Document 6

U.S. Department of Justice

Office of Legal Counsel

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MANUAL FOR ATTORNEY-ADVISERS

The materials in this binder are intended to provide each new attorney in the Office of Legal Counsel ("OLC") with basic information and useful documents regarding the work, policies, and procedures of this Office and the Department of Justice. The materials are not exhaustive, however, and your assigned mentor and the Office's Executive Officer[1] can explain, amplify, and augment them.

We preface these materials with an overview of the Office.

THE WORK OF OLC

OLC has been described as the Attorney General's lawyer because of its responsibility for assisting the Attorney General in performing her function as legal adviser to the President and agencies in the Executive Branch. This function has its origins in the Judiciary Act of 1789, which provided that the Attorney General would "give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments touching any matters that may concern any of their departments," and has been continued under current law. *See* 28 U.S.C. §§ 511-513 (1994). In addition to this statutory authority, the Attorney General provides legal advice under Executive Order No. 12146, which calls for agency heads who serve at the pleasure of the President to submit interagency legal disputes to the Attorney General for resolution. OLC also provides advice and legal opinions to the Attorney General and the heads of other components of the Department of Justice. The Office is headed by an Assistant Attorney General ("AAG") and several Deputy Assistant Attorneys General ("deputies"). Because this Office acts as a legal adviser on issues that include some of the most sensitive in government, the ongoing work of the Office generally is not public and should not be discussed outside of the Office.

[1] This manual refers to various attorneys and staff members by designated roles. For a list of attorneys and staff currently filling these roles, see Tab 17.

☞ *For a compilation of the relevant legal authority pertaining to OLC, see Tab 1.*

☞ *For a history of OLC and other documents relating to the background and work of OLC, see Tab 2.*

An attorney joining OLC will likely face a broad range of legal and constitutional issues only rarely encountered in the attorney's prior practice or clerkship. A starting point—and an invaluable reference throughout your work at OLC—is a memorandum prepared by then-Assistant Attorney General Walter Dellinger addressing separation-of-powers issues that arise in a domestic context.

☞ *For a copy of the "Dellinger Memo," Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel,* Re: The Constitutional Separation of Powers between the President and Congress *(May 7, 1996), and an accompanying Table of Authorities, see Tab 3.*

Below, we briefly outline the basic practice areas of OLC. Note that OLC does not—and is not authorized to—provide legal advice outside the Executive Branch of the federal government. At times OLC will provide advice to others in the Executive Branch that is then shared outside of the Executive Branch, as when OLC's comments on pending legislation are conveyed to Congress as part of a Department or Administration position.

Opinions and Advice. OLC provides clients throughout the Executive Branch with written opinions and oral advice concerning a wide range of legal issues. Constitutional analysis—particularly in the area of separation of powers—makes up a large portion of the work of the Office. OLC also regularly addresses matters of statutory interpretation, such as determining what powers or duties derive from a statutory grant of authority or whether the absence of express authority precludes a contemplated agency action.

☞ *A more detailed discussion of OLC opinions and advice begins at page 4.*

Bill Comments. OLC reviews and comments on proposed legislation from a constitutional perspective. The Office's focus is often on the separation-of-powers implications of proposed legislation, but we advise on the full range of constitutional issues that the legislation may raise. In addition to commenting on bills during their congressional consideration, where appropriate OLC also provides comments when a bill is presented to the President, including suggested language for a veto or signing statement.

☞ *A more detailed discussion of the preparation of bill comments appears at page 12.*

Executive Orders and Attorney General Orders. OLC reviews for form and legality all Executive Orders and proclamations proposed to be issued by the President. In addition, OLC reviews for form and legality all proposed orders of, and all regulations requiring the approval of, the Attorney General.

☞ *For more detailed materials relating to OLC's "form and legality" review of Executive and Attorney General orders, see Tab 4.*

Ethics. OLC provides opinions for the White House, other agencies, and the Justice Department concerning the applicability and interpretation of the ethics laws. In addition, the Office of Government Ethics must submit many of its proposed regulations to the Attorney General for review and, in some cases, concurrence. OLC reviews such regulations on the Attorney General's behalf.

OPINION DRAFTING AND ADVICE GIVING

This section of the manual describes the substantive work of an attorney-adviser through the opinion drafting process, along with related but distinct functions—such as the preparation of bill comments and the provision of oral advice.

TRACKING NEW MATTERS

The Office tracks all assignments through a searchable electronic database. Every matter has a unique "matter number" under which information on the matter is stored in the database. In the case of a bill comment, an Executive Order, an Attorney General Order, or a citizen letter (*see infra* p. 16), one of the secretaries ordinarily assigns a matter number and records certain basic information before giving the document to the assigning deputy or an attorney. When the head of the office or a deputy assigns you any other kind of project (including a written opinion, a request for oral advice, a request for OLC participation in a working group, or a special project), you should ensure that all relevant information on the project is entered into the OLC database. You should obtain an OLC new matter sheet and fill out the matter title, requestor, attorneys and deputies assigned, and a brief description of the matter. Since the matter title may not fully reflect the issues the project involves, it is extremely important to identify the key issues in the description. Particularly when the Office considers an issue but has no occasion to produce a written product, the database can be an important research tool.

Once you have completed a new matter form, give it to one of the front office secretaries, who will assign a new matter number and enter the information into the database. They will return the new matter form to you. You should retain the form; when you complete the project, the form will become part of the Office's central file on the project. *See infra* p. 12.

☞ *For a copy of an OLC new matter cover sheet, see Tab 5.*

TWO-DEPUTY CONCURRENCE RULE

Throughout your work, you should keep in mind that, regardless of the type of project involved or the form the advice takes, the Office only provides advice to Department components or other agencies with the concurrence of at least two deputies (or a deputy and the AAG).

PRELIMINARY WORK ON FORMAL OPINIONS

Initial Meeting with the Deputies. For all substantive new matters, you should set up a meeting with the first deputy (and, unless time constraints make it impossible, the second deputy) supervising the project. The purpose of the meeting will be (1) to determine whether the request is one to which the Office can appropriately respond; (2) to identify other interested agencies or

components from which we should solicit views and to determine if the Office needs to seek further analysis or conclusions from the requestor; (3) to discuss the substance of the question presented; (4) if the Office has previously addressed the issue, to determine whether the Office is comfortable simply reiterating its previous advice; and (5) to set interim and final deadlines for completion of the work. On the back of a new matter form, you will find a First Deputy Checklist to review at this meeting.

To ensure that the discussion is helpful, you should do some preliminary research in advance of the meeting. You should first determine whether the Office has previously opined on the question presented. In addition to the matter tracking database described above, OLC has a second electronic database, BRS, containing past OLC opinions, file memoranda, letters, and certain other documents. Check BRS to see if the Office has written on the subject. You should also consult other attorneys in the Office who have handled issues in the general or specific subject matter of your request; they may know of some relevant work product or previous oral advice. In addition, consult any statute, regulations, or relevant legislative history that might bear on the issue, whether or not the agency's submission cites it. One or two days before the meeting, provide the deputies with copies of key results of your preliminary research (i.e., copies of the most important cases, OLC opinions, statutes, regulations, and legislative history).

Requesting Comments from Other Components and Agencies. An agency's opinion request often implicates the interests or expertise of other agencies or other components within the Department of Justice. After discussing with the deputies assigned to the matter whether to solicit comments from an interested agency or component, you should prepare, for signature of the AAG or first deputy, a letter to the general counsel or component head presenting the relevant questions and attaching the incoming opinion request.

☞ *For a copy of a sample letter soliciting agency comments, see Tab 6.*

You should notify the requesting agency of your intention to solicit comments from other agencies, particularly where we have been asked to resolve an interagency dispute. In the case of an interagency dispute, OLC's role is quasi-judicial. In this role, the Office does not utilize *ex parte* written submissions. Because it is the policy of OLC to share supporting materials with affected agencies, so that the submission of each agency is more useful, you should inform the requesting agency of your intent to solicit comments from others and to share the agency's materials. It is not unheard of for an agency to submit internal agency memoranda as supporting material and request that we not share such material with other agencies. On occasion, after being notified that the Office will share its materials with another agency, the requesting agency has withdrawn certain materials or even withdrawn its request.

Alerting Others. The Office sometimes receives a request for legal advice on an issue with important policy implications. For example, an agency may ask OLC whether a certain policy would be constitutional, but other entities in the Executive Branch may oppose the policy on

other grounds. Because the goal will be to arrive at a coordinated Department or Executive Branch position, it may be appropriate to consult the offices of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the White House Counsel to ensure that OLC does not unnecessarily attempt to resolve a complicated constitutional issue when the Department or the Executive Branch will oppose the policy in any event. You should consider and discuss at your initial deputies' meeting whether the case is one in which such consultation would be appropriate.

Evaluating Deadlines. Where the agency or the deputies have established a deadline, you should assess at the outset whether it is realistic in light of the work that will be involved and your workload generally. This will allow the deadline or your workload to be adjusted or the mater to be reassigned at the outset, rather than when the deadline is imminent or already passed.

RESOURCES AND RESEARCH

The Main Justice library is temporarily (i.e., for the next several years) located on the seventh floor. Supreme Court briefs and certain legislative materials are located in stacks on the fifth floor, accessible from the 5200 corridor. Microform materials are held in the basement, accessible from the elevators at the intersection of the 200 and 700 corridors. In addition to the materials located in the Main Justice library, the librarians can arrange to borrow books from libraries within and outside the Department.

☞ *For information on the location of materials within the Main library, see Tab 7.*

The Main library provides instruction on how to conduct legislative history research and how to use the Internet—including Thomas, a Library of Congress web site (thomas.loc.gov) containing links to current and recent bills—for legal research. You may wish to contact the Main library to arrange to participate in these programs shortly after you arrive. The head of the OLC paralegals can arrange for Westlaw training.

The OLC Library is located in room 3220. The Library contains some of the most used and most useful legal materials for our practice, and access to the Library is limited to OLC attorneys and staff. In addition to a complete set of the U.S. Code and U.S. Code Annotated and the full range of federal reporters, the OLC Library contains Statutes at Large, U.S.C.C.A.N., the Code of Federal Regulations, recent copies of the Federal Register and Congressional Record, and presidential papers and documents. The OLC Library also contains a number of books and treatises useful in our practice, including historical materials concerning ratification of the Constitution, the General Accounting Office's Principles of Appropriations Law (also known as the GAO "Redbook"), and treatises on administrative law, civil procedure, constitutional law, immigration law, and international law.

Apart from the materials in the OLC Library, many OLC attorneys retain binders containing key separation-of-powers cases that bear upon the Office's practice. Ask your mentor if he or she can provide you with such a binder for copying.

OLC has historically published selected opinions in bound volumes. (The earlier Attorney General opinions are also published.) These published opinions are also available on Lexis and Westlaw, and certain publicly available opinions appear on OLC's Internet website. *See infra* p. 17. OLC also maintains hard and electronic files of its work product. The electronic OLC database—BRS—is available by selecting the icon on the desktop or start menu of your computer. BRS is a searchable database and is broken down into several sub-directories to permit research limited by year. BRS training is available through the head of the OLC paralegals. BRS contains all formal OLC opinions. *Not all OLC opinions are published and not all opinions are public.* Unless otherwise authorized or based upon an independent determination by an appropriate deputy, an OLC opinion must not be shared beyond the agency to which it is addressed. BRS also contains all substantive file memoranda. These may provide an invaluable record of prior research as well as previous legal conclusions that the Office communicated orally to the client agency. Such memoranda are rarely shared outside of the Office.

In addition to providing an exhaustive and uniquely relevant database for research of OLC issues, OLC work product also reflects Office precedent. Formal OLC opinions—memoranda provided for a client outside of OLC and signed by the head of the Office or a deputy—record the formal legal advice of the Office and, unless rejected or modified by the Attorney General or the President, are binding on DOJ components and the Executive Branch generally and provide important precedent for resolving future questions or disputes. OLC opinions may address an issue squarely and resolve it authoritatively. In other cases, the opinions will, like case law, provide authority or analysis by analogy and should be used as such. Nonetheless, OLC precedent is not immutable and an attorney-adviser should be prepared to support or disagree with the conclusions of a relevant opinion.

File memoranda do not necessarily reflect the fully considered view of the Office and generally pertain to less fundamental issues. They nonetheless reflect advice previously given.

In addition to BRS, hard copies of all OLC work product are maintained in the "day books," the official chronological files of the Office. The most recent day books are kept in the Copier Room (Room 3263), while older ones are stored in the library. For some subject areas in which the Office provides advice, the Office also maintains written work product by subject matter.

☞ *For an index of OLC files maintained by subject matter, see Tab 8.*

DRAFTING AN OLC OPINION

There is no single way to write an OLC opinion. We try to stress the obvious virtues: be clear and concise. The most important thing to remember is to be accurate and to reach the soundest possible conclusion. OLC's value depends on our ability to give prompt, objective, clear, and, most importantly, accurate legal advice. It is important to talk with your first deputy to agree on a general outline of the advice before you write. Unless a project is classified or so sensitive that information about it must be restricted, do not hesitate to share drafts with any other attorney in the Office who, by dint of expertise, experience, or a fresh set of eyes, may be of help.

Every opinion, memorandum, or letter is the product of the Office, not of any particular attorney, and some of our better products have been edited a great deal and gone through several drafts. Indeed, when such revisions occur, you should understand that this process reflects both the complexity of the issue and the practice of the Office; it should not be thought to reflect on the quality of your draft. It is the rare draft that emerges as a final OLC opinion with little evolution.

Writing an opinion is very much an interactive process. Although the process will vary with each project, you should stay in contact with the deputies as your work progresses, perhaps sharing outlines, perhaps talking informally. It is normally the case that an attorney and deputies assigned to a project will meet many times before a first draft is completed.

The best introduction to the OLC drafting process is to review several models. As you will see, it is generally useful—and indeed the common practice—to begin each opinion with a statement indicating that we are responding to a request and identifying at the outset the question presented and our conclusion.

☞ *For samples of formal OLC opinions, see Tab 9.*

OLC POLICIES ON STYLE AND CITATION

Matters of Format and Style. You should prepare memoranda using Times New Roman font. Use 12-point for text and 10-point for footnotes. In footnotes, include two spaces after the footnote number.

Generally, we use the Sixteenth Edition of the *Bluebook* when citing to sources in OLC opinions. Following are certain exceptions and matters that bear clarification:

General Citation and Style Rules

1. *Typeface.* Italicize case names and titles, including book and memoranda titles.

2. *Short forms*. Do not use "hereinafter." Simply include abbreviations or short forms in parentheses with quotation marks. E.g.: ("Bombmaking Report") or ("FBI"). The format for internal cross-references should be as follows: *See supra* p. 5; *infra* p. 10. For previously cited materials that do not require a short form, use the following format: *See* Moore, *supra*, at 6-10. For materials frequently cited in the same document or that would have lengthy *supra* forms, we favor using the short form. E.g.: FDA Report at 3; not Food and Drug Administration, *supra*, at 3. If a case is cited frequently (once every two or three pages) throughout a document, it is acceptable to use a short form throughout. If the case is not as frequently cited, use a short form within particular sections and provide the full cite again in a new section. Do not use a short form if the previous citation to the same case appears more than four pages earlier.

3. *Style*. We use Congress's rather than Congress'. Capitalize branches of government and like words when used as a noun (the Judiciary, the Legislature, the Executive Branch, the Cabinet; but judicial decision-making, legislative process, executive action, cabinet meetings). Capitalize State when using it as a noun to refer to a litigant or governmental body (The State is losing tremendous revenue and state expenditures are increasing). Italicize i.e. and e.g. only when using them as signals. Italicize only those Latin words that are not incorporated in common usage. For example, use quid pro quo and ad hoc but *inter alia*, *amicus curiae*, and *ex parte*.

4. *Quoted Material and Omissions*. Only use a block quote format when the quoted material is 50 or more words. It is acceptable to omit internal quotation marks and indicate the omission parenthetically (internal quotation marks omitted). Use (footnote omitted) and (citation omitted) rather than an ellipse.

Specific Materials

1. *Legislative Materials*. When citing to legislative materials, we follow the format used in the Sixteenth Edition of the *Bluebook*. That is, do not include the session number for federal bills and hearing materials. For *Id.* citations to House and Senate Reports that are reprinted in U.S.C.C.A.N., use the following form: *Id.* at 34, 1986 U.S.C.C.A.N. at 436.

2. *U.S. Code and C.F.R. Citations*. Include the year when citing for the first time to any section of the United States Code and the Code of Federal Regulations. To avoid clutter, place the year in a separate citation sentence

rather than in a textual sentence.[2] Cite to U.S.C. except when the U.S.C. supplement does not reflect a recent change to the provision you are citing. It may be appropriate to use both U.S.C. and U.S.C.A. citations in the same document. For example, it is acceptable to use both of the following in the same document: 18 U.S.C. § 2701 (1994) and 18 U.S.C.A. § 2703 (West Supp. 1999). When citing a range including both provisions, however, cite the source incorporating the latest provisions, even if some provisions have not been amended. 18 U.S.C. §§ 2701-2711 (West Supp. 1999).

3. *Executive Orders*. Do not use commas in Executive Order numbers.

4. *OLC and AG Opinions*. Opinions of the Office of Legal Counsel should include a "Re:" line. The citation should start with "Memorandum for." Memorandum for Alan J. Kreczko, Special Assistant to the President, from Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty* at 5 (Nov. 25, 1996). Published opinions of the Office should also include the italicized title and should use the following abbreviation: 1 Op. O.L.C. 168 (1977). Include the A and B in citations to Volume 4 of the OLC opinions. When citing the opinions of the Attorney General, include the title of the opinion.

5. *Other Memoranda*: Cite other memoranda or letters using the format for OLC memoranda.

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[2] Thus, using a real example from the publication project, we should *not* employ the following sentence structure for the first references in an opinion to particular provisions:

> We believe that . . . payments to a government employee under FTTA section 7 do not violate 18 U.S. C. § 208 (1988 & Supp. IV 1992) or 18 U.S.C. § 209(a) (1988 & Supp. IV 1992).

Rather, we should write the sentence as follows:

> We believe that . . . payments to a government employee under FTTA section 7 do not violate § 208 or § 209(a) of title 18. *See* 18 U.S.C. § 208 (1988 & Supp. IV 1992); *id.* § 209(a) (1988 & Supp. IV 1992).

In the case of a subsequent citation to the same provisions, however, we could use the original structure:

> We believe that . . . payments to a government employee under FTTA section 7 do not violate 18 U.S.C. § 208 or 18 U.S.C. § 209(a).

REVIEWING AND FINALIZING AN OLC OPINION

As a first step, the first deputy assigned to your matter will review your draft. Along with your draft, you should provide the deputy with a copy of the incoming request and all relevant materials, such as the statute or key cases. (If materials are voluminous, you may wish to check with the deputy before transmitting them all.) As you work in collaboration with the first deputy, your opinion may go through several redrafts. Consult the deputies regarding when to involve the second deputy and AAG in review. Although sometimes the second deputy and AAG need not review the draft until the first deputy is prepared to sign off on it, at times it will prove more efficient to share earlier drafts with one or both of them.

Cite Checking. After the first deputy has reviewed your opinion, or in some cases after two deputies have done so, you should ask the head of the OLC paralegals to assign your opinion to a paralegal for cite checking. If the opinion changes substantially as a result of second deputy or AAG review, it may be appropriate to resubmit the opinion for further cite checking.

Finalizing Your Opinion. When the first deputy tells you to finalize the opinion, you should verify whether the first deputy or the head of the Office will be signing the document and adjust the "From" line accordingly. If a long time has passed since the agency requested the opinion, confirm that the opinion is still directed to the proper official. The final opinion should be printed on bond paper. If you e-mail your document to your secretary, he or she can convert the format and print it out on bond, although you are welcome do both those things yourself.

When the opinion is printed in final, you should again proofread the document. Do not assume that just because you read it one draft ago, it is okay. You will be shocked at the number of printing problems that can appear out of nowhere in the final draft—forced pages, missing pages numbers, font problems, etc. Read it again to be sure.

Before the opinion is signed, complete a "publication recommendation sheet" containing basic information on the opinion and your recommendation whether the opinion should be published. For a more detailed discussion of the publication process, see *infra* p. 17.

Distributing the Opinion. When the opinion is signed, ask your secretary to prepare an envelope to send the original signed opinion to the recipient. In some cases, you will want to fax the opinion immediately in addition to sending the original. Also, in some cases, courtesy copies should go to other agencies or components, particularly those that submitted views.

Your secretary will make a copy of the opinion for internal distribution. It will go to the head of the Office, to all of the deputies, to you, to the OLC Executive Officer for inclusion in the OLC day books, to the attorney-adviser coordinating the publication project, and to the file on your particular matter. Your secretary will record the name of the final electronic file, so be sure that you provide it to him or her if you print the final opinion yourself. E-mail an electronic version of the opinion to the secretary who maintains BRS.

Creating the OLC File. After you complete an opinion, you should compile materials to be retained in the OLC files. The OLC file on your matter will contain the original request, the new matter cover sheet, a copy of the opinion, and any materials that you think are useful to maintain but are not otherwise available (for example, you need not include copies of the statute or cases, but do include copies of an unpublished agency memo that bears on the issue). It is your responsibility to see that these materials are assembled. Transmit the materials to the head of the OLC paralegals.

ORAL ADVICE

It will not be uncommon for you to provide oral advice. Under no circumstances should you provide someone with substantive advice without conferring with a deputy. Once a matter is assigned, it is not unusual for individuals from the client agency (or other interested parties in the government) to call you directly. In most instances, this is entirely appropriate and, indeed, integral to the efficient operation of the Office and the smooth progression of the matter on which you are working. You will be expected to exercise your good judgment in what is and is not appropriate to say over the telephone. When in doubt, check with a deputy.

On some substantive matters, after conferring with a deputy, you will relay the Office's advice orally. You should memorialize the question presented, the Office's conclusion, and, as appropriate, the research, analysis, and reasoning involved, in a file memorandum. The memo should reflect who in the Office participated in the formulation and approval of the advice. The file memo should be reviewed by the first and second deputies before being "filed." Provide the file memo to your secretary for distribution and e-mail it to the secretary who maintains BRS. A file memo does not ordinarily require cite checking.

☞ *For sample file memoranda, see Tab 10.*

When you think it might be helpful to do so, you should prepare a non-substantive file memorandum (or, as may be appropriate, a memo to the first deputy), recording a conversation or memorializing some other aspect of a matter. Such memoranda are not included in BRS or the day books.

BILL COMMENTS

OLC reviews virtually all legislation and accompanying reports transmitted by Congress to the Administration or the Department of Justice for review. In addition, because almost all documents, bills, or testimony the Executive Branch provides to Congress must go through an interagency clearance process, OLC routinely reviews other agencies' testimony or comments on legislation. We refer to this aspect of our work as the "bill comment" practice. Generally speaking, the Office of Legislative Affairs ("OLA") coordinates the Department's review of matters within the Administration and vis-à-vis Congress. In the case of appropriations measures,

however, OLC communicates its views directly to the Office of Management and Budget ("OMB").

Assigning Bill Comments. Bill comments will be assigned to you, in the first instance, by the deputy responsible for this practice area. The distribution of bill comment assignments is based on a host of criteria, including the workload of various attorneys, the subject matter involved, and the bill's length and complexity. Once a bill is assigned to you, subsequent iterations of the bill, related amendments, correspondence, and indeed related bills should come to you directly from the front office secretaries without going to the bill comment deputy.

What They Look Like. When a bill is assigned to you, a staff member in the Office will put it in your "in" box. On the cover will be a green sheet that is attached by OLC. It will show your name (as the attorney assigned) and the due date for comment. Whatever your workload, you should look at it immediately to determine the deadline. The green sheet will include an OLC tracking number used to track bill comments in our computer database. In many cases, the green sheet will have two tracking numbers: one in brackets and the other without. The number with no brackets is the tracking number for the attached bill. The number in brackets is the number that was assigned to an earlier version of the bill, another amendment, or related legislation. This information can be very useful, especially when you were not the attorney who reviewed the previous or related bill comment denoted in brackets. With this number, you can determine—by checking the computer database or the hard file—whether we had a comment on the previous bill.

Below the green sheet, there ordinarily will be a pink sheet (in the case of testimony, a yellow sheet) attached by OLA. It will state the due date by which OLA must receive comments. The pink sheet will also list other information, such as which other components are reviewing the bill. The key information is the due date for comments, the name of the bill, the bill number or, in the case of material not related to a pending bill, a number assigned by OLA such as "B. 123." The OLA pink sheet will also list—near the bottom—the OLA contact handling the bill. This is your OLA contact for discussing deadlines and for transmitting OLC's comments to OLA.

In the event that a deadline is not realistic (they are sometimes imminent), you should call the OLA contact to find out if the deadline is flexible and, if so, what new deadline can be arranged. Negotiating deadlines with OLA is, in the first instance, your responsibility, but you should also keep the deputy informed of any arrangements and request the deputy's assistance where needed to arrange a workable deadline with OLA. If the matter appears upon initial review to be inconsistent with your workload, you should discuss it with the bill comment deputy immediately. Because many bills will automatically come to you from the front office secretaries, the bill comment deputy may not be aware of the full volume of bills sent to you. Thus, in the event that you become overloaded, you should alert the bill comment deputy immediately to discuss how to alleviate the volume. Similarly, if you are unable to meet a deadline, you should discuss the matter with the bill comment deputy.

What To Look For. We review legislation and related materials for constitutional issues, often relating to the separation of powers, particularly those concerning presidential prerogatives, such as the Appointments Clause, war powers, foreign affairs, etc. In addition, we focus on non-structural constitutional issues, such as equal protection, due process, and First and Fourth Amendment rights. Although it is not our principal emphasis of review, we have provided comments relating to statutory issues, such as instances in which proposed language would conflict or create an ambiguity with another statute. Such non-constitutional review, however, is typically limited to instances in which the OLC reviewer is aware, because of expertise or previous exposure, of such a statutory problem. Thus, where you find such a problem, it may merit comment, but you need not feel that you should seek out such issues.

When you identify a possible issue for comment, you should use your judgment as to the extent of preliminary research appropriate. You may wish to consult with your colleagues, or to review case law, OLC opinions, and prior comments. Before you begin drafting, however, you should consult with the bill comment deputy to discuss the potential issues for comment. This may save you significant time (insofar as the deputy may be aware of relevant research—like an impending OLC opinion—or may determine that the issue does not warrant comment). On occasion, you will identify issues that merit comment but that arise so often in our practice that there is an established body of OLC work on which to draw in drafting your comment. In such cases, it may be more efficient to draft the comment and then share it with the bill comment deputy.

Drafting Bill Comments. There are few hard and fast rules about bill comments. On the whole they tend to be short—often only one page and rarely more than three or four. It is helpful to describe the relevant provision briefly at the outset of the comment. Although you have the text of the bill in front of you, future OLC attorneys doing research will find your comments more useful if they include bill descriptions. Bill comments also follow a rather standard format that can easily be discerned by review of a few models.

Because many issues recur in our bill comment practice, prior comments may provide helpful support for particular propositions. For the benefit of the reviewing deputies, you may wish to include citations to prior bill comments in your initial draft. Because bill comments themselves rarely become public, *see infra* p. 18, we generally do not cite them in final bill comments; you should therefore remove such citations before transmitting the comment to OLA or OMB.

☞ *For models of OLC bill comments, see Tab 11.*

The bill comment deputy will function as the first deputy for the bill comment and, as with an opinion, a second deputy will need to review the bill comment. Bill comments require cite checking and must be signed, but, unlike opinions, they need not be printed on bond paper. Bill comments are distributed and recorded, however, in the same manner as opinions. You should follow the procedures detailed *supra* p. 11. In addition to distributing the hard copy of your bill

comment, you should e-mail it to the OLA contact person, with a *bcc* to yourself and a *cc* to the bill comment deputy. (In addition, the Office at times has experimented with having an attorney-adviser act as a liaison with OLA to ensure that our comments are included in final letters to Congress or within the Administration; include a *cc* to this person if applicable.) The subject line of the e-mail should reflect the title of the bill (though you should feel free to abbreviate as needed) and the bill number. In the e-mail, be sure to include the OLC tracking number. You should also note on the green sheet attached to the bill that you had a comment and briefly summarize the comment. You should attach a copy of the e-mail and the comment to the back of the bill and give the packet to your secretary for filing.

When OLA incorporates an OLC comment into a letter to Congress or within the Administration, the OLA contact should route a signed copy of the letter to OLC. When you receive a copy of such a letter, you should ensure that it also has been routed to the attorney-adviser who acts as a liaison with OLA (if there is someone who fills that role).

No Comment. In the vast number of cases, the legislation, reports, testimony, and correspondence we review present no constitutional issues or any other issue meriting an OLC comment. If you are uncertain whether an issue you have identified merits comment (or, indeed, whether it is even a constitutional issue at all), you should consult with the bill comment deputy. In many cases, you may wish to consult as a preliminary matter with a colleague with expertise in the relevant area. If, based upon your own determination or following consultation with a colleague, the bill does not merit comment, you may communicate that "no comment" to OLA. Unless you are relatively new to the job, you should not feel that you must check with the bill comment deputy in such cases (so as to avoid conversations like, "I've read this bill authorizing the Small Business Administration to conduct a review of its pencil acquisition procedures, and I don't think there are any constitutional issues"). When you have no comment, send an electronic mail to the OLA contact, with a *cc* or *bcc* to yourself. Some deputies handling the bill comment process like to receive copies of no-comment e-mails; check with the deputy in question to determine his or her preference. The subject line should reflect the title of the bill (though you should feel free to abbreviate as needed) and the bill number. It is often helpful to include the OLC tracking number, so that you can easily determine, as you review your assignment report or a later or related version of a bill, when and how you handled the matter. A no comment would look like this:

To: Greg Jones
From: Oscar Cox
Re: HR 1234, SBA Pencil Acquisition Bill

OLC has no comment on H.R. 1234, the Small Business Administration Pencil Acquisition and Review Act of 1999. [OLC No. 37123]

Oscar Cox (4-5555)

You should save a copy of the e-mail in an electronic file devoted to bill comments, so that you can easily refer to it when a subsequent iteration of the bill circulates or when you are reviewing your assignment report. You should note on the green sheet that you had no comment and return the bill to your secretary so that it may be logged into the system as completed.

If you consider or research an issue at any length or discuss it with a deputy and decide not to comment, you should briefly note the issue considered or discussed on the green sheet in the section entitled "List Issues Involved." (For example: "Considered potential *Printz/New York* problem with subsections 5(b), (c), and (i). Discussed with deputy and decided not to comment on the theory that 5(b) essentially supplies rules of decision, 5(c) is in service of 5(b), and 5(i) creates no new difficulties.") The brief comment will become part of the OLC matter tracking database and will assist attorneys who consider related or similar bills.

CITIZEN LETTERS

The Office frequently receives letters from citizens seeking legal advice or assistance. One of the paralegals ordinarily prepares, for review by an attorney-adviser and the signature of a deputy, responses stating that, because OLC is authorized by law to render advice and assistance to the President or the heads of Executive Branch agencies, the Office cannot provide the requested assistance. On occasion, the Attorney General refers citizen correspondence he or she receives to this Office. Although we respond to such letters by noting the Department's long-standing policy not to provide legal opinions for persons outside the Executive Branch, we generally offer background information that is responsive to the inquiry.

