A. Casey, *Let Lawyers be Lawyers*, THE AMERICAN LAWYER 73 (Sept. 2004).

[7] *See, e.g.*, David Luban, *The War on Terrorism and the End of Human Rights*, 22 Phil. & Pub. Pol'y Q. 9 (2002); David Luban, *At War with the law in Iraq*, L.A. TIMES, June 13, 2006, at B-13.

[8] *See generally, supra* note 3, regarding Professor Goldsmith's written comments concerning Professor Yoo and Judge Bybee in Goldsmith's book, THE TERROR PRESIDENCY.

several of the Draft Report's criticisms seem to us unfair in light of language in the Bybee Memo itself. For example, the Draft Report suggests that the discussion was not relevant because "it is difficult to imagine a real-world situation" where an interrogator would "reasonably anticipate[]" that his questioning would produce information that would avoid an imminent, threatening harm. [*Id.* at 162; *see also id.* at 160 n.151.] Yet the Bybee Memo itself counseled that the availability and strength of the defense would depend on (1) the degree of certainty that government officials have that a "particular individual has information needed to prevent an attack" and (2) the likelihood that the terrorist attack is to occur and the amount of damage the attack would cause. [Bybee Memo at 41.] It is, with all respect, therefore misleading to suggest, as the Draft Report does, that the Bybee Memo advised that a necessity defense would be available without reference to these considerations.[9]

The Draft Report also asserts inexplicably that the Bybee Memo did not address an element of the necessity defense requiring the defendant to show that there was no available alternative to violating the law. [Draft Report at 161.] Yet as the Draft Report itself acknowledges in a footnote on the same page, the Bybee Memo does address this point. [*See id.* at 161 n.152.] The Bybee Memo states: "[T]he defendant *cannot* rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." [Bybee Memo at 40 (emphasis added).]

Finally, at various points, the Draft Report goes beyond questioning OLC's methodology and questions the motives of attorneys Yoo and Bybee directly. For example, the Draft Report asserts expressly that the Commander-in-Chief and the affirmative defense sections of the Bybee Memo were added not to provide a more complete analysis of relevant legal authority, but rather because then-Assistant Attorney General for the Criminal Division, Michael Chertoff, properly had refused to decline prosecution of future violations of the anti-torture statute, so OLC attorneys sought to reverse the effect of that decision. To support this very serious accusation, the Draft Report seemingly relies on little more than the fact that the two sections were drafted following a White House meeting at which the Criminal Division declined to provide an advance declination. [Draft Report at 150.] Without explanation or evidence to the contrary, the Draft Report dismisses the more innocuous possibility that discussions of these areas of law were added for the sake of completeness (as OPR was informed by attorneys Yoo and Koester), at the request of or with the support of OLC's clients (as attorney Philbin and David Addington indicated). [*Id.*] Notably, the Draft Report presents no evidence that the OLC attorneys even opposed the Department's decision to decline prosecution; to the contrary, OLC was tasked with drafting the written notice refusing to decline prosecution of future statutory violations. Again, one may take issue with the conclusions that OLC reached in this time period—as we too have

[9] The Draft Report also takes the Bybee Memo to task for "briefly allud[ing]" to a "'ticking time bomb scenario,'" which the Draft Report says "is based on a number of unrealistic assumptions and has little, if any relevance to intelligence gathering in the real world." [Draft Report at 160 n.151, quoting Bybee Memo at 31 n.17.] This criticism seems, with all respect, to be unfair and misleading. Although the Draft Report implies otherwise, the Bybee Memo does not mention the ticking time bomb scenario at all in its discussion of the necessity defense. (The passage in the Bybee Memo that the report cites appears in the Memo's discussion of international decisions.) Moreover, the Bybee Memo references the "ticking time bomb" scenario not to justify its own conclusions, but rather to describe the analysis adopted by the Israeli Supreme Court in response to a hypothetical proposed by the Israeli General Security Service. [*See* Bybee Memo at 31 n.17.] In these circumstances, it is difficult to understand why OPR believed it appropriate to criticize OLC.

both previously done—but we see little basis for OPR's conclusion that it reached these conclusions in bad faith.

In summary, we believe there are substantial, material problems with the Draft Report's analysis of the Rule 1.1 issue.

Rule 2.1 Finding—Failure to Provide Candid Legal Advice

The Draft Report also finds that attorneys Yoo and Bybee provided advice that "did not represent independent legal judgment or candid legal advice." [*Id.* at 172-77, 179-80.] OPR's investigation does not seem to us to support this conclusion, and we find its proposal even more unconvincing than any proposed conclusion under Rule 1.1.

