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Supervisory Responsibility for the Office of Legal Counsel

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ABSTRACT

In the wake of the notorious Justice Department Office of Legal Counsel (OLC) torture memoranda, various reforms have been proposed to prevent future erroneous and poorly reasoned legal opinions on matters of the utmost national importance. The need for reform is all the more pressing in a post-9/11 world in which the Executive Branch will continue to arrogate, often in secret, various national security-related powers. None of the proposals, however, addresses the supervisory role that Justice Department and other Executive Branch lawyers play in the formation of OLC opinions.

This Article argues that the failure to hold more senior government lawyers accountable for the ethical failures of their subordinates dooms the many laudable proposals aimed at protecting against flawed OLC legal advice. By letting higher-up lawyers off the hook, these proposals ignore the collective nature of OLC opinion writing. More ominous, the failure to hold supervisors responsible encourages senior public officials to disengage from difficult legal analyses, therefore depriving opinions of their judgment, expertise, and experience. Most importantly, these officials are better situated to withstand the pressure to approve Executive branch actions.

This Article proposes a new professional rule of conduct and process that addresses the responsibilities of senior executive branch lawyers and supervising lawyers who work with OLC lawyers. The proposal will require a greater number of senior lawyers to review and sign off on OLC opinions and to correct deficiencies where they perceive them. Adhering to the proposal will increase oversight of the OLC, ensure greater accountability, and lead to better and more independent legal advice for the Executive Branch.

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INTRODUCTION

Matthew Lauer: Why is waterboarding legal, in your opinion?
President George W. Bush: Because the lawyer said it was legal.[1]

The disclosure of U.S. Department of Justice Office of Legal Counsel (OLC) memoranda on the applicability of the federal anti-torture statute to CIA interrogation methods, which included the determination that waterboarding was legal, has elicited numerous criticisms, government reports, and articles concerning the soundness of the opinions themselves and the accountability of the principal authors.[2] The interest has been generated, in part, by the controversial issues at the heart of the opinions, but also by the particular power of OLC, which may issue opinions that are binding and are effectively Executive Branch law and can remain secret from the public and from the other branches of government. Much attention has focused on the ethical breaches of the memoranda's authors John Yoo and Jay Bybee.[3] Additionally, former OLC attorneys have proposed guiding principles and OLC established best practices, as well as some structural changes to the Office, to ensure that opinions are written with greater objectivity and candor.[4] Missing from the numerous critiques and proposals is a sufficiently

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1. NBC News Special: "Decision Points", (NBC television broadcast Nov. 8, 2010) (interview by Mattthew Lauer with former President George W. Bush) (transcript available at http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/).

2. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel, to White House Counsel Alberto S. Gonzales, Re: Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A (August 1, 2002) [hereinafter Bybee Memorandum], *available at* http://fl1.findlaw.com/news.findlaw.com/wp/docs/doj/ bybee80102mem.pdf; Memorandum from Jay S. Bybee, Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel, to Acting General Counsel John Rizzo of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative (August 1, 2002) [hereinafter Classified Bybee Memorandum], *available at* http://dspace.wrlc.org /doc/bitstream/2041/70967/00355_020801_004display.pdf.

3. OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, 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 16 (JULY 29, 2009) [hereinafter OPR REPORT], *available at* http://judiciary.house.gov/hearings/pdf/ OPRFinalReport090729.pdf; Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Att'y Gen., Re: 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 2 (Jan. 5, 2010) [hereinafter Margolis Memorandum], *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

4. Walter E. Dellinger, Dawn Johnsen et al., *Principles to Guide the Office of Legal Counsel* (2004) [hereinafter *Guidelines*], *reprinted in* Dawn E. Johnsen, *Constitutional 'Niches': The Role of Institutional Context in Constitutional Law: Faithfully Executing the Laws: Internal Legal Constraints of Executive Power*, 54 UCLA L. REV. 1559, app. 2 (2007); Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter 2010 OLC Best Practices Memorandum], *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (updating Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005) [hereinafter 2005 OLC Best Practices Memorandum], *available at* http://www.justice.gov /olc/best-practices-memo.pdf.).

rigorous consideration of the role of the authors' superiors in the crafting of the memoranda and what, if any, responsibility they bear, and, going forward, what rules of professional conduct should govern the supervisors of lawyers crafting legal opinions on the utmost sensitive issues confronting the Executive Branch.