☞ *For sample responses to citizen letters, see Tab 12.*

OLC Administrative Matters

Publication and Public Release of Opinions

Should the Opinion Be Published? OLC publishes selected opinions in bound volumes. These published opinions are also available on Lexis and Westlaw, and certain publicly available opinions appear on OLC's Internet website. For publication purposes, eligible OLC opinions include (a) any work product, memorandum, testimony, etc., (b) that is signed by a deputy or higher, and (c) that is addressed to someone outside of OLC. We do not publish form and legality memoranda for Executive Orders or Attorney General Orders. We only publish bill comments in rare cases, when they are particularly extensive or important.

OLC's Publication Project Committee determines, based on recommendations by the attorney and deputies, whether to publish an opinion. Before a deputy signs your opinion, you should fill out a "publication recommendation sheet." You should find the opinion recommendation sheet attached to the opinion when it is returned to you after a cite check by one of the OLC paralegals. The form includes the name of the opinion, the date the opinion is to be issued, the date the opinion was cite checked, proposed headnotes for the opinion, and recommendations from the attorney and deputies involved on whether the Office should publish the opinion. Once you fill out the form and the opinion is signed, attach a signed copy of the opinion to the form and circulate it to the deputies on the project for their recommendations. Once everyone has made a recommendation, you should return the form with a signed copy of the opinion to the attorney who coordinates the publication project. You should include headnotes even if you do not recommend that the Office publish the opinion, unless it is clear that the opinion is not suitable for publication, since the deputies or the Committee may overrule your recommendation.

☞ *For a copy of the publication recommendation sheet, see Tab 13.*

In making your recommendation, you should consider, among other things, whether the opinion: (1) addresses an issue likely to recur in the same or another context; (2) addresses an issue of interest to the public, or others beyond the components or agencies to which it is distributed; (3) addresses a matter that gives helpful insight into the operations of government; (4) revises a prior published decision of OLC; (5) conflicts with written opinions of other agencies or governmental bodies; or (6) takes an approach not taken by the courts.

Other Publication Project Tasks. As the Office prepares opinions for publication, you may be asked to review opinions and draft headnotes or to review cite checking conducted by the paralegals. You should regard these assignments as important and complete them in a timely fashion. You will often find that once you turn to them, they require relatively little time.

Confidentiality and when an opinion is made "public." OLC treats all matters within the Office as pertaining to the business of our "clients" and—much as in private practice—we regard the matters as confidential within the Office. This is particularly the case with our opinions. If others ask you for a copy of an opinion, check with the first deputy. Almost invariably, you will need to seek the views of the client agency. (In those cases when OLC wishes to publish an opinion, we first get the permission of the client agency.)

If the opinion is released *outside of the Executive Branch* it is regarded as "public." If an opinion is released, let the head of the OLC paralegals know so that he or she may note the distribution on an opinion list and the day book copy of your opinion. For more recent opinions, the head of the paralegals and the attorney-adviser who coordinates the publication project maintain a list that generally indicates which opinions have been released. Although OLC's bill comments are rarely, if ever, publicly released, the substance of the advice is often incorporated in letters to Congress from OLA or OMB setting forth Department or Administration views on the legislation. In such cases, the OLA or OMB letter, rather than the memorandum from OLC, would constitute the public statement of the Department or the Administration.

HANDLING AND MAINTAINING DOCUMENTS AND ELECTRONIC MAIL

You should retain all notes, documents, and e-mails that are important to understanding a decision of the Office. It may be useful to enable the AutoArchive feature of your e-mail program to facilitate maintenance of e-mails.

Once your security clearance has been approved, you will be provided with a mandatory briefing on access to and handling of classified materials. Under no circumstances should a classified document be left unattended or provided to an individual without an appropriate clearance or without a need to know of a document's contents. Safes are located in the AAG's office suite. Most but not all documents may be maintained in our safes. Information classified at the code word level may only be discussed or maintained in a suitable secure facility. The AAG's Confidential Assistant and the Security Programs Manager know the combinations to the safes. Documents requiring storage should be taken to the Command Center when persons with access to safes are unavailable. There are special rules for duplicating classified documents. In addition, classified documents may only be disposed of by shredding.

☞ *For more information on security issues, see Tab 14.*

If a document is disposable and is not classified, but implicates privacy concerns or is otherwise sensitive, you should deposit it in a burn bag.

ASSIGNMENT REPORTS

Attorneys must submit, on a biweekly basis, assignment reports to the deputy who tracks assignments. As they become due, your secretary will prepare for your review a draft assignment

report. Nonetheless, it is your responsibility to stay on top of this and to ensure timely completion of your assignment reports. Drawing on the computer database, your secretary will create a draft report identifying all of your pending and recently completed matters. To facilitate the deputies' review of your assignment report, you should ensure that your secretary has placed your pending legal opinions first, ahead of your bill comments.

For each project, the report will include the OLC tracking number and the information on the new matter form for the matter. Your principal work in reviewing the draft assignment report will be to update the description of the matter's status. You should be brief, but sufficiently descriptive that the reader—the assigning deputy—will have a good sense of your workload and the flavor of the project. You should also review your assignment report carefully to determine that completed matters are so identified.

Once your secretary has edited your assignment report and you have reviewed it, you should initial the first page. Your secretary will then distribute copies of the report, including a copy to you. Be sure to maintain a file of your assignment reports, as you may wish to refer to your last assignment report as you review the next one.

☞ *For a sample assignment report, see Tab 15.*

Budgetary Statistics

The last page of your assignment report will include a sheet entitled, "Budgetary Statistics." This sheet identifies, in the most bare-bones fashion, the volume of work you produced during the period covered by the assignment report.

On your budgetary statistics form, you should count opinions, memoranda, bill comments, orders, and any other written advice only once, at the time the matter is completed and a written product issued.

Under bill comments, you should include "no comments" as well as bills or agency testimony on which you provided a written comment.

Record as a separate item each time you provide oral advice—whether by telephone or at a meeting. Where multiple conversations or meetings occur on a single topic or related topics, record each instance in the appropriate category on the budgetary statistics form. Do not, however, count conversations in which you are not providing substantive legal advice but are simply being asked a question or being given additional factual information. Count any meeting attended where you could have been called upon to offer advice or spot issues, whether or not you actually gave advice. Also, count oral advice even on matters on which written advice is separately provided.

If you provide significant assistance to the head of the Office, a deputy or to another

attorney-adviser on a matter (*e.g.*, preparation for a meeting or reviewing a written document), record that on the budgetary statistics form. You need not, however, list a separate item on the assignment report (unless you suspect that on one has opened a new matter, in which case ask whether you should do so).

ETHICS MATTERS

Shortly after your tenure in OLC begins, you will be required to attend a departmental ethics briefing. The Office's designated ethics officer will provide you with the dates and times of these briefings. It will be your responsibility to arrange to attend the briefing.

If in the course of your tenure you have any ethics questions or concerns, you should contact the designated ethics officer. There are, however, two general areas about which people often have questions.

Conflicts of Interest. If you, a spouse, dependent child, general partner, or an outside organization in which you are an officer, director, trustee, general partner, or employee or with which you are negotiating for employment has a financial interest in a particular matter in the office, you may not work on that matter, unless you obtain a waiver. Although ownership in a diversified mutual fund will not disqualify you when the stocks held by the fund might otherwise present a problem, ownership in a mutual fund concentrating in a particular industry, State, or country may disqualify you from working on a matter involving that industry, State, or country.

Personal Use of Office Resources. The second area of frequent inquiry concerns personal use of office resources. Here are the basic rules about what you may do (provided your activities do not interfere with your work):

1. You may make personal use of office and library equipment and facilities, as long as there is only negligible expense to the government, such as for electricity, ink, small amounts of paper, and ordinary wear and tear.

2. You may make personal calls of reasonable length and number, as well as faxes, to locations within the commuting area; you may also make long-distance calls of reasonable length and number, if you charge them to a personal account, such as a credit card.

3. You may use e-mail for short personal messages, as long as you do not send these messages to large groups of people or disseminate information on non-governmental activities like fundraising or a business.

4. You may make reasonable and limited of the Internet, as long as

access is not to one of the Internet sites that will charge the government as a user or to material, such as sexually explicit material, that is inappropriate for the workplace.

5. Within limits of reasonableness, you may use Westlaw after-hours for pro bono matters and professional development.

REIMBURSEMENT/SUPPLIES/CABS

Office supplies are available in the copier room. You may request additional supplies by asking OLC's Executive Officer. You should hesitate before spending money in connection with Office matters in the expectation that you will be reimbursed. These matters are covered by complex rules and you should check with OLC's Executive Officer before expending any funds.

If you do not have parking privileges and a particular project requires that you work late (generally after 8:00 p.m.), you may be reimbursed for cab fare incurred for transportation home from the Office. Provide a receipt to OLC's budget and financial contact.

PARKING

The Office has a limited number of parking spaces for attorneys and staff, which are assigned on the basis of seniority among those wishing to drive. If you are not eligible for a parking space or do not choose to have one assigned to you, and you commute by public transportation, you may be eligible for a transit subsidy. Check with OLC's Executive Officer.

ATTIRE

Attorneys are generally expected to wear business attire, with exceptions to this general rule left to each individual's good judgment based upon such factors as weather or meetings.

Casual Friday. On Fridays attorneys and staff may dress in casual attire that is appropriate for a professional office setting. Please note that although Casual Friday is widely practiced in the Department and in Washington generally, we advise that you dress in business attire if you anticipate any meetings outside the Office on a Friday.

Casual August. As some accommodation to the relative quiet of August and with due regard for the city's early history as a swamp, the AAG has often extended the Office's Casual Friday policy throughout August, with attorneys advised to dress appropriately when meetings outside the Office are scheduled. Indeed, it may be advisable for attorneys to keep appropriate business attire in their offices in the event of an unexpected meeting. The AAG ordinarily declares Casual August to be in effect from Congress's August recess through Labor Day.

COLLEGIALITY

The Office prides itself on its relatively small size and the collegiality that its size permits. Indeed, it historically has been the view that the nature of OLC's work and its inherently collaborative nature mandates a small staff. Accordingly, you should not hesitate to avail yourself of that collegiality, seeking out the views or assistance of others. Likewise, you should freely make yourself available to others, offering the benefit of your own experience (which you will develop surprisingly quickly) as well as the benefit of your time.

More formally, the Office often has Wednesday lunches, during which attorneys of the Office discuss pending matters of interest or a single attorney presents a pending matter for discussion. By the same token, OLC is a busy place. You are the ultimate judge of your schedule and the balance that your docket demands. You should also understand that those same demands may keep many colleagues in their offices, or keep doors shut, or heads wrinkled in concentration.

Collegiality also demands due regard for our colleagues even when the press of our own business isolates us. For example, when using a printer—your nearby network printer, or the Westlaw or BRS printers—please pick up your documents promptly.

You should also print out law review articles from electronic databases with hesitation. Such articles take painfully long to print out and you should only do so when a hard copy is not available from the library. If you are printing out law review articles as background research, you should do so in off-hours. If your research is for a personal project, you are subject to the ethical restrictions noted above; as a simple matter of collegiality, you should not take up printer time during the work day.

MISCELLANEOUS

Your mentor, your executive officer, and the deputies are all obvious resources that have been mentioned in various sections of this manual. We would be remiss if we failed to point out the most senior attorneys in OLC, who have worked through various administrations and offer a wealth of knowledge, expertise, and sound judgment. They are also, without exception, generous colleagues. They are: Paul Colborn, Robert Delahunty, Rosemary Hart, and Dan Koffsky.

Topping them all is our colleague Herman Marcuse, who joined the Department of Justice in 1947 and has been with OLC since 1958. Herman works part-time, and remains an active and valued colleague and an encyclopedic resource to the new attorneys of the Office.

☞ *An organizational chart for the Department of Justice appears at Tab 16.*

☞ *For a list of attorneys and staff who currently serve in various roles within OLC, see Tab 17.*

Document 7

United States Department of State

Washington, D.C. 20520

January 11, 2002

UNCLASSIFIED
MEMORANDUM

TO: John C. Yoo
Deputy Assistant Attorney General
Office of the Legal Counsel
United States Department of Justice

FROM: William H. Taft, IV WHT
Legal Adviser

SUBJECT: Your Draft Memorandum of January 9

I attach a draft memorandum commenting on the draft you sent me earlier in the week. While we have not been able in two days to do as thorough a job as I would like in reviewing your draft, I am forwarding these comments to you in draft form now for your consideration. They suggest that both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.

Our concerns with your draft are focussed on its consideration of the status of detainees who were members of the Taliban Militia as a practical matter. Under the Geneva Conventions, these persons would be entitled to have their status determined individually. We find untenable the draft memorandum's conclusion that this is unnecessary because (1) Afghanistan ceased to be a party to the Conventions, (2) the President may suspend the operation of the Conventions with respect to Afghanistan, and (3) customary international law does not bind the United States. As a matter of international law, the draft comments show, all three premises are wrong.

The draft memorandum badly confuses the distinction between states and governments in the operation of the law of treaties. Its conclusion that "failed states" cease to be parties to treaties they have joined is without support. Its argument that Afghanistan became a "failed state" and thus was no longer bound by treaties to which it had been a party is contrary to the official position of the United States, the United Nations and all other states that have

considered the issue. The memorandum's assertion that the President may suspend the United States' obligations under the Geneva Conventions is legally flawed and procedurally impossible at this stage. The memorandum fails to address the question of whether customary international law is binding on the United States as a matter of international law. (As John Marshall was fond of saying, to ask the question is to answer it.)

John, I understand you have long been convinced that treaties and customary international law have from time to time been cited inappropriately to circumscribe the President's constitutional authority or pre-empt the Congress's exercise of legislative power. I also understand your desire to identify legal authority establishing the right of the United States to treat the members of the Taliban Militia in the way it thinks best, if such authority exists. I share your feelings in both of these respects. I do not, however, believe that on the basis of your draft memorandum I can advise either the President or the Secretary of State that the obligations of the United States under the Geneva Conventions have lapsed with regard to Afghanistan or that the United States is not bound to carry out its obligations under the Conventions as a matter of international law. That may mean, of course, that we must determine specifically whether individual members of the Taliban Militia in our custody are entitled to POW status, and it may be that some are actually entitled to it. In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. I have no doubt we can do so here, where a relative handful of persons is involved. Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. We should talk.

Attachment:
As stated.

cc: Secretary of State
Judge Gonzalez

DRAFT
January 11, 2002

This provides our comments on the OLC Draft Memorandum for William J. Haynes II, General Counsel, Department of Defense, Concerning the Application of Treaties and Laws to Al Qaeda and Taliban Detainees. We look forward to discussing our views further.

Our comments are grouped into four sections. First, we set out in a general way some implications of the line of analysis presented in the draft opinion. Second, we discuss various difficulties inherent in the draft's conclusions themselves, in particular the questions of the existence of Afghanistan as a State and the continuity of treaty obligations. We also consider cases when the Convention was previously applied, including cases in which full compliance was not possible, and the consequences of such non-compliance. Most importantly, we address the analysis of the Geneva Convention obligations to Taliban forces. Third, we consider the draft memorandum's discussion of whether the applicability of the Geneva Conventions may be suspended. Fourth, we consider the draft memorandum's conclusion on the continued applicability of customary international law in the event the Geneva Conventions are determined to be inapplicable. Finally, we include in an appendix a summary of potential reactions to the conclusions that neither the Geneva Conventions nor customary law is applicable.

International law does not support key conclusions in the Draft Memorandum, including those concerning Afghanistan's existence as a State, the continuity of treaty obligations, the applicability of Geneva Convention III ("GPW") to Taliban forces and the applicability of customary international law.

Treaty relations between Afghanistan and other nations continue to apply. The issue of recognition of the Taliban government and its effectiveness in performing governmental functions is entirely separate from the question of statehood and whether a state remains a treaty partner. Specifically, the United States and the international community have continued to recognize Afghanistan as a State with international treaty obligations. Indeed, Afghanistan has remained a member of the United Nations at all times. Afghanistan is today and has been at all relevant times a Party to the Geneva Conventions. Even if, as the draft opinion suggests, the Convention is now in force but was not in effect under the Taliban regime, the U.S. is today subject to the obligations applicable under the GPW.

The Geneva Conventions are applicable by their terms to the Taliban forces. The GPW is intended to apply in the broadest set of circumstances, with "recognition" of the adversary not a prerequisite to its application. Article 4(A)(3) of GPW specifically applies to "members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." The Taliban qualify as a "government or authority" and, as a category, Taliban forces could meet factual tests of "regular armed forces." In cases of doubt as to specific individuals associated with the Taliban, Article 5 of the Prisoners of War Convention requires that protection be

provided until their status has been determined by a competent tribunal. Finally, the suggestion in the draft opinion that the President might suspend the Geneva Conventions is contrary to international law and procedurally unavailable.

Contrary to the conclusions of the draft opinion, customary international law creates rights for, and obligations on, the United States. The U.S. relies on customary international law in key areas, including law of war, immunities, treaty interpretation, law of the sea, and expropriation. The breach of customary international law obligations could subject the United States to adverse international consequences and reduce our ability to conform the behavior of other countries to international standards. Even where U.S. law trumps a particular international law for domestic purposes, it does not, without more, relieve the U.S. of its international obligations.

Consequences of the Memorandum's Conclusions

If the analysis and conclusions of this draft opinion were accepted, a number of the consequences could be very significant, and therefore should be noted:

- If neither the Geneva Conventions nor the customary international law of war applied, the legal basis for military commissions would be undermined.

- If law obligation applied, U.S. forces would also no longer enjoy the rights of belligerents; they would become subject to prosecution for such common crimes as murder and willful destruction of property.

- The conclusion that the Geneva Conventions do not apply could presumably be the basis for actions that otherwise would violate the Convention, including conduct that would constitute a grave breach.[1] This raises a risk of future criminal prosecution for U.S. civilian and military leadership and their advisers, by other parties to the Geneva Conventions (in view of the Convention obligations with respect to finding and prosecuting violations).

- For the first time, the United States would deny the applicability of the Geneva Conventions to opposing forces in an armed conflict involving U.S. forces. This would be contrary to consistent U.S. practice aimed at promoting the widest possible application of those conventions.

- If Afghanistan is determined not to be a party to the Geneva Conventions because it is a "failed State" or if the United States could suspend its treaty obligations with Afghanistan under the Geneva Conventions, either

[1] The grave breaches specified in article 130 of Geneva Convention III include depriving the prisoner of war "the rights of fair and regular trial prescribed in the Convention." Other potential breaches that would not constitute grave breaches are "acts contrary to the provisions of the present Convention." GPW III, Article 129, 3rd para.

prospectively or for some identified period of time, Afghanistan would have no effective treaty relationship with the United States under those Conventions for the same period. The implications of such a legal approach include:

- The United States would have no basis to complain of violations of the Geneva Conventions committed against U.S. or coalition forces who continue to conduct operations in Afghanistan, notwithstanding the fact that hostilities may be ongoing.

- Afghanistan would also not be a party to any other treaty that was open only to States. It would have no obligations vis-à-vis the United States under the Nuclear Non-Proliferation Treaty; it would not be a member of the IMF or World Bank for purposes of finance or assistance; it would ceased to be a member of the United Nations and no longer have obligations under the Charter.

- If Afghanistan had at some point ceased to exist as a State, numerous other questions would arise that are neither addressed nor considered in the draft – e.g., diplomatic relations and the status of our Embassy, ownership of assets, liability for claims, loans and debts, and so forth. One must also consider the implications of the fact that the position taken in the opinion is contrary to the legal position consistently taken by the United States on the status of Afghanistan, from 1996 until today.

- If the United States is precluded from maintaining mutual treaty obligations with a "failed State", this would have far-reaching implications for the conduct of U.S. foreign policy toward other States with questionable governing regimes.

Comments on the Draft Opinion

I. The Continuing Applicability of Treaty Relations

The Draft Opinion sets forth two basic arguments with respect to the continuing applicability of treaty relations.

First, it argues that Afghanistan ceased to be a party to the Geneva Conventions because it ceased to be a State. If Afghanistan is a non-party, the U.S. did not have any obligations vis-à-vis Afghanistan under the Treaty. Recognizing that Afghanistan is at present undoubtedly a State, the opinion argues that even if Afghanistan's Party status is "restored," the U.S. is still not bound to follow the Geneva Conventions because the President can determine that Afghanistan has not yet "returned to the status of a state party to the Convention" (p. 24), and because the jurisdictional provisions of the Convention remain inapplicable even if it is.

Second, it argues that, even if Afghanistan is viewed as having remained a party to the Geneva Conventions, the President can now determine that the obligations of the United States owed to Afghanistan under the Conventions were or are suspended, and that such a determination would be valid under international law.[2]

While the first argument makes a number of valid points about the constitutional role and legal authority of the President under domestic law, it is confused and inaccurate in a number of other respects. The concept of "failed State" has been developed as a historical and political analytic tool, not as a legal concept. A failed State does not thereby cease to be a State, nor does it cease to be a party to relevant Conventions.

Specifically, neither the United States nor any other country has viewed Afghanistan at any point as ceasing to be a State. Neither the United States nor any other State has viewed it as ceasing to be a party to international agreements. The fact that the United States did not recognize the Taliban as the government of Afghanistan is completely irrelevant.

Since Afghanistan never ceased to be a party, there is no question whether its party status is now fully or partially "restored," nor is there even such a concept of losing and restoring party status in treaty law. As the opinion repeatedly fails to recognize, the ability, inability, or even unwillingness of a State to perform international treaty obligations is a question entirely separate from the question of its status. Afghanistan has continued to be a State and a party to the Geneva Conventions during the relevant period.

A. Afghanistan Has Continued to Be a State and a Party to the Geneva Conventions.

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[2] Draft Opinion at 28-32.

1. In General, a "failed State" Does Not Cease to Be a State and Remains a Party to Relevant Conventions.

The concept of "failed State" has recently gained currency in both academic and popular writing, but it is not a legal concept. Some argue that the normal international law rules governing outside intervention in internal affairs should be different in the case of a "failed State."[3] Nonetheless, contrary to the suggestion in the draft opinion, a "failed State" is still understood to be a State, and it does not cease to be a party to relevant Conventions.[4]

According to the Draft Opinion, Afghanistan was not a State under the Taliban because it failed "some, and perhaps all, of the ordinary tests of statehood."[5] This is inaccurate. The non-recognition of the Taliban was a foreign policy judgment; the Taliban did ultimately effectively control as much as 90% of the territory, it exercised the functions of a government, and it was generally treated by the international community as a *de facto* governing authority. Even if the Draft Opinion factual analysis were accurate, however, the conclusion that a "failed State" is not a State rests on a misunderstanding and misapplication of the criteria for statehood. It is also contrary to U.S. and international practice.

The discussion of the "tests" of statehood in relation to Afghanistan concern the question of whether there is a government in control of the territory and capable of engaging in foreign relations. There has been no question about the boundaries of Afghanistan; neighboring countries have not sought to extend their borders into Afghanistan, nor has there been any change in the delineation of Afghanistan in authoritative United States maps.

Essentially, the Draft Opinion's argument turns on the premise that an existing State must continue to have a recognized, effective government or else cease to be a State. No such principle, however, exists in international law. To the contrary, it is well-established in international law and U.S. practice that the absence of a recognized government, or a government in control of territory, does not render an existing State "stateless."[6]

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[3] Far from arguing that "failed States" should no longer be participants in treaty regimes, the literature views the continued application of treaty regimes as particularly important with respect to failed States, to ensure protection of the population. *See, e.g.*, Ruth Gordon, "Saving Failed States: Sometimes a Neocolonialist Notion," 12 Am. U. J. Int'l L.& Policy 903 (1997); Oscar Schachter, "The Decline of the Nation-State and Its Implications for International Law," 36 Colum. J. Transnat'l L. 7 (1997); Jennifer Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents," 31 Colum. Hum. Rts. L.Rev. 81 (1999).

[4] For example, Oscar Schachter, whose article is referenced in the draft opinion, states: "The term "failed states" has come to be used for these cases [where government and civil order have virtually disappeared, including Liberia, Somalia, and Afghanistan] and others like them. The United Nations has continued to treat them as member states, entitled in principle to 'sovereign equality,'...." Schachter, at 18.

[5] Draft Opinion at 22.

[6] "There are therefore four conditions which must obtain for the existence of a state. . . . But once a state is established, temporary interruption of the effectiveness of its government, as in a civil war or as a result of

The "statehood" criteria to which the Draft Opinion refers are those applied to determine whether to recognize a new State in the first instance; their application with respect to the extinction of an existing State is an entirely different question. Once a State comes into being, the question becomes not one of recognition, but rather a question of extinction.[7] There is a very strong presumption in international law against extinction of a State, even after a lengthy period of internal anarchy (e.g., China, Somalia).[8]

We are aware of no instance in which a well-established existing State has ceased to exist, either in the view of the United States or in the view of the international community, on the grounds of internal conflict and absence of a single effective or recognized government.[9] Nor do occupation and annexation by an external power, if nonconsensual, normally affect the continuing existence of a State. To the contrary, there are many examples of States continuing with only ineffective governments-in-exile or no recognized government at all. It is well-established that internal conflict and revolution, even if prolonged, do not affect the continuity of the existence of a State. In World War II, for example, France, the Netherlands, and Belgium did not cease to be States when they were overrun by Germany and the only independent "governments" were in exile. The United States never accepted the incorporation of Estonia, Latvia and Lithuania by the Soviet Union, and continued to recognize their existence as States. Neither the United States nor any other country that did not recognize any government in Cambodia under the Hun Sen regime took the position that Cambodia itself was not a State.

Nor is there any practice or authority that a State without a single effective, recognized internal government somehow ceases to be a party to treaties or other international obligations. The United States has taken the position that treaty relations can survive even in the effective absence of a country. In the case of the Baltics, for example, the view of the United States was that not only did the Baltic States themselves continue to exist, but also that all treaties with the Baltics continued to exist as treaties in force, although temporarily incapable of performance by the Baltic States party.

2. Specifically, the United States and the International Community Have Continued to Recognize Afghanistan as a State with International Treaty Obligations

belligerent occupation, is not inconsistent with the continued existence of the state." Jennings and Watts, I Oppenheim's International Law, §34, 120, 122 (1992).

[7] *Id.*, at 206-208.

[8] *See generally*, James Crawford, The Creation of States in International Law, pp. 405-412 and 417-420.

[9] "Of these four elements needed before a community may be regarded as a state, some may at times exist only to a diminished extent, or may even be temporarily absent, without the community necessarily ceasing to be a state. Thus the existence of a civil war may affect the continued effective existence of a government, or relations with other states may affect the degree to which sovereignty is retained, while the state nevertheless continues to exist." Jennings and Watts, *supra*, §34, at 123 (footnotes omitted). Even in cases of dissolution, annexation, and merger, moreover, despite the change in statehood there may be continuation of treaty relations (e.g., the U.S.S.R., Czechoslovakia, the United Arab Republic).

The United States Position. The official United States position before, during and after the emergence of the Taliban was that Afghanistan constituted a State.[10]

The United States never broke diplomatic relations with Afghanistan. On January 30, 1997, the Department of State issued guidance for issuance of diplomatic visas to Afghans, prefaced by the following statement: "While the United States maintains diplomatic relations with the Islamic State of Afghanistan, the USG does not recognize any central government in Afghanistan." In August 1997, the U.S. "suspended operations" of the Afghan embassy in Washington. The U.S. did not, however, suspend operations at the sole consulate of Afghanistan in the United States, in New York. The consulate continued to have a consular officer accredited to the United States.

When the United States recently opened a Liaison Office in Kabul prior to the existence of a recognized government, we viewed the opening of the Liaison Office as the restaffing of a continuing diplomatic mission to the country of Afghanistan. We also took the position that the mission enjoyed the rights and privileges of a diplomatic mission under the Vienna Convention on Diplomatic Relations, based on Afghanistan's continuing as a party to that multilateral treaty. This position had concrete practical consequences, such as the continuing protection of the U.S. mission and personnel.

Our practice consistently demonstrated a clear distinction between non-recognition of the Taliban as a government and continuing recognition of Afghanistan as a State. Even with respect to statutory certifications, for example, the United States distinguished between statutes that required certifications as to "States" or "Countries" and those that required certifications as to "Governments." Thus, for example, we determined that Afghanistan was a major illicit drug producing and drug transit country which had not cooperated fully with the United States with respect to efforts against drugs. The Statement of Explanation provides, inter alia, that "In 1999 Afghanistan cultivated a larger opium poppy crop and harvested more opium gum than any other country....." (Presidential Determination No. 2000-16 of February 29, 2000, 65 Federal Register 15797-98, March 23, 2000.) On the other hand, we did not consider Afghanistan to meet the criterion for the terrorism list that "the government of that Country has repeatedly provided support for acts of international terrorism" because there was no recognized government. (§6(j) of the Export Administration Act.)

Our position with respect to the continuation of treaties is also a matter of record. The U.S. Government publication Treaties in Force has continuously listed Afghanistan as a party to all bilateral and multilateral treaties, including specifically the Geneva Conventions. This is not mere inertia, as the publication does include notes where changes in sovereignty and status have raised questions regarding treaty applicability.[11]

[10] Indeed, the United States maintained a similar position during the period of Soviet occupation of Afghanistan in the 1980s; notwithstanding Soviet control of Afghanistan and its government, the United States continued to consider Afghanistan to be a State.

[11] *See, for example*, the note with respect to the Union of Soviet Socialist Republics, Treaties In Force, January 2000, at 297.

As the above brief indication of U.S. official policy and practice indicates, the recognition of governments and States poses complex questions with implications for a very wide range of legal and policy questions. They are deeply intertwined with the conduct of foreign policy and even the day-to-day administration of international relations, such as the issuance of visas.[12] As such, these questions are ones on which the Department of State possesses a particular knowledge and expertise. The Department has created the record of the U.S. government's official relations with Afghanistan in recent years. A determination that for some period of time Afghanistan ceased to exist would be inconsistent with that record.

The International Position. The international community as a whole continued to recognize Afghanistan as a State. Afghanistan never ceased to be a member of the United Nations, for example, although membership is only open to States. Moreover, Afghanistan continued to be actively represented at the United Nations. As the Draft Opinion itself notes, "the overwhelming majority of States and the United Nations recognized exiled President Burhanuddin Rabbani and his government as the country's legal authorities." (Footnote 57, p. 22.) Such recognition necessarily of the government of a country presumes the existence of the country itself.

The UN Security Council has also indicated that the Taliban and other parties to the Afghan conflict were bound to comply with the Geneva Conventions. In UNSC Resolution 1193 (1998), the Security Council reaffirmed that:

> All parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949 . . .

UNSC Resolution 1214, also concerning the conflict in Afghanistan, uses essentially the same language in a preambular clause. The parties referred to in these instances are the Taliban and those forces fighting against the Taliban. These Resolutions, in which the United States joined consensus, describe "obligations" to adhere to the Geneva Conventions. The Security Council could not have issued a resolution containing such a clause if it had not been convinced that there was a proper legal basis to apply international law obligations to the parties to the conflict within Afghanistan. Evidently, the Council - and the United States – did not believe that Afghanistan was a "failed State" where the Geneva Conventions had become inapplicable. Nor does the ICRC. Their database, which reflects the authoritative records of the Swiss Government as treaty depositary, lists Afghanistan as having enjoyed uninterrupted status as a party to the Conventions since it first joined in 1956.[13]

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*www.ICRC.ORG

[12] There are other implications as well, not discussed here, such as the implications for Afghani citizens who would be "stateless" in the absence of their State.

