

Christopher H. Schroeder

**From the Department of Justice to Guantanamo Bay: Administration
Lawyers and Administration Interrogation Rules, Part III**

**Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
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Chairman Nadler, Ranking Minority Member Franks, members of the Subcommittee, thank you for giving me the opportunity to testify before you today. My name is Christopher H. Schroeder, and I am currently a professor of law and public policy studies at Duke University, as well as of counsel with the law firm of O'Melveny & Myers. In the past, I have had the privilege to serve as a Deputy Assistant Attorney General in the Office of Legal Counsel in the Department of Justice, including a period of time in 1996-97 when I was the acting head of that office. Before that, I have also had the privilege of serving on the staff of the Senate Judiciary Committee, including as its Chief Counsel in 1992-93.

As you know, the Office of Legal Counsel's primary responsibility is to provide sound legal advice to other components of the Executive Branch, especially the President and the White House, so that the President can meet his constitutional obligation to take care that the laws are faithfully executed. When asked to provide legal analysis by the President or others in the Executive Branch, the attorneys in the office do not function as policy makers, although they may participate in meetings in which matters of both policy and law are being discussed. Even when they do participate in such discussions, Office of Legal Counsel attorneys must be mindful of the difference between law and policy, a difference that it is essential for us to maintain if we are to continue to be a government of laws and not of men and women.

The work of the Office of Legal Counsel, or OLC as it is often called, is well known within the executive branch as well as here on Capitol Hill, but its work typically is done without gaining much public notoriety. That has changed in recent years, when the public's attention has focused on controversial administration actions such as the National Security Agency's warrantless surveillance program, the use of military commissions to try suspected terrorists, and the use of aggressive interrogation techniques on some of the detainees in the war on terror. As each of these activities has become known, the President and the administration have staunchly defended them as perfectly legal. And then we have learned that behind each of those assertions has been an Office of Legal Counsel memorandum or analysis defending that assertion.

The attention given to the Office as a result of its association with these controversies has been overwhelmingly negative. Legal commentators have roundly criticized the quality of the work that is contained in these memoranda and analyses. Criticisms have come from a wide variety of sources, including from people who are otherwise sympathetic to the efforts being undertaken by the President and even to the very programs that were the subjects of OLC analysis. For example, Jack Goldsmith, who was the head of OLC from 2003 to 2004, examined some of the most controversial opinions issued by the Office prior to his arrival. He concluded that they were “deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.”¹ Former Attorney General John Ashcroft, former Deputy Attorney General James Comey and other high ranking DOJ officials concluded that earlier OLC analysis of the legality of the NSA surveillance program were unsound. Numerous legal scholars have critically analysed the OLC’s work and found it wanting for many reasons.

One group of OLC memoranda that has received a particularly large amount of negative attention relates to the use of aggressive interrogation techniques at Guantanamo Bay and elsewhere, especially the Memorandum for Alberto Gonzales, Counsel to the President, dated August 1, 2002 and signed by Jay Bybee. To this day, we might not know of the existence of this memo had it not been leaked around the time that the photographs from Abu Ghraib were being exposed. We now know that it was prepared by OLC after people in the CIA had expressed concern about whether the federal criminal statute prohibiting torture would apply to CIA personnel using abusive interrogation methods in attempts to extract information from key Al Qaeda operatives, including Abu Zubaydah and Khalid Sheikh Mohammed.

Of all the memoranda that have been disclosed to date, the August 1, 2002 memorandum has received the most public criticism.² That memorandum provides an

¹ Jack Goldsmith, *THE TERROR PRESIDENCY* 10 (2007). *See also* the recent testimony of former Acting Assistant Attorney General Daniel Levin before this Subcommittee. When asked by Representative Davis “Mr. Levin, . . . do you know of any Administration that has so consistently advanced positions that are at odds with mainstream and judicial opinions regarding the scope of its powers?,” he replied: “I don’t.”