This Article argues that holding the opinion authors' supervisors responsible is vital to ensuring that the Department of Justice, and specifically OLC, provides independent legal advice to the President and the Executive Branch. The need for independent legal advice is more pronounced during a "Terror Presidency,"[5] a period of crisis over which the Executive appears poised to preside indefinitely. Given the technological potential for catastrophic attacks, any President will continue to claim extensive powers for the foreseeable future.[6] OLC is therefore an ever more vital internal check, a crucial part of Executive process, which can ensure the legality of Executive actions and curb excesses.

Without holding particular senior Executive branch lawyers and supervisors responsible for the actions of their OLC subordinates, however, OLC may serve more as rubber stamp than as a true legal advisor or check on the post-9/11 Presidency. An emphasis on supervisory responsibility requires an expanded and more rigorous conception and regulation of supervisory lawyers, which must also buttress and reinforce a set of legal values in OLC. The prior focus on the individual authors of the opinions ignores the collective nature of legal work and the legal norms and ethics that are communicated within the process of authoring legal opinions. Emphasizing the professional misconduct of individual lawyers, without looking at superiors' roles, may lead to scapegoating individual lawyers and obfuscating what is in fact a deficient ethical infrastructure of the office. Additionally, proposed institutional infrastructural changes may not prevent similarly poor legal opinions in the future because they fail to sufficiently clarify the normative foundations of the Office.

This Article proposes a more expansive formulation of the Model Rule of Professional Conduct 5.1, concerning supervisory responsibility, specific to OLC. The current version of Rule 5.1 provides that law firm partners and lawyers with similar managerial authority must take steps to ensure compliance with the *Model Rules*.[7] The Rule also imposes similar obligations on direct supervisors.[8] Supervising lawyers may be held responsible for their subordinates' professional misconduct if they order the conduct, know of the misconduct and ratify it, or fail to takes steps to mitigate the consequences of the misconduct.[9] The current rule

5. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 183-84 (2007).

6. *Id.*

7. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2010) [hereinafter MODEL RULES].

8. MODEL RULES R. 5.1(b).

9. MODEL RULES R. 5.1(c)(1), (2).

does not, however, require sufficient oversight on the part of supervisors for an office such as OLC, where the work touches on ethically fraught issues of the highest national importance.

The new iteration of Rule 5.1 institutes a number of structural changes to OLC that are intended to safeguard independent legal advice, including a two-year limitation on the tenure of the Assistant Attorney General in charge of OLC; a requirement that the Attorney General sign any opinions concluding that the President is not bound by particular laws; and the insertion of a permanent ethics advisor within OLC. The Rule also requires supervising lawyers to make greater efforts to learn of ethical misconduct on the part of their OLC subordinates and to make greater efforts to remediate breaches, based in part on the seriousness of the issue at stake, *e.g.*, potential waterboarding of detainees. The Rule also expands the definition of supervisor, clarifying that lawyers holding senior positions outside of OLC who review and comment upon drafts have an obligation to reasonably supervise the primary authors of the memo. Clarification of the supervisory role that certain Executive Branch lawyers play, and a corresponding delineation of their responsibilities, will deter lawyers, supervisors, and subordinates alike, from succumbing to bystander apathy. As a result, lawyers will take greater ownership for the legal opinions generated by the office. In so doing, Executive Branch lawyers will develop and adhere to a normative foundation that demands fealty to the law above loyalty to the client.

Section I of this Article provides a background on OLC and the authority of its opinions. I also review the drafting of the torture memoranda, including the role played by senior lawyers. Section II examines different approaches that have been taken to hold lawyers involved in the preparation of the memoranda accountable, specifically through civil lawsuits, OLC Guiding Principles and Best Practices, and government ethics investigations. Section III briefly addresses the literature on some of the perceived limitations in the current system for regulation of lawyers, particularly its normative shortcomings. Section IV outlines Model Rule of Professional Conduct 5.1, which specifically addresses supervisory responsibility, as an example of a rule that can reflect an ethic of accountability without external enforcement. Finally, Sections V and VI discuss the proposed Rule 5.1 specific to OLC that would address OLC's unique authority, and require politically accountable senior Executive lawyers' meaningful dialogue with those lawyers drafting opinions. In recognizing the inherently social and collective nature of lawyering, the Rule requires that rather than permitting instances of bystander apathy and deflection of responsibility, these interactions must be opportunities for generating norms that can establish a set of collective values for the Executive Branch. I also offer examples of how and why Rule 5.1 would apply to senior Executive lawyers Attorney General John Ashcroft and Assistant Attorney General Michael Chertoff.