[13] www.icrc.org

B. The Geneva Convention Has Been in Force at All Relevant Times

The Draft Opinion agrees that at present Afghanistan is a State with a recognized government and addresses the question whether the Geneva Conventions are now in force. It concludes at page 24 that "even if Afghanistan now has a recognized government, it does not *necessarily* follow that its status as a party to the Conventions has been completely restored." There is, however, no basis for such a conclusion. Granting that Afghanistan is a party to the treaty today means that the treaty must henceforth govern U.S. conduct.[14]

Since Afghanistan never ceased to be a party, however, there is no question whether Afghanistan's party status is now fully or partially "restored." More fundamentally, there is no such concept of losing and "restoring" party status in treaty law. Once a State ceases to be a party to a treaty, it cannot automatically resume party status. Rather, it must join the treaty anew, typically by depositing an instrument of ratification or accession. If Afghanistan ceased to be a State and therefore ceased to be a party to treaties, it would not now be a party to any treaties whatsoever. That is to say, no treaties would be in force and Afghanistan would have to join every treaty anew. This would include, for example, the Non-Proliferation Treaty, the U.N. Charter, the governing instruments of the World Bank and other international financial institutions, and all other treaties and agreements that specify that all Parties must be States.

The discussion of "restoration" in the Draft Opinion illustrates a significant underlying analytic difficulty with the Draft Opinion, which is that the question whether an entity is a State and party to a treaty, on the one hand, is consistently confused with the very different and unrelated question whether it is able to perform relevant obligations. The Supreme Court cases cited in the Draft Opinion concern the latter, not the former question.[15]

We have no quarrel with, and indeed support, the view that the recognition of States and governments, and the determination of whether a State can perform its treaty obligations, are fundamentally and constitutionally Executive functions.[16] However, it

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[14] See, e.g., Vienna Convention on the Law of Treaties, Art. 26. Applying a treaty in force to the existing situation, i.e., to POWs now in custody, is not the same as giving it retroactive effect. Anthony Aust, Modern Treaty Law and Practice 142 (2000).

[15] Clark v. Allen, 331 U.S. 503 (1947); Terlinden v. Ames, 184 U.S. 270 (1902); and the discussion in the Draft Opinion on pages 16 and 24.

[16] Although supporting a robust view of the President's constitutional authority, however, it must be noted that the discussion of constitutional authority in the Draft Opinion at pp. 14-16 is somewhat overstated. It is well established that the recognition of States and of governments is an Executive power. Nonetheless, it likely that neither the Congress nor the Supreme Court would agree that the President has plenary power over the interpretation of treaties and of international law. We endorse the conclusion that "the question whether a state is in a position to perform its treaty obligations is essentially a political question". (Terlinden v. Ames, 184 U.S. 270, 288 (1902). Questions of termination, breach, interpretation, and suspension, however, may implicate powers of Congress and the courts. Perkins v. Elg, 307 U.S. 327 (1939); Goldwater v. Carter, 444 U.S. 996 (1979).

remains true that the ability, inability, or even unwillingness[17] of a State to perform international treaty obligations is a question unrelated to the question of its status. There are numerous instances of temporary or even prolonged inability or unwillingness to fulfill treaty obligations by particular countries, including even the United States. The ineffectiveness of the Taliban and their lack of respect for fundamental norms of international behavior as well as international obligations have no bearing on whether Afghanistan has continued to be a State and a party to the Geneva Conventions.

As discussed also in connection with suspension, below, in the case of the Geneva Conventions the ability of the Taliban to respect treaty obligations does not justify a reciprocal suspension of compliance by the other party. Even if suspension were permissible, moreover, it is too late to announce a suspension for the period of Taliban control. Suspension is not automatic, nor is it retroactive, but it rather requires formal notification in advance.[18]

It follows that the Third Geneva Convention constitutes at present a treaty in force between the United States and Afghanistan. The Draft Opinion argues that this treaty is not now applicable, because Afghanistan was not a party "at the time of the conflict."[19] However, the normal rule is that treaties apply to the circumstances as they are at the time the treaty is in force, in accordance with its terms. Once an extradition treaty is in force, for example, the extradition obligation applies to all relevant individuals irrespective of when the crime was committed or when they were taken into custody. Moreover, as a factual matter it cannot be argued that there is no armed conflict at present; not only is the conflict still ongoing, but it is expected to continue for some time. Therefore, even under the interpretation adopted by the Draft Opinion, the most one could say is that some prisoners would be covered by the Convention and some would not, depending on whether they were captured before or after the United States recognized the interim government. This does not appear to be a particularly useful or workable conclusion.

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[17] *See, e.g.*, Draft Opinion at p. 21.
[18] *See infra.*
[19] Draft Opinion at p. 24.

II. The Application of the Geneva Conventions

The case is clear for applying the Third Geneva Convention (GPW) to the Taliban, and presumptively according the Taliban members Prisoner of War (POW) status and/or treatment consistent with the GPW, not only on the basis of the text and negotiating history of the Convention but also on the basis of sound practice and policy.

This section concludes that the GPW applies because the situation as between the United States and the Taliban is one of an armed conflict arising between two or more High Contracting Parties under Article 2. It first reviews the special status of the GPW under international law, the text of Article 2 and that recognition of a government or authority is not a prerequisite to application under Article 2. In this connection, we examine the Taliban's status as governing authority in Afghanistan, concluding that, even on the terms identified by the Draft Opinion at pp. 18 - 19, the Taliban had sufficient indicia of "authority" for purposes of being bound by the Geneva Conventions. The subsequent section shows that the GPW envisioned precisely a situation such as the Taliban military, whose members "profess allegiance to a government or an authority not recognized by the Detaining Power." GPW, Article 4(A)(3). It notes, however, that the conclusion that the GPW applies to the Taliban *category* does not necessarily lead to the result that *all Taliban soldiers* meet the requirements for POW status -- they should enjoy the protection of such status until special tribunals under Article 5 determine in individual circumstances that particular persons do not meet the requirements for POW status. Third, the section presents consistent U.S. practice in this area, with particular reference to the provision of POW status to Viet Cong units during the Vietnam War, and to other situations such as Haiti and Somalia.

A. The Applicability of the GPW to Taliban Soldiers

1. The Special Character of the Geneva Conventions

The GPW, like all other Geneva Conventions on the Protection of Victims of War, stands apart from other treaties in a number of respects. It was among the earliest treaties to extend its protections directly to individuals, whether combatants or civilians. The U.S. Senate Committee on Foreign Relations, when favorably reporting the Conventions out to the Senate for advice and consent to ratification, stated:

> "Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. . . . The practices which they bind nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the injunctions of formal treaty obligations." *Geneva Conventions for the Protection of War Victims, Report of the Committee on Foreign Relations of the United States Senate*, 84th Congress, 1st Session, Executive Report No. 9, July 27, 1955, at 32.

The text of the GPW bears out the view that it applies in circumstances such as those in Afghanistan -- indeed, even in situations of occupation by a foreign power where the original governing authority has been displaced and no longer exercises governmental functions. GPW, Article 2, paragraph 2.

Article 1 of the GPW, common to all four Geneva Conventions of 1949, expresses the basic principle that it is to be applied broadly:

> "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances." GPW, Article 1.

The United States has embraced this principle, historically applying a liberal interpretation of the GPW when assessing its application in a given conflict.[20] The respected ICRC commentaries on the 1949 Geneva Conventions emphasize that "Article 1 is no mere empty form of words but has been deliberately invested with imperative force." Jean Pictet, *Commentaries on the Geneva Conventions of 1949*, Volume III, at 18 ("Pictet"). Pictet notes specifically the special character of the Geneva Conventions under international law:

> "By undertaking this obligation [of Article 1] at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity, binding each party to contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-a-vis' itself and at the same time 'vis-a-vis' the others. The motive of the Convention is so essential for the maintenance of civilization itself that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties." Id. at 17-18.[21]

That said, Article 1 does not of itself provide for the application of the GPW in all circumstances *of armed conflict*. Article 2 provides for the scope of application in what is commonly referred to as international armed conflict. Rather, as described in the ICRC Commentaries to Additional Protocol I to the Geneva Conventions, the phrase "in all circumstances" mainly "prohibits all Parties from invoking any reason not to respect the [Convention] as a whole, whether the reason is of a legal or other nature." *ICRC Commentaries to Additional Protocol I*, page 37, paragraph 48.[22]

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[20] *See, e.g., Cumulative Digest of U.S. Practice in International Law 1981 - 1988*, pp. 3453-4.

[21] Treaty law refers to this kind of obligation as *erga omnes* -- owing obligations to the community as a whole.

[22] Article 1 does, however, set the Geneva Conventions apart from the default rule of international law under which certain countermeasures -- or reciprocal noncompliance with certain provisions of an agreement -- may be taken. Failures of one party to an armed conflict to implement its obligations under the GPW do not release the other party from its obligations under the GPW. *See, e.g.*, Article 60(5) of the Vienna Convention on the Law of Treaties (excluding suspension as an option in the event of a material breach of provisions relating to the protection of the human person contained in treaties of a humanitarian character).

2. Article 2 of the GPW Applies

The Draft Opinion asserts that "Afghanistan was in a condition of statelessness during the time of the conflict," and that therefore the "Taliban militia could not have been considered a government that was also a High Contracting Party to the Geneva Conventions." Draft Opinion at 22. This paper has already demonstrated that there is no concept of failed statehood under treaty law and that "failed States" remain parties, as a matter of international law, to the agreements they have joined. Under Article 2 of the GPW, it is also the case that the Taliban remained bound to uphold the obligations of Afghanistan as a "High Contracting Party."

Article 2 of the GPW provides for its scope of application as follows:

> "In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." Article 2, GPW.

The first paragraph requires that the armed conflict "arise between two or more of the High Contracting Parties" to the GPW. As demonstrated above, Afghanistan remained a High Contracting Party by virtue of accepted principles of international law, a fact that is recognized by U.S., UN, International Committee of the Red Cross (ICRC) and other organizations' statements and documents.[23] That the ICRC, for instance, considered the Taliban bound to uphold Afghanistan's obligations under the Geneva Conventions is

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[23] A basic factual and legal flaw appears in the Draft Opinion on this point. The Draft Opinion notes that the Taliban were recognized as the legitimate government of Afghanistan by only three states: Pakistan, Saudi Arabia and the United Arab Emirates. Draft Opinion at 22. (The recognition was of the Taliban government, not the "militia" as so described by the Draft Opinion.) Yet at the same time, the Draft Opinion, as noted, asserts that Afghanistan was "stateless." However, one might imagine a situation in which one of those governments that had recognized the Taliban became engaged in an armed conflict with Afghanistan. Moreover, it is often the case that such governments would merely break diplomatic relations and not withdraw their recognition from the other. In such a situation, the GPW would continue to apply at least as between such parties. But according to the logic of the Draft Opinion, Afghanistan would be a High Contracting Party for the purposes of, e.g., Pakistan, but not for purposes of the United States. The illogic of this conclusion would emerge sharply if both Pakistan and the United States were engaged in armed conflict in Afghanistan.

demonstrated by the formal ICRC note delivered to them in early October calling on them to meet several enumerated obligations.[24]

3. The Recognition of the Adversary Is Not a Prerequisite to Application of the GPW

The Draft Opinion relies upon the fact that the United States, as well as most governments, did not accord the Taliban formal recognition as the government of Afghanistan. However, *the application of the Geneva Conventions does not depend upon the mutual recognition of the parties* -- either recognition of governments or statehood. *See generally* Allan Rosas, *The Legal Status of Prisoners of War* (1976), pp. 262 - 92 (hereinafter "Rosas"). The well-respected German military manual on the law of war provides:

> "It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States [citations to text omitted]." Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (1995), para. 206 at 45.[25]

The annotation to this provision notes the following:

> "The applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another. Throughout the Arab-Israel conflict, the Arab states have not recognized Israel as a state [citation, noting peace treaties with Egypt and Jordan, omitted], yet both sides in that conflict have accepted the applicability of international humanitarian law. *The question of whether the parties to an armed conflict are states is objective and not a matter to be determined by the subjective recognition policies of each party.*" C. Greenwood, *id.* at 45 (emphasis added).[26]

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[24] While the United States does not have a copy of the note provided to the Taliban, the ICRC also delivered such a note to the United States (as is their custom), at the same time informing us that they had done so with the Taliban. *See* Note of the ICRC delivered to the U.S. Mission to UN and Other International Organizations in Geneva, 28 September 2001.

[25] Paragraph 2 of Article 2 provides further textual evidence that the GPW is intended to apply in situations where the parties do not recognize the legitimacy of one another as governments or where one of the parties is not exercising territorial control or governmental authority. Paragraph 2 provides that the Convention applies "to all cases of partial or total occupation of the territory of a High Contracting Party." Occupation requires the displacement of one party's governing authority by the Occupying Power -- and often, in such situations, the Occupying Power may not recognize the legitimacy of the authority it displaces. Indeed, in the situation in the Middle East, Israel's position is that *no legitimate authority* preceded its occupation of the West Bank -- and in consequence, although Israel argues that the Geneva Conventions do not apply as a matter of law in the territories (a position we do not share), it administers the territories *as if* the Conventions were in force. The Draft Opinion's insistence on recognition as a standard in determining the applicability of the GPW is again shown to be misplaced in light of the textual requirement of application in the cases of occupation.

[26] See Rosas at 241, 243. Rosas adds: "Thus, neither the Arab states nor the United States have asserted that they would be freed from an obligation to apply humanitarian law in the Middle East and Vietnam [illegible]ts because they have not recognized Israel and the Democratic Republic of Vietnam respectively." [illegible]t 241.

British and other allies. The negotiators, however, "deliberately dropped the requirement that such armed forces should be fighting in conjunction with a State recognized as a regular belligerent." *Id.* at 64. The precise situation of the Free French was a motivating historical example but it was not the sole standard by which Article 4(A)(3) is to be assessed.[27]

Pictet suggests several points for distinguishing the "regular armed forces" under Article 4(A)(3). One feature of such forces is "the fact that *in the view of their adversary*, they are not operating or are no longer operating under the direct authority of a Party to the conflict in accordance with Article 2 of the Convention." Pictet at 63 (emphasis added). This is not to say that the state at issue is no longer a party to the Geneva Conventions or that the armed forces are no longer associated with a party to the conflict, but simply that the adversary does not recognize the authority to which the armed forces owe allegiance. Thus, U.S. non-recognition of the Taliban does not automatically exclude the Taliban soldiers from the scope and operation of the GPW.

Pictet makes two other points of direct relevance here: First, he suggests that recognition of the government or authority referred to in Article 4(A)(3) would be expected to come from third States, which would be "consistent with the spirit of the provision". *Id.* In this situation, only three states accorded the Taliban formal recognition, but Pictet and other sources do not suggest a numerical minima for purposes of recognition. Moreover, the international community acted *as if* the Taliban controlled Afghanistan and had a responsibility to adhere to Afghanistan's international obligations. This form of "recognition" should satisfy the concern described by Pictet. Second, Pictet notes that

> "this authority, which is not recognized by the adversary, should either consider itself as representing one of the High Contracting Parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them." Pictet at 63.

We have no information concerning any Taliban declarations concerning application of the Convention. However, the Taliban did consider itself the representative government of Afghanistan, as indicated by its attempts to gain broader recognition from the international community (such as seeking the Afghanistan seat at the United Nations).

Rosas sums up the appropriate interpretation of Article 4(A)(3) and its relationship to the application of the GPW in this way:

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[27] As Professor Levie explains, "[t]he 1949 Diplomatic Conference was attempting to supply a rule which would cover situations which had caused numerous problems during World War II with its many 'governments-in-exile' and, not infrequently, with competing such governments. . . . As such problems multiplied, the ICRC addressed a note to all of the belligerent States . . . : 'The International Committee are of [the] opinion that the principles stated must be applied, irrespective of all juridical arguments as to the recognition of belligerent status of the authority to whom the combatants concerned belong.'" *Prisoners of War in International Armed Conflicts*, 59 International Law Studies at 59 (1977). This opinion "became the basis . . . for Article 4A(3) of the 1949 Convention." *Id.* at 60.

> "What seems to be necessary, however, is that *the authority can plausibly claim to represent the party to the conflict for the purposes of offering military resistance to another state*, [cite omitted], and that it *displays an organization at least resembling that of a provisional government*. [cite omitted] A *certain amount of organization and discipline* on the part of the authority also seems to be implied in the reference in the provision to 'regular armed forces'. [cite omitted] In practice, at least, it would seem that the authority must have been afforded some kind of recognition (although *not necessarily formal recognition as a government*) by third states. [cite omitted] If the party which the government or authority claims to represent is a High Contracting Party the Third Convention also binds the authority in question." Rosas at 255 (emphasis added).

The rationale for Article 4(A)(3) was, as described by Pictet, to avoid a situation where a party does not apply the GPW solely on political grounds, much as the Nazis did with respect to the Free French forces in World War II. As a result, Article 4(A)(3) provides for standards far less restrictive than one might identify for purposes of the formal recognition of statehood or governments, and it provides clear textual support for the application of the GPW in the situation of armed conflict between U.S. forces and Taliban forces in Afghanistan.

B. The Taliban Met the Criteria to Be Considered an "Authority" or a "Government" under Article 4(A)(3).

While recognition of the Taliban as the legitimate government of Afghanistan is, and was, unnecessary for the operation of the GPW, one may still wish to consider whether the Taliban could be said to be a "government or an authority" in any respect in Afghanistan. As just noted, the criteria for claiming "authority" are somewhat less restrictive than those that might be applicable to the recognition of states or governments generally. The Draft Opinion's criteria, however, are much more stringent than required under the GPW. Nonetheless, we will look to the criteria of the Draft Opinion to demonstrate that even under those overly strict criteria, the Taliban controlled the territory of Afghanistan and exercised governmental functions in such a way as to be a responsible authority under Article 4(A)(3).

While most of the world community did not recognize the *legitimacy* of the Taliban, the United States, the United Nations and many other governments and organizations treated the Taliban *de facto* as the prevailing authority in Afghanistan. Take, for instance, the prosecution of Operation Enduring Freedom itself. The Pentagon has treated the Taliban military, for purposes of the military campaign, as an opposing military force in control of forces, equipment, territory and other resources. Senior Pentagon officials referred to the "Taliban government."[28] When the U.S. Government reported to the UN Security Council that it had taken action in self-defense following the September 11 attacks, it referred to the "Taliban regime."[29]

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[28] *See, e.g.*, Briefing by Secretary of Defense Rumsfeld, September 25, 2001.

[29] *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/946, 7 October 2001.

UN Security Council resolutions (supported by the United States) reflect a similar understanding of the *de facto* control and governance of Afghanistan by the Taliban. Security Council Resolution 1267 of October 15, 1999, determined that the "failure of Taliban authorities" to meet previous demands to hand over Usama bin Laden to appropriate states "constitute[d] a threat to international peace and security," and acting under the Chapter VII enforcement provisions of the UN Charter, demanded that the Taliban carry out various tasks that could only be associated with control and governance.[30] Indeed, the Security Council indicated that the Taliban and other parties to the Afghan conflict were bound to comply with the Geneva Conventions.[31]

We are advised by the Department's regional and intelligence experts that the Draft Opinion's portrayal of Afghanistan under Taliban rule is fundamentally inaccurate.

- There is no question that the Taliban, although not recognized by the United States and almost all other countries as the government of Afghanistan, did effectively control 90% of Afghanistan's territory, and did exercise the functions of a government therein, even though they may have done so in a manner incompatible with modern standards and sensibilities. The Taliban certainly thought of itself as the government. Indeed, they may have brought about the most effective central control in Afghan history – albeit at a terrible cost to Afghanistan and its people.

- The Taliban's objective was to turn Afghanistan into an Islamic state based on their particular interpretation of Islamic law. The Taliban staffed and operated those institutions of government that comported with their pre-modern conception of what a government ought to do. They had foreign justice and education ministries, and ministry for the promotion of virtue and eradication of vice. The work of the ministries was coordinated through a Council of Ministers. Through these institutions the Taliban authorities issued legislative decrees on a wide variety of subjects, and worked to enforce them through often draconian means.

- The Taliban instituted and enforced a system of taxation based on the Islamic *ushra* principle. They appointed or confirmed regional governors, district leaders, mayors, and other regional and local officials.

- The Taliban maintained a functioning system of Islamic courts to deal with criminal cases and civil disputes in accordance with the principles of Islamic law as the Taliban conceived them. While we may and do find much of the Taliban's criminal law abhorrent, we have no basis on which to deny that it was in fact a system,

[30] For example, Security Council Resolution 1333 of 19 December 2000 demanded that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps," etc. S/RES/1333 (2000), para. 1. The Security Council variously referred to the Taliban as "authorities" and as a "faction," suggesting at least some recognition that the Taliban controlled Afghanistan but remained involved in a civil war with other belligerents within its territory.

[31] See above at Part I.A.2.

however primitive by our standards, of law and procedure, and that generally speaking those procedures were followed in practice.

- The Taliban's initial success and popularity among the people of Afghanistan was precisely because the Taliban were able to impose law and order to the areas they controlled. They disarmed much of the population. They suppressed the patchwork of gangs and warlords that dominated the country following the Soviet withdrawal. They largely put an end to roadside kidnappings, extortion, robbery, rape and other crimes that had long plagued the Afghan people. And, when the international community demanded it of them, in 2000-2001 they declared, and enforced with great effectiveness, a ban on growing of opium poppies.

- The Taliban also were capable of carrying out, and did in fact carry out, relations with other countries and international organizations. Three countries (Pakistan, the UAE, and Saudi Arabia) maintained diplomatic relations with the Taliban, and the Taliban dealt on regular basis with special envoys, humanitarian personnel, and other UN officials. Taliban representatives also met with State Department and other U.S. Government officials.

- The Taliban respected, and asserted effective control over, borders with Pakistan, Iran, Tajikstan, Turkmenistan, Uzbekistan and China, maintaining a system of border troops, passport controls, and the like.

It should be stressed that the United States' refusal to recognize the Taliban as the government was not a conclusion that the Taliban was not in effective control of the great part of Afghanistan territory.

C. The Relevance of the Taliban Relationship with Al Qaeda

Resting on four newspaper articles, the Draft Opinion argues that the Taliban's relationship with Al Qaeda was of such closeness that "the Taliban cannot be regarded as an independent actor." Draft Opinion at 22. We appreciate the suggestion that "other non-public information... may be available to the Executive," *id. at 23.* The Legal Adviser's Office therefore consulted with our South Asia experts to determine whether such an assertion could be regarded as factually accurate. The experts believe that the relationship between the Taliban was not as the Draft Opinion describes it. Indeed, even the Pentagon's description of the Taliban-Al Qaeda relationship suggested an understanding of the distinction between the two.[32] The Taliban was not indistinguishable from al Qaida. The Taliban effectively formed a national army. Taliban troops generally fought skirmishes. Commanders often, though not always, led troops from their own tribes. The central government had jurisdiction over all these troops, though it was

[32] *See, e.g.*, Briefing by RADM Stufflebeem, October 17, 2001 ("Our strategy is to go after those elements of military power. That was a Taliban tank. It's in the Taliban military. The Taliban military is supporting their leadership, and their leadership is supporting al Qaeda. So we are systematically pulling away at those legs underneath the stool that the Taliban leadership counts on to be able to exert their influence and power.")

careful not to alienate local leaders. Other troops were led by individual commanders who did not bring their own troops. Taliban troops did not include foreigners. Arabs, Pakistanis, and others were kept separate from Taliban troops. In any case, the Taliban vastly outnumbered the Arabs and non-Afghans, who may have included 4000 soldiers to the Taliban's 45,000.

D. GPW Article 4(A)(3): How the GPW Would Apply to the Taliban

1. The Application of Article 4(A)(3) to the Taliban Soldiers as a Category Entitled to POW Status

As described above, Article 4 of the GPW provides for several categories of persons who would be entitled to the status of prisoner of war under the GPW. Under the circumstances where the United States did not recognize the Taliban as the legitimate government of Afghanistan, one would look to Article 4(A)(3) for its application. In particular, we are led to the conclusion that the Taliban soldiers as a category were "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." Article 4(A)(3), GPW.

We have already explained why the Taliban should be considered a "government or an authority" for purposes of Article 4(A)(3). The Taliban military forces should also be considered "regular armed forces" for purposes of 4(A)(3). As Rosas points out, "regular armed forces" implies "[a] certain amount of organization and discipline." Rosas at 255. Pictet is more explicit, saying that it was understood during the GPW negotiations that such forces would "have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) [of Article 4(A)]: they wear uniforms, they have an organized hierarchy and they know and respect the laws and customs of war." Pictet at 63. As a result the question becomes a factual one.[33]

The Draft Opinion provides no basis for a contrary conclusion. For instance, it merely states that the Department of Defense "advises us that the Taliban's militia's command structure *probably* did not meet the first of these requirements; that the evidence *strongly indicates* that the requirement of a distinctive uniform was not met; and that the requirement of conducting operations in accordance with the law and customs of armed conflict was not met." Draft Opinion at 25. Department of State experts suggest that the Taliban command structure differed from the kinds of structure we might find in our own armed forces, but we do not think the structure was such as to fall outside the bounds of Article 4(A)(3).[34] Similarly, our experts report that Taliban soldiers did wear uniforms and sought additional uniforms regularly, recognizing that resources were often

[33] It is well understood in the law of war that the commission of violations of the law of war by one, some or many members of an armed force do not thereby implicate the status of all of the members of such armed forces. Moreover, the display of distinctive insignia and the command structure of the armed force are also recognized in the same way – if some members do not meet these criteria, it does not prejudice the status of all members of the force.

[34] To say that this structure would fall outside Article 4(A)(3) would work to release less structured armed forces from their Geneva Convention obligations – a result we surely want to avoid in a context where asymetrical conflict is to be expected.

not available to purchase them. Moreover, the GPW requirement is not for a "distinctive uniform" but for a "distinctive sign," and our information indicates that the Taliban soldiers did wear distinctive black turbans. GPW, Article 4(A)(2). In any event, the available information does not enable us to reach a conclusion that such a requirement was not met. Finally, we agree that Taliban forces likely committed serious violations of the laws of armed conflict during the recent conflict, including the use of civilians to shield military objectives from attack. However, the commission of crimes by some members of the force is not sufficient to demonstrate that the Taliban forces generally may not be covered under Article 4(A)(3). Rather, the question in this respect is whether the Taliban forces were unable to implement the laws of war.[35] Further, there is no evidence to suggest that the Taliban provided central command level direction and guidance for forces to violate the laws of war. If there is factual evidence to support certain leaders providing instructions that would violate the laws of war or that the violations were so widespread and systematic that military leaders knew or should have known that the violations occurred, then appropriate action for violation of command responsibility can be taken against these commanders.[36]

Outside experts also have examined the Taliban military and assessed its infantry quality, armor, artillery, organization and other resources. One respected publication assessed that the Taliban "displayed an innovative approach to warfare characterized by the use of surprise, mobility, speed, impressive logistics support and an efficient command, control, communications and intelligence (C3I) network." *Jane's World Armies*, 8 October 2001. Such an analysis runs counter to the unsupported assertions in the Draft Opinion on the nature of the Taliban military and would rather support their falling within the category of "regular armed forces" under Article 4(A)(3).

2. Review by a Competent Tribunal in Cases of Doubt as to Whether a Person is Entitled to Status.

A conclusion that the Taliban forces fall within the bounds of Article 4(A)(3) as "regular armed forces" does not mean that all Taliban soldiers would be entitled to POW status. Article 5 of the GPW provides:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Article 5, GPW.

Under Article 5, the detaining authorities would be well within their authority, for example, to review for status determination any Taliban member about whom there is

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[35] For instance, one reason among many that the Al Qaeda forces may not be entitled to POW status is that their operations are *designed* to violate the laws of war – most particularly, to target and attack civilian populations as such, civilians and civilian property. It is this kind of systematic violation which excludes organized forces from Article 4(A)(3).

[36] *See, e.g., Application of Yamashita*, 327 U.S. 1 (1946).

doubt as to his status. Indeed, consistent U.S. practice has been to set up tribunals in such situations.

A fairly recent example of the operation of Articles 4 and 5 of the GPW may be found in the Gulf War. During Operation Desert Storm in 1991, U.S. armed forces handled the detaining, interning, and transferring of 86,000 Iraqi detainees. Due to supply shortages, most of the camps were not complete when the first Iraqi POWs were captured. The four U.S. camps were built with chain link fencing, concertina wire, tents, guard towers, wash basins, latrines, generators, and water bladders. Article 5 hearings were conducted to determine the status of the detainees. At the end of the US custody of the Iraqi POWs, ICRC officials indicated that the treatment of the POWs by the U.S. forces was "the best compliance with the GPW in any conflict in history." (Conduct of the Persian Gulf War Final Report to Congress, Appendix L, 1992).

D. Common Article 3

Although our conclusion is that Article 2 applies and disposes of the question of Article 3 's application to the Taliban, we think it is nonetheless essential to point out why the Draft Opinion's arguments on the non-applicability of Common Article 3 are inaccurate.

Common Article 3 picks up where Common Article 2 leaves off -- that is, with armed conflicts not of an international character. Such conflicts are almost always, and typically so, internal armed conflicts, or civil wars. And indeed, the negotiators of the Geneva Conventions had internal conflicts in mind. Nonetheless, the negotiators did not choose the most available formulations, such as "internal armed conflicts" or "armed conflicts arising solely in the territory of one party." Their formulation indicates a readiness to ensure that all armed conflicts that were not international as between High Contracting Parties would be covered. The combination of Articles 2 and 3 was intended to cover *all armed conflicts*. This is evident also from the subsequent negotiation of Article 1(2) of Additional Protocol II which provides:

> This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and acts of a similar nature, as *not being armed conflicts*. (Emphasis added.)

It would be extremely difficult to defend a U.S. position premised on the notion that the conflict in Afghanistan is not an armed conflict of any sort as contemplated under the Geneva Conventions.

E. U.S. Practice under the GPW

The United States has consistently applied the GPW to armed conflicts. DoD Directive 2310.1 (August 18, 1994) provides that "The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." Indeed, we are aware of

no instance in which the United States has denied the applicability of the Geneva Conventions to either U.S. or opposing forces engaged in armed conflict. We have applied the Geneva Conventions whether we were defending a friendly State against a hostile aggressor (e.g., Vietnam, Kuwait), seeking to restore a legitimate government (e.g., Grenada, Panama, Haiti), or restoring order to a country without a government (e.g., Somalia).

- During the **Korean** conflict, even before the United States and other major states had ratified the Geneva Conventions, General MacArthur, the United Nations Commander in Korea, said that the UN forces would comply with the principles of the Geneva Conventions.

- During the **Vietnam** conflict, the United States applied the GPW to detainees until their final status was determined. Detainees were classified as POWs (i.e., given POW status) when determined to be qualified under one of several categories. These categories included Viet Cong Main Force and Local Force personnel, North Vietnamese Army personnel and certain irregulars engaged in belligerent acts (e.g., Guerillas, Self-Defense Forces and Secret Self-Defense Forces). HQ, Military Assistance Command, Vietnam, Directive Number 381-46, Annex A, December 27, 1967. 62 American Journal of International Law, pp. 766-768; Howard Levie, Documents on Prisoners of War, pp. 748-751 (1979). The U.S. took this step even though North Vietnam rejected the U.S. contention that captured U.S. airmen should be treated as POWs under the GPW on the basis that there had been no declaration of war by either nation.