² A partial list of published work criticizing the legal analysis in the August 1, 2002 memorandum includes: Milan Markovic, *Can Lawyers Be War Criminals?*, 20 *Geo. J. Legal Ethics* 347, 349 (2007); Jose Alvarez, Symposium: *Torture and the War on Terror: Torturing the Law*, 37 *Case W. Res. J. Int’l L.* 175, 195 (2006); David Luban, *The Torture Debate in America*, in *Liberalism, Torture, and the Ticking Bomb* 35, 66 (Karen Greenberg ed., Cambridge University Press 2006); Louis-Phillippe Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 *Am. U. Int’l L. Rev.* 9, 37 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 *Cornell L. Rev.* 67, 83 (2005); Marty Lederman, *Understanding the OLC Torture Memos (Part I)* (Jan. 8, 2005) <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html>; Marty Lederman, *Judge Roberts and the Commander in Chief Clause* (Sept. 13, 2005) <http://www.scotusblog.com/wp/judge-roberts-and-the-commander-in-chief-clause/>; *Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Harold Hongju Koh, Dean and Professor of International Law, Yale Law School); Peter Brooks, *The Plain Meaning of Torture?*, *Slate*, Feb. 9, 2005, <http://www.slate.com/id/2113314>; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Colum. L. Rev.* 1681, 1707 (2005); Jordan J. Paust, *Executive Plans and Authorization to*

analysis that in its cumulative effect is quite breathtaking. According to it, the criminal anti-torture statute is limited to extreme acts that cause severe pain equivalent to “serious physical injury, such as organ failure or impairment of bodily function, or even death,” or prolonged mental harm, and then only when it is the specific objective of the actor to inflict this level of pain or harm. The memorandum goes on to argue that even if someone committed acts that met its narrow definition of torture, the criminal defenses of necessity and self-defense could be available. Finally, it concludes that any person who acts under the President’s direction in conducting interrogations would be protected from criminal liability because statutes cannot limit the President’s powers as commander-in-chief. Along the way, the memorandum also concludes that the protections of Common Article 3 of the Geneva Conventions, which the United States has obligated itself to respect, do not apply to Al Qaeda. In the words of Philippe Sands, the result was a complete “Green Light” to subject Al Qaeda detainees to interrogation techniques that are well beyond the bounds of what our military personnel have been trained to employ, that would be prohibited “cruel treatment” if Common Article 3 were to apply (as the Supreme Court has held it does), and that are plainly unlawful.

The August 1, 2002 memorandum was apparently accompanied by a second memorandum, which is still classified and undisclosed, that identifies numerous specific interrogation techniques that were said not to contravene the criminal anti-torture statute. The legal sign-off on these techniques – and a similar analysis by OLC in early 2003 (and perhaps even earlier) that the Department of Defense was not legally obliged to adhere to several federal statutes and treaties restricting abusive conduct -- played an important role in the eventual migration of many of the techniques to Guantanamo, as well as to Iraq and Afghanistan, where they seem to have contributed to the general perception of an absence of any legal limits, which in turn resulted in the behavior at Abu Ghraib. The exact details of this migration are still somewhat uncertain, but the larger outlines of what occurred have been pieced together through investigative reporting by Jane Mayer, Dana Priest, Sy Hersh, Philippe Sands and others.

Because memoranda whose legal analyses have been so roundly criticized played an important role in the critical decisions that led to such controversial interrogation techniques, it is important to understand how they were produced – and what can be done to help ensure that episodes like this one will not be repeated.

There are two distinct messages to take away from the story of these memoranda. The first relates to something mentioned in the quotation from Jack Goldsmith a moment ago. The analysis in the August, 2002 memorandum and others is driven not only by tendentious statutory interpretations, and by implausible theories of defenses to criminal statutes, but also, and above all, by assertions of “extraordinary constitutional authorities on behalf of the President.” Throughout this administration, the key people responsible

Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811, 813-23 (2005); Jack Balkin, *Youngstown and the President's Power to Torture* (July 16, 2004), <http://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html>. We also know of a number of JAG memos written in early 2003 critical, among other things, of the application of the reasoning of the August 1, 2002 memorandum to the military.

for giving the final sign-off on legal analysis have too often embraced a view of presidential power that, like the August 1, 2002 memorandum, is breathtaking. Their view is that anything that the President considers it prudent to do to protect the national security is lawful, including actions that violate federal criminal statutes.