I. BACKGROUND ON THE OFFICE OF LEGAL COUNSEL'S DRAFTING OF THE TORTURE MEMORANDA

A. THE OFFICE OF LEGAL COUNSEL

Lawyers working in OLC wield unique and enormous power. Opinions authored by lawyers in the office can enjoy a force of authority akin to that of controlling law, and may even be kept secret. Pursuant to the Attorney General's delegation, the Assistant Attorney General who heads OLC is tasked with a number of responsibilities, including preparing formal opinions by the Attorney General, and assisting the Attorney General in his legal adviser capacity to the President and to the Cabinet.[10] The office may be asked to resolve legal disputes between differing executive agencies.[11] Formal written opinions by OLC constitute "controlling legal advice to Executive Branch officials in furtherance of the President's constitutional duties to preserve, protect, and defend the Constitution" and the "Take Care" Clause.[12] Because these opinions may address matters of first impression that will never be ruled on by a court, they may constitute the final and binding interpretation of law.[13] Finally, due to the often sensitive nature of the opinions, particularly those that may concern national security, they may go unpublished and undisclosed.[14]

The OLC, like other components of the Department of Justice, is headed by an Assistant Attorney General, a political appointee requiring Senate confirmation.[15] The Office is comprised of about two dozen lawyers, of whom a number may be Deputy Assistant Attorneys General, who are also political appointees but do not require Senate confirmation.[16] The bulk of the lawyers are career civil servants.[17]

OLC lawyers are subject to the same rules of professional responsibility as other lawyers.[18] As lawyers advising the President and other Executive Agency

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10. 28 U.S.C. §§ 510-513 (2006); 28 C.F.R. 0.25(a) (2010). Also pertinent here, the regulations provide that the OLC is responsible for advising on the "legal aspects of treaties and other international agreements." 28 C.F.R. 0.25(d) (2010).

11. Exec. Order No. 12146, 1-4 (codified at 3 C.F.R. 409, 4100 (1980)); *Guidelines* , *supra* note 4, at 1577.

12. *See* 2010 OLC Best Practices Memorandum, *supra* note 4; 2005 OLC Best Practices Memorandum *supra* note 4; *Guidelines*, *supra* note 4, at 1577.

13. 2010 OLC Best Practices Memorandum, *supra* note 4, at 1; *Guidelines*, *supra* note 4, at 1577; Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 49-50 (2009); Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1463-68 (2010).

14. The Office of Legal Counsel only publishes opinions which it has determined are "appropriate for publication." Office of Legal Counsel Website, Opinions, *available at* http://www.justice.gov/olc/opinions.htm (last visited Jan. 7, 2011).

15. U.S. Dep't of Justice, Office of Legal Counsel, FY 2011 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION, [hereinafter FY 2011 PERFORMANCE BUDGET], *available at* http://www.justice.gov/jmd/2011justification/pdf/fy11-olc-justification.pdf; Morrison, *supra* note 13, at 1460.

16. FY 2011 PERFORMANCE BUDGET, *supra* note 15, at 1; Morrison, *supra* note 13, at 1460.

17. Morrison, *supra* note 13, at 1460.

18. *See* OPR REPORT, *supra* note 3, at 17.

heads, the most applicable rule governing their legal work is to be found in Model Rule of Professional Conduct 2.1, which requires a lawyer to "exercise independent professional judgment and render candid advice."[19] As in many lawyering contexts, however, there arise tensions between the OLC lawyer's obligation to provide objective and candid advice to the client and to abide by or help realize the client's—here, the President's—objectives.[20] The nature of the OLC position, however, offers, according to some scholars, a "schizophrenic choice" between objective interpreter of law and political advocate for administration policies.[21]