- During the 1983 U.S. military operation in **Grenada** to protect American citizens, forestall further chaos, and assist in the restoration of democratic institutions, the U.S. military detained members of the Grenadan People's Revolutionary Army and Cuban nationals, who had been sent to the island to support the pro-Marxist regime. The detainees were screened, and those meeting the criteria of the Convention were accorded POW status in accordance with the GPW. The ICRC praised the U.S. efforts; Cuban government attempts to exploit the POW issue were unsuccessful due to "strict compliance with the Geneva Conventions by the United States". Army TJAG Memorandum for the Vice Chief of Staff of the Army, Nov. 4, 1983, quoted in 1981-1988 Cumulative Digest of the United States Practice in International Law, pp. 3452-3456.[37]

- During the 1989 Operation Just Cause in **Panama**, the United States provided members of the Panamanian Defense Forces, who were supporting the illegitimate government of Manuel Noriega, with the

[37] *See generally The Grenada Papers: The Inside Story of the Grenadian Revolution and the Making of a Totalitarian State*–as told in *Captured Documents* (Seabury and McDougall eds. 1984); Mark Adkin, *Urgent Fury: The Battle for Grenada* (1989) and Hugh O'Shaughnessy, *Grenada: Revolution, Invasion and Aftermath* (1984).

protections normally accorded to POWs until their final release and repatriation, even if they might not have been entitled to such protections under Article 4 of the GPW. In a letter to the Attorney General, the State Department's Legal Adviser indicated that "the United States policy to construe the Article 2 of the Geneva Convention III was based on our strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. armed forces." The General Counsel for the Department of Defense concurred with the Legal Adviser's views. January 11, 1990 letter from State Department Legal Adviser to the Attorney General.[38]

- During the 1992 crisis in **Somalia**, U.S. armed forces and other countries participated in a humanitarian assistance operation to relieve the suffering of the Somalia people arising from hostilities between warring factions. A 1993 report to Congress noted that in mid-1992 humanitarian conditions were horrendous, warlords were fighting for control of the country, food supplies were used as a weapon of war, and a large number of Somalis had either died or were at risk of starvation. Despite these chaotic conditions, the United States determined that "the common Article 3 principles [of the Geneva Conventions] continue to apply to the situation in Somalia. Adherence to these principles is consistent with accomplishment of the humanitarian mission and defense of U.S./International forces as may be necessary." (92 STATE 41351, cleared by JCS/OSD)

- In 1994, United States airmen flew missions over **Bosnia** in support of UNPROFOR. "The Administration ... reviewed the issue of the status of members of the US Armed Forces who may be captured in connection with air strikes in Bosnia. The conflict in the former Yugoslavia has been generally regarded an international armed conflict, and it is thus the position of all relevant General Counsel (including State, DOD, JCS and DOJ) that such individuals would be entitled to prisoner of war status." (94 STATE 044536).

- In 1994, the U.S. Armed Forces carried out a military operation in **Haiti** under the authority of United Nations Security Council Resolution 940. This authorized all necessary means to facilitate the departure from Haiti of the military leadership, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti. In the Resolution, the UNSC expressed its concern for the "significant deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian

[38] *See generally Malcolm McConnell: Just Cause: The Real Story of America's High-Tech Invasion of Panama* (1991); Kevin Buckley, *Panama: The Whole Story* (1991); Thomal Donnelly et al, *Operation Just Cause: The Storming of Panama* (1991); and Ivan Musicant, *The Banana Wars: A History of United States Military Intervention in Latin America from the Spanish-American War to the Invasion of Panama* (1990).

refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVIH). . . ." The U.S. Government reiterated in a diplomatic note to the ICRC, that "as is well known to the ICRC, the United States is a strong supporter of the 1949 Geneva Convention(s) ... and customary international law dealing with armed conflict, and in particular those provisions on the protection of prisoners of war and civilians." The note continued that, in the event of hostilities, "the United States will, upon engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict." Regarding the transfer of POWs, the cable concluded that "captured members of the Haitian military will be initially detained by the U.S. Article 12 of the Third (POW) Geneva Convention of 1949 authorizes the U.S. to transfer any POWs to Haitian authorities once the requirements of the convention have been met." (94 STATE 252718, cleared by JCS/OSD/DOJ.)

- More recently, the United States applied the GPW during the conflict with **Yugoslavia** (FRY) in 1999. The Kosovo Liberation Army captured a Yugoslav Army Officer in April 1999 and turned him over to the Government of Albania. When Albania surrendered him to the United States, we acknowledged his status as a POW. As such, he was given treatment in accordance with the GPW. This was consistent with our position pertaining to the three U.S. soldiers detained by the FRY. In the latter case, it did not matter that the U.S. soldiers were captured in Macedonia; they still had POW status and were entitled to the protections of the GPW.

III. Suspension of or Deviation from Geneva Convention Obligations

A. Suspension of Geneva Convention Obligations

The Draft Opinion suggests at p. 28 that, even if Afghanistan has continued to be a party to the Geneva Conventions, "the President could still regard [them] as temporarily suspended during the current military action."

There are a number of difficulties with this analysis.

Under the law of the United States, the right of the President to suspend a treaty is viewed as a subsidiary right of his power to terminate treaties. While most treaties to which the United States is a party can be terminated or suspended by the United States, there are some limitations in treaties or in general principles of treaty law that constrain that power. Most treaties do not address the question of suspension. With respect to such treaties, the residual rules in the Vienna Convention, which are generally recognized as reflecting the operative rules of customary international law, would apply to the extent that they are not inconsistent with the provisions of the particular treaty..

The Draft Opinion recognizes that the relevant customary international law rule is embodied in Article 60 of the Vienna Convention on the Law of Treaties, which reads as follows in relevant part:

> **Termination or suspension of the operation of a treaty as a consequence of its breach**
>
> 2. A material breach of a multilateral treaty by one of the parties entitles
>
> . . .
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
>
> 3. A material breach of a treaty, for the purpose of this article, consists in:
>
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
>
> . . .
>
> 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

One difficulty with the Draft Opinion's analysis is that the President did not in fact suspend the Conventions, and cannot now do so retroactively. Suspension is not automatic. When a party fails to fulfill its obligations, the other party may or may not choose to suspend its own reciprocal performance.[39] In U.S. practice, suspension is exceedingly rare. The Vienna Convention on the Law of Treaties provides that a party must give written notice of the intention to suspend treaty obligations in advance.[40] The suspension is effective only during the period of suspension, and not retroactively.[41]

Another difficulty is the question whether the grounds for suspension in fact exist in this case. It is not clear from the Draft Opinion what Afghanistan's alleged breach is or how and when the United States was specifically affected by it. Yet both subparagraphs of Article 60(2) use the concept of entitlement to "invoke" the breach as a ground for suspending the treaty. It is also not clear that the United States has invoked the breach at the time it occurred.

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[39] Charlton v. Kelly, 229 U.S. 447 (1913).
[40] Articles 65 and 67.
[41] Article 72.

A third difficulty is the rule embodied in paragraph 5. That provides that provisions relating to the protection of the human person in a treaty of a "humanitarian character" cannot be suspended. The negotiating history of the Vienna Convention establishes that this rule was specifically intended to apply to the Geneva Conventions.[42] As noted in the most recent comprehensive discussion of treaty law and practice, the obligations of the Geneva Convention with respect to protection of persons are not based on reciprocity, and therefore lack of reciprocity is not considered as a ground for suspension:

> Article 60(5) makes it clear that Article 60(1)-(3) does not apply to breach of provisions in treaties relating to the protection of the human person . . . Although it was the Geneva Conventions of 1949 which were in mind the paragraph would equally apply to other conventions of a humanitarian character . . . since they create rights intended to protect *individuals irrespective of the conduct of the parties to each other*."[43]

This conclusion is reinforced by the terms of the Geneva Conventions themselves, which indicate that the obligations may not be terminated – and, derivatively, not suspended – during the course of a conflict. Article 142 of the GPW, which is a provision common to the four Conventions, provides for denunciation. However, "a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated."

Treaties to which the United States is a party are the law of the land. To the extent that they contain provisions limiting termination in certain circumstances, it may well be that the intention of the parties was also to limit suspension and that in those circumstances the President is not free to suspend. While the Draft Opinion invokes the maxim of *expressio unius est exclusio alterius*, a canon of construction for domestic legislation, there is a different maxim applicable to treaties: *ut res magis valeat quam pereat* ("that the thing may rather have effect than be destroyed"). In Techt v. Hughes, 229 N.Y. 222, 240-244 (1920) Judge Cardozo observed that there was general agreement that parties concluding treaties which regulate the conduct of hostilities intend them to continue during the conduct of hostilities.[44]

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[42] Except for paragraph 5 of Article 60, the text of the breach article had been generally agreed long before the Vienna Conference. At the Conference, the Government of Switzerland made the proposal that is embodied in paragraph 5. As pointed out in A. Aust, The Modern Law of Treaties, p. 238, it was the Geneva Conventions of 1949 that the Conference had in mind when adopting the Swiss amendment.

[43] Anthony Aust, Modern Treaty Law and Practice, at 238 (2000)(emphasis supplied).

[44] The necessity for continuity of international law protections during the course of hostilities is reflected in other treaties as well. The Vienna Convention on Diplomatic Relations, which is in force between Afghanistan and the United States, provides in article 44 that the receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment. Article 45 provides that even in cases of armed conflict, the receiving state must respect and protect the presence of the mission, together with its property and archives.

B. Deviation from the Strict Terms of the Treaty Regime

The Draft Opinion refers to a number of instances where a strict reading of United States practice has deviated from a strict reading of the requirements of the Geneva Conventions. These instances demonstrate that it is unnecessary either to determine that the United States' obligations under the Geneva Conventions are inapplicable or to comply literally with every provision without any deviation. Anticipating that compliance may be difficult or even impossible, it may be argued that a determination of inapplicability is to be preferred to less than perfect compliance. The continuing applicability of the GPW with respect to the treatment of Taliban detainees does not, however, mean that any failure to conform to every word in the Convention will be considered a breach of the party's treaty obligations. We will not address specific examples of the application of the GPW in concrete situations in this memo. The White House Counsel, the NSC Legal Adviser, the DOD General Counsel and the Legal Counsel to the Chairman of the Joint Staff are aware that we are prepared to consult with them on such questions as they arise.

As a general matter, we would note that practice under the Geneva Conventions demonstrates that compliance with such treaties as a factual matter is not always "to the T." In most cases, compliance with treaties is a matter of practical application – e.g., examining the ordinary meaning to be given the treaty terms, agreements among the parties as to the terms' meaning any subsequent practice of the parties in applying the treaty and any other relevant rules of international law.[45] However precise a text appears to be, the way in which it is actually applied by the parties indicates what they understand it to mean, provided the practice is consistent and is common to, or accepted by, all parties.[46] In some cases, it may even be acceptable to read an implied term into a treaty.[47] Even where the treaty term, as interpreted, is violated, Article 60 of the Vienna Convention on the Law of Treaties only provides remedies (i.e., termination or suspension) in the event of a "material breach" of the treaty.[48]

In this connection, the Draft Opinion's discussion of two occasions since 1949 -- the Korean War and the Persian Gulf War -- where U.S. practice "has deviated from the

[45] Vienna Convention on the Law of Treaties, Art. 31.

[46] See, e.g., Anthony Aust, The Modern Law of Treaties 194 (2000) (citing U.S.-France Air Service Arbitration 1962 (54 ILR 303).

[47] Vienna Convention on the Law of Treaties, Art. 31. One may take as an example the application of the Geneva Conventions by the United Kingdom during the Falklands/Malvinas War. At the end of that conflict in 1982, with winter approaching 13,000 Argentine soldiers surrendered to UK forces. The tent shelters Britain had sent by ship were lost in its sinking. GPW article 22(1) expressly prohibits "internment" of POWs other than in premises on land. Accordingly, as a matter of necessity they were detained on UK merchant ships used to repatriate them to Argentina before the cessation of active hostilities. *See* Martin Middlebrook, *Task Force: The Falklands War* (1982), at 247, 381, 385 (rev. ed. 1987). The ICRC viewed this practical solution favorably. *See* Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict: Falkland-Malvinas Islands* (1982); *International Humanitarian Law and Humanitarian Action*, at 31 (ICRC, 1984)

[48] See, e.g., Aust, *supra* , at 238-239, 300 (2000).

clear requirements of Article 118" of the GPW to repatriate POWs immediately upon the cessation of active hostilities is unsound. Draft Opinion at 30. The Draft Opinion noted further that POWs may "in no circumstances renounce in part or in entirety the rights secured to them" by the GPW. Article 7, GPW.[49] In fact, however, the negotiations of the GPW indicate that the customary law and practice of granting asylum to POWs (i.e., allowing them to renounce their right to immediate repatriation) was intended to be preserved by the GPW.[50] *See, e.g., Geneva Conventions for the Protection of War Victims. Report of the Committee on Foreign Relations of the United States Senate*, 84th Congress, 1st Session, Executive Report No. 9, July 27, 1955, at 23-24 (noting the view of the Executive Branch and the Committee that "nothing in the Geneva Conventions of 1949 . . . will compel the United States forcibly to repatriate prisoners of war who fear political persecution, personal injury, or death should they return to their homeland"). As a result, the non-repatriation of certain prisoners was not considered as a breach of a treaty by State Parties, notwithstanding the language of the GPW.

In addition, the GPW, like the other Geneva Conventions, distinguishes between "grave breaches" of the Convention to which individual criminal responsibility attaches and other violations of the GPW. Grave breaches consist of:

> "[a]ny of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious bodily injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." GPW, Article 130.

The United States is bound to respect all of the provisions of the Convention. As a matter of practice, however, States do not always so comply and, although responsibility attaches, the consequences for such noncompliance are typically questions associated with relations with our allies and public opinion. During the Gulf War, for instance, the United States did not set up specific Prisoner of War camps as required by the GPW, instead setting up "holding camps" from which detainees were transferred to the Saudis (under an agreement concluded in accordance with the GPW, article 12). As a result, the United States did not comply with its obligations on particular issues associated with the running of a POW camp, which it was arguably required to establish. In the end, the United States did not face substantial criticism for this course of action -- and has not faced such criticism for similar conduct in Haiti, Panama and Grenada.

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[49] As Pictet notes, the inalienable right to be repatriated was "based upon the general assumption that for the prisoner, repatriation constitutes a return to a normal situation and that, in almost every case, it is his own wish to be repatriated." Pictet Commentary on art. 118.

[50] The asylum concept was based in part upon the desire to avoid the recurrence of gross human rights violations and extrajudicial killings like those that occurred following WWII and the Korean War. *See* Pictet, at 512, 543-48; *see also* Howard S. Levie, *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 Am. J. Int'l Law 694 (1973) (citing negotiations and UNGA resolutions, but rejecting the notion that "a norm of international law has evolved which prohibits the involuntary repatriation of prisoners under any circumstances").

Policymakers should be aware of two separate issues in particular:

- First, *criminal responsibility attaches* to the commission of grave breaches of the Convention, including by operation of fundamental principles of command responsibility. If a court or other U.S. body were to find that the GPW does apply, and that U.S. treatment of such persons fell below such standards as to be considered grave breaches, persons responsible may be held accountable.[51] No international criminal responsibility attaches, however, to other violations of the Convention. Such violations are on a par with a failure to observe any other international obligation.

- Second, the Geneva Conventions do not contain mandatory dispute settlement mechanisms such that another State could bring a claim against us under it. It is possible, even likely, that a decision not to apply the Geneva Convention would lead to such actions as a request for an advisory opinion from the International Court of Justice, proceedings in regional human rights forums, and other forms of extreme international and public opprobrium. Differing questions of interpretation and application of the Convention, on the other hand, are more typically matters of discussion among States, rarely rising to the level of formalized dispute.

If, as we believe, the GPW does apply, it is our assessment that international and domestic opinion would not look to each detail of the GPW to determine whether we are in compliance, but would rather look to fundamental compliance overall and to the nature and quality of alleged deviations before expressing a negative view. It is in this respect that careful attention to the grave breach provisions are particularly important, for as long as we can apply the other provisions -- we believe that public and international opinion will serve not to embarrass the United States but to bolster opinion on the conduct of the current war against terrorism. Even if the GPW did not apply at all, moreover, international opinion would likely look to international human rights norms, which in significant respects are more onerous, to judge our actions. As a general rule, it is preferable that the GPW standards apply in cases of hostilities, since these rules are designed for such situations.[52]

[51] Note further that under GPW Article 131 "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of" grave breaches.

[52] *See, for example*, the U.S. submissions in the Grenada Case before the Inter-American Commission, in which the United States took the position that in cases covered by international humanitarian law, international human rights standards did not apply.

IV. Customary International Law

The Draft Opinion states at page 34 that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of Al Qaeda and the Taliban." It states at page 38 that "[a]s non-federal law, . . . customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan." In fact, however, customary international law creates obligations binding on the United States under international law and potentially under domestic law. Were the President, as contemplated by the Draft Opinion, to act lawfully under federal law in a manner that would be inconsistent with the obligations of the United States under customary international law, that action would, notwithstanding its lawfulness under U.S domestic law, constitute a breach of an international legal obligation of the United States. That breach would subject the United States to adverse international consequences in political and legal fora and potentially in the domestic courts of foreign countries.

It is well-established that customary international law creates obligations on States. The International Court of Justice has recognized this principle on many occasions. *See, e.g., Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 46, para. 86 ("breach of an international legal obligation arising out of a treaty or a general rule of law"). Article 38 of the Statute of the Court, to which the United States is a party, states that the Court shall apply "international custom, as evidence of a general practice accepted as law" in deciding cases before it.

The United States has long accepted that customary international law imposes binding obligations as a matter of international law. In domestic as well as international fora, we often invoke customary international law in articulating the rights and obligations of States, including the United States. We frequently appeal to customary international law in the following areas, among others:

- Law of War : the United States has frequently addressed the binding character of customary international law in this context. The Department of the Army Field Manual on the Law of Land Warfare, FM 27-10 (July 1956) provides at paragraph 7c as follows: "*Force of Customary Law.* The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy (see par. 497). The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country." *See also* Department of Defense Directive Number 5100.77 (December 9, 1998) para 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its

individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.")

- With respect to Additional Protocol I of 1977 to the 1949 Geneva Conventions, which the United States has not ratified, U.S. officials have taken the position that "the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future." Remarks of Michael J. Matheson, Deputy Legal Adviser, U.S. Department of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 420 (1987).

- We have taken consistent positions with regard to customary international law in U.S. courts. In its Statement of Interest before the U.S. Court of Appeals for the Second Circuit in Kadic v. Karadzic, (No. 94-9069) at p. 5, for example, the United States argued (and the Court of Appeals ultimately agreed) that "[c]ustomary international law does not bind exclusively state actors. ... [A]cts committed by non-state actors may indeed violate international law." The United States noted that:

  (a) among the alleged violations at issue in this civil suit were genocide, war crimes, and crimes against humanity in violation of customary international law;

  (b) the United States had "officially asserted" to the International Criminal Tribunal for the Former Yugoslavia that "proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals" (quoting the Submission of the Government of the United States to the International Criminal Tribunal for the Former Yugoslavia in respect of the Tadic case);

- In November 1986, Herbert Okun, Deputy Permanent Representative of the United States to the United Nations, stated in a speech to the General Assembly of the United Nations that: "We are all aware of the number and scope of violations of international humanitarian law being carried out in Afghanistan by the Soviet Union or its puppets. These include, but by no means are limited to: The 1949 Geneva Conventions and customary international law designed to protect civilians." Department of State Bulletin, January 1987, p. 84.

- It should also be noted that under Section 4 of the President's Military Order, any individual subject to that order may be tried by military commission "for any and all offenses triable by military commission." Military commissions have jurisdiction to try individuals for offenses against the law of nations "of which the law of war is a part," *Application of Yamashita*, 327 U.S. 1, 7 (1946), *accord, Ex part Quirin*, 317 U.S. 1, 11 (1942). The Counsel to the President recently

indicated that persons to be tried by military commission "must be chargeable with offenses against the international laws of war." *Martial Justice, Full and Fair* by Alberto R. Gonzales, New York Times, November 30, 2001. We are concerned that arguments by the United States to the effect that customary international law is not binding will be used by defendants before military commissions (or in proceedings in federal court) to argue that the commissions cannot properly try them for crimes under international law. Although we can imagine distinctions that might be offered, our attempts to gain convictions before military commissions may be undermined by arguments which call into question the very corpus of law under which offenses are prosecuted.

- Immunities: the United States relies upon customary international law to provide the President and his family with immunity from prosecution and legal process when he travels abroad, by virtue of the doctrine of head of State immunity, which is entirely a matter of customary international law. Historically, it has also relied upon customary law with respect to the immunities of diplomatic and consular agents and representatives. *See, e.g.*, U.S. Statement of Interest filed in Begum v. Saleh, 99 Civ. 11834 (S.D.N.Y. filed March 31, 2000)(referring to the UN Headquarters Agreement and the Convention on Privileges and Immunities of the United Nations, the United States submitted: "The privileges and immunities to which diplomats accredited to the United States were entitled were, at the time the above treaties were negotiated, governed by customary international law. Customary international law had for centuries recognized that the absolute independence and security of diplomatic envoys was essential to fulfillment of their critical role in international relations, and that full diplomatic immunity was a necessary guarantor of that independence.") *See also* 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire, 988 F.2d 295, 299-300 (2d Cir.), cert. denied, 510 U.S. 819 (1993).

- Treaties: as the Draft Opinion notes at pages 31-32, the law applicable to the interpretation and implementation of treaties is considered customary international law. A State's obligation to comply with its treaty obligations, for example, originally derives from a customary international law obligation.

- The Law of the Sea: the United States has consistently asserted in its interactions with other States that customary international law governs in respect of (among many others matters) the definition of the continental shelf, the determination of baselines for purposes of measuring the breadth of the territorial sea and other maritime zones and the right of innocent passage through the territorial sea of coastal States. The United States has claimed for itself, for example, rights in its Exclusive Economic Zone on the basis that "international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over the natural resources and related jurisdictions." (Proclamation 5030, Exclusive Economic Zone of the United States of America, March 10, 1983). The United States regularly protests other countries' refusals to comply with customary international law-based freedom of navigation rules. Without asserting its rights under customary international law, for example, the

The fact that the internationally wrongful act may have been lawful under the internal law of a State has no bearing on the lawfulness of the act under international law. *See, e.g.*, ILC draft Article 3 ("The characterization of act of State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law") and the Commentary accompanying that Article (at 74). *See, e.g., Treatment of Polish Nationals, 1932, P.C.I.J., Series A/B, No. 44*, p.4, pp. 25-5 ("according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted . . . [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. . . . The application of the Danzig Constitution may . . . result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law . . . . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.").

Where the international responsibility of a State for an internationally wrongful act is engaged, the State is under an international law obligation, *inter alia*, to cease its wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. *See, e.g.*, ILC draft Articles 30 and 31 and the Commentaries accompanying those Articles (at 216, 223). *See also Factory at Chorzow, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.").

Thus, irrespective of the conclusions of the Draft Opinion with respect to the status of customary international law as part of federal law,[53] it is clear that customary

[53] The Department of State is continuing to review the Draft Opinion with respect to this issue. We would note, however, that the Founding Fathers were in fact quite cognizant of the importance of compliance with customary international law ("the law of nations") and did in fact incorporate it by reference into the Constitution through the offenses clause. That it was not expressly included as a basis of jurisdiction for Article III courts is not dispositive. In its brief as amicus curiae before the U.S. Supreme Court in Boos v. Barry, No. 86-803 (1987) at pp. 20-21 (supporting respondents opposing the petition for a writ of certiorari), the United States stated that: "In the period immediately following the Declaration of Independence, the Continental Congress sought to assure the world that the 'law of nations [would be] strictly observed' by the United States (14 J. Continental Cong. 635 (1779)). . . . It was regarded as a matter 'of high importance to the peace of America that she observe the law of nations,' and it was anticipated that this would be 'perfectly and punctually done' by the new national government (The Federalist No. 3, at 43 (Jay) (C. Rossiter ed. 1961)." The Framers expressly included a reference to the "law of nations" in the offenses clause (U.S. CONST., Art. I, § 8, cl. 10) and also incorporated it directly into U.S. law through the Alien Tort Statute, enacted as part of the Judiciary Act of 1789, now codified at 28 U.S.C. 1350. Despite the continuing academic controversy (to which the Draft Opinion refers) about its status post-Erie and whether the President may choose in certain circumstances not to comply with it, customary international law is in fact recognized and continues to be applied by U.S. courts in a variety of circumstances.

international law creates international legal obligations for the United States for the breach of which the United States would be responsible as a matter of international law. The Draft Opinion does not address this "legally meaningful" aspect of U.S. compliance with relevant customary international law-based obligations.

Appendix A.

Fora in which U.S. determinations may be reviewed if it decides against GPW application

At several points the Draft Opinion notes the deference given by U.S. Courts to Presidential determinations in the conduct of foreign policy and the interpretation of treaties. The following is a catalogue of a number of ways in which the decisions related to detainees in our custody may be examined.

I. Domestic

U.S. Court Review. A decision not to afford GPW protections to Taliban prisoners may be scrutinized by U.S. federal courts. Although the writ of habeas corpus historically has not been available to enemy aliens captured and imprisoned outside U.S. territory, *see, e.g., Johnson v. Eisentrager*, 70 S. Ct. 936 (1950) (holding that German nationals, confined in Germany following conviction by military commission of having engaged in military activity against United States in China after surrender of Germany, had no right to writ of habeas corpus to test legality of their detention), the "doors of our courts have not been summarily closed upon these prisoners," *id.* at 945. Even those enemy prisoners without a right to habeas corpus historically have had their applications considered by the U.S. federal courts, including the Supreme Court. *Id.* As the Supreme Court recognized in *Eisentrager*, three different federal courts "provided [the prisoners'] counsel opportunity to advance every argument in their support and to show some reason in the petition why they should not be subject to the usual disabilities of non-resident enemy aliens." *Id.*

Civil Liability. The Alien Tort Claims Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1993). Courts have recognized causes of action under the ATCA for violations of customary international human rights norms including, *inter alia*, genocide,[54] war crimes,[55] torture,[56] prolonged arbitrary detention,[57] and cruel, inhuman or degrading treatment.[58] The ATCA has, at times, been employed against persons acting under color

[54] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).
[55] *Id.*
[56] *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).
[57] *Martinez v. City of Los Angeles*, 141 F.3d 1373 (6th Cir. 1998); *Alvarez-Machain v. Sosa*, 266 F.3d 1045 (9th Cir. 2001).
[58] *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996)(allowing former Ethiopian women prisoners to sue an official of former Ethiopian government official for arbitrary detention and torture, including cruel, inhuman, and degrading treatment and punishment in Ethiopia); *Paul v. Avril*, 901 F.Supp. 330 (S.D. Fla. 1994) (found that former military ruler of Haiti bears personal responsibility for systematic pattern of egregious human rights abuses during his military rule and therefore bears responsibility for torture and arbitrary detention committed by his military forces); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (found that former Guatemalan Minister of Defense could be liable for cruel inhuman and degrading

of U.S. law.[59] It remains an open question, however, whether an ATCA claim against a U.S. official would succeed.

2. International

Criminal Prosecution. Article 129 of GPW places each Party "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, ... hand such persons over for trial" to another party. If we conclude that the GPW does not apply, and take actions arguably inconsistent with it, foreign prosecutors may investigate U.S. government officials to determine whether they committed grave breaches.

UN Commission on Human Rights. This Commission is the primary human rights body of the United Nations. It adopts resolutions on thematic matters involving human rights and it may adopt resolutions concerning the human rights performance of named countries. The latter is inevitably a highly charged exercise, as demonstrated by past annual U.S. efforts to have the Commission adopt resolutions condemning China and Cuba. This year, for the first time ever, the United States is not a member of the Commission, and the Administration has not yet decided whether we will be present as an observer. This year's session runs from March 18 to April 26 in Geneva. If our treatment of Taliban detainees does not comport with perceived international standards (e.g., the Geneva Conventions, the International Covenant on Civil and Political Rights), we can expect heavy criticism in the Commission and, perhaps, for the first time, a resolution naming and criticizing the United States directly.

ECOSOC and the UN General Assembly. Resolutions adopted by the Commission on Human Rights move through the UN system, first to the Economic and Social Council (ECOSOC), which reviews, adopts and forwards them to the General Assembly, which reviews and adopts them. At each stage there is debate. Thus, there will be two repetitions of whatever is produced by the Commission. ECOSOC meets in July; the General Assembly meets in the fall.

International Court of Justice – Advisory Opinions. Article 96 of the UN Charter authorizes "[t]he General Assembly or the Security Council [and other UN bodies to] request the International Court of Justice to give an advisory opinion on any legal question." On several occasions, the Court has provided guidance in advisory opinions on the application of an international treaty despite objections of a concerned party.[60]

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treatment, which included: witnessing the torture or severe mistreatment of an immediate relative; watching soldiers ransack their homes and threaten their families; being bombed from the air; and having a grenade thrown at them).

[59] See, e.g., *Jama v. U.S. I.N.S.*, 22 F.Supp. 353 (D.N.J. 1998) (allowing immigration detainees to bring claims under ACTA against private corrections contractor for cruel, inhuman or degrading treatment.)

[60] *See, e.g., Interpretation of Peace Treaties*, 1950 I.C.J. Reports 65; *Reservations to the Genocide Convention*, 1951 I.C.J. Reports 15.

The Court has also provided guidance on the scope and content of customary international law, even over the objections of States.[61]

Inter-American Court of Human Rights - Advisory Opinions. Article 64 of the American Convention on Human Rights allows for member states of the Organization of American States to request an advisory opinion from the Inter-American Court of Human Rights regarding the interpretation of the American Convention or "other treaties concerning the protection of human rights in the American states." While the decisions are not binding, many countries in the Americas that have accepted the jurisdiction of the Court consider them authoritative. If an advisory opinion were to be requested from the Court in regard to an interpretation of obligations of countries pursuant the Geneva Conventions, or more generally under international humanitarian law, it is probable that the Court would exercise its advisory jurisdiction over the matter.

OSCE. The United States has been an active participant in the Organization for Security and Cooperation and Europe (OSCE) since signing the Helsinki Final Act in 1976. Although OSCE documents do not create legal obligations, they do create political commitments that are subject to regular public scrutiny by OSCE institutions (such as the Office of Democratic Institutions and Human Rights ("ODIHR")) as well as by other participating states. The United States relies on the OSCE to achieve various political objectives within the region, particularly in Central Asia - objectives that will be hard to further if we are subject to increased criticism for running afoul of our OSCE commitments. On November 22, 2001, ODIHR requested information about the implications of the President's Military Order; we replied on December 1.

Inter-American Commission on Human Rights. Petitions may be submitted on behalf of individuals charging a violation of any of the rights enumerated in the American Declaration on the Rights and Duties of Man to the Inter-American Commission on Human Rights ("IACHR"). The IACHR is an organ of the Organization of American States, to which the United States is a party. If the IACHR finds the petition admissible, it may issue a Final Report with a decision on whether there has been a violation of the American Declaration and offer recommendations to the State. If the State does not take steps to implement the recommendations, the Report becomes public. Cases were brought against the United States with respect to elements of U.S. actions in Grenada and in Panama. Given its past rulings, the IAHCR will certainly consider complaints on behalf of the Taliban to be admissible; its rules concerning standing allow third parties to file petitions on behalf of Taliban members. The IACHR also will feel free to interpret and determine the applicability of the Geneva Conventions and other treaties.