This is a deeply flawed view of presidential authority. I will be happy to engage in discussion with the members of this Committee regarding why I believe so firmly that the broad view of presidential power embodied in these two memoranda is unsound. For present purposes, I want to emphasize that it is far outside the mainstream of legal thought.³ No President except possibly Richard Nixon has subscribed to such a sweeping understanding of his powers. To be sure, other presidents, including President Clinton, from time to time have received advice from their lawyers that a particular law was unconstitutional as applied to a particular circumstance and that he was not bound to comply with it for that reason. Such decisions are always controversial, and many in the Congress criticize them when they are made. But no prior President has believed, nor has he received regular legal advice, that his powers to ignore federal criminal statutes are as sweeping as they are claimed to be by this Administration. Legal advisers to the have concluded on numerous occasions that the President lacked the authority to break federal laws. Indeed, even in this administration, Department of Justice officials other than those who authored these much-criticized memoranda have determined that the virtually limitless commander-in-chief authority that is advocated in the August 1, 2002 memorandum and elsewhere is wrong. That became evident when we learned about the refusal of John Ashcroft, James Comey, Jack Goldsmith and others agree to reauthorizing the NSA surveillance program, as well as when the August 1, 2002 memorandum was re-evaluated within OLC. In prior administrations as well, the Office of Legal Counsel has concluded that presidential authority is subordinate to duly enacted statutes. For example, when William Rehnquist was head of OLC under President Nixon, he testified that the President could not impound funds when Congress had directed their expenditure.⁴ Attorney General Edward Levi, under President Ford, testified that if Congress enacted the Foreign Intelligence Surveillance Act, presidents would be bound to follow its procedures.⁵ Walter Dellinger, head of OLC under President Clinton, wrote that Defense Department personnel who informed foreign governments of the location of planes suspected of carrying narcotics could be guilty of a

³ Also testifying before this Subcommittee, Dan Levin concurs in this assessment. See note 1.

⁴ "It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend T]he execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them." See Hearings on the Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92nd Cong., 1st Sess. 279, 283 (1971).

⁵ "As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which the President is to engage in foreign intelligence surveillance essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court's decision in the Steel Seizure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obligated to follow it." Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. On Courts, Civil Rights, Civil Liberties, and the Administration of Justice of the H. Comm. On the Judiciary, 94th Cong. 92 (1976).

crime under the Aircraft Sabotage Act of 1984 if the foreign government then shot down those planes.⁶ President Clinton also signed both the anti-torture federal criminal statute and the War Crimes Act into law, voicing no constitutional objection that their enforcement would somehow infringe on the president's commander-in-chief authority.⁷

Nor has the Supreme Court has never come close to endorsing anything approaching this expansive a theory of presidential power. To the contrary, whenever the Supreme Court has been presented with a case in which the executive branch has acted in violation of an existing statute governing the conduct of armed conflict or intelligence gathering, it has repudiated the idea that the President has broad authority to ignore existing law. It has done so in cases decided as far back as the early 1800s.⁸ Back in the Truman administration, when existing laws did not permit the President to seize industrial property and in fact provided alternative means to resolve labor-management disputes, thereby implicitly limiting the tools available to the President, the Court denied the President had authority to seize the steel mills even though he thought it was a national security imperative to keep them operating in order to supply our troops fighting in Korea.⁹

The current Supreme Court continues the long history of rejecting the idea that the President has broad authority to ignore existing law in the name of national security. In fact, several specific Bush Administration claims that can be found in the OLC's legal analysis of interrogation techniques have reached the Supreme Court – and the Supreme Court has rejected each of them. For instance, the interrogation memoranda largely ignored the reasoning of the *Steel Seizure* case because its authors claimed its reasoning was restricted to questions of the President's domestic powers, whereas the president's broad assertions of authority were based on the President's power as commander-in-chief.¹⁰ In *Hamdan v. Rumsfeld*,¹¹ the Supreme Court rejected the argument that *Steel Seizure* does not apply to the exercise of the President's commander-in-chief authority, even as applied to *aliens* held outside the United States who were alleged to have violated the laws of war. *Hamdan* involved a challenge to the procedures for trying detainees by military commission, which had been established under the President's commander-in-chief powers, which was emphasized by the President's naming the order creating them Military Order No. 1. The Supreme Court nonetheless held that the President's military commissions were unlawful because they violated requirements Congress had imposed

⁶ Office of Legal Counsel, U.S. Department of Justice, "United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking," 18 Op. O.L.C. 148, June 14, 1994.