OLC's function as an effective maker of law for the Executive Branch distinguishes its relationship to the Executive from any traditional lawyer-client relationship. On the one hand, there is the aspirational view that the job of the Attorney General is to be an independent, impartial interpreter of the law. On the other hand, there is the historically based or realist view that the Attorney General and OLC attorney can be considered a legal policy figure, who seek to carry out the President's objectives first, with a secondary consideration of the legal constraints.[22]

The conception of the independent and impartial legal adviser is best encapsulated in OLC Best Practices memoranda and Guiding Principles that emerged in response to the initial public disclosure of the earliest opinions on torture and interrogation. Former OLC attorneys wrote that the "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."[23] The Guiding Principles appear to dismiss the "advocacy model of lawyering"—defined as the crafting of "merely plausible legal arguments to support their clients' desired actions"—because it "inadequately promotes the President's constitutional obligation to ensure the legality of executive action."[24] Similarly, OLC issued a Best Practices memorandum in 2005, explaining that OLC must offer "candid, independent, and principled advice—even when that advice may be inconsistent

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19. MODEL RULES R. 2.1.

20. *Compare* MODEL RULES R. 2.1 *with* 1.2(a) and 1.3 (Diligence.) Notwithstanding changes in the Model Rules of Professional Conduct, the tensions reflect the prior Code rule, which articulated a zealous representation on behalf of the client. The comment to Rule 1.3 retains the "zealous" strand, providing: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Accordingly, the revisions and amendments to rules have not eradicated the vestiges of this tension. Indeed, one may query whether the current articulations in 1.2 and 1.3 in any way diminish the view, well-established in the bar's history and in popular imagination, of the paramount obligation of zealous representation.

21. Power, *supra* note 13, at 49-50. *See also* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377, 403 (1993).

22. *See generally* Norman Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1933-36 (2008).

23. *See Guidelines*, *supra* note 4, at 1.

24. *Id.*

with the desires of policymakers."[25] And Professor Dawn Johnsen, a former OLC attorney and once nominee to head OLC during the Obama Administration, identified the Office's most important function as "the ability to say no to the President."[26] This conception of the Office has elements of a judicial or quasi-judicial role, due in part to the binding effect of its opinions.[27] Professor David Luban has contended that the obligation of impartiality is only heightened by virtue of the secret aspect and the constitutional obligation to "take care that the laws be faithfully executed."[28] These views are further supported by the general notion that government lawyers must serve the public interest—that, in the words of the oft cited *Berger v. United States* opinion, "government has an overriding obligation to see that justice is done."[29]

In contrast, the historical/realist view of OLC considers the role of the OLC attorney as more of an advocate or team player and enabler of Executive Branch policy.[30] Johnsen acknowledges that "OLC's role is more complicated than that of a disinterested arbiter."[31] Professor Norman Spaulding questions what it even means to call for an independent Attorney General, contending that invariably the role, which entails offering opinions, is inherently "legal and political."[32] In his history of the evolution of the Office of the Attorney General through the Reconstruction era, he describes an Office that has been politically accountable to the President, which requires the diminishment of independence, and which has

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25. 2005 OLC Best Practices Memorandum, *supra* note 4, at 1.

26. *Guidelines*, *supra* note 4, at 1582-83.

27. *Id.* at 1581-82; *see also* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 203 (2009) (describing legal advice as "quasi-judicial"; "written opinions binding entire departments of the government are judicial in a more direct way").

28. LUBAN, *supra* note 27, at 203; *see also* OPR Report, *supra* note 3, at 17 (noting that the lack of adversarial process makes the situation the OLC lawyer practices in similar to that of a lawyer appearing in an *ex parte* proceeding, which then requires disclosure of all material facts to court, whether or not they are adverse, citing MODEL RULES R. 3.3(d)).

29. OPR REPORT, *supra* note 3, at 17, n. 18 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). *But see* Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L. J. 333, 343-45 (2009) (collecting sources criticizing concept of government lawyer's obligations to public interest over the client). For a discussion of the variation in the national security lawyer's duties based upon the identity of the client and the model of legal practice, *see* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 317-25 (2007).

30. *See Guidelines*, *supra* note 4, at 1583; McGinnis, *supra* note 21, at 377, 403; Power, *supra* note 13, at 54-56 (discussing dueling allegiances of fidelity to law, being a team player, and an enabler). Also reflecting the "enabler" view, John Yoo observes that the Justice Department has a "long tradition in defending the President's commander-in-chief power." JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 185 (2006).