UN Special Rapporteurs. The Commission on Human Rights appoints experts as Special Rapporteurs to examine selected areas. The Special Rapporteur on Summary and Arbitrary Executions and the Special Rapporteur on Torture regularly inquire about the status of particular individuals in the United States and request our assurances that our

[61] *See, e.g., Advisory Opinion, The Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Reports. That Advisory Opinion was requested by the General Assembly in Resolution 49/75K (1994), which was adopted by a vote of 78 - 43 (U.S.) - 38 (abstentions).

treatment of an individual comports with international standards. The United States consistently responds to these inquiries about individuals (many on death row or in prison) from Special Rapporteurs, providing assurances that it is conforming with international law in its treatment of those individuals. In mid-November the Department received an inquiry about the Military Order of November 13 from the Special Rapporteur on the Independence of Judges and Lawyers. We have not yet responded.

Inquiry Under Article 132 of the Geneva Convention Relative to the Treatment of Prisoners of War. Article 132 provides:

> At the request of a Party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.
>
> If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.
>
> Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

It is possible that a coalition partner could attempt to invoke this provision if we are holding one of their nationals.

Inquiries and Monitoring by Treaty Bodies. The United States is a party to the International Covenant on Civil and Political Rights ("ICCPR"), the Convention against Torture, and the Convention on the Elimination of Racial Discrimination. These treaties establish a regular reporting obligation for States Parties and a specialist body charged with the oversight of treaty performance by States. It is possible that if the United States appears to be acting in a manner inconsistent with its treaty obligations, the Human Rights Committee could request an immediate report from the United States on its compliance, followed by a public oral hearing.

Document 8

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 22, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President,
and William J. Haynes II
General Counsel of the Department of Defense

Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that President has sufficient grounds to find that these treaties do not protect members of the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part I of this memorandum describes the WCA and the most relevant treaty that it incorporates: the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").[1]

Parts II and III of this memorandum discuss why other deviations from the text of Geneva III would not present either a violation of the treaty or of the WCA. Part II explains that al Qaeda detainees cannot claim the protections of Geneva III because the treaty does not apply to them. Al Qaeda is merely a violent political movement or organization and not a nation-State. As a result, it cannot be a state party to any treaty. Because of the novel nature of this conflict, moreover, a conflict with al Qaeda is not properly included in non-international forms of armed

[1] The four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955. These are the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115 ("Geneva Convention I"); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219 ("Geneva Convention II"); the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III"); and the Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3317 ("Geneva Convention IV").

conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

Part III discusses why the President may decide that Geneva III, as a whole, does not protect members of the Taliban militia in the current situation. The President has the constitutional authority to temporarily suspend our treaty obligations to Afghanistan under the Geneva Conventions. Although he may exercise this aspect of the treaty power at his discretion, we outline several grounds upon which he could justify that action here. In particular, he may determine that Afghanistan was not a functioning State, and therefore that the Taliban militia was not a government, during the period in which the Taliban was engaged in hostilities against the United States and its allies. Afghanistan's status as a failed State is sufficient ground alone for the President to suspend Geneva III, and thus to deprive members of the Taliban militia of POW status. The President's constitutional power to suspend performance of our treaty obligations with respect to Afghanistan is not restricted by international law. It encompasses the power to suspend some treaties but not others, or some but not all obligations under a particular treaty. Should the President make such a determination, then Geneva III would not apply to Taliban prisoners and any failure to meet that treaty's requirements would not violate either our treaty obligations or the WCA.

Part IV examines justifications for any departures from Geneva III requirements should the President decline to suspend our treaty obligations toward Afghanistan. It explains that certain deviations from the text of Geneva III may be permissible, as a matter of domestic law, if they fall within certain justifications or legal exceptions, such as those for self-defense or infeasibility. Further, Part IV discusses the President's authority to find, even if Geneva III were to apply, that Taliban members do not qualify as POWs as defined by the treaty.

In Part V, we address the question whether, in the absence of any Geneva III obligations, customary international law requires, as a matter of federal law, that the President provide certain standards of treatment for al Qaeda or Taliban prisoners. We conclude that customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the United States military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause.

I. *Background and Overview of the War Crimes Act and the Geneva Conventions*

It is our understanding that your Department is considering two basic plans regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict. First, the Defense Department intends to make available a facility at the U.S. Navy base at Guantanamo Bay, Cuba ("GTMO"), for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. At the present moment, your Department has confined these individuals in temporary facilities, pending the construction of a more permanent camp at GTMO. While it is conceivable that some might argue that these facilities are not fully in keeping with the terms of Geneva III, we understand that they meet minimal humanitarian requirements consistent with the need to prevent violence and for force protection. We understand that GTMO authorities are

providing these individuals with regular food and medical care, and that basic hygiene and sanitary standards are being maintained. You have further informed us that your plans for a longer-term facility at GTMO are still under development.[2]

Second, your Department is developing procedures to implement the President's Military Order of November 13, 2001, which establishes military commissions for the trial of violations of the laws of war committed by non-U.S. citizens.[3] The question has arisen whether Geneva III would restrict the proposed rules, or even require that only courts-martial be used to try members of al Qaeda or the Taliban militia for war crimes.

We believe that the WCA provides a useful starting point for our analysis of the application of the Geneva Conventions to the treatment of detainees captured in the Afghanistan theater of operations.[4] Section 2441 of title 18 renders certain acts punishable as "war crimes." The statute's definition of that term incorporates, by reference, certain treaties or treaty provisions relating to the laws of war, including the Geneva Conventions.

A. *Section 2441: An Overview*

Section 2441 of Title 18 lists four categories of war crimes. First, it criminalizes "grave breaches" of the Geneva Conventions, which are defined by treaty and will be discussed below. Second, it makes illegal conduct prohibited by articles 23, 25, 27 and 28 of the Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 ("Hague Convention IV"). Third, it criminalizes violations of what is known as "commonarticle 3," which is a provision common to all four of the Geneva Conventions. Fourth, it criminalizes conduct prohibited by certain other laws of war treaties, once the United States joins them. A House Report states that the original legislation "carries out the international obligations of the United States under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes." H.R. Rep. No. 104-698, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2166. Each of those four conventions includes a clause relating to legislative implementation and to criminal punishment.[5]

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[2] We have discussed in a separate memorandum the federal jurisdiction issues that might arise concerning Guantanamo Bay. *See* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General and John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).

[3] *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[4] The rule of lenity requires that the WCA be read so as to ensure that prospective defendants have adequate notice of the nature of the acts that the statute condemns. *See, e.g., Castillo v. United States*, 530 U.S. 120, 131 (2000). In those cases in which the application of a treaty incorporated by the WCA is unclear, therefore, the rule of lenity requires that the interpretive issue be resolved in the defendant's favor.

[5] That common clause reads as follows:

> The [signatory Nations] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. . . . Each [signatory nation] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . . It may also, if it prefers,. . . hand such persons over for trial to another [signatory nation], provided such [nation] has made out a *prima facie* case.

In enacting section 2441, Congress sought to fill certain perceived gaps in the coverage of federal criminal law. The main gaps were thought to be of two kinds: subject matter jurisdiction and personal jurisdiction. First, Congress found that "[t]here are major gaps in the prosecutability of individuals under federal criminal law for war crimes committed against Americans."[6] For example, "the simple killing of a[n American] prisoner of war" was not covered by any existing Federal statute.[7] Second, Congress found that "[t]he ability to court martial members of our armed services who commit war crimes ends when they leave military service. [Section 2441] would allow for prosecution even after discharge."[8] Congress considered it important to fill this gap, not only in the interest of the victims of war crimes, but also of the accused. "The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims' home countries for prosecution."[9] Accordingly, section 2441 criminalizes forms of conduct in which a U.S. national or a member of the Armed Forces may be either a victim or a perpetrator.

B. *Grave Breaches of the Geneva Conventions*

The Geneva Conventions of 1949 remain the agreements to which more States have become parties than any other concerning the laws of war. Convention I deals with the treatment of wounded and sick in armed forces in the field; Convention II addresses treatment of the wounded, sick, and shipwrecked in armed forces at sea; Convention III regulates treatment of POWs; Convention IV addresses the treatment of citizens.

The Geneva Conventions, like treaties generally, structure legal relationships between nation-States, not between nation-States and private, transnational or subnational groups or organizations.[10] Article 2, which is common to all four Geneva Conventions, makes the

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Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[6] H.R. Rep. No. 104-698, at 6, *reprinted in* 1996 U.S.C.C.A.N. at 2171.

[7] *Id.* at 5, *reprinted in* 1996 U.S.C.C.A.N. at 2170. In projecting our criminal law extraterritorially in order to protect victims who are United States nationals, Congress was apparently relying on the international law principle of passive personality. The passive personality principle "asserts that a state may apply law – particularly criminal law – to an act committed outside its territory by a person not its national where the victim of the act was its national." *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998). The principle marks recognition of the fact that "each nation has a legitimate interest that its nationals and permanent inhabitants not be maimed or disabled from self-support," or otherwise injured. *Lauritzen v. Larsen*, 345 U.S. 571, 586 (1953); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

[8] H.R. Rep. No. 104-698, at 7, *reprinted in* 1996 U.S.C.C.A.N. at 2172. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court had held that a former serviceman could not constitutionally be tried before a court martial under the Uniform Code for Military Justice (the "UCMJ") for crimes he was alleged to have committed while in the armed services. The WCA cured this problem.

[9] H.R. Rep. No. 104-698, at 7, *reprinted in* 1996 U.S.C.C.A.N. at 2172. The principle of nationality in international law recognizes that (as Congress did here) a State may criminalize acts performed extraterritorially by its own nationals. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

[10] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); *The Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact

application of the Conventions to relations between state parties clear. It states that: "the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them."[11] Similarly, it states that "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

As noted above, Section 2441(c)(1) criminalizes "grave breaches" of the Convention. Each of the four Geneva Conventions has a similar definition of "grave breaches." Geneva Convention III defines a grave breach as:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva Convention III, art. 130. As mentioned before, the Geneva Conventions require the High Contracting Parties to enact penal legislation to punish anyone who commits or orders a grave breach. *See, e.g., id.* art. 129. Further, each State party has the obligation to search for and bring to justice (either before its courts or by delivering a suspect to another State party) anyone who commits a grave breach. No State party is permitted to absolve itself or any other nation of liability for committing a grave breach.

Given the specific definition of "grave breaches," it bears noting that not <u>all</u> breaches of the Geneva Conventions are criminalized under Section 2441. Failure to follow some of the regulations regarding the treatment of POWs, such as difficulty in meeting all of the conditions set forth for POW camp conditions, does not constitute a grave breach within the meaning of Geneva Convention III, art. 130. Only by causing great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial, or forcing them to serve in the Armed Forces, could the United States actually commit a grave breach.

<u>*C. Common Article 3 of the Geneva Conventions*</u>

Section 2441(c)(3) also defines as a war crime conduct that "constitutes a violation of common article 3" of the Geneva Conventions. Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is *not* one between High Contracting Parties to the Conventions. Thus, common article 3 may require the United States, as a High Contracting Party, to follow certain rules even if other parties to the conflict are not parties to the Conventions. On the other hand, article 3 requires State parties to follow only certain minimum standards of treatment toward prisoners, civilians, or the sick and wounded – standards that are much less onerous and less detailed than those spelled out in the Conventions as a whole.[12]

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between independent nations."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) ("[T]reaties are agreements between nations.")

Geneva III art. 2 (emphasis added).

[12] Common Article 3 reads in relevant part as follows:

Common article 3 complements common article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[13] Common article 3, however, covers "armed conflict not of an international character" – a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting Parties.

Common article 3's text provides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory. First, the text of the provision refers specifically to an armed conflict that a) is not of an international character, and b) occurs in the territory of a state party to the Convention. It does not sweep in all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as an international terrorist organization) as parties to the conflict. Further, common article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states. Also, the language at the end of article 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was designed to ensure that a state party that observed article 3 during a civil war would not be understood to have granted the "recognition of the insurgents as an adverse party."[14]

This interpretation is supported by commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory."[15] A legal scholar writing in the same year in which the Conventions were prepared

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In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. . . .

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[13] Article 2's reference to a state of war "not recognized" by a belligerent was apparently intended to refer to conflicts such as the 1937 war between China and Japan. Both sides denied that a state of war existed. *See* Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit./Y.B. Int'l L. 294, 298-99 (1949).

[14] Frits Kalshoven, *Constraints on the Waging of War* 59 (1987).

[15] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at ¶ 4539 (Yves Sandoz et al. eds., 1987)

stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must normally mean a civil war."[16]

Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between nation-States (subject to article 2), and large-scale civil war within a nation-State (subject to article 3). To understand the context in which the Geneva Conventions were drafted, it will be helpful to identify three distinct phases in the development of the laws of war.

First, the traditional laws of war were based on a stark dichotomy between "belligerency" and "insurgency." The category of "belligerency" applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the category of "insurgency" applied to armed violence breaking out within the territory of a sovereign State.[17] International law treated the two classes of conflict in different ways. Inter-state wars were regulated by a body of international legal rules governing both the conduct of hostilities and the protection of noncombatants. By contrast, there were very few international rules governing armed conflict within a state, for states preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law, which precluded any possible intrusion by other States.[18] This was a "clearly sovereignty-oriented" phase of international law.[19]

The second phase began as early as the Spanish Civil War (1936-39) and extended through the time of the drafting of the Geneva Conventions until relatively recently. During this period, State practice began to apply certain general principles of humanitarian law beyond the traditional field of State-to-State conflict to "those internal conflicts that constituted large-scale civil wars."[20] In addition to the Spanish Civil War, events in 1947 during the civil war between the Communists and the Nationalist regime in China illustrated this new tendency.[21] Common article 3, which was prepared during this second phase, was apparently addressed to armed conflicts akin to the Chinese and Spanish civil wars. As one commentator has described it, article 3 was designed to restrain governments "in the handling of armed violence directed against them for the express purpose of secession or at securing a change in the government of a

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[16] Gutteridge, *supra*, at 300.

[17] *See* Joseph H. Beale, Jr., *The Recognition of Cuban Belligerency*, 9 Harv. L. Rev. 406, 406 n.1 (1896).

[18] *See The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)* (Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia 1995) ("*Tadic*"), 105 I.L.R. 453, 504-05 (E. Lauterpacht & C.J. Greenwood eds., 1997).

[19] *Id.* at 505; *see also* Gerald Irving Draper, *Reflections on Law and Armed Conflicts* 107 (1998) ("Before 1949, in the absence of recognized belligerency accorded to the elements opposed to the government of a State, the law of war . . . had no application to internal armed conflicts. . . . International law had little or nothing to say as to how the armed rebellion was crushed by the government concerned, for such matters fell within the domestic jurisdiction of States. Such conflicts were often waged with great lack of restraint and cruelty. Such conduct was a domestic matter.").

[20] *Tadic*, 105 I.L.R. at 507. Indeed, the events of the Spanish Civil War, in which "both the republican Government [Spain] and third States refused to recognize the [Nationalist] insurgents as belligerents," *id.* at 507, may be reflected in common Article 3's reference to "the legal status of the Parties to the conflict."

[21] *See id.* at 508.

State," but even after the adoption of the Conventions it remained "uncertain whether [Article 3] applied to full-scale civil war."[22]

The third phase represents a more complete break than the second with the traditional "State-sovereignty-oriented approach" of international law. This approach gives central place to individual human rights. As a consequence, it blurs the distinction between international and internal armed conflicts. This approach is well illustrated by the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, which appears to take the view that common article 3 applies to all armed conflicts of *any* description other than those between state parties, and is not limited to internal conflicts between a State and an insurgent group. In this conception, common article 3 is not just a complement to common article 2; rather, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2.[23]

Such an interpretation of common article 3, however, ignores the text and the context in which it was ratified by the United States. If the state parties had intended the Conventions to apply to all forms of armed conflict, they could have used broader, clearer language. To interpret common article 3 by expanding its scope well beyond the meaning borne by its text is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements. Further, as we have discussed, article 3 was ratified during a period in which the traditional, State-centered view of international law was still dominant and was only just beginning to give way to a human-rights-based approach. Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common article 3. Conflicts of these kinds would have been unforeseen and were not provided for in the Conventions. Further, it is telling that in order to address this unforeseen circumstance, the State parties to the Geneva Conventions did not attempt to distort the terms of

[22] *See* Draper, *Reflections on Law and Armed Conflicts*, *supra*, at 108.

[23] Some international law authorities seem to suggest that common Article 3 is better read as applying to all forms of non-international armed conflict. The *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *supra*, after first stating that Article 3 applies when "the government of a single State [is] in conflict with one or more armed factions within its territory," suggests, in a footnote, that an armed conflict not of an international character "may also exist in which armed factions fight against each other without intervention by the armed forces of the established government." *Id.* ¶ 4339 at n.2. A still broader interpretation appears to be supported by the language of the decision of the International Court of Justice (the "ICJ") in *Nicaragua v. United States* – which the United States refused to acknowledge by withdrawing from the compulsory jurisdiction of the ICJ. *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, (International Court of Justice 1986), 76 I.L.R. 1, 448, ¶ 218 (E. Lauterpacht & C.J. Greenwood eds., 1988). The ICJ's decision is probably best read to suggest that all "armed conflicts" are either international or non-international, and that if they are non-international, they are governed by common Article 3. If that is the correct understanding, however, the result was merely stated as a conclusion, without taking account either of the precise language of Article 3 or of the background to its adoption. Moreover, while it was true that one of the conflicts to which the ICJ was addressing itself – "[t]he conflict between the *contras*' forces and those of the Government of Nicaragua" – "was an armed conflict which is 'not of an international character,'" *id.* at 448, ¶ 219, that conflict was recognizably a civil war between a State and an insurgent group, not a conflict between or among violent factions in a territory in which the State had collapsed. Thus there is substantial reason to question the logic and scope of the ICJ's interpretation of common Article 3, which, in any event, is not binding as a matter of domestic law on the United States.

common article 3 to apply it to cases that did not fit within its terms. Instead, they drafted two new protocols to adapt the Conventions to the conditions of contemporary hostilities.[24] The United States has not ratified these protocols, and hence cannot be held to the reading of the Geneva Conventions they promote. Thus, the WCA's prohibition on violations of common article 3 would apply only to internal conflicts between a state party and an insurgent group, rather than to all forms of armed conflict not covered by common article 2.

II. *Application of WCA and Associated Treaties to al Qaeda*

We conclude that Geneva III does not apply to the al Qaeda terrorist organization. Therefore, neither the detention nor trial of al Qaeda fighters is subject to Geneva III (or the WCA). Three reasons, examined in detail below, support this conclusion. First, al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions. Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III. Third, the nature of the conflict precludes application of common article 3 of the Geneva Conventions.

Geneva III does not apply to a non-State actor such as the al Qaeda terrorist organization. Al Qaeda is not a State. It is a non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations. Non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war. Common article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited to cases of declared war or armed conflict "between two or more of the High Contracting Parties." Al Qaeda is not a High Contracting Party. As a result, the U.S. military's treatment of al Qaeda members is not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs. Conduct towards captured members of al Qaeda, therefore, also cannot constitute a violation of 18 U.S.C. § 2441(c)(1).

Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III. It might be argued that, even though it is not a State party to the Geneva Conventions, al Qaeda could be covered by some protections in Geneva Convention III. Article 4(A)(2) of Geneva III defines prisoners of war as including not only captured members of the armed forces of a High Contracting Party, but also irregular forces such as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements." Article 4(A)(3) also includes as POWs "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Id.* art. 4(A)(3). It might be claimed that the broad terms of these provisions could be stretched to cover al Qaeda.

This view would be mistaken. Article 4 does not expand the application of the Convention beyond the circumstances expressly addressed in common articles 2 and 3. Unless

[24] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

there is a conflict subject to article 2, article 4 simply does not apply. If the conflict is one to which article 3 applies, then article 4 has no role because article 3 does not trigger application of the rest of the provisions of Geneva III. Rather, article 3 provides an alternative set of standards that requires only minimal humanitarian protections. As we have explained, the conflict with al Qaeda does not fall within article 2. As a result, article 4 has no application. In other words, article 4 cannot be read as an alternative, and a far more expansive, statement of the application of the Convention. It merely specifies, where there is a conflict covered by article 2 of the Convention, who must be accorded POW status.

Even if article 4, however, were considered somehow to be jurisdictional as well as substantive, captured members of al Qaeda still would not receive the protections accorded to POWs. First, al Qaeda is not the "armed forces," volunteer forces, or militia of a state party that is a party to the conflict, as defined in article 4(A)(1). Second, they cannot qualify as volunteer force, militia, or organized resistance force under article 4(A)(2). That article requires that militia or volunteers fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat. As these requirements also apply to any regular armed force under other treaties governing the laws of armed conflict,[25] al Qaeda members would not qualify under article 4(A)(3) either, which provides POW status to captured individuals who are members of a "regular armed force" that professes allegiance to a government or authority not recognized by the detaining power. Members of al Qaeda, therefore, would not qualify for POW treatment under article 4, even if it were somehow thought that they were participating in a conflict covered by common article 2 or if article 4 itself were thought to be jurisdictional in nature.

Third, the nature of the conflict precludes application of common article 3 of the Geneva Conventions. As discussed in Part I, the text of common article 3, when read in harmony with common article 2, shows that the Geneva Conventions were intended to cover either: a) traditional wars between state parties to the Conventions (article 2), b) or non-international civil wars (article 3). Our conflict with al Qaeda does not fit into either category. It is not an international war between nation-States because al Qaeda is not a State. Nor is this conflict a civil war under article 3, because it *is* a conflict of "an international character." Al Qaeda operates in many countries and carried out a massive international attack on the United States on September 11, 2001. Therefore, the military's treatment of al Qaeda members is not limited either by common article 3 or 18 U.S.C. § 2441(c)(3).

III. *Application of the Geneva Conventions to the Taliban Militia*

Whether the Geneva Conventions apply to the detention and trial of members of the Taliban militia presents a more difficult legal question. Afghanistan has been a party to all four Geneva Conventions since September 1956. Some might argue that this requires application of the

[25] Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

Geneva Conventions to the present conflict with respect to the Taliban militia, which would then trigger the WCA. Nonetheless, we conclude that the President has more than ample grounds to find that our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict. Under Article II of the Constitution, the President has the unilateral power to suspend whole treaties or parts of them at his discretion. In this part, we describe the President's constitutional power and discuss the grounds upon which he can justify the exercise of that power.

There are several grounds which mightthe President could exercise that authority here. First, the weight of informed opinion indicates that, for the period in question, Afghanistan was a "failed State" whose territory had been largely held by a violent militia or faction rather than by a government. As a failed state, Afghanistan did not have an operating government nor was it capable of fulfilling its international obligations. Therefore, the United States could decide to partially suspend any obligations that the United States might have under Geneva III towards the Taliban militia. Second, there appears to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda. This would have rendered the Taliban more akin to a terrorist organization that used force not to administer a government, but for terrorist purposes. The President could decide that no treaty obligations were owed to such a force.

A. *Constitutional Authority*

Article II of the Constitution makes clear that the President is vested with all of the federal executive power, that he "shall be Commander in Chief," that he shall appoint, with the advice and consent of the Senate, and receive, ambassadors, and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2, cl. 2. Congress possesses its own specific foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce. While Article II, section 1 of the Constitution grants the President an undefined executive power, Article I, section 1 limits Congress to "[a]ll legislative Powers herein granted" in the rest of Article I.

From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington administration: "The constitution has divided the powers of government into three branches [and] . . . has declared that 'the executive powers shall be vested in the President,' submitting only special articles of it to a negative by the senate."[26] Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."[27] In defending President Washington's authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President's foreign affairs powers. According to Hamilton, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive

[26] Thomas Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Appointments* (1790), *reprinted in* The Papers of Thomas Jefferson 378 (Julian P. Boyd ed., 1961).

[27] *Id.* at 379.

Power; leaving the rest to flow from the general grant of that power."[28] As future Chief Justice John Marshall famously declared a few years later, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation. . . ."[29]

On the few occasions where it has addressed the question, the Supreme Court has lent its approval to the executive branch's broad powers in the field of foreign affairs. Responsibility for the conduct of foreign affairs and for protecting the national security are, as the Supreme Court has observed, "'central Presidential domains."[30] The President's constitutional primacy flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II making the President the Chief Executive of the Nation and the Commander in Chief.[31] Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'"[32] This foreign affairs power is independent of Congress: it is "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[33]

In light of these principles, any unenumerated executive power, especially one relating to foreign affairs, must be construed as within the control of the President. Although the Constitution does not specifically mention the power to suspend or terminate treaties, these authorities have been understood by the courts and long executive branch practice as belonging solely to the President. The treaty power is fundamentally an executive power established in Article II of the Constitution, and power over treaty matters post-ratification are within the President's plenary authority. As Alexander Hamilton declared during the controversy over the Neutrality Proclamation, "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."[34] Commentators also have supported this view. According to the drafters of the *Restatement (Third) of the Foreign Relations Law of the United States*, the President has the power either "to suspend or terminate an [international] agreement in accordance with its terms," or "to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States."[35] Indeed, the President's power to terminate treaties, which has been accepted by practice and considered opinion of the three branches,[36] must include the lesser power of temporarily suspending them. We have discussed these questions in detail in recent opinions, and we follow their analysis here.[37]

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[28] Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett et al. eds., 1969).

[29] 10 Annals of Cong. 613-14 (1800).

[30] *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).

[31] *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982).

[32] *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

[33] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[34] Hamilton, *Pacificus* No. 1, *supra*, at 42.

[35] *Restatement (Third) of the Foreign Relations Law of the United States* § 339 (1987).

[36] *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President to Denounce the ABM Treaty* (Dec. 14, 2001); *Goldwater v. Carter*, 617

The courts have often acknowledged the President's constitutional powers with respect to treaties. Thus, it has long been accepted that the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or because it has undergone other changes in sovereignty.[38] Nonperformance of a particular treaty obligation may, in the President's judgment, justify a decision to suspend or terminate the treaty.[39] While Presidents have unrestricted discretion, as a matter of domestic law, in suspending treaties, they can base the exercise of this discretion on several grounds. For example, the President may determine that "the conditions essential to [the treaty's] continued effectiveness no longer pertain."[40] He can decide to suspend treaty obligations because of a fundamental change in circumstances, as the United States did in 1941 in response to hostilities in Europe.[41] The President may also determine that a material breach of a treaty by a foreign government has rendered a treaty not in effect as to that government.[42]

Exercising this constitutional authority, the President can decide to suspend temporarily our obligations under Geneva III toward Afghanistan. Other Presidents have partially suspended treaties, and have suspended the obligations of multilateral agreements with regard to one of the state parties.[43] The President could also determine that relations under the Geneva Conventions

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F.2d 697, 706-07 (D.C. Cir.) (en banc), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979); Senate Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 201 (Comm. Print 2001) (prepared by Congressional Research Service, Library of Congress) (footnotes omitted).

[37] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); *see also* Memorandum for William Howard Taft, IV, Legal Adviser, Department of State, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Constitutional Authority to Withdraw Treaties from the Senate* (Aug. 24, 2001).

[38] *See Kennett v. Chambers*, 55 U.S. 38, 47-48, 51 (1852); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Saroop v. Garcia*, 109 F.3d 165, 171 (3d. Cir. 1997) (collecting cases). Alexander Hamilton argued in 1793 that the revolution in France had triggered the power (indeed, the duty) of the President to determine whether the pre-existing treaty of alliance with the King of France remained in effect. The President's constitutional powers, he said, "include[] that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty." Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds 1969).

[39] *See Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *aff'd.* 67 U.S. (2 Black) 481 (1862).

[40] *See International Load Line Convention*, 40 Op. Att'y Gen. 119,124 (1941). Changed conditions have provided a basis on which Presidents have suspended treaties in the past. For example, in 1939, President Franklin Roosevelt suspended the operation of the London Naval Treaty of 1936. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." David Gray Adler, *The Constitution and the Termination of Treaties* 187 (1986).

[41] *International Load Line Convention*, 40 Op. Att'y Gen. at 123.

[42] *See, e.g., Charlton v. Kelly*, 229 U.S. 447, 473 (1913); *Escobedo v. United States*, 623 F.2d 1098, 1106 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

[43] In 1986, the United States suspended the performance of its obligations under the Security Treaty (ANZUS Pact), T.I.A.S. 2493, 3 U.S.T. 3420, *entered into force* April 29, 1952, as to New Zealand but not as to Australia. *See* Marian Nash (Leich), 1 *Cumulative Digest of United States Practice in International Law 1981-1988*, at 1279-81.

with Afghanistan should be restored once an Afghan government that is willing and able to execute the country's treaty obligations is securely established.[44] A decision to regard the Geneva Conventions as suspended would not constitute a "denunciation" of the Conventions, for which procedures are prescribed in the Conventions.[45] The President need not regard the Conventions as suspended in their entirety, but only in part.[46]

Among the grounds upon which a President may justify his power to suspend treaties is the collapse of a treaty partner, in other words the development of a failed state that could not fulfill its international obligations and was not under the control of any government. This has been implicitly recognized by the Supreme Court. In *Clark v. Allen*, 331 U.S. 503 (1947), the Supreme Court considered whether a 1923 treaty with Germany continued to exist after the defeat, occupation and partition of Germany by the victorious World War II Allies. The Court rejected the argument that the treaty "must be held to have failed to survive the [Second World War], since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community."[47] Instead, the Court held that "the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden v. Ames*, 184 U.S. 270, 288 [(1902)]. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligations of either party in respect to them."[48] In *Clark*, the Court also made clear that the President could consider whether Germany was able to perform its international obligations in deciding whether to suspend our treaty relationship with her.

Thus, suspension of the Geneva Conventions as to Afghanistan would not affect the United States' relationships under the Conventions with other state parties.

[44] On June 20, 1876, for example, President Grant informed Congress that he was suspending the extradition clause of the 1842 "Webster-Ashburton Treaty" with Great Britain, Convention as to Boundaries, Suppression of Slave Trade and Extradition, Aug. 9, 1842, U.S.-Gr. Brit., Art 10, 8 Stat. 572, 579. Grant advised Congress that the release of two fugitives whose extradition was sought by the United States amounted to the abrogation or annulment of the extradition clause, and that the executive branch in response would take no action to surrender fugitives sought by the British Government unless Congress signified that it do so. The clause remained suspended until it was reactivated by the British Government's resumed performance.

[45] *See, e.g.*, Geneva Convention III, art. 142. The suspension of a treaty is distinct from the denunciation or termination of one. Suspension is generally a milder measure than termination, often being partial, temporary, or contingent upon circumstances that can be altered by the actions of the parties to the treaty. Moreover, at least in the United States, suspension of a treaty can be reversed by unilateral executive action, whereas termination, which annuls a treaty, and which is therefore more disruptive of international relationships, would require Senate consent to a new treaty to be undone.

[46] In general, the partial suspension of the provisions of a treaty (as distinct from both termination and complete suspension) is recognized as permissible under international law. Article 60 of the Vienna Convention on treaties explicitly permits the suspension of a treaty "in whole or in part." "[U]nder both treaty law and non-forcible reprisal law as a basis for responsive suspension it is clear that suspension may be only partial and need not suspend or terminate an agreement as a whole, in contrast, for example, with treaty withdrawal clauses." John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 Va. J. Int'l L. 881, 932 (1999). It should be noted, however, that the United States is not a party to the Vienna Convention on treaties, although it has treated its rules as customary international law. This issue is explored in greater detail, *infra* Part III.C.