After reviewing relevant documents from this time period and interviewing all the attorneys involved in requesting and providing this advice, OPR found no direct evidence that the opinions in question reflected anything other than Mr. Bybee's or Mr. Yoo's best legal judgment at the time—a fact that OPR confirmed in our recent meeting, *see supra* note 3, but that the Draft Report does not once mention. Nor has OPR identified any previous or subsequent commentary by either Mr. Bybee or Mr. Yoo that indicates that their actual legal views differed from those set forth in the opinions in question. Both Mr. Bybee and Mr. Yoo stated that their opinions reflected "a fair and objective view of the statute's meaning and that they never intended to arrive at a foreordained result." [Draft Report at 172.][10]

While any one of us—within OPR, OAG, or ODAG—might disagree with certain conclusions, or even many conclusions, offered by OLC during the relevant time period, the Draft Report provides little basis to speculate that the attorneys involved did not offer their independent, candid legal advice in good faith under the difficult circumstances presented. Absent any evidence to disbelieve the testimony of Mr. Bybee and Mr. Yoo, we respectfully submit that the speculation currently contained in the Draft Report is insufficient to support a finding that these attorneys were not acting in good faith or rendering their best independent assessment of the law in providing the advice contained in these opinions.[11]

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[10] Given classification concerns it is difficult to discuss what OPR appears to view as the most relevant evidence that Bybee and Yoo failed to provide their independent and candid legal advice.

[11] We also note that the factors OPR considered to determine whether Mr. Bybee and Mr. Yoo violated Rule 2.1 were factors OPR created in this case. As the draft report itself states, these factors are supported by little, if any, legal precedent or scholarly commentary. [Draft Report at 126.] If, as OPR asserts, there is little, if any relevant precedent concerning Rule 2.1, then such an approach is almost unavoidable. However, we note that the Draft Report offers as evidence of professional incompetence the Bybee Memo's failure to cite precedent to support its definition of the phrase "prolonged mental harm" under seemingly analogous circumstances. [Draft Report at 139.] When explicating that at least somewhat vague phrase, the Bybee Memo noted that the phrase appeared nowhere else in the federal code, and it then cited and discussed various dictionaries and secondary sources. [Bybee Memo at 7.] The Draft Report does not identify or suggest any secondary sources that the Bybee Memo should have also considered, nor does the Draft Report suggest that the phrase elsewhere appears elsewhere in any section of the federal code. [Draft Report at 139.]

B. RECONSIDERATION OF CERTAIN DECLINATIONS

The Draft Report recommends that "the Department reexamine certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG." [*Id.* at 9.] As the Draft Report itself recognizes, the question whether to prosecute matters addressed in the CIA OIG report has been addressed independently by two sets of prosecutors, first in the Counterterrorism Section (then located in the Criminal Division) and later in the U.S. Attorney's Office for the Eastern District of Virginia. In both cases, the declinations were based on a variety of prosecutorial considerations, many of which seemingly would be unaffected by any information in the Draft Report and most of which seemingly would have been known to prosecutors at the time of their decisions.[12] Indeed, prosecutors in the Eastern District of Virginia made their decision to decline prosecution in 2005, well after the 2002 Bybee Memo had been withdrawn by the Department. In addition, if and when OPR's report is finalized (whether with or without any professional misconduct referrals), the prosecutors could be given access to it, and could re-evaluate their decisions as they saw fit. In light of these facts, we believe it is unnecessary for OPR to recommend reconsideration.

C. RECOMMENDATION THAT THE DEPARTMENT REVIEW THE BRADBURY MEMOS

The Draft Report also recommends that the Department review certain Bradbury Memos. The Draft Report, however, does not acknowledge a key fact—that the Attorney General himself already reviewed the Bradbury Memos. This was undertaken, in what we believe was an unprecedented effort, in response to congressional requests for the Attorney General to do so. That fact alone, which is not even mentioned in the Draft Report, makes the recommendation seem inapposite.