31. *Guidelines*, *supra* note 4, at 1581.

32. *See* Spaulding, *supra* note 22, at 1934, 1968-69. In discussing independence of the Office of the Attorney General, Spaulding refers to a criterion that he insists must be employed separate from the context of *ultra vires* or illegal actions *already taken* by the Executive; otherwise, he explains, the term is of little utility in analyzing the conduct of governmental lawyers from the office. *Id.* at 1935. I too adopt this understanding of independence for purposes of this article. The inquiry concerns the independence of OLC's initial position or approach to issues and policies subjected to its analysis.

historically resisted any structural changes.[33]

Though agreeing "as a general matter" that OLC should serve an independent role, Professor Jack Goldsmith, former head of OLC, tempers his agreement with a series of "caveats," including questioning whether OLC may offer advice akin to "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," whether OLC is bound by Supreme Court opinions, and the import of classification on that independent role.[34] Similar to Spaulding, Goldsmith invokes the historical experience of OLC, contending that no head of the office has ever fully provided independent legal advice, citing the examples of Attorneys General Edward Bates' opinion supporting the suspension of habeas corpus and Robert Jackson's opinion supporting the destroyer for bases deal.[35]

Empirical research also evidences a very high tendency on the part of OLC to support the President. Professor Trevor Morrison found that of 245 publicly available OLC opinions written since the beginning of the Carter Administration through the first year of the Obama Administration, OLC supported the President's view in 193 opinions, or 79% of the time.[36] Twenty opinions (8%) upheld some portion of the President's position and 32 opinions (13%) opposed the White House's view.[37]

Ultimately, Goldsmith appears to have concluded there is not an articulable standard that governs OLC's provision of legal advice, telling ethics investigators he could not answer what is the role of OLC and whether an attorney has crossed a line.[38] Notwithstanding the historical lack of independent legal advice, it is plainly unacceptable to permit OLC lawyers to provide opinions without any standard orienting their work and advice.[39] To be sure, the Best Practices

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33. *Id.* at 1953-68, 1977. Spaulding does not despair entirely of the possibility of securing some sort of independence for the Office of the Attorney General, as is discussed later in this article. *See infra* Part V.C.2.

34. Margolis Memorandum, *supra* note 3, at 2. A fuller exploration of Goldsmith's views on the ambiguous and fraught nature of the OLC attorney's task may be found in GOLDSMITH, *supra* note 5, at 33-39.

35. Margolis Memorandum, *supra* note 3, at 18-19; GOLDSMITH, *supra* note 5, at 168, 195-99; *see also* John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73, 74 (2010) (observing that OLC generally overvalues Executive branch institutional interests).

36. Morrison, *supra* note 13, at 1476-79. Because the data do not include opinions that remain classified, the results may be skewed downward. As I discuss in greater detail, lawyers will feel more pressured to provide legal support for Executive positions that are to be implemented in secret because the matters may concern national security and there will be few, if any, additional checks on the Executive's actions. *See infra* Part V.

37. Morrison, *supra* note 13, at 1476-79.

38. OPR REPORT, *supra* note 3, at 19. Goldsmith offers a more "cooperative" and revealing conception of the OLC's role and the office's limits in his own book, acknowledging an inevitable tension between articulating the law and realizing the President's objectives, but ultimately relying on the OLC's own culture and norms, GOLDSMITH, *supra* note 5, at 37-39, a sentiment shared by many OLC veterans. *See, e.g., Guidelines*, *supra* note 4, at 1.

39. Jesselyn Radack, a former OPR lawyer, proposes a new role for all government legal advisors that would include OLC lawyers. In addition to responsibilities set forth in Model Rule 2.1, the proposed rule would address some of the shortcomings evidenced in the torture memoranda. Proposed Rule 2.2 would require an

memoranda reflect that view, though they also share some of Goldsmith's ambivalence about the contours of the role, revealing the Office's seeming latent schizophrenia. However, a review of the actions taken by OLC lawyers in crafting the torture memoranda leaves open to question what standard they thought was governing their conduct. The lack of any articulation of standards by supervising attorneys during the period in which the initial opinions were written speaks both to an insufficiently defined legal framework for the OLC and an utter failure of senior lawyers in their supervisory responsibilities.