⁷ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, tit. V, §506(a), 108 Stat. 382, 463-64 (1994) (codified as amended at 18 U.S.C. §§2340-2340B (2000 & Supp. IV 2004)). War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C.A. §2441 (West 2000 & Supp. 2007))

⁸ *Little v. Barreme*, 6 U.S. 170 (1804).

⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

¹⁰ Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, re Standard of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), at p. 31. The claim about the limited application of *Youngstown* was made explicitly in an interview with one of the memo authors, John Yoo. See Jane Mayer, "The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted," *The New Yorker*, February 2006, 7

¹¹ 548 U.S. 557, 126 S. Ct. 2749.

by statute in the Uniform Code of Military Justice. Justice Stevens' opinion for the Court states that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."¹² It cited *Steel Seizure* as the controlling authority on this point.

Several years prior to that, the Department of Justice specifically argued to the Court that the habeas corpus statute *could not* be construed to give Guantanamo detainees the right to petition the courts challenging their detention, because to do so would impinge upon the Commander-in-Chief's exclusive authority to determine how to treat suspected alien enemies.¹³ Not only did the Court hold that the President was bound by the habeas statute, but not a single Justice accepted the Department's view that Congress could not regulate enemies' access to U.S. courts.

As another example, one of the interrogation memoranda baldly states that that "Congress cannot exercise its authority to make rules for the Armed Forces to regulate military commissions,"¹⁴ because that statute would interfere with the President's commander-in-chief powers. But once again *Hamdan* holds directly the opposite.

Finally, the interrogation memoranda – relying on still earlier memoranda from OLC -- conclude that the detainee treatment provisions of Common Article 3 of the Geneva Conventions do not apply to our conflict with Al Qaeda. Although the memoranda rest this conclusion on an interpretation of the terms of Geneva, it is clear from the logic of the memoranda that had they not found Geneva to be inapplicable on that ground, they would have claimed that its requirements were no more binding on the President as commander-in-chief than were domestic criminal laws. The Supreme Court has rejected that argument. It found that Common Article 3 does apply to our conflict with Al Qaeda, and that the failure of the military commissions to comply with the requirements of Common Article 3 constituted a reason for striking them down.¹⁵

In sum, one reason these memoranda went astray, and one reason they have been subjected to withering criticism, is that they embrace an unsound theory of presidential power. To the extent their conclusions were driven by an unsound theory, those conclusions are also unsound.

The second message to take away from the story of these memoranda relates to the procedures that were followed when these memos were produced. Several years ago, I along with eighteen other former employees of the Office of Legal Counsel looked back on the experiences of OLC across different administrations to see if we could articulate the most important practices that have guided the work of the Office over the years, in

¹² *Id.*, at 2774.

¹³ Brief of the Respondents, *Rasul v. Bush*, Nos. 03-334 and 03-343, March, 2004 at 41-46.

¹⁴ John C. Yoo. 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 (March 14, 2003), footnote 13) (citing a 2002 OLC memo that apparently rested on this argument).

¹⁵ *Hamdan*, at 2798.

order to identify a set of best practices for the Office. What resulted was a statement of ten Guidelines that we think capture those best practices. The group of nineteen who participated in this exercise believe that when followed these Guidelines greatly improve the prospect that the Office will deliver high quality legal advice. I have attached a copy of the Guidelines to this prepared testimony.

As the name implies, a set of best practices seeks to identify the practices that work best toward ensuring that the quality of the eventual legal advice the office produces will be the highest possible caliber. In some specific instances, best practices are not achieved, and I am sure it will be possible to locate decisions in every past administration when the Office has fallen short. At the same time, these Guidelines are not unrealistic, abstract inventions divorced from the real experience of the Office. To the contrary, each grows out of the practical experiences of lawyers across administrations.

How do these Guidelines relate to the interrogation memoranda? First, the interrogation memoranda did not follow the practices identified in the Guidelines. In fact, they may well have violated eight of them.¹⁶ Also, a number of elements of the legal analysis of the August 1, 2002 memorandum have been criticized for presenting an inaccurate and implausible assessments of the applicable law, extending beyond criticism of their expansive claims of presidential authority.¹⁷ These two facts are related: Failure to follow the Guidelines quite likely contributed to the poor quality of the memorandum's analysis of applicable law.