Further, OPR supports its recommendation for an additional review on several grounds that appear to be misguided and inadequately supported. For example, the Draft Report says that the Bradbury Memos should be reviewed because there was "evidence that there was pressure on the Department to complete legal opinions which would allow the CIA interrogation program to go forward." [*Id.* at 182.] But the Draft Report, with all respect, misinterprets the only evidence it cites. As the Draft Report acknowledges, Bradbury has repeatedly stated, under oath and in his interviews with OPR, that he was never pressured to reach any particular result in his evaluation of CIA's interrogation program. In the end, it appears that OPR relies almost entirely on an email from then-DAG Jim Comey. But a fair reading of that email again suggests only that there was pressure to come to *an answer as soon as possible*, not pressure to come to *any particular answer or conclusion*. This is consistent with Bradbury's recollection. In light of this, we were pleased to hear that OPR did not intend to suggest that Bradbury was pressured to come to a particular result. [Statement of J. Meade, Dec. 31 meeting.][13]

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[12] Some of these considerations are discussed in classified portions of the Draft Report.

[13] It is extraordinarily commonplace for a client to urge or even pressure his or her attorney for a faster answer to a legal question than the attorney (or we, or a third-party reviewer, years later) may have preferred. Such clients furthermore typically are individuals and institutions with far less grave responsibilities than senior Executive Branch officials attempting to effectively defend our Nation and its citizens from terrorism and violence, consistent with legal advice from those positioned to undertake the analysis. In the same way, judges often impose tighter time constraints on attorneys, during trials and briefing, than the attorneys (or third-parties) might regard as optimal or

Another reason offered to support the review recommendation is the alleged failure of OLC or the Department to consider and address the moral and policy considerations triggered by the issues. [Draft Report at 189-90.] Although the Draft Report does not recommend OLC specifically do this, it does suggest that someone at the Department should address those issues. This criticism, however, appears to be based on a misapprehension of facts—both generally with respect to Department practices concerning the provision of policy (and moral) advice within the Executive Branch, and also more specifically with respect to events during the time period of the OLC opinions at issue.

Within the Executive Branch, there are extensive efforts to solicit relevant policy advice from all affected Departments or agencies. In this process, often referred to colloquially as "The Interagency," policy issues are reviewed and vetted, typically in an ascending process, with initial reviews and discussions occurring through subject matter experts and relatively senior officials. As the review progresses, it is carried forward and refined by officials such as the Deputies in the respective Departments. Ultimately, as appropriate, the policy reviews and analyses are further refined by "Principals," such as the Attorney General, the Secretary of Defense, the Secretary of State, and so forth. The exact number of levels of review can vary—based on whether there is broad consensus, the gravity or scope of the issue, etc.—but the salient point is that this review is undertaken and senior level Department officials can and do routinely provide policy advice within it. They also have the opportunity to provide moral advice, as appropriate, to interagency colleagues and the Vice President and President. With respect to policymaking concerning the question of interrogation practices at the time in question, it also has been widely reported that this was a subject discussed, at cabinet-level meetings, with, among others, the then-Attorney General present and participating.[14]

To be sure, some or all of us now participating in the review of the OPR Draft Report might disagree with the policy guidance that was then provided; we might even speculate about whether we would have disagreed with some or all of the policy assessments and advice provided if we actually had participated in events as they unfolded in real time in the months and years immediately following September 11, 2001. However, at the very minimum, the Department then and now participates, and surely will continue to participate, in a robust Executive Branch policy process that allows for senior level officials to offer, as appropriate, policy and moral advice.

Let us please offer three final points in this regard. First, in contemplating when and how the Department best offers its policy (or moral) advice to others in the Executive Branch, please note that the scope of policy questions under review is extraordinarily vast and complex. It reaches to issues, to take just a few examples, involving difficult environmental, diplomatic, economic, health care, and military matters. Our sister Departments and agencies within the

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even reasonable. The fact that Executive Branch officials would pressure OLC for *an answer*, so that they could proceed consistent with it, whatever that required, is enormously different than the allegation or speculation that an OLC attorney provided particular legal advice, or reached a particular conclusion, he or she did not believe in good faith was correct.

[14] *See, e.g.*, Staff of S. Comm. on Armed Servs., 110th Cong., REPORT ON INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xv (Comm. Print 2008); Condoleeza Rice, QFR from S. Comm. on Armed Servs. at 1-2, 6 (Sept. 12, 2008); John B. Bellinger, III, QFR from S. Comm. on Armed Servs. at 1-3, 7 (Sept. 12, 2008).

Executive Branch often are specifically tasked with being the world's leading experts on such matters, and those Departments and agencies draw upon literally hundreds of thousands of experienced and well-trained subject matter experts. Most of these experts are career civil servants who serve, and serve well, through administrations of whatever political affiliation. The Department of Justice and its senior leaders offer substantial policy and other advice in this Executive Branch process, but simple humility dictates the recognition that, on many issues presented, we are not the best-positioned voices in the policy dialogue.