[47] 331 U.S. at 514.

[48] *Id.; see also id.* at 508-09 (President might have "formulated a national policy quite inconsistent with the enforcement" of the treaty).

Clark demonstrates the Supreme Court's sanction for the President's constitutional authority to decide the "political question" whether our treaty with Germany was suspended because Germany was not in a position to perform its international obligations. Equally here, the executive branch could conclude that Afghanistan was not "in a position to perform its treaty obligations" because it lacked, at least throughout the Taliban's ascendancy, a functioning central government and other essential attributes of statehood. Based on such facts, the President would have the ground to decide that the Nation's Geneva III obligations were suspended as to Afghanistan. The President could further decide that these obligations are suspended until Afghanistan became a functioning state that is in a position to perform its Convention duties. The federal courts would not review such political questions, but instead would defer to the decision of the President.

B. *Status as a Failed State*

There are ample grounds for the President to determine that Afghanistan was a failed State, and on that basis to suspend performance of our Geneva III obligations towards it.[49] Indeed, the findings of the State and Defense Departments, of foreign leaders, and of expert opinion support the conclusion that Afghanistan under the Taliban was without a functioning central government. The collapse of functioning political institutions in Afghanistan is a valid justification for the exercise of the President's authority to suspend our treaty obligations towards that country.

Such a determination would amount to finding that Afghanistan was a "failed state." A "failed State" is generally characterized by the collapse or near-collapse of State authority. Such a collapse is marked by the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy.

An initial approach to the question whether Afghanistan was a failed state is to examine some of the traditional indicia of statehood.[50] A State has failed when centralized governmental authority has almost completely collapsed, no central authorities are capable of maintaining government institutions or ensuring law and order, and violence has destabilized civil society and

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[49] We should not be understood to be saying that the President's basis for suspending the Geneva Conventions as to Afghanistan is merely the fact that Afghanistan underwent a change of government in 1996, after the military successes of Taliban. The general rule of international law is that treaty relations survive a change of government. *See, e.g.*, 2 Marjorie M. Whiteman, *Digest of International Law* 771-73 (1963); J.L. Brierly, *The Law of Nations* 144-45 (6th ed. 1963); Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 Am. J. Int'l L. 337 (1977). The general rule is that treaties may still be observed even as to State parties, the current governments of which have been unrecognized. *See New York Chinese TV Programs v. U.E. Enterprises*, 954 F.2d 847 (2d Cir. 1992); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 202 cmts. a, b (1987).

[50] It would be mistaken to argue that the concept of a failed State is not legal in nature, and thus cannot be taken into account in determining whether to suspend our Geneva III obligations toward Afghanistan. Legal scholars as well political scientists have employed the concept for some time. Moreover, even if taken only as a category of litical science, the term "failed State" encapsulates a description of structural conditions within a country such as Afghanistan) that are directly relevant to considering whether that country has lapsed for *legal* purposes into a condition of statelessness.

the economy.[51] Borrowing from the *Restatement (Third) of U.S. Foreign Relations Law*, we may conclude that a state has "failed" if it cannot satisfy some or all of the three traditional tests for "statehood" under international law: i) whether the entity has a defined territory and population; ii) whether the territory/population is under the control of its own government; and iii) whether the entity engages in or has the capacity to engage in formal relations with other States.[52] The State Department has restated this formulation by elaborating a four-part test for statehood: i) whether the entity have effective control over a clearly defined territory and population; ii) whether an organized governmental administration of the territory exists; iii) whether the entity has the capacity to act effectively to conduct foreign relations and to fulfill international obligations; iv) whether the international community recognizes the entity.[53]

We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nonetheless, the available facts in the public record would support the conclusion that Afghanistan was a failed State – including facts that pre-existed the military reversals suffered by the Taliban militia and the formation of the new transitional government pursuant to the Bonn Agreement. Indeed, there are good reasons to doubt whether *any* of the conditions were met.

First, even before the outset of the conflict with the United States, the Taliban militia did not have effective control over a clearly defined territory and population. It is unclear whether the Taliban militia ever fully controlled most of the territory of Afghanistan. At the time that the United States air strikes began, at least ten percent of the country, and the population within those areas, was governed by the Northern Alliance. Indeed, the facts suggest that Afghanistan was divided between different tribal and warring factions, rather than controlled by any central State. The Taliban militia in essence represented only an ethnically Pashtun movement, a "tribal

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[51] "States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as 'failed States' or '*États sans gouvernmement.*'" Daniel Thurer, *The Failed State and International Law*, International Review of the Red Cross No. 836 (Dec. 31, 1999), available at http://www.icrc.org/eng/review (visited Jan. 10, 2002). Somewhat different tests have been used for determining whether a State has "failed." First, the most salient characteristic of a "failed State" seems to be the disappearance of a "central government." Yoram Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, 166 Mil. L. Rev. 93, 103 (2000); *see also id.* ("All that remains is a multiplicity of groups of irregular combatants fighting each other."). Closely related to this test, but perhaps somewhat broader, is the definition of a "failed State" as "a situation where the government is unable to discharge basic governmental functions with respect to its populace and its territory. Consequently, laws are not made, cases are not decided, order is not preserved and societal cohesion deteriorates. Basic services such as medical care, education, infrastructure maintenance, tax collection and other functions and services rendered by central governing authorities cease to exist or exist only in limited areas." Ruth Gordon, *Growing Constitutions*, 1 U. Pa. J. Const. L. 528, 533-34 (1999). Professor Thurer distinguishes three elements (respectively, territorial, political and functional) said to characterize a "failed State": 1) failed States undergo an "implosion rather than an explosion of the structures of power and authority, the disintegration and destructuring of States rather than their dismemberment;" 2) they experience "the total or near total breakdown of structures guaranteeing law and order;" and 3) there are marked by "the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world."

[52] *See Restatement (Third) of the Foreign Relations Law of the United States* § 201; *see also* 1933 Montevideo Convention on Rights and Duties of States, art. 1, 49 Stat. 3097, 28 Am. J. Int'l L. Supp. 75 (1934).

[53] Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 Am. J. Int'l L. 337 (1977).

militia,"[54] that did not command the allegiance of other major ethnic groups in Afghanistan and that was apparently unable to suppress endemic violence in the country. As a prominent writer on the Taliban militia wrote well before the current conflict began, "[e]ven if [the Taliban] were to conquer the north, it would not bring stability, only continuing guerrilla war by the non-Pashtuns, but this time from bases in Central Asia and Iran which would further destabilize the region."[55]

Second, again even before the United States air strikes and the successes of the Northern Alliance, an organized governmental administration did not exist in Afghanistan. One noted expert on the Taliban has concluded that the country had

> ceased to exist as a viable state . . . . The entire Afghan population has been displaced, not once but many times over. The physical destruction of Kabul has turned it into the Dresden of the late twentieth century. . . . There is no semblance of an infrastructure that can sustain society -- even at the lowest common denominator of poverty. . . . The economy is a black hole that is sucking in its neighbors with illicit trade and the smuggling of drugs and weapons, undermining them in the process. . . . Complex relationships of power and authority built up over centuries have broken down completely. No single group or leader has the legitimacy to reunite the country. Rather than a national identity or kinship-tribal-based identities, territorial regional identities have become paramount. . . . [T]he Taliban refuse to define the Afghan state they want to constitute and rule over, largely because they have no idea what they want. The lack of a central authority, state organizations, a methodology for command and control and mechanisms which can reflect some level of popular participation . . . make it impossible for many Afghans to accept the Taliban or for the outside world to recognize a Taliban government. . . . No warlord faction has ever felt itself responsible for the civilian population, but the Taliban are incapable of carrying out even the minimum of developmental work because they believe that Islam will take care of everyone.[56]

Another expert had reached similar conclusions before the outbreak of the conflict:

> Afghanistan today has become a violent society, bereft of political institutions that function correctly and an economy that functions at all. When this is coupled with the destruction of population and the physical infrastructure . . ., it becomes clear that Afghanistan is a country on the edge of collapse, or at least profound transformation. . . . With the Taliban, there are few meaningful governmental structures and little that actually functions.[57]

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[54] Larry P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* 46, 115 (2001).

[55] Ahmed Rashid, *Taliban: Militant Islam, Oil & Fundamentalism in Central Asia* 213 (2001).

[56] *Id.* at 207-08, 212-13.

[57] Goodson, *supra*, at 103-04; 115.

The State Department has come to similar conclusions. In testimony early in October 2001 before the Senate Foreign Relations Committee's Subcommittee on Near East and South Asian Affairs, Assistant Secretary of State for South Asian Affairs Christina Rocca explained that:

> [t]wenty-two years of conflict have steadily devastated [Afghanistan], destroyed its physical and political infrastructure, shattered its institutions, and wrecked its socio-economic fabric. . . . The Taliban have shown no desire to provide even the most rudimentary health, education, and other social services expected of any government. Instead, they have chosen to devote their resources to waging war on the Afghan people, and exporting instability to their neighbors.[58]

Rather than performing normal government functions, the Taliban militia exhibited the characteristics of a criminal gang. The United Nations Security Council found that the Taliban militia extracted massive profits from illegal drug trafficking in Afghanistan and subsidized terrorism from those revenues.[59]

Third, the Taliban militia was unable to conduct normal foreign relations or to fulfill its international legal obligations. Publicly known facts suggest that the Taliban was unable to obey its international obligations and to conduct normal diplomatic relations. Thus, the Taliban militia consistently refused to comply with United Nations Security Council Resolutions 1333 (2000) and 1267 (1999), which called on it to surrender Osama bin Laden to justice and to take other actions to abate terrorism based in Afghanistan.[60] Those resolutions also called on all States to deny permission for aircraft to take off or to land if they were owned or operated by or for the Taliban, and to freeze funds and other resources owned or controlled by the Taliban. Reportedly, the Taliban militia also may have been unable to extradite bin Laden at the request of Saudi Arabia in September, 1998, despite its close relations with the Saudi government. As a

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[58] United States Department of State, International Information Programs, *Rocca Blames Taliban for Humanitarian Disaster in Afghanistan* (Oct. 10, 2001), *available at* http://www.usinfo.state.gov/regional/nea/sasia/afghan/text2001/1010roca.htm (visited Jan. 10, 2001).

[59] *See* U.N. Security Council Resolution 1333 (2000), *available at* http://www.un.org/Docs/scres/2000/res1333e.pdf (finding that "the Taliban benefits directly from the cultivation of illicit opium by imposing a tax on its production and indirectly benefits from the processing and trafficking of such opium, and . . . these substantial resources strengthen the Taliban's capacity to harbor terrorists"). The United States Government has amassed substantial evidence that the Taliban has condoned and profited from narco-trafficking on a massive scale, with disastrous effects on neighboring countries. *See The Taliban, Terrorism, and Drug Trade: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Comm. on Government Reform*, 107th Cong. (2001) (testimony of William Bach, Director, Office of Asia, Africa, Europe, NIS Programs, Bureau of International Narcotics and Law Enforcement Affairs, Department of State; testimony of Asa Hutchinson, Administrator, Drug Enforcement Administration, U.S. Department of Justice).

[60] U.N. Security Council Resolution 1333 "strongly condemn[ed]" the Taliban for the "sheltering and training of terrorists and [the] planning of terrorist acts," and "deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." U.N. Security Council Resolution 1214, ¶ 13 (1998) enjoined the Taliban to stop providing a sanctuary and training for terrorists. U.N. Security Council Resolution 1267, ¶ 2 (1999), stated that the Taliban's failure to comply with the Council's 1998 demand constituted a threat to the peace. *See* Sean D. Murphy, *Efforts to Obtain Custody of Osama Bin Laden*, 94 Am. J. Int'l L. 366 (2000).

result, the Saudi government expelled the Afghan *chargé d'affaires*.[61] The Taliban's continuing role in sheltering and supporting those believed to be responsible for the terrorist attacks of September 11, 2001 placed it in clear breach of international law, which required it to prevent the use of its territory as a launching pad for attacks against other nations.[62]

It has been suggested by government officials and independent press reports that the Taliban militia had become so subject to the domination and control of al Qaeda that it could not pursue independent policies with respect to the outside world.[63] Former Ambassador Robert Oakley described the relationship as "very close. The Taliban and bin Laden, particularly Mullah Omar, go way, way back . . . [Bin Laden] has helped the Taliban with material support since they began their movement in Afghanistan."[64] Richard Haass, Director of the State Department's Office of the Policy Planning Staff, has noted that the Taliban "have accepted substantial financial support from and proved themselves subservient to" al Qaeda.[65] Al Qaeda apparently supplied the Taliban regime with money, materiel, and personnel to help it gain the upper hand in its ongoing battles with the Northern Alliance.[66] Because al Qaeda was capable of mustering more formidable military forces than the Taliban at any given point, and because failure to protect bin Laden would have cost the Taliban the support of radical Islamists, it may well have been impossible for the Taliban to surrender bin Laden as directed by the United Nations, even if it had been willing to do so. While a policy decision to violate international law

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[61] *See* Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* 301-02 (2001).

[62] *See* Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks*, *available at* http://jurist.law.pitt.edu/forum/forumnew34.htm (visited Jan. 10, 2002) ("If (as has been claimed by the US and UK governments) bin Laden masterminded the attacks on New York and Washington, Afghanistan is in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states. The United States and its allies thus have a legal right to violate Afghanistan's territorial integrity to destroy bin Laden and related terrorist targets. If the Taliban elects to join forces with bin Laden, it, too, becomes a lawful target."); *see also* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 40-42, 51-54 (1999).

[63] *See, e.g.*, Michael Dobbs & Vernon Loeb, *2 U.S. Targets Bound by Fate*, Wash. Post, Nov. 14, 2001 at A22 ("According to Thomas Gouttierre, an Afghan expert at the University of Nebraska and a former UN adviser, the so-called Afghan Arabs surrounding bin Laden were much more educated and articulate than the often illiterate Taliban and succeeded in convincing them that they were at the head of a world-wide Islamic renaissance. 'Al Qaeda ended up hijacking a large part of the Taliban movement,' he said, noting that [Taliban supreme religious leader Mohammed] Omar and bin Laden were 'very, very tight' by 1998."); Peter Baker, *Defector Says Bin Laden Had Cash, Taliban In His Pocket*, Wash. Post, Nov. 30, 2001 at A1 (reporting claims by former Taliban official of al Qaeda's corruption of Taliban officials).

[64] *Online News Hour: The Taliban* (Sept. 15, 2001), *available at* http://www.pbs.org/newshour/bb/terrorism/july-dec01/taliban_9-15.html (visited Jan. 15, 2002).

[65] *The Bush Administration's Response to September 11th – and Beyond*, Remarks to the Council of Foreign Relations (Oct. 15, 2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/haass_001.htm (visited Jan. 15, 2002).

[66] The so-called "55th Brigade," a military force consisting primarily of Arabs under Syrian and Saudi commanders, was based outside of Kabul and was trained, maintained and paid for by al Qaeda. It "provided crucial support to Taliban forces during offensives against the Northern Alliance over the past five years." Michael Jansen, *US focused initially on bin Laden Mercenaries*, The Irish Times on the Web (Oct. 30, 2001), *available at* http://www.ireland.coewspaper/world/2001/1030/wor6.htm (visited Jan. 15, 2002). According to some reports, these al Qaeda fighters were the most aggressive and ideologically committed forces available to the Taliban leadership, and were used to control other Taliban units. *See also* Michael Kranish & Indira A.R. Lakshmanan, *artners in 'Jihad': Bin Laden Ties to Taliban*, Boston Globe, Oct. 28, 2001, at A1. This article contains especially detailed information about the close linkages between the two movements and their leaders.

would not be grounds to deny statehood, if al Qaeda – a non-governmental terrorist organization – possessed such power within Afghanistan to prevent its alleged rulers from taking action against it as ordered by the U.N., this would indicate that the Taliban militia did not exercise sufficient governmental control within the territory to fulfill its international obligations.

The Taliban militia's failure to carry out its international obligations became even further apparent during the conflict itself. During the United States' campaign in Afghanistan, Secretary Rumsfeld noted that the Taliban "are using mosques for ammunition storage areas. They are using mosques for command and control and meeting places. They are putting tanks and artillery pieces in close proximity to hospitals, schools, and residential areas."[67] In a series of "Fact Sheets" issued during the campaign, the State Department described in detail many of the atrocities committed by the Taliban and al Qaeda before and during the United States' military operations. These included massacres of both prisoners and civilians. For example, the State Department reported that in August, 2000, the Taliban had "executed POWs in the streets of Herat as a lesson to the local population."[68] The State Department also reported on November 2, 2001 that "[t]he Taliban have put the Afghan civilian population in grave danger by deliberately hiding their soldiers and equipment in civilian areas, including in mosques."[69] According to State, the Taliban "massacred hundreds of Afghan civilians, including women and children, in Yakaoloang, Mazar-I-Sharif, Bamiyan, Qezelabad, and other towns."[70] For example, the State Department noted, a report by the United Nations Secretary General regarding the July, 1999, massacre in the Shomaili Plains stated that "[t]he Taliban forces, who allegedly carried out these acts, essentially treated the civilian population with hostility and made no distinction between combatants and non-combatants."[71] All of this evidence goes to prove that the Taliban militia regularly refused to follow the laws of armed conflict, which, besides independently providing grounds for a presidential suspension of Geneva III, also demonstrate that Afghanistan had become a failed state and was under the control not of a government but of a violent terrorist group.

Fourth, the Taliban militia was not recognized as the legitimate government of Afghanistan by the United States or by any member of the international community except Pakistan. Neither the United States nor the United Nations ever recognized that the Taliban militia was a government. The only two other States that had maintained diplomatic relations with it before the current conflict began (Saudi Arabia and the United Arab Emirates) soon

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[67] *Transcript: Rumsfeld Says Taliban Functioning As Military Force Only, supra.*

[68] *Fact Sheet on Al Qaeda and Taliban Atrocities* (released Nov. 22, 2001 by Coalition Information Center), *available at* http://www.usinfo.state.gov/topical/pol/terror/01112301.htm (visited Jan. 15, 2002). The source cited for this particular report was the Defense Department.

[69] *Fact Sheet: Taliban Actions Imperil Afghan Civilians* (Nov. 2, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01110203.htm (visited Jan. 15, 2002). Further, the State Department publicized reports from *The Washington Post* that the Taliban was using entire villages as human shields to protect their stockpiles of ammunition and weapons, that they were relocating the police ministry in Kandahar to mosques, that they had taken over NGO relief organization buildings, and that they were discovered transporting tanks and mortar shells in the guise of humanitarian relief. *Fact Sheet: The Taliban's Betrayal of the Afghan People* (Nov. 6, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01110608.htm (visited Jan. 15, 2002).

[70] *Id.*

[71] *Id.* (quoting report; no citation given).

severed them.[72] Even Pakistan had withdrawn its recognition before the end of hostilities between the United States and the Taliban forces. This *universal* refusal to recognize the Taliban militia as a government demonstrates that other nations and the United Nations concurred in a judgment that the Taliban militia was no government and that Afghanistan had ceased to operate as a nation-State.

Indeed, the cabinet departments of the U.S. Government best positioned to determine whether Afghanistan constituted a failed state appear to have reached that conclusion some time ago. Secretary of Defense Donald Rumsfeld, for example, declared at a November 2, 2001 press conference that the "Taliban is not a government. The government of Afghanistan does not exist today. The Taliban never was a government as such. It was a force in the country that is not substantially weakened – in many cases cloistered away from the people."[73] Secretary Rumsfeld has made substantially the same remarks on several other occasions. On October 29, 2001, he described the Taliban as "an illegitimate, un-elected group of terrorists."[74] And on November 4, 2001, he stated at a press conference with the Foreign Minister of Pakistan that "Taliban is not really functioning as a government as such. There is really not a government to speak of in Afghanistan today."[75] On November 11, 2001, the Secretary emphasized the extent to which Afghanistan had fallen under the control of al Qaeda: "for all practical purposes, the al Qaeda has taken over the country."[76] Secretary Rumsfeld's final statement indicates his belief that no real government functioned in Afghanistan, but rather that groups of armed, violent militants had come into control.

In the recent past, the State Department took the same view. Near the start of the conflict, the Bureau of South Asian Affairs found that "[t]here is no functioning central government [in Afghanistan]. The country is divided among fighting factions. . . . The Taliban [is] a radical Islamic movement [that] occupies about 90% of the country."[77] Undersecretary of State Paula J. Dobriansky said on October 29, 2001, that "young Afghans cannot remember a time when their country really worked. There was a time – a little over 20 years ago – when Afghanistan was a functioning state, a member of the world community. . . . Unfortunately it is

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[72] *See A Look at the Taliban*, USA Today, Sept. 30, 2001, *available at* http://www.usatoday.com/news/world/2001/thetaliban.htm (visited Jan. 10, 2002). Indeed, Pakistan had been the only country in the world that maintained an embassy in Kabul; the overwhelming majority of States and the United Nations recognized exiled President Burhanuddin Rabbani and his government as the country's legal authorities. *See Taliban tactics move to hostage ploy*, Aug. 8, 2001, available at http://www.janes.com/regional_news/asia_pacific/news/jid/jid010808_1_n.shtml (visited Oct. 19, 2001).

[73] Secretary Rumsfeld Media Availability en Route to Moscow (Nov. 2, 2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/dod_brief64.htm (visited Jan. 15, 2002).

[74] *Rumsfeld Says Taliban to Blame for Casualties* (Oct. 29, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01102905.htm (visited Jan. 15, 2002).

[75] *Transcript: Rumsfeld Says Taliban Functioning As Military Force Only* (Nov. 4, 2001), *available at* http:www.usinfo.state.gov/topical/pol/terror/0110403.htm (visited Jan. 15, 2002).

[76] *Rumsfeld on Afghanistan Developments on "Fox News Sunday,"* (Nov. 12, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01111204.htm (visited Jan. 15, 2002).

[77] *Background Note* (October, 2001), *available at* http://www.state.gov/r/pa/bgn/index.cfm?docid=5380 (visited Jan. 10, 2002), prepared by the Bureau of South Asian Affairs/ *See also* Reuters AlertNet - Afghanistan, *Country Profiles* ("There are no state-constituted armed forces. It is not possible to show how ground forces' equipment has been divided among the different factions."), *available at* http://www.alertnet.org/thefacts/countryprofiles/152478?version=1 (visited Jan. 15, 2002).

now difficult to remember that functioning Afghanistan."[78] As recently as December 12, 2001, the State Department's Office of International Information Programs, drawing on Coalition Information Center materials and media reports, stated that *both* the Taliban and al Qaeda "are terrorist organizations," and characterized the Taliban's leader, Mullah Omar, as "a terrorist."[79]

Some international officials concur with the views of our Government. Lakhdar Brahimi, for example, the United Nations mediator in Afghanistan and a former Algerian Foreign Minister, described Afghanistan under the Taliban as a "failed state which looks like an infected wound."[80] Tony Blair, the Prime Minister of Great Britain, on a visit to that country this month, declared that "Afghanistan has been a failed state for too long and the whole world has paid the price."[81]

Based on the foregoing, it is apparent that the publicly-available evidence would support the conclusion that Afghanistan, when largely controlled by the Taliban militia, failed some, and perhaps all, of the ordinary tests of statehood. Nor do we think that the military successes of the United States and the Northern Alliance change that outcome. Afghanistan *was* effectively stateless for the relevant period of the conflict, even if after the Bonn Agreement it became a State recognized by the United Nations, the United States, and most other nations.[82] The President can readily find that at the outset of this conflict, when the country was largely in the hands of the Taliban militia, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. In other words, the Taliban militia would not even qualify as the *de facto* government of Afghanistan. Rather, it would have the status only of a violent faction or movement contending with other factions for control of Afghanistan's territory, rather than the regular armed forces of an existing state. This would provide sufficient ground for the President to exercise his constitutional power to suspend our Geneva III obligations toward Afghanistan.

C. *Suspension Under International Law*

Although the President may determine that Afghanistan was a failed State as a matter of domestic law, there remains the distinct question whether suspension would be valid as a matter

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[78] Paula J. Dobransky, *Afghanistan: Not Always a Battlefield* (Oct. 29, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01102908.htm (visited Jan. 15, 2002).

[79] *The End of the Taliban Reign of Terror in Afghanistan* (Dec. 12, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01121206.htm (visited Jan. 15, 2002).

[80] Rashid, *supra*, at 207.

[81] Philip Webster, *Blair's mission to Kabul*, The Times of London, Jan. 8, 2002, *available at* 2002 WL 4171996.

[82] We do not think that the military successes of the United States and the Northern Alliance necessarily meant that Afghanistan's statehood was restored before the Bonn agreement, if only because the international community, including the United States, did not regard the Northern Alliance as constituting the government of Afghanistan. United Nations Security Council Resolution 1378, ¶ 1 (2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/unsecres_1378.htm (visited Nov. 19, 2001), expressed "strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government" (emphasis added); *see also id.* ¶ 3 (affirming that the United Nations should play a central role in supporting Afghan efforts to establish a "new and transitional administration leading to the formation of a new government"). The plain implication of this Resolution, which reflects the views of the United States, is that Afghanistan after the Taliban did not have a government at that time.

of international law.[83] We emphasize that the resolution of that question, however, *has no bearing* on domestic constitutional issues, or on the application of the WCA. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.

International law has long recognized that the material breach of a treaty can be grounds for the party injured by the breach to terminate or withdraw from the treaty.[84] Under customary international law, the general rule is that breach of a multilateral treaty by a State party justifies the suspension of that treaty with regard to that State. "A material breach of a multilateral treaty by one of the parties entitles . . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."[85] If Afghanistan could be found in material breach for violating "a provision essential to the accomplishment of the object or purpose of the [Geneva Conventions]," suspension of the Conventions would have been justified.[86]

We note, however, that these general rules authorizing suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[87] Although the United States is not a party to the Vienna Convention, some lower courts have said that the Convention embodies the customary international law of treaties, and the State Department has at various times taken the same view.[88] The Geneva Conventions must be regarded as "treaties of a humanitarian character," many of whose provisions "relat[e] to the protection of the human person."[89] Arguably, therefore, a decision by the United States to suspend Geneva III with regard to Afghanistan might put the United States in breach of customary international law.

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[83] In general, of course, a decision by a State not to discharge its treaty obligations, even when effective as a matter of domestic law, does not necessarily relieve it of possible international liability for non-performance. *See generally Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

[84] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 47, ¶ 98 (Advisory Opinion June 21, 1971) (holding it to be a "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. . . . The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law[.]").

[85] Vienna Convention on Treaties, art. 60(2)(b).

[86] *Id.* art. 60(3).

[87] *Id.* art. 60(5). The Vienna Convention seems to prohibit or restrict the suspension of humanitarian treaties if the sole ground for suspension is material breach. It does not squarely address the case in which suspension is based, not on particular breaches by a party, but by the party's disappearance as a State or on its incapacity to perform its treaty obligations.

[88] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 122 S. Ct. 206 (2001); Moore, *supra*, at 891-92 (quoting 1971 statement by Secretary of State William P. Rogers and 1986 testimony by Deputy Legal Adviser Mary V. Mochary).

[89] *See* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 191 (2d ed. 1984) (explaining intent and scope reference to "humanitarian" treaties). Indeed, when the drafters of the Vienna Convention added paragraph 5 to ...cle 60, the Geneva Conventions were specifically mentioned as coming within it. *See* Harris, *supra*, at 797.

In addition, the Geneva Conventions could themselves be read to preclude suspension. Common article 1 pledges the High Contracting Parties "to respect and to ensure respect for the present Convention *in all circumstances*" (emphasis added). Some commentators argue that this provision should be read to bar any State party from refusing to enforce their provisions, no matter the conduct of its adversaries. In other words, the duty of performance is absolute and does not depend upon reciprocal performance by other State parties.[90] Under this approach, the substantive terms of the Geneva Conventions could never be suspended, and thus any violation would always be illegal under international law.

This understanding of the Vienna and Geneva Conventions cannot be correct. There is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension. The drafters included a provision that precludes State parties from agreeing to absolve each other of violations.[91] They also included careful procedures for the termination of the agreements by individual State parties, including a provision that requires delay of a termination of a treaty, if that termination were to occur during a conflict, until the end of the conflict.[92] Yet, at the same time, the drafters of the Conventions did not address suspension at all, even though it has been a possible option since at least the eighteenth century.[93] Indeed, if the drafters and ratifiers of the Geneva Conventions believed the treaties could not be suspended, while allowing for withdrawal and denunciation, they could have said so explicitly and easily in the text.

A blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule, international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions. Apart from its unfairness, that result would reward and encourage non-compliance with the Conventions. True, the Conventions appear to contemplate that enforcement will be promoted by voluntary action of the parties.[94] Furthermore, the Conventions provide for intervention by "the International Committee of the Red Cross or any other impartial humanitarian organization . . . subject to the consent of the Parties to the conflict concerned."[95] But the effectiveness of these provisions depends on the good will of the very party assumed to be committing material breaches, or on its sensitivity to international opinion. Likewise, the provision authorizing an impartial investigation of alleged violations also hinges on the willingness of a breaching party to permit the investigation and to abide by its result. Other conceivable remedies, such as the imposition of an embargo by the United Nations on the breaching party, may also be inefficacious in particular circumstances. If, for example, Afghanistan were bound by Geneva Convention III to provide certain treatment to United States prisoners of war but in fact materially breached such duties, a United Nations embargo might have little effect on its behavior. Finally, offenders undoubtedly face a risk of trial and punishment before national or international courts after the conflict is over. Yet that form of relief presupposes that the offenders will be subject to capture at the end of the conflict - which may well depend on

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[90] *See, e.g.*, Draper, *The Red Cross Conventions, supra*, at 8; *see also Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 76 I.L.R. at 448, ¶ 220.

[91] *See, e.g.*, Geneva Convention III, art. 131.

[92] *See, e.g., id.*, art. 142.

[93] *See* Sinclair, *supra*, at 192.

[94] *See, e.g.*, the Geneva Convention III, art. 8; Geneva Convention IV, art. 9.

[95] Geneva Convention III, art. 9; Geneva Convention IV, art. 10.

whether or not they have been defeated. Reliance on post-conflict trials, as well as being uncertain, defers relief for the duration of the conflict. Without a power to suspend, therefore, parties to the Geneva Conventions would only be left with these meager tools to remedy widespread violation of the Conventions by others.

Thus, even if one were to believe that international law set out fixed and binding rules concerning the power of suspension, the United States could make convincing arguments under the Geneva Conventions itself, the Vienna Convention on Treaties, and customary international law in favor of suspending the Geneva Conventions as applied to the Taliban militia in the current war in Afghanistan.

D. Application of the Geneva Conventions As a Matter of Policy

We conclude this Part by addressing a matter of considerable significance for policymakers. To say that the President may suspend specific provisions of the Geneva Conventions *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied *as a matter of U.S. Government policy*. There are two aspects to such policy decisions, one involving the protections of the laws of armed conflict and the other involving liabilities under those laws.

First, the President may determine that for reasons of diplomacy or in order to encourage other States to comply with the principles of the Geneva Conventions or other laws of armed conflict, it serves the interests of the United States to *treat* al Qaeda or Taliban detainees (or some class of them) as if they were prisoners of war, even though they do not have any legal entitlement to that *status*. We express no opinion on the merits of such a policy decision.