This point is also supported by evidence beyond my own testimony or speculation. Because the August 1, 2002 memorandum was subjected to so much criticism once it was made public, the administration formally withdrew it and announced that it would ask the Office of Legal Counsel to prepare a new analysis of the scope of the anti-torture law. On December 30, 2004 OLC, which was then being managed by other individuals than those responsible for the original memoranda, issued that new analysis. The second memorandum applied the best practices of the Office more successfully than the first, and the legal analysis of the second better reflects the state of the law than the first.

As for the legal analysis, the 2004 memorandum differs materially from the first. Notably it entirely avoids assertions of presidential authority to override statutory law. It concludes that the definition of torture covers a wider range of actions than the 2002 memorandum had done, it candidly acknowledges that the requirement that the actor have a specific intention to commit torture is more ambiguous than had the 2002 memorandum, and it unequivocally rejects in a single, obviously correct sentence – “There is no exception under the statute permitting torture to be used for a ‘good

¹⁶ Guideline Number Nine recommends that the Office strive to maintain good working relations with the White House Counsel's office, which it seems to have done during the period the interrogation memoranda were being written. Guideline Number Ten does not apply to standard legal advice of the kind found in the memoranda.

¹⁷See the sources cited in note 2.

reason.” -- the absurd notion that the torture statute recognizes the criminal defenses of self-defense and necessity. Throughout its analysis the 2004 memorandum is more forthcoming in explaining points at which giving a precise legal answer is difficult. Some of its legal conclusions are still controversial, but to my knowledge it has not been attacked as deeply flawed, sloppily reasoned or overbroad.¹⁸

As for evaluating the two memoranda under the Guidelines, I will not take the Subcommittee’s time to identify all the differences, but instead will concentrate on three general differences, which address the issues of consultation, candor, and transparency through disclosure.

Guideline Number Eight states that “Whenever time and circumstances permit, OLC shall seek the views of all affected agencies and components of the Department of Justice before rendering final advice.” Wide consultation increases the chances of drawing on relevant expertise located elsewhere, both inside Justice and outside. Departments and agencies charged with administering statutes and other laws often have had lengthy experience with the legal ambiguities and issues raised by them. OLC may not always agree with the legal positions taken by other components of the executive branch, but carefully listening to them can only improve the quality of the product.

Specifically, whenever OLC is asked to analyze a criminal statute, it typically consults with the Criminal Division of the Department of Justice, which as the component charged with overseeing the prosecution of individuals for violating the criminal laws naturally must regularly engage in interpreting them. Full consultation ought normally to include advice from both the leadership of the Division and also the career professionals there, to ensure that benefit is gained from their experience as well. When addressing questions that relate directly to how any specific statute is actually administered, the departments or agencies responsible for the day-to-day administration of the statute should also be consulted. When disputes arise between departments or agencies about how a statute is interpreted, there is a formal procedure for submitting that dispute to OLC and for each agency to submit their views, but even outside this formal process, consultation often involves multiple divisions, departments or agencies.

We know that the writers of the 2004 memorandum consulted with the Criminal Division, because the memorandum explicitly states that has the Criminal Division “reviewed this memorandum and concurs in the analysis.” The 2002 memorandum is silent with regard to consultation. Most of the investigative reporting on how these memoranda were constructed concludes that only a very small group of high level officials had access to their contents until after they became final. Both the State

¹⁸ In fact, when Dan Levin, who directed the production of the second memorandum and signed it, testified before this Subcommittee last week, he explained that one part of the second memorandum that had come under some criticism had been misinterpreted. Footnote 8 of the December, 2004 memorandum states that “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” Levin stated that this footnote was not intended to endorse the authorization of any of the extreme interrogation techniques, and that he was never able to complete a thorough, individual analysis of those techniques.

Department and the INS administer applications of the anti-torture statute in making asylum and immigration status determinations, but we have no indication that their advice was sought. Some investigative reporting has disclosed that the leadership of the Criminal Division endorsed the general criminal defense portions of the 2002 memo, but it is not clear what the views of the career professionals were. We do not have a full picture of who was consulted as the August, 2002 memo was being prepared, and it would be useful if its authors could speak to this point.