Second, as part of this overall process, OLC has long had a unique role, both within the Department's efforts and within the interagency review as a whole. OLC often contributes to the policy process by being tasked to give simply legal advice, shorn of any policy preferences or shading. This task is well understood within the interagency process, and it is designed to ensure that at least one legal analysis, from very well-credentialed and hard-working attorneys, is provided that will not mask discretionary policy preferences as legal requirements or prohibitions. There are innumerable attorneys who work for our sister Departments and agencies, and often the claim is made that they, whether unintentionally or purposefully, are attempting to achieve policy outcomes by casting them as legal requirements. OLC therefore is tasked with providing legal advice *simpliciter*, across an enormously broad waterfront of complex legal questions, and not shading that advice with policy or other considerations. Again, such policy or moral advice is provided, as appropriate, by senior leaders from other offices and positions within the Department, and also, of course, from senior leaders from State, Defense, Treasury, EPA, HHS, and so forth, as well as, of course, by senior advisors to the President and Vice President.[15]

Third, with respect to the analysis set forth in the Draft Report, the comments to D.C. Bar Rule 2.1 appear at odds with OPR's suggestion that it would be "appropriate and necessary" for *OLC* to incorporate "moral, social and political factors" into its analysis of the relevant legal authorities concerning interrogation. [Draft Report at 189; *see also id.* at 191.] Specifically, Comment 3 to Rule 2.1 states, where "[a] client expressly or impliedly ask[s] the lawyer for purely technical advice," and is "experienced in legal matters," "the lawyer may accept [the request] at face value" and provide technical legal advice. Only where a client is "inexperienced in legal matters" may the lawyer's "responsibility as advisor" include providing guidance that goes beyond "strictly legal considerations." As discussed above, OLC's typical function in the Executive Branch is to provide its technical legal opinion to clients throughout the Executive Branch. Those clients (in this case, the General Counsel of the CIA and the White House Counsel) are sophisticated policymakers, who are fully capable of understanding the parameters of such advice and evaluating non-legal factors on their own. Those clients also are involved, along with the Attorney General and other cabinet members, as part of a robust and on-going Executive Branch review of relevant policy and moral issues.

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[15] If OLC were to more broadly provide policy and moral advice, it would necessarily need to gather substantial amounts of additional, relevant information across a broad array of subjects. Otherwise, the moral or policy advice would be ill-informed and even irresponsible. Such a process would diminish OLC's ability to perform its historic mission of providing pure legal advice. Attendant delays also would hinder OLC in its mission of providing that type of legal advice to the Executive Branch within timeframes that assist a President and his or her Administration to expeditiously evaluate and address challenges in a dynamic, evolving, and sometimes dangerous world, where inaction itself can have profound human consequences.

Finally, the next Administration will be free to review these opinions—as it is with all OLC memos or opinions—if it wishes. It is therefore unnecessary for OPR specifically to recommend such a review.

III. CONCLUSION

It is impossible to predict with precision the full impact of a recommendation of disciplinary action against lawyers who worked under the unprecedented circumstances referred to above, including the catastrophic loss of life suffered by the country in the September 11 attacks, the express threat of further such attacks and murders, and the possibility that such additional deaths could be avoided, as well as the absence of any reason to believe that these OLC lawyers were acting in anything but good faith. Nonetheless, it is also impossible to believe that government lawyers called on in the future to provide only their best legal judgment on sensitive and grave national security issues in the time available to them will not treat such a recommendation as a cautionary tale—to take into account not only what they honestly conclude, but also the personal and professional consequences they might face if others, with the leisure and benefit of years of hindsight, later disagreed with their conclusions. Faced with such a prospect, we expect such lawyers to trim their actual conclusions accordingly. Nor, if the recommendation of professional discipline stands, could the Department reasonably be expected to readily attract, as it does now, the kinds of lawyers who could make such difficult decisions under pressure without the lingering fear that if those decisions appear incorrect when reconsidered, not only their conclusions but also their competence and honesty might be called into question. OLC lawyers might be willing to subject themselves to the inevitable public second-guessing of their work that occurs years later in a time of relative calm. But we fear that many might be unwilling to risk their future professional livelihoods. Jack Goldsmith has written already of the dangers that what he calls cycles of aggression and timidity in intelligence gathering present to national security lawyers and the welfare of the Nation as a whole. *See* THE TERROR PRESIDENCY at 163-64. We believe that the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country.

Sincerely,

Michael B. Mukasey
Attorney General

Mark Filip
Deputy Attorney General