Second, the President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgressions against those standards. Thus, for example, even though Geneva Convention III does not apply as a matter of law, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners whom they may happen to seize. The U.S. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.[96]

A decision to apply the principles of the Geneva Conventions or of others laws of war as a matter of policy, not law, would be fully consistent with the past practice of the United States. United States practice in post-1949 conflicts reveals several instances in which our military forces have applied Geneva III as a matter of policy, without acknowledging any legal obligation to do so. These cases include the wars in Korea and Vietnam and the interventions in Panama and Somalia.

[96] The President could, of course, also determine that it will be the policy of the United States to require its own troops to adhere to standards of conduct recognized under customary international law, and could prosecute offenders for violations. As explained below, the President is not *bound* to follow these standards by law, but may direct the armed forces to adhere to them as a matter of policy.

Korea. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, General Douglas MacArthur, the United Nations Commander in Korea, declared that his forces would act consistently with the principles of the Geneva Conventions, including those relating to POWs. General MacArthur stated: "My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly common article 3. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly."[97]

It should be noted, however, that deciding to follow Geneva III as a matter of policy would allow the United States to deviate from certain provisions it did not believe were appropriate to the current conflict. In Korea, for example, the United States did not fulfill the requirement that it repatriate all POWs at the end of the conflict. Pursuant to the armistice agreement, thousands of Chinese and North Korean POWs who did not wish to be repatriated were examined by an international commission, and many eventually ended up in Taiwan.[98]

Viet Nam. The United States through the State Department took the position that the Geneva Convention III "indisputably applies to the armed conflict in Viet Nam," and therefore that "American military personnel captured in the course of that armed conflict are entitled to be treated as prisoners of war."[99] We understand from the Defense Department that our military forces, as a matter of policy, decided at some point in the conflict to accord POW treatment (but not necessarily POW status) to Viet Cong members, despite the fact that they often did *not* meet the criteria for that status (set forth in Geneva Convention III, art. 4), *e.g.*, by not wearing uniforms or any other fixed distinctive signs visible at a distance.

Panama. The United States' intervention in Panama on December 20, 1989 came at the request and invitation of Panama's legitimately elected President, Guillermo Endara.[100] The United States had never recognized General Manuel Noriega, the commander of the Panamanian Defense Force, as Panama's legitimate ruler. Thus, in the view of the executive branch, the conflict was between the Government of Panama assisted by the United States on the one side and insurgent forces loyal to General Noriega on the other. It was not an international armed conflict between the United States and Panama, another State. Accordingly, it was not, in the executive's judgment, an international armed conflict governed by common article 2 of the Geneva Conventions.[101] Nonetheless, we understand that, as a matter of policy, all persons

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[97] *Quoted in* Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F.L. Rev. 1, 63 n.235 (2001).

[98] David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 Va. J. Int'l L. 801, 883-85 (1996).

[99] *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, July 13, 1966, *reprinted in* John Norton Moore, *Law and the Indo-China War* 635, 639 (1972).

[100] *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997).

[101] *See* Jan E. Aldykiewicz and Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflict*, 167 Mil. L. Rev. 74, 77 n.6 (2001). In *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), the district court held that the United States' intervention in Panama in late 1989 was an international armed conflict under (common) Article 2 of the Geneva Convention III, and that General Noriega was entitled to POW status. To the extent that the holding

captured or detained by the United States in the intervention – including civilians and members of paramilitary forces as well as members of the Panamanian Defense Force – were *treated* consistently with the Geneva Convention III, until their precise status under that Convention was determined. A 1990 letter to the Attorney General from the Legal Adviser to the State Department said that "[i]t should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law."[102]

Interventions in Somalia, Haiti and Bosnia. There was considerable factual uncertainty whether the United Nations Operation in Somalia in late 1992 and early 1993 rose to the level of an "armed conflict" that could be subject to common article 3 of the Geneva Conventions, particularly after the United Nations Task Force abandoned its previously neutral role and took military action against a Somali warlord, General Aideed. Similar questions have arisen in other peace operations, including those in Haiti and Bosnia. It appears that the U.S. military has decided, as a matter of policy, to conduct operations in such circumstances as if the Geneva Conventions applied, regardless of whether there is any legal requirement to do so. The U.S. Army Operational Law Handbook, after noting that "[i]n peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the [laws of war] legally applies," states that it is "the position of the US, UN and NATO that their forces will apply the 'principles and spirit' of the [law of war] in these operations."[103]

It might be argued, however, that the United States has conceded that Geneva III applied, as a matter of law, in every conflict since World War II. The facts, as supplied by our research and by the Defense Department, demonstrate otherwise. Although the United States at times has declared in different wars that the United States would accord Geneva Convention III treatment to enemy prisoners, there are several examples where the United States clearly decided not to comply with Geneva III as a matter of law. Further, such a position confuses situations in which the United States said it would act *consistently* with the Geneva Conventions with those in which we admitted that enemy prisoners would receive POW status as a matter of law. Our conduct in

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assumed that the courts are free to determine whether a conflict is between the United States and another "State" regardless of the President's view whether the other party is a "State" or not, we disagree with it. By assuming the right to determine that the United States was engaged in an armed conflict with *Panama* -- rather than with insurgent forces in rebellion against the recognized and legitimate Government of Panama -- the district court impermissibly usurped the recognition power, a constitutional authority reserved to the President. The power to determine whether a foreign government is to be accorded recognition, and the related power to determine whether a condition of statelessness exists in a particular country, are exclusively executive. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.' . . . Similarly, recognition of belligerency abroad is an executive responsibility. . . .") (citation omitted); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) ("[T]he question whether [the Republic of] Texas [while in rebellion against Mexico] had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals . . . were bound to consider . . . Texas as a part of the Mexican territory."); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1145 (9th Cir.) ("[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive branch alone the authority to recognize, and to withdraw recognition from, foreign regimes."), *cert. denied*, 528 U.S. 951 (1999).

[102] Letter for the Hon. Richard L. Thornburgh, Attorney General, from Abraham D. Sofaer, Legal Adviser, State Department at 2 (Jan. 31, 1990).

[103] *Quoted in* Bialke, *supra*, at 56.

Panama provides an important example. There, the United States never conceded that the forces of Manuel Noriega qualified as POWs under the Geneva Convention, but did provide for them as a policy matter as if they were POWs.

IV. Detention Conditions Under Geneva III

Even if the President decided not to suspend our Geneva III obligations toward Afghanistan, two reasons would justify some deviations from the requirements of Geneva III. This would be the case even if Taliban members legally were entitled to POW status. First, certain deviations concerning treatment can be justified on basic grounds of legal excuse concerning self-defense and feasibility. Second, the President could choose to find that none of the Taliban prisoners qualify as POWs under article 4 of Geneva III, which generally defines the types of armed forces that may be considered POWs once captured. In the latter instance, Geneva III would apply and the Afghanistan conflict would fall within common article 2's jurisdiction. The President, however, would be interpreting the treaty in light of the facts on the ground to find that the Taliban militia categorically failed the test for POWs within Geneva III's terms. We should be clear that we have no information that the conditions of treatment for Taliban prisoners currently violate Geneva III standards, but it is possible that some may argue that our GTMO facilities do not fully comply with all of the treaty's provisions.

A. Justified Deviations from Geneva Convention Requirements

We should make clear that as we understand the facts, the detainees currently are being treated in a manner consistent with common article 3 of Geneva III. This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care. They have not yet been tried or punished by any U.S. court system. As a result, the current detention conditions in GTMO do not violate common article 3, nor do they present a grave breach of Geneva III as defined in article 130. For purposes of domestic law, therefore, the GTMO conditions do not constitute a violation of the WCA, which criminalizes only violations of common article 3 or grave breaches of the Conventions.

That said, some very well may argue that detention conditions currently depart from Geneva III requirements. Nonetheless, not all of these deviations from Geneva III would amount to an outright violation of the treaty's requirements. Instead, some departures from the text can be justified by some basic doctrines of legal excuse. We believe that some deviations would not amount to a treaty violation, because they would be justified by the need for force protection. Nations have the right to take reasonable steps for the protection of the armed forces guarding prisoners. At the national level, no treaty can override a nation's inherent right to self-defense. Indeed, the United Nations Charter recognizes this fundamental principle. Article 51 of the U.N. Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." As we have discussed in other opinions relating to the war on terrorism, the September 11 attacks on the Pentagon and the World Trade Center have triggered the United States' right to defend itself.[104] Our national right to self-defense must encompass the lesser

[104] Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* at 22-33 (Nov.

included right to defend our own forces from prisoners who pose a threat to their lives and safety, just as the Nation has the authority to take measures in the field to protect the U.S. armed forces. Any Geneva III obligations, therefore, may be legally adjusted to take into account the needs of force protection.

The right to national self-defense is further augmented by the individual right to self-defense as a justification for modifications to Geneva III based on the need for force protection. Under domestic law, self-defense serves as a legal defense even to the taking of a human life. "[S]elf defense is . . . embodied in our jurisprudence as a consideration totally eliminating any criminal taint . . . . It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether . . . ."[105] As the U.S. Court of Appeals for the District of Columbia Circuit has observed, "[m]ore than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that 'all homicide is malicious, and of course, amounts to murder, unless . . . *excused* on the account of accident or self-preservation . . . .' Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time . . . ."[106] Both the Supreme Court and this Office have opined that the use of force by law enforcement or the military is constitutional, even if it results in the loss of life, if necessary to protect the lives and safety of officers or innocent third parties.[107] Thus, as a matter of domestic law, the United States armed forces can modify their Geneva III obligations to take into account the needs of military necessity to protect their individual members.

Other deviations from Geneva III, which do not involve force protection, may still be justified as a domestic legal matter on the ground that immediate compliance is infeasible. Certain conditions, we have been informed, are only temporary until the Defense Department can construct permanent facilities that will be in compliance with Geneva. We believe that no treaty breach would exist under such circumstances. The State Department has informed us that state practice under the Convention allows nations a period of reasonable time to satisfy their affirmative obligations for treatment of POWs, particularly during the early stages of a conflict.[108] An analogy can be drawn here to a similar legal doctrine in administrative law. For

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6, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2-3 (Oct. 17, 2001).

[105] *Griffin v. Martin*, 785 F.2d 1172, 1186-87 & n.37 (4th Cir. 1986), *aff'd by an equally divided court*, 795 F.2d 22 (4th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 919 (1987).

[106] *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir.) (footnote omitted), *cert denied*, 414 U.S. 1007 (1973).

[107] *See Tennessee v. Garner*, 471 U.S. 1, 7, 11 (1985) (Fourth Amendment "seizure" caused by use of force subject to reasonableness analysis); Memorandum to Files, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* (Aug. 19, 1996); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("[A] USG officer or employee may use deadly force against civil aircraft without violating [a criminal statute] if he or she reasonably believes that the aircraft poses a threat of serious physical harm . . . to another person.").

[108] During the India-Pakistan conflicts between 1965 and 1971, prisoners were able to correspond with their families, but there were "some difficulties in getting lists of all military prisoners" -- "[e]specially at the beginning of the conflict." Allan Rosas, *The Legal Status of Prisoners of War* at 186 (1976). Similarly, during the 1967 War in the Middle East, Israeli authorities delayed access to Arab prisoners on the grounds that "all facilities would be granted as soon as the prisoners were transferred to the camp at Atlith . . . In the meantime, delegates had the

example, it is a well-established principle that, where a statutory mandate fails to specify a particular deadline for agency action, a federal agency's duty to comply with that mandate is lawfully discharged, as long as it is satisfied within a reasonable time. The Administrative Procedure Act expressly provides that a "reviewing court shall . . . compel agency action unlawfully withheld or *unreasonably* delayed." 5 U.S.C. § 706 (emphasis added). Courts have recognized accordingly that a federal agency has a reasonable time to discharge its obligations.[109] Thus, "if an agency has no concrete deadline establishing a date by which it must act, . . . a court must compel only action that is delayed unreasonably. . . . [W]hen an agency is required to act--either by organic statute or by the APA--within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable."[110]

Here, Geneva III contains no strict deadlines for compliance. Indeed, it would be illogical to require immediate compliance, particularly if a nation were suddenly attacked and had no warning that POW facilities would be needed. Further, it might not be immediately practicable, given the conditions in the field where POWs would first be detained, to provide conditions that fully comply with Geneva III. Given that Geneva III has no mandated timetable, the armed forces have a reasonable time to satisfy their obligations of treatment with regard to POWs and are not guilty of breach when it is infeasible to achieve immediate compliance.

B. Status of Taliban Prisoners Under Article 4

Even if the President declines to suspend our obligations under Geneva III toward Afghanistan, it is possible that Taliban detainees still might not receive the legal status of POWs. Geneva III provides that once a conflict falls within common article 2, combatants must fall within one of several categories in order to receive POW status. Article 4(A)(1)-(3) sets out the three categories relevant here: i) members of the armed forces of a party to the conflict, along with accompanying militia and volunteer forces; ii) members of militia or volunteer corps who are commanded by an individual responsible to his subordinates, who have a distinctive sign recognizable from a distance, who carry arms openly, and who obey the laws of war; and iii) members of regular armed forces who profess allegiance to a government or authority that is not recognized by the detaining power. Should "any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," article 5 of Geneva III requires that these individuals "enjoy the protections of" the Convention until a tribunal has determined their status. As we understand it, as a matter of practice prisoners are presumed to have article 4 POW status until a tribunal determines otherwise.

Although these provisions seem to contemplate a case-by-case determination of an individual detainee's status, the President could determine categorically that all Taliban prisoners fall outside article 4. Under Article II of the Constitution, the President possesses the power to

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opportunity to see some of the prisoners at the transit camp at El Quantara and Kusseima." *Id.* at 203 (citation omitted). Although Israel was technically obliged under the Convention to provide access to Arab POWs, immediate compliance with that obligation was infeasible.

[109] *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987).

[110] *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

interpret treaties on behalf of the Nation.[11] He could interpret Geneva III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

We do not have, however, the facts available to advise your Department or the White House whether the President would have the grounds to apply the law to the facts in this categorical manner. Some of the facts which would be important to such a decision include: whether Taliban units followed a recognizable, hierarchical command-and-control structure, whether they wore distinctive uniforms, whether they operated in the open with their weapons visible, the tactics and strategies with which they conducted hostilities, and whether they obeyed the laws of war. If your Department were to conclude that the Afghanistan conflict demonstrated that the conduct of the Taliban militia had always violated these requirements, you would be justified in advising the President to determine that all Taliban prisoners are not POWs under article 4.

It is important to recognize that if the President were to pursue this line of reasoning, the executive branch would have to find that the Afghanistan conflict qualifies as an international war between two state parties to the Conventions. Article 4 is not a jurisdictional provision, but is instead only applied once a conflict has fallen within the definition of an international conflict covered by common article 2 of the Conventions. At this point in time, we cannot predict what consequences this acceptance of jurisdiction would have for future stages in the war on terrorism.

Nonetheless, if the President were to make such a determination, the WCA still would not impose any liability. As will be recalled, the WCA criminalizes either grave breaches of the Geneva Conventions or violations of common article 3. If members of the Taliban militia do not qualify as POWs under article 4, even though the conflict falls within common article 2's jurisdictional provisions, then their treatment cannot constitute a grave breach under Geneva III. Article 130 of Geneva III states that a grave breach occurs only when certain acts are committed against "persons . . . protected by the Convention." If the President were to find that Taliban prisoners did not constitute POWs under article 4, they would no longer be persons protected by the Convention. Thus, their treatment could not give rise to a grave breach under article 130, nor constitute a violation of the WCA.

Further, if the President were to find that all Taliban prisoners did not enjoy the status of POWs under article 4, they would not be legally entitled to the standards of treatment in common article 3. As the Afghanistan war is international in nature, involving as it does the use of force by state parties – the United States and Great Britain – which are outside of Afghanistan, common article 3 by its very terms would not apply. Common article 3, as we have explained earlier, does not serve as a catch-all provision that applies to all armed conflicts, but rather as a

[11] Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001).

specific complement to common article 2. Further, in reaching the article 4 analysis, the United States would be accepting that Geneva Convention jurisdiction existed over the conflict pursuant to common article 2. Common article 3 by its text would not apply, and therefore any violation of its terms would not constitute a violation of the WCA.

V. *Customary International Law*

Thus far, this memorandum has addressed the issue whether the Geneva Conventions, and the WCA, apply to the detention and trial of al Qaeda and Taliban militia members taken prisoner in Afghanistan. Having concluded that these laws do not apply, we turn to the effect, if any, of customary international law. Some may take the view that even if the Geneva Conventions, by their terms, do not govern the treatment of al Qaeda and Taliban prisoners, the substance of these agreements has received such universal approval that it has risen to the status of customary international law. Customary international law, however cannot bind the executive branch under the Constitution because it is not federal law. This is a view that this Office has expressed before,[112] and is one consistent with the views of the federal courts,[113] and with executive branch positions before the courts.[114] Although we are not currently aware whether any detention conditions currently would violate customary international law, it should be clear that customary international law would not bind the President.

A. *Is Customary International Law Federal Law?*

Under the view promoted by many international law academics, any presidential violation of customary international law is presumptively unconstitutional.[115] These scholars argue that customary international law is federal law, and that the President's Article II duty under the Take Care Clause requires him to execute customary international law as well as statutes lawfully enacted under the Constitution. A President may not violate customary international law, therefore, just as he cannot violate a statute, unless he believes it to be unconstitutional. Relying upon cases such as *The Paquete Habana*, 175 U.S. 677, 700 (1900), in which the Supreme Court observed that "international law is part of our law," this position often claims that the federal judiciary has the authority to invalidate executive action that runs counter to customary international law.[116]

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[112] *See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (1989).

[113] *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[114] *See id.* at 669-70; *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935-36 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

[115] *See, e.g.*, Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 325 (1985); Louis Henkin, *International Law As Law in the United States*, 82 Mich. L. Rev. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1179 (1985); *see also* Jonathan R. Charney, *Agora: May the President Violate Customary International Law?*, 80 Am. J. Int'l L. 913 (1986).

[116] Recently, the status of customary international law within the federal legal system has been the subject of sustained debate with legal academia. The legitimacy of incorporating customary international law as federal law has been subjected in these exchanges to crippling doubts. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 817 (1997); *see also* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 672-673 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1269

This view of customary international law is seriously mistaken. The constitutional text nowhere brackets presidential or federal power within the confines of customary international law. When the Supremacy Clause discusses the sources of federal law, it enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI. Customary international law is nowhere mentioned in the Constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant to Congress the power to "define and punish . . . Offenses against the Law of Nations."[117] It is also clear that the original understanding of the Framers was that "Laws of the United States" did *not* include the law of nations, as international law was called in the late eighteenth century. In explaining the jurisdiction of the Article III courts to cases arising "under the Constitution and the Laws of the United States," for example, Alexander Hamilton did not include the laws of nations as a source of jurisdiction.[118] Rather, Hamilton pointed out, claims involving the laws of nations would arise either in diversity cases or maritime cases,[119] which by definition do not involve "the Laws of the United States." Little evidence exists that those who attended the Philadelphia Convention in the summer of 1787 or the State ratifying conventions believed that federal law would have included customary international law, but rather that the laws of nations was part of a general common law that was not true federal law.[120]

Indeed, allowing customary international law to rise to the level of federal law would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by the Constitution for amending the Constitution or for enacting legislation.[121] Customary international law is not approved by two-thirds of Congress and three-quarters of the State legislatures, it has not been passed by both houses of Congress and signed by the President, nor is it made by the President with the advice and consent of two-thirds of the Senate. In other words, customary international law has not undergone the difficult hurdles that stand before enactment of constitutional amendments, statutes, or treaties. As such, it can have no legal effect

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(1988). These claims have not gone unchallenged. *See* Harold H. Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1827 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371, 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 Fordham L. Rev. 393, 396-97 (1997). Bradley and Goldsmith have responded to their critics several times. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 330 (1997).

[117] U.S. Const. art. I, § 8, cl. 10.

[118] *The Federalist No. 80*, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[119] *Id.* at 444-46.

[120] *See, e.g.*, Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 830-37 (1989); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1306-12 (1996); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 333-36 (1997).

[121] *Cf. INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto for failure to undergo bicameralism and presentment as required by Article I, Section 8 for all legislation).

on the government or on American citizens because it is not law.[122] Even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention self-executing against the executive branch.[123] If even treaties that have undergone presidential signature and senatorial advice and consent can have no binding legal effect in the United States, then it certainly must be the case that a source of rules that never undergoes any process established by our Constitution cannot be law.

It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority. This has been recognized by the Supreme Court since the earliest days of the Republic. In *The Schooner Exchange v. McFaddon*, for example, Chief Justice Marshall applied customary international law to the seizure of a French warship only because the United States government had not chosen a different rule.

> It seems then to the Court, to be a principle of public [international] law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals.[124]

In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall again stated that customary international law "is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[125] In other words, overriding customary international law may prove to be a bad idea, or be subject to criticism, but there is no doubt that the government has the power to do it.

Indeed, proponents of the notion that customary international law is federal law can find little support in either history or Supreme Court case law. It is true that in some contexts, mostly involving maritime, insurance, and commercial law, the federal courts in the nineteenth century looked to customary international law as a guide.[126] Upon closer examination of these cases, however, it is clear that customary international law had the status only of the general federal common law that was applied in federal diversity cases under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). As such, it was not considered true federal law under the Supremacy Clause; it did not support Article III "arising under" jurisdiction; it did not pre-empt inconsistent state law; and it did not bind the executive branch. Indeed, even during this period, the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore

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[122] In fact, allowing customary international law to bear the force of federal law would create significant problems under the Appointments Clause and the non-delegation doctrine, as it would be law made completely outside the American legal system through a process of international practice, rather than either the legislature or officers of the United States authorized to do so.

[123] *See, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

[124] 11 U.S. (7 Cranch) 116, 145-46 (1812).

[125] *Id.* at 128.

[126] *See, e.g., Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875).

serve as the basis for federal subject matter jurisdiction. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, for example, the Supreme Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the Constitution, laws, treaties, or Executive proclamations of the United States.[127] The spurious nature of this type of law led the Supreme Court in the famous case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), to eliminate general federal common law.

Even the case most relied upon by proponents of customary international law's status as federal law, *The Paquete Habana*, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana* involved the question whether U.S. armed vessels in wartime could capture certain fishing vessels belonging to enemy nationals and sell them as prize. In that case, the Court applied an international law rule, and did indeed say that "international law is part of our law."[128] But Justice Gray then continued, "*where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations." *Id.* (emphasis added). In other words, while it was willing to apply customary international law as general federal common law (this was the era of *Swift v. Tyson*), the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time. No Supreme Court decision in modern times has challenged that view.[129] Thus, under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law norms.

Constitutional text and Supreme Court decisions aside, allowing the federal courts to rely upon international law to restrict the President's discretion to conduct war would raise deep structural problems. First, if customary international law is indeed federal law, then it must

[127] 92 U.S. 286, 286-87.

[128] 175 U.S. at 700.

[129] Two lines of cases are often cited for the proposition that the Supreme Court has found customary international law to be federal law. The first derives from *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The "*Charming Betsy*" rule, as it is sometimes known, is a rule of construction that a statute should be construed when possible so as not to conflict with international law. This rule, however, does not apply international law of its own force, but instead can be seen as measure of judicial restraint: that violating international law is a decision for the political branches to make, and that if they wish to do so, they should state clearly their intentions. The second, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, applied the "act of state" doctrine, which generally precludes courts from examining the validity of the decisions of foreign governments taken on their own soil, as federal common law to a suit over expropriations by the Cuban government. As with *Charming Betsy*, however, the Court developed this rule as one of judicial self-restraint to preserve the flexibility of the political branches to decide how to conduct foreign policy.

Some supporters of customary international law as federal law rely on a third line of cases, beginning with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, the Second Circuit read the federal Alien Tort Statute, 28 U.S.C. §1350 (1994), to allow a tort suit in federal court against the former official of a foreign government for violating norms of international human rights law, namely torture. Incorporation of customary international law via the Alien Tort Statute, while accepted by several circuit courts, has never received the blessings of the Supreme Court and has been sharply criticized by some circuits, *see, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), as well as by academics, see Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 330 (1997).

receive all of the benefits of the Supremacy Clause. Therefore, customary international law would not only bind the President, but it also would pre-empt state law and even supersede inconsistent federal statutes and treaties that were enacted before the rule of customary international law came into being. This has never happened. Indeed, giving customary international law this power not only runs counter to the Supreme Court cases described above, but would have the effect of importing a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process. If customary international law does not have these effects, as the constitutional text, practice and most sensible readings of the Constitution indicate, then it cannot be true federal law under the Supremacy Clause. As non-federal law, then, customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan.

Second, relying upon customary international law here would undermine the President's control over foreign relations and his Commander in Chief authority. As we have noted, the President under the Constitution is given plenary authority over the conduct of the Nation's foreign relations and over the use of the military. Importing customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field.[130] It is difficult to see what legal authority under our constitutional system would permit customary international law to restrict the exercise of the President's plenary power in this area, which is granted to him directly by the Constitution. Further, reading customary international law to be federal law would improperly inhibit the President's role as the representative of the Nation in its foreign affairs.[131] Customary law is not static; it evolves through a dynamic process of State custom and practice. "States necessarily must have the authority to contravene international norms, however, for it is the process of changing state practice that allows customary international law to evolve."[132] As we observed in 1989, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[133] The power to override or ignore customary international law, even the law applying to armed conflict, is "an integral part of the President's foreign affairs power."[134]

Third, if customary international law is truly federal law, it presumably must be enforceable by the federal courts. Allowing international law to interfere with the President's

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[130] *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) (reviewing authorities).

[131] "When articulating principles of international law in its relations with other states, the Executive branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." *Sabbatino*, 376 U.S. at 432-33. *See also Rappenecker v. United States*, 509 F.Supp. 1024, 1029 (N.D. Cal. 1980) ("Under the doctrine of separation of powers, the making of those determinations [under international law] is entrusted to the President."); *International Load line Convention*, 40 Op. Att'y Gen. at 123-24 (President "speak[s] for the nation" in making determination under international law).

[132] 13 Op. O.L.C. at 170.

[133] *Id.*

[134] *Id.* at 171.

war power in this way, however, would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches. Indeed, treating customary international law as federal law would require the judiciary to intervene into the most deeply of political questions, those concerning war. This the federal courts have said they will not do, most recently during the Kosovo conflict.[135] Again, the practice of the branches demonstrates that they do not consider customary international law to be federal law. This position makes sense even at the level of democratic theory, because conceiving of international law as a restraint on warmaking would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives.

Based on these considerations of constitutional text, structure, and history, we conclude that customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners.

Conclusion

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners. We also conclude that the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan during the period of the conflict. He may exercise that discretion on the basis that Afghanistan was a failed state. Even if he chose not to, he could interpret Geneva III to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution.

We should make clear that in reaching a decision to suspend our treaty obligations or to construe Geneva III to conclude that members of the Taliban militia are not POWs, the President need not make any specific finding. Rather, he need only authorize or approve policies that would be consistent with the understanding that al Qaeda and Taliban prisoners are not POWs under Geneva III.

Please let us know if we can provide further assistance.

Jay S. Bybee
Assistant Attorney General

[135] *See, e.g., Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

Document 9

Human Rights / United States

The Half-Life of Torture

Legal opinions signed by 9th Circuit Judge Jay Bybee helped pave the way for alleged torture during President Bush's war on terror

Dan Levine
The Recorder
April 13, 2009

Post a Comment

9th Circuit Court of Appeals Judge Jay Bybee
Image: Jason Doiy/The Recorder

Six weeks before Gen. Augusto Pinochet overthrew the Chilean government in 1973, Jay Bybee, a 19-year-old Mormon missionary, disembarked in windswept **Punta Arenas**, nearly 2,000 miles south of Santiago.

"It was a place where you lean on a 45-degree angle to walk around the corner, and then if you don't change your angle, you fall flat," then-mission-president Roland Glade remembers. "It was a place you send somebody who knows what they're doing."

Bybee wasn't afraid to practice his Spanish, and he entertained by imitating Chicago, New York and "New Joisey" accents, fellow missionary David Magnusson said. After the coup, the missionaries learned to allow enough time to proselytize and make it home before the military curfew.

Talking politics with Chileans was verboten. Though Bybee, now a Bush-appointed 9th U.S. Circuit Court of Appeals judge, liked high school debating, he passed at Brigham Young University, telling **Magnusson** it was "too contentious."

In the decades to come, Bybee's easy personality would help him recover from life's setbacks – and serve him well for most of his legal career. But it is also one clue into understanding why Bybee is among the former Bush administration lawyers under review for war crimes by **Baltasar Garzon**, the same Spanish judge who once ordered Pinochet's arrest.

Bybee has retained **Latham & Watkins'** Maureen Mahoney to negotiate the European inquiry and other probes of his role at the Justice Department, where he signed off on the so-called torture memos in 2002. During President Bush's war on terror, those legal opinions paved the way for such treatment as wrapping a towel around a detainee's neck and smashing his head against a wall, according to an International Red Cross **report made public** last week in the *New York Review of Books*.

Bybee declined to talk about his work at the Office of Legal Counsel. But when he gathered former clerks last year at a Las Vegas steak house for a five-year reunion, he was more revealing.

"He said our work has been well-researched, carefully written, and that he was very proud of the work that we've done and the opinions his chambers has issued," said **Tuan Samahon**, who was Bybee's first judicial clerk and is now a UNLV professor.

According to Samahon, the judge then added: "I wish I could say that of the prior job I had."

Such sentiments contrast with public comments from John Yoo, Bybee's former deputy at the OLC, who maintains that all of his legal memos were fully vetted by management. That could foreshadow potential finger pointing as the legal process plays out. But whatever the outcome of various probes

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into his role, Bybee has become a study into how a person behaves when he knows his name will be forever linked with a dark historical episode.

"You can either stew about it and drown in bitterness, or move on and do the best you can. That's what Jay is trying to do," said one longtime friend. "Some people get over it and have a good life. Some people don't."

THE MAKING OF THE MEMOS

Bybee wasn't supposed to run the OLC. In the spring of 2001, Attorney General John Ashcroft and the White House couldn't agree on a candidate. They finally settled on a then-Columbia Law School professor, **John Manning**, but he pulled out.

Then stationed at UNLV's law school, Bybee had established conservative academic credentials. He also had a friend in the White House: Timothy Flanigan, a fellow BYU grad who was Alberto Gonzales' deputy and who knew Bybee from their time as summer associates at **Shearman & Sterling**, said **Steven Guynn**, a mutual friend who is now a deals lawyer at **Gibson, Dunn & Crutcher**.

Bush nominated Bybee to head the OLC in July, but the professor stayed in Las Vegas to finish a teaching commitment, Samahon said. When the Twin Towers fell, the Senate hadn't yet held a hearing on his nomination. By the time Bybee arrived in November, Yoo, a national security expert, had already issued at least three legal memos broadening the White House's power at its behest.

Even as Bybee settled into the OLC job, a new one beckoned: Procter Hug Jr., a longtime 9th Circuit judge from Nevada, took senior status on Jan. 1, 2002, creating a vacancy in Bybee's home state. In his **confirmation documents**, Bybee said the White House approached him about the seat that winter, and Bush nominated him in May.