Guideline Number Two states that “OLC’s advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government – the courts and Congress – and constitutional limits on the exercise of governmental power.” There is a lot of content in this Guideline. The part of it I want to stress here is the instruction to be “thorough and forthright.” One of the shortcomings of the 2002 memorandum is that it appears to reach firm legal conclusions without disclosing that there are some substantial counter arguments to or weaknesses in the reasoning that has been used to justify those results. For example, it concludes that the criminal law defenses of self-defense and necessity may be available to someone who has engaged in interrogation techniques later judged by a court to amount to torture. The memorandum’s interpretation of the availability of these two defenses is open to significant question simply in terms of the available case law and authorities on the subject in American law. (One reason to doubt that the Criminal Division was fully consulted is that it is hard to believe that lawyers who regularly prosecute cases would concur in such a broad analysis of these defenses as the memoranda contain.) Exacerbating the problem, no mention is made of the fact that the Convention Against Torture expressly states that the prohibition on torture is absolute, countenancing no exceptions, regardless of any claim of necessity. Nor does the memo even mention the official position of the United States, articulated in the U.S.’s Report to the UN Committee Against Torture in 1999: “No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a 'state of public emergency') or on orders from a superior officer or public authority.” In contrast, as noted before, the 2004 memorandum rejects these criminal defenses out of hand, in a single sentence.

Whenever possible, written advice from the Office of Legal Counsel should acknowledge counter arguments or difficulties that its reasoning may face when it is reviewed by others. For one thing, acknowledging the counter arguments shows to the reader that the arguments have been considered and, if the memorandum is thorough, will also indicate why in the end the OLC advice finds them not sufficiently compelling to alter the conclusions reached. For another, it allows the ultimate “clients” of the analysis, who will frequently include law-trained individuals, to evaluate the quality of the advice, not having simply to rely upon an OLC conclusion. This empowers the Attorney General and President to evaluate whether to overrule the advice, or far short of that, for all

policymakers to assess whether they will decline to take action even though OLC has concluded they may take that action.

Finally, Guideline Number Six states that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” In addition, Number Five provides that “[o]n the very rare occasion when the executive branch ... declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.” As the qualifying language in these Guidelines suggests, there can be legitimate reasons for non-disclosure of OLC opinions, including but not limited to potentially compromising the national security. Nonetheless, the presumption should be that OLC legal advice will be disclosed and, if held in confidence, will be withheld no longer than necessary to serve the interest that counsels confidentiality – especially where that advice is that the Executive branch can ignore statutory commands. It is vital to the operation of our constitutional democracy that the executive branch be prepared to supply the legal basis for decisions made and actions taken. Our federal government is a government of great but limited power, and everything it does must ultimately be bottomed on a legitimate source of legal authority. Making public the legal justification for a course of action can be as important to the public’s appraisal of the quality of its government as disclosure of the course of action itself.

On the question of transparency through disclosure, the contrasts between the two earlier memoranda and the later one are also stark. The August 2002 memorandum and its bold claims that the President can ignore federal criminal law to order torture were held in secret until someone with access to them leaked the memorandum. Once that happened, the administration quickly distanced itself from the memorandum by withdrawing it. The more modest and cautious 2004 memorandum was immediately disclosed to the public. This may well imply that a practice of disclosing analysis like that of the 2002 memorandum would have prevented the Office of Legal Counsel from issuing such a broad assertion of presidential authority to violate the federal criminal laws..

In conclusion, I want to urge strongly the importance of adhering to a group of best practices going forward, whether these that I have discussed today or some improved articulation of them. Such practices are not guarantees that legal advice coming from the Office of Legal Counsel can be kept free from legal error, but they are time-tested means for reducing the likelihood of such errors and improving the quality of advice that is given. They ought to be valued for those reasons.

Thank you. I will be glad to answer any questions the members of the Subcommittee may have.

Principles to Guide the Office of Legal Counsel

December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in 4 The Founders' Constitution* 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled *Opinions of the Attorney General* and *Opinions of the Office of Legal Counsel*, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decision makers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety—not only executive power, but also judicial and congressional power and constitutional limits on governmental power—and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to

describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

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

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at

times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted,

before the fact, regarding any and all substantial executive branch action of questionable legality.

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 their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

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