That Bybee would be ready to leave the Justice Department so quickly didn't surprise some Justice Department observers: the OLC had been a traditional launching pad to the federal judiciary's upper reaches. But Bybee's 9th Circuit confirmation took time, and it was the period after his nomination -- but before his Senate vote -- when the most controversial events of his career would transpire.

On Aug. 1, 2002, Bybee signed two memos, both drafted by Yoo. **One of them**, which has since been publicly released, said interrogation techniques could be cruel, inhumane or degrading and still not rise to the level of impermissible torture. Another memo, which hasn't been made public but has been the subject of news accounts, approved a list of techniques the CIA sought to use.

As the CIA sought legal cover that summer, lawyers advising other national security principals say Yoo was their primary OLC liaison -- a fact which jibes with descriptions of Bybee's management style ("a delegator," Samahon said). A high-level council of lawyers driving the administration's bid for increased authority included Yoo -- and Bybee's friend, Flanigan -- but not Bybee, **according to a book** by Bybee's successor, Jack Goldsmith.

Flanigan, now at **Wilmer Cutler Pickering Hale and Dorr**, declined to talk about the judge.

Despite Yoo's heavy involvement, though, the judge's signature on the torture memos weren't perfunctory. According to information Bybee submitted to the Armed Services Committee last fall, as his office prepared the memos, Bybee saw a CIA assessment of the "psychological effects of military resistance training."

The assessment came to him in a meeting with Yoo and two other OLC attorneys in July, and Bybee told the committee that it informed the Aug. 1 memo, which is believed to have approved specific interrogation techniques, such as waterboarding. The Obama administration is reportedly split on the question of whether to make that opinion public.

News of the torture memos **broke** in 2004, toward the end of Bybee's first year on the 9th Circuit. Samahon, his clerk, remembers gathering for the weekly staff meeting.

"He condemned the policy choice to use torture as a tool of interrogation," he said. "It was quite eloquent, something like, 'When the republic would countenance the use of torture as an instrument of forging policy, truly the spirit of liberty has gone out of us.'"

Samahon said he didn't interpret Bybee's use of the word "torture" as a legal term of art. And he acknowledges that in Bybee's approach to the law, a policy choice could be ill-advised, or even abhorrent -- but still constitutional.

Yet Yoo has often gone further, arguing that the administration's aggressive tactics saved American

lives. He also points to Bybee in his book, where Yoo describes a standard practice at the OLC in which lawyers submitted their drafts to at least two colleagues, or the chief, for review before being issued.

Neither Yoo nor his lawyer, Gibson, Dunn partner **Miguel Estrada**, returned messages.

Unlike Yoo, Bybee wasn't a national security expert; as an academic, he'd developed a bit of a specialty in the Establishment Clause. And according to one former lawyer at the OLC, he continued to pursue that interest there.

The former OLC lawyer wouldn't discuss specifics, but shortly after Bybee left, the OLC opined that the Parks Service could give historic preservation grants to the Old North Church in Boston without violating the First Amendment, even though religious ceremonies still took place there.

UNDER A MUSHROOM CLOUD

The judge keeps his chambers in Las Vegas, where his father worked on the Nevada **nuclear test site** in the 1950s, and the young Bybee witnessed a mushroom cloud from a distance. While he was in his 20s, his father died suddenly from cancer believed to be brought on by the nuclear work, sister Karen Bybee said, adding that her brother immediately stepped in to lead the family.

The judge could have gone to Duke University School of Law, but he stayed at BYU for a girlfriend, said Bybee's friend Guynn. Then, she ended the relationship during Bybee's first semester at law school.

"I still have this image talking to him on the phone, with him sort of lamenting the fact he gave up Duke for a girl, and now he doesn't even have the girl," said Frederick Gedicks, another friend who is now a BYU law school professor himself.

Bybee eventually married a teacher, and they have four children.

"Jay picks himself up and moves on. I would not describe him as stoic, just solid," Gedicks said. "He's not an emoter, but certainly not a stone, either."

The judge worked on appeals for the Justice Department in the 1980s, and then in the White House Counsel's office under George H.W. Bush. His moral barometer sometimes made life complicated, remembers **Randall Guynn**, a **Davis Polk & Wardwell** partner who is Steven Guynn's younger brother.

Randall Guynn once prepared a European itinerary for an upcoming trip he and Bybee planned. "He wouldn't allow me to fax it, because he wasn't sure it was appropriate to use government ink and paper for a personal trip," said Guynn, who lived in Paris at the time.

The Davis Polk lawyer instead faxed the document to his firm's Washington, D.C., office, which then messengered it to Bybee.

After Bybee left the Justice Department, his successors withdrew some of the controversial torture memos. Though Bybee acknowledged reviewing CIA briefing material, he didn't provide details for the Armed Services Committee. Some members of Congress have criticized the intelligence agency for downplaying its interrogation program, according to **Jane Mayer's** account in "The Dark Side."

When it came time for one of Bybee's successors, Daniel Levin, to craft new torture guidelines, Levin arranged to be waterboarded to gain firsthand knowledge, Mayer wrote.

In addition to the Spanish inquiry, the Justice Department's Office of Professional Responsibility has been prepping a much-anticipated dissection of the OLC's legal memos. That report could recommend sanctions against lawyers who were involved; media outlets like **Newsweek** have reported that the preliminary findings are critical of Yoo and Bybee.

As a judge, Bybee is not regulated by the Nevada Bar Association. And the U.S. Judicial Conference can only bring disciplinary actions for conduct that occurred on the bench, said Arthur Hellman, a University of Pittsburgh School of Law professor.

Thus, short of criminal charges, impeachment is likely the only available domestic remedy for Bybee's critics, and the political will for Congress to undertake that process is far from certain.

What is certain is that Bybee's work for the OLC will follow him.

"I have not talked to other judges about his memo on torture," said 9th Circuit Judge Betty Fletcher, his ideological opposite, "but to me it seems completely out of character and inexplicable that he would have signed such a document."

Last summer, the 9th Circuit convened for a few days of law and golf at its annual conference in Sun Valley, Idaho. One morning, liberal attorneys like Kathleen Sullivan and Seth Waxman ripped the Bush administration at a discussion about executive power. Yoo was supposed to be on the panel, but didn't show -- an organizer joked that he'd been "detained."

One lawyer asked the panelists whether former administration officials should be prosecuted. Sullivan said it would be difficult, suggesting reparations for the victims as an alternative. Throughout, Bybee sat quietly in an aisle seat, listening.

Post a Comment

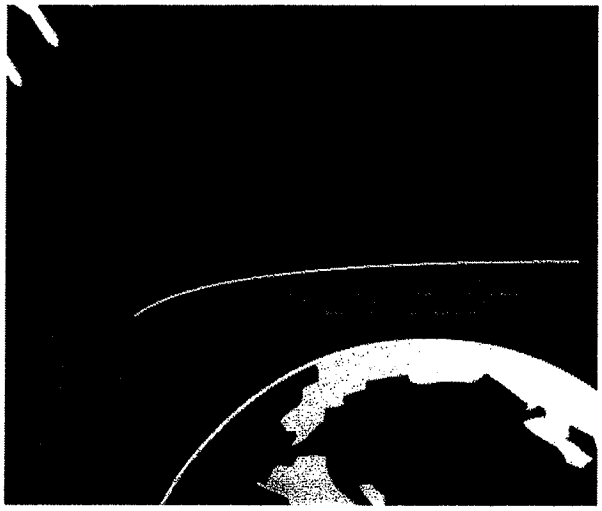
Document 10

The Washington Post

Amid Outcry on Memo, Signer's Private Regret

Friends Say Judge Wasn't Proud of Outcome

By Karl Vick
Washington Post Staff Writer
Saturday, April 25, 2009



LAS VEGAS -- On a Saturday night in May last year, Jay S. Bybee hosted dinner for 35 at a Las Vegas restaurant. The young people seated around him had served as his law clerks in the U.S. Court of Appeals for the 9th Circuit, the post Bybee had assumed after two turbulent years at the Justice Department, where as head of the Office of Legal Counsel he signed the legal justifications for harsh interrogations that have become known as the "torture memos."

Five years along in his new life as a federal judge, Bybee gathered the lawyers and their dates for a reunion, telling them he was proud of the legal work they had together produced.

And then, according to two of his guests, Bybee added that he wished he could say the same about his previous position.

It was, in the private room of a public restaurant, the kind of joyless judgment that some friends and associates say the jurist arrived at well before the public release of four additional memos last week and the resulting uproar that has engulfed Washington. One of the documents, dated Aug. 1, 2002, offered a helpfully narrow definition of torture to the CIA and soon became known as the "Bybee memo," because it bore his signature.

"I've heard him express regret at the contents of the memo," said a fellow legal scholar and longtime friend, who spoke on the condition of anonymity while offering remarks that might appear as "piling on." "I've heard him express regret that the memo was misused. I've heard him express regret at the lack of context -- of the enormous pressure and the enormous time pressure that he was under. And anyone would have regrets simply because of the notoriety."

That notoriety worsened this week as the documents -- detailing the acceptable application of waterboarding, "walling," sleep deprivation and other procedures the Bush administration called "enhanced interrogation methods" -- prompted calls from human rights advocates and other critics for criminal investigations of the government lawyers who generated them.

Of the three former Justice Department lawyers associated with the memos, the public's attention has focused particularly harshly on Bybee because of his position as a sitting federal judge; John C. Yoo, who largely wrote the Bybee memo, returned to academic life, and Steven G. Bradbury, who signed three memos, resumed private practice at the end of the Bush administration.

Democratic lawmakers, human rights groups and others have called for Congress to impeach Bybee,

complaining that his 2003 Senate confirmation came more than a year before his role in the memos was known. "If the Bush administration and Mr. Bybee had told the truth, he never would have been confirmed," said Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), adding that "the decent and honorable thing for him to do would be to resign."

Democrats blocked the nomination of former Defense Department general counsel William J. Haynes II to the Court of Appeals for the 4th Circuit because of his role in supporting aggressive interrogations of military detainees. Haynes withdrew his nomination in 2007.

The Justice Department withdrew the memos in the closing days of the Bush administration, and as its Office of Professional Responsibility investigates their origin -- and Congress, the American Bar Association and the United Nations mull inquiries -- Bybee is represented by Maureen E. Mahoney, a star litigator at Latham & Watkins.

The aura of regret described by Bybee's friends and associates stands in contrast to the demeanor of Yoo, who served under Bybee and has maintained both a public profile and the fearless confidence that informed the memos. "Al-Qaeda in the months after 9/11 was going to carry out follow-on attacks on our country and its citizens," Yoo said Tuesday at a conference at Chapman University, the Orange, Calif., campus where he is teaching this spring.

Bybee left the issue behind in 2003, returning to the gated suburban Las Vegas subdivision where he lives with his wife and children. He has said nothing publicly about the documents, a silence associates attributed to the restrictions on a sitting appellate judge, the possible advice of counsel and his own manner.

"Judge Bybee tends to be a very private person, even when he's not in the newspapers," said Ann S. Jarrell, law librarian in the downtown U.S. courthouse where he keeps his chambers. Neither Bybee nor Mahoney would comment for this article.

Still, in the years since the original Bybee memo was made public, his misgivings appeared evident to some in his immediate circle.

"On the primary memo, that legitimated and defined torture, he just felt it got away from him," said the fellow scholar. "What I understand that to mean is, any lawyer, when he or she is writing about something very complicated, very layered, sometimes you can get it all out there and if you're not careful, you end up in a place you never intended to go. I think for someone like Jay, who's a formalist and a textualist, that's a particular danger."

Tuan Samahon, a former clerk who recalled Bybee's remarks at the reunion dinner, said in an e-mail that the judge defended the legal reasoning behind the memos but not the policy decision. Bybee was disappointed by what was done to prisoners, saying that "the spirit of liberty has left the republic," Samahon said.

"Jay would be the sort of lawyer who would say, 'Look, I'll give you the legal advice, but it's up to someone else to make the policy decision whether you implement it,' " said Randall Guynn, who roomed with Bybee at Brigham Young University and remains close.

Jameel Jaffer, director of the ACLU's National Security Project, which filed a freedom-of-information request regarding the latest memos, said any distinction Bybee may make between the logic of the memos and their application in secret prisons is theoretical at best.

"I don't think the August 2002 memos reflect serious attempts to grapple in good faith with the law," Jaffer said. "These are documents that are meant to justify predetermined ends. They're not objective legal memos at all."

Neither Guynn nor his brother, Steve, who also roomed with Bybee, recalled the judge distancing himself from the memos. But in the years since the first memo became public, Bybee left that sense with some.

"I got the impression that he was not pleased with that bit of scholarship," said an associate who asked not be identified sharing private conversations. "I don't know that he 'owned it.' . . . The way he put it was: He was head of the OLC, and it was written, and he was not pleased with it."

"But he signed it," said Chris Blakesley, a friend and fellow professor at the University of Nevada at Las Vegas Boyd School of Law who was outraged by the memo, which was leaked in May 2004.

"The very evening it came out, we were going to dinner, and I told him how awful it was and I hoped he got a chance to repudiate it," Blakesley said. "He didn't say very much, and it was kind of awkward because our families were there."

"Getting to the personal side of him, my sense is he would love to repudiate them all," Blakesley said. "Which gets to: Why'd you sign it?"

Bybee had worked in Washington before. During the 1980s he was in the civil and legal policy divisions at the Justice Department, then served as associate White House counsel under President George H.W. Bush.

During the Clinton years, he went from Louisiana State to UNLV, whose law school was so new it was located in an old elementary school across Tropicana Avenue. Through the thin walls of the annex, constitutional law specialist Tom McAffee would hear Bybee working the phones. But he struck none of his colleagues as an ideologue.

"I have colleagues with reputations as indoctrinators," said McAffee, who has known Bybee 30 years and co-authored a book with him on the Ninth and 10th amendments. "Bybee was the opposite end of the spectrum. He was more interested in getting people to think about things."

Students enjoyed Bybee, voting him professor of the year in 2000. "He was 'The Great Professor,' " said Briant S. Platt, who worked as his research assistant and later clerk. "He was quite self-deprecating: 'You get a root beer float in me and I'm a lot of fun.' "

Bybee still occasionally teaches a course at UNLV on separation of powers.

"The whole idea that the Constitution is based on a kind of wariness of mankind's tendency to grab power, that is an idea I got from Jay," McAffee said. "So the whole idea of uninhibited executive power, from him, does seem passing strange."

Bybee's friends said he never sought the job at the Office of Legal Counsel. The reason he went back to Washington, Guynn said, was to interview with then-White House counsel Alberto R. Gonzales for a slot that would be opening on the 9th Circuit when a judge retired. The opening was not yet there, however, so Gonzales asked, "Would you be willing to take a position at the OLC first?" Guynn said.

Being unable to answer for what followed is "very frustrating," said Guynn, who spoke to Bybee

before agreeing to be interviewed.

"If they end up having hearings," he said, "they're going to have a very difficult time trying to square him with their judgments about the memo."

Staff writer Ashley Surdin contributed to this report.

View all comments that have been posted about this article.

Document 11

PATRICK J. LEAHY, VERMONT
CHAIRMAN

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 29, 2009

The Honorable Jay S. Bybee
Ninth Circuit Court of Appeals
333 Las Vegas Blvd S
Las Vegas, NV 89101

Dear Judge Bybee:

I write to invite you to testify before the Senate Judiciary Committee.

I enclose a recent article from *The Washington Post*. It suggests that you have expressed regret at the content of the Office of Legal Counsel (OLC) memoranda issued while you headed that office and that you feel that they were misused. The article reports that you were concerned about the exercise of the policies that the opinions authorized, that you were "disappointed by what was done to prisoners," and that you felt that "the spirit of liberty has left the republic." The article notes that your associates claim you do not feel ownership of these memos but, instead, describe your involvement this way: "He was head of the OLC, and it was written, and he was not pleased with it." By coming forward and testifying before the Committee, you will have the opportunity to amplify or correct these accounts, and explain your role and your views.

The *Post* article concludes that you have allegedly found it "frustrating" not to be able to explain your position with regard to these memos. By coming forward to testify, you will be able to explain your position with regard to these matters, including your involvement and your knowledge regarding how these memos were written and approved, what considerations went into that process, who was consulted in that process and the roles of various individuals.

According to the press account, you became the Assistant Attorney General in charge of the Office of Legal Counsel after interviewing with White House Counsel Alberto Gonzales because you were interested in being nominated to a judgeship on the Ninth Circuit Court of Appeals. Apparently he asked if you would be willing to head OLC first. I am sure you would like an opportunity to come forward and set the record straight with respect to whether and, if so, how your judicial ambitions related to your participation at OLC.

You were nominated by President George W. Bush to serve as head of OLC on September 4, 2001. You were confirmed on October 23, 2001. While serving as the head of OLC you were then first nominated by President George W. Bush to be a Federal Judge on the United States Court of Appeals for the Ninth Circuit on May 22, 2002, and renominated on January 7, 2003.

Along with others, I sought to explore your work at OLC but we were told by you that you would not answer those questions. You were confirmed to be a Federal Judge on March 13, 2003.

Thereafter, in 2004, an OLC memo signed by you and dated August 1, 2002, became public. In that memo you signed, the Office of Legal Counsel concluded that to violate U.S. law against torture, conduct must cause pain equivalent to "the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." That memo was withdrawn in connection with the nomination of Alberto Gonzales to be Attorney General of the United States.

More recently, a second August 1, 2002, memorandum, also signed by you, has been publicly released by the Obama administration. This second memo specifically authorizes the use of coercive interrogation techniques on Abu Zubaydah, including sleep deprivation for 11 days at a time and waterboarding.

I also enclose an article published today in *The New York Times* in which you state, in contrast to the recent *Post* report, that you "believed at the time, and continue to believe today, that the conclusions were legally correct." You also stated that the Office of Legal Counsel provided its "best, honest advice, based on our good-faith analysis of the law." The contrast between the recent articles in *The New York Times* and *The Washington Post* is striking. I am giving you the opportunity to come forward and clarify what you meant in your public discussion of these matters, and so that we can establish the facts and get to the truth.

There is significant concern about the legal advice provided by OLC while you were in charge, how that advice came to be generated, the considerations that went into it, and the role played by the White House.

I look forward to your cooperation and your testimony.

Sincerely,

PATRICK LEAHY
Chairman

Document 12

Presidential Nominations Search Results

Nomination: PN1778-107
Date Received: May 22, 2002 (107th Congress)
Nominee: Jay S. Bybee, of Nevada, to be United States Circuit Judge for the Ninth Circuit, vice Procter R. Hug, Jr., retired.
Referred to: Senate Judiciary

Legislative Actions

Floor Action: May 22, 2002 - Received in the Senate and referred to the Committee on the Judiciary.
Floor Action: November 20, 2002 - Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate.

Organization: The Judiciary

Control Number: 107PN0177800

Document 13

S. HRG. 108–135, PT. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

FEBRUARY 5, FEBRUARY 12, MARCH 12, MARCH 27, AND APRIL 1, 2003

PART 2

Serial No. J–108–1

Printed for the use of the Committee on the Judiciary

precedent of my circuit and the precedent established by the Supreme Court. I think to do otherwise would be chaotic, and I think disserves the people who then cannot count on understanding what the law is. They have no way of knowing what law will be applied if a judge is free to ignore the dictates of higher courts.

Chairman HATCH. It would not be long for the Constitution to go down the drain if we had judges just doing what they felt within their souls was right, rather than applying the law, as the precedents demand.

Mr. BYBEE. It would be chaotic, Senator.

Chairman HATCH. Yes, it would.

Well, if there were no controlling precedent, dispositively concluding an issue with which you are presented in your circuit, to what sources would you apply to obtain persuasive authority?

Mr. BYBEE. Thank you, Mr. Chairman.

If I faced a situation in which there were no controlling precedents, then I would begin with the text of the statute. That is the clearest record of what Congress meant. I begin with the text of the statute.

In those cases in which there might be some ambiguity that cannot be resolved by referring directly to the text of the statute or to the broader structure of the act that it is a part of or to some clear understanding or history, then I would look to other tools that would help me understand what Congress meant.

Chairman HATCH. In what circumstances, if any, do you believe an appellate judge should overturn precedent within his or her own circuit?

Mr. BYBEE. Mr. Chairman, that's a hard question, and I think that's one that each judge will have to decide for himself or herself. The second Justice Harlan I think took the position that he would dissent three times to make his views known where he believed that the Court had erred, and then he would accept the circuit precedent or the Supreme Court's precedent.

In the case where you have a firm belief that the Court has plainly made a mistake Circuit Courts may revisit their decisions, but I think that would take a very, very careful weighing of what compelled the decision in the first place, how long it had been in place, what kind of reliance people or companies or States had placed upon that decision, and I think one would have to think very carefully, long and hard, before one would overturn it.

Nevertheless, Senator, there certainly are a number of instances in the Supreme Court and in the Courts of Appeals where courts have been compelled to overturn themselves where they believed that they did make a mistake.

Chairman HATCH. Thank you. My time is up. I am going to turn to Senator DeWine.

Senator DEWINE. Mr. Bybee, Senator Leahy raised some important points about some activities in which the Department of Justice has engaged. As you are aware, this Committee does have jurisdiction over oversight over the Department of Justice. Let me ask you whether you feel you have authority to answer questions today on behalf of the Department of Justice.

Mr. BYBEE. No, Senator, I do not.

Document 14

7/17/06 N.Y. Times A16
2006 WLNR 12267283

New York Times (NY)

July 17, 2006

Section: A

Abu Ghraib Rewarded

Editorial urges Senate to reject Pres Bush's nomination of William **Haynes** II for seat on United States Court of Appeals for **Fourth Circuit**; says **Haynes**, Pentagon's general counsel, helped shape some of administration's most legally and morally objectionable anti-terrorism policies, notably use of **torture**

William Haynes II, the Pentagon's general counsel, has been closely involved in shaping some of the Bush administration's most legally and morally objectionable policies, notably on the use of torture. The last thing he is suited to be is a federal judge, but that is just what President Bush wants to make him. The Senate has been far too willing to rubber-stamp the president's extreme judicial nominees. But there is reason to hope that strong opposition to Mr. Haynes, including from the military, may block this thoroughly inappropriate choice.

Mr. Haynes has been nominated for a seat on the United States Court of Appeals for the Fourth Circuit, based in Richmond, Va., a court that has heard some of the most important cases about the constitutional limits on the war on terror. This is a subject on which Mr. Haynes has no business posing as an impartial jurist. He has for years been part of a small group of insiders who have mapped out the Bush administration's policies on questioning detainees and declaring American citizens to be "enemy combatants." The administration's policies in this area have been indecent and lawless, and the Supreme Court has repeatedly had to step in to rein them in.

Mr. Haynes was by many accounts a key player in the administration's development of its shamefully narrow definition of "torture," which gave the green light for a wide array of abuses. The decisions made in Washington cleared the way for abusive treatment of the detainees being held in Guantanamo Bay, and created the environment necessary for the Abu Ghraib torture scandal to occur. It is disturbing that while low-level soldiers have been convicted for their actions at the Iraqi prison, Mr. Haynes has been rewarded with a coveted judicial nomination.

The administration likes to blame opposition to its judicial nominees on "liberal activists," but Mr. Haynes's most high-profile opposition comes from the military itself. Twenty retired military officers, including a retired Army colonel who served as chief of staff to Secretary of State Colin Powell, wrote to the Senate to express their concern that the policies Mr. Haynes helped develop "compromised military values, ignored federal and international law and damaged America's reputation and world leadership." The officers expressed their "deep

concern" about his fitness for the court.

At Mr. Haynes's confirmation hearing, some of the most pointed questioning came from Senator Lindsey Graham, Republican of South Carolina. Mr. Graham, who has served as a military lawyer, takes the law of combat seriously, and he seemed to be genuinely offended by Mr. Haynes's record. Democrats are, quite properly, talking about filibustering Mr. Haynes's nomination if it comes to that, but it should not. This is one judicial nomination that moderate, and even independent conservative, Republicans should join Senate Democrats in defeating.

---- INDEX REFERENCES ---

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END OF DOCUMENT

Document 15

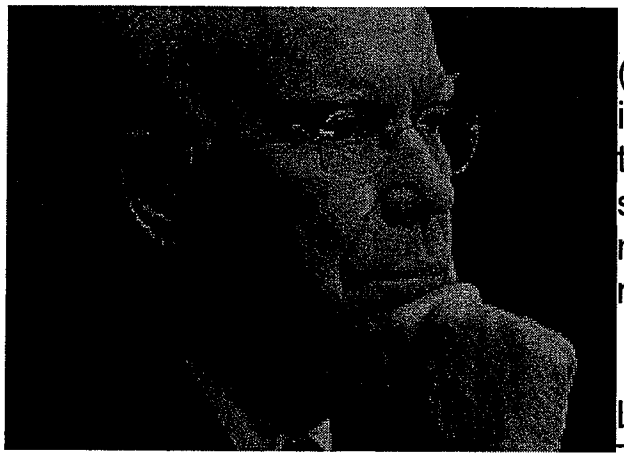
May 21, 2010

This is the print preview: Back to normal view »

Ryan Grim
ryan@huffingtonpost.com | HuffPost
Reporting From DC

Leahy: If Bybee Is "Decent And Honorable" He'll Resign

04/21/09 01:25 PM



On Monday, Sen. Orrin Hatch (R-Utah), rejected calls for the impeachment of federal judge and torture memo author Jay Bybee, saying that he was "one of the most honorable people you'll ever meet."

If that's the case, Sen. Patrick Leahy (D-Vt.), told reporters Tuesday, then Bybee should resign.

"The fact is, the Bush administration and Mr. Bybee did not tell the truth. If the Bush administration and Mr. Bybee had told the truth, he never would have been confirmed," said Leahy, chairman of the Senate Judiciary Committee.

"The decent and honorable thing for him to do would be to resign. And if he is a decent and honorable person, he will resign," he said deliberately.

A reporter followed up, asking what Congress should do if Bybee refused to step down. Leahy smiled and walked toward the Senate chamber, declining to comment further.

Bybee is among a team of Bush administration lawyers that drafted legal documents justifying waterboarding, stuffing detainees in small boxes with insects and other forms of torture.

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Document 16

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

January 5, 2010

[redacted]

MEMORANDUM FOR THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL

FROM: David Margolis
Associate Deputy Attorney General

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

DISCUSSION:

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

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

For the reasons stated below, I do not adopt OPR's findings of misconduct. This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, OPR's own analytical framework defines "professional misconduct" such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard. For this reason and based on the additional analysis set forth below, I cannot adopt OPR's findings of misconduct, and I will not authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed.

I. Historical and procedural background

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

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

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about how to respond to the terrorist threat.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mukasey/Filip letter at 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OPR final report at 184.

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

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

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

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

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

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

II. OPR's findings

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

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

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

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

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

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

Id. at 18-19.

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

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identified a known, unambiguous obligation that applied to Yoo and Bybee's issuance of the pertinent memoranda. In its final report, OPR's misconduct findings do not identify a violation of a specific bar rule. Rather, OPR gleaned the "duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" from several sources including D.C. Rule of Professional Conduct (DCRPC or DC Rule) 2.1,[7] DCRPC 1.1, an OLC Best Practices Memo issued on May 16, 2005,[8] and a document entitled "Principles to Guide the Office of Legal Counsel" (Guiding Principles), which a number of former OLC attorneys endorsed in December 2004. *Id.* at 21-24. In addition to gleaning its applied standard from the listed sources, OPR also declared:

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

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

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

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

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decided) to hold OLC attorneys who author opinions about important matters, but the pertinent question is whether this standard is properly applied to determine whether OLC attorneys complied with the standards imposed on them by Rules of Professional Conduct. If OPR has failed to identify properly a "known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy," or has failed to establish that the obligation unambiguously applied to the attorneys' conduct, then its misconduct analysis fails on that basis.

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

OPR described its conclusions in the second draft by stating:

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

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

In the final report, however, OPR concluded:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q: That's fair enough.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[redacted] And to use sort of a technical term, everyone was freaked out about it, because they thought we really were going to suffer a significant attack.

And it was in the context of that and a relatively recent capture of a particular individual [redacted] that the sort of great urgency for this issue arose.

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

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

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

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

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

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

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

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

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

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

DCRPC 1.2(e) provides:

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

The commentary to this rule provides further guidance:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. OPR's criticisms of the memoranda

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

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

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

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

1. The unclassified Bybee memo

a. Specific intent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Severe pain

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

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

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

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

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

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

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

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

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

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

c. Ratification history of the Convention Against Torture

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

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

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

d. United States Judicial interpretations

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

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

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

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

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

e. International decisions

(1) *Ireland v. United Kingdom*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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f. Commander-in-Chief power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[redacted] at 44.

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

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

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anybody was pushing us in one direction or another.

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

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

Yoo Pt. II at 6-7.

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

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

Id. at 31.

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

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Id. at 36.

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

Id. at 37.

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

  * * *

  A So, you know, they're written for people who work in the area and are sort of familiar with the sort of general background.

Id. at 38-39.

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

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that–

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

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

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

Q Okay.

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

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

A I don't think so.

Q –memo?

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

Id. at 41-42.

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

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

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

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

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

Q. Okay.

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

* * *

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

Id. at 60-63.

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

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

Bybee at 115.

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

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

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

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

Rizzo April 8, 2009 response at 4.

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

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

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

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

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

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

g. Criminal defenses to torture

(1) The necessity defense

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Self Defense

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

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

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

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

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

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

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

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

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

2. The Classified Bybee memo

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

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

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

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

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

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

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

b. Failure to discuss distinctions between SERE training and interrogation

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

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

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

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

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

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

c. Other criticisms

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

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

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

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

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

3. Conclusion

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

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

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

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

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

C. Yoo's intent

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

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

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

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

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

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

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

For all of the above reasons, I am not prepared to conclude that the circumstantial evidence much of which is contradicted by the witness testimony regarding Yoo's efforts establishes by a preponderance of evidence that Yoo intentionally or recklessly provided misleading advice to his client. It is a close question. I would be remiss in not observing, however, that these memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel. While I have declined to adopt OPR's findings of misconduct, I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. These memoranda suggest that he failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice. I do not believe the evidence establishes, however, that he set about to knowingly provide inaccurate legal advice to his client or that he acted with conscious indifference to the consequences of his action. In reaching this determination, I am mindful that at the time the memos were authored, the number of individuals with whom Yoo could consult was extremely limited, and his consultation with the Assistant Attorney General of the Criminal Division was a reasonable action given Yoo's own lack of criminal law experience.

III. Conclusion

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

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

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

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

OPR final report at 19. I have found that Yoo and Bybee did not violate a clear obligation or standard. However, as I have noted, the standard that OPR identified is consistent with the action that the Department reasonably expects of its attorneys. In contradiction of that high standard, the unclassified Bybee memo consistently took an expansive view of executive authority and narrowly construed the torture statute while often failing to expose (much less refute) countervailing arguments and overstating the certainty of its conclusions. Even though the memorandum was intended for a limited audience, Yoo and Bybee certainly could have foreseen that the memorandum would someday be exposed to a broader audience, and their failure to provide a more balanced analysis of the issues created doubts about the *bona fides* of their conclusions. I appreciate Philbin's description of the task at hand, to wit to identify the line and not to build in a margin of comfort inside the line. However, this task did not necessarily demand a memorandum devoid of nuance, and I believe primarily that the unclassified Bybee memorandum overstates the certainty of its conclusions in a way the represents a "marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take." Thus, I conclude that Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments.

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

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

[redacted]