B. THE TORTURE MEMORANDA

On August 1, 2002, OLC issued a memorandum (Bybee Memo) concerning interrogation standards under the U.N. Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by the torture statute, 18 U.S.C. §§ 2340-2340A.[40] OLC also issued a classified memorandum (Classified Bybee Memo) that day explaining whether particular interrogation methods would violate the torture statute. These opinions were drafted primarily by then Deputy Assistant Attorney General John Yoo and reviewed and signed off on by the head of OLC, then Assistant Attorney General Jay S. Bybee. In support of a working group on detainee interrogations composed of military and civilian Defense Department personnel, Yoo provided another memorandum (Yoo Memo), which "incorporated the Bybee Memo virtually in its entirety," but focused on military, rather than CIA, interrogation.[41]

Much of the attention following the leak of Bybee Memo to the press in June 2004 has centered on the role of Yoo and Bybee in producing the opinions.[42] On June 21, 2004, Congressman Frank Wolf asked the Office of Professional Responsibility (OPR) to investigate the drafting of the Bybee Memo.[43] Over the course of almost five years, the OPR investigated the drafting of the Bybee Memo, and the Classified Bybee Memo, as well as later opinions that purported to supersede the Bybee Memo and Classified Bybee Memo, as well as memoranda analyzing the applicability of the War Crimes Act, the Detainee Treatment Act, Common Article 3 of the Geneva Conventions, and Article 16 of

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advising attorney to disclose majority legal positions when advocating "novel" positions, disclose adverse case law, and provide advice on the "wisdom and morality" of the client's proposed course of action. Jesselyn Radack, *Tortured Legal Ethics: the Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 42 (2006). Professor Fred C. Zacharias proposes a "moral dialogue" between the lawyer and client when the conduct might be illegal, requiring a discussion of moral and political considerations. Zacharias, *supra* note 29, at 262-63.

40. Bybee Memorandum, *supra* note 2.

41. OPR REPORT, *supra* note 3, at 49-54.

42. Yoo, in particular, has garnered significant amounts of attention. He has been an unapologetic defender of the memoranda and their reasoning and conclusions. *See* Yoo, *supra* note 30, at 165-202.

43. OPR REPORT, *supra* note 3, at 4.

the Convention Against Torture, to interrogation techniques.[44]

Based upon interviews with many of the most important government lawyers and relying upon government investigations, OPR constructed a comprehensive and detailed history of the creation of the interrogations memoranda. The impetus for the opinions was the CIA's interest in employing "harsh" and "more aggressive" interrogation techniques on an Al Qaeda detainee Abu Zubaydah, who had been captured in March 2002.[45] The proposed techniques included, (1) attention grasp, (2) walling, (3) facial hold, (4) facial or insult slap, (5) cramped confinement, (6) insects placed in a confinement box, (7) wall standing, (8) stress positions, (9) sleep deprivation, (10) use of diapers and denial of toilet facilities, (11) waterboarding, and (12) mock burial.[46] Concerned that the use of these techniques might expose personnel to criminal liability, the CIA sought an OLC opinion on the legality of the techniques.[47]

The Bybee memorandum arrived at a number of dubious conclusions concerning the torture statute, likely foreordained because, as many have observed, the authors "began with the objective of justifying torture."[48] Based upon this legal analysis, the Classified Bybee Memo concluded that of the specific techniques that the CIA proposed using in interrogating Abu Zubaydah, ten interrogation techniques—including stress positions, sleep deprivation, exploiting the fear of insects, and waterboarding—would not violate the torture statute.[49] Eventually, the Bybee Memo and other opinions concerning interrogations were repudiated and have been roundly criticized by OLC attorneys and

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44. *Id.* at 5-9.

45. *Id.* at 32-34. President Bush acknowledged this history in a speech on September 6, 2006. *See* George W. Bush, President, United States of America, Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006 [hereinafter President Bush Speech], *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html. President Bush described as "tough" the "alternative set of procedures" used by the CIA, which were determined to be lawful by the Justice Department.

46. OPR REPORT, *supra* note 3, at 35-36. The OPR Report redacted the twelfth technique but it is believed that, based upon a review of earlier drafts of the OPR Report, this technique was in fact mock burial. *See* "New Information on 'Mock Burials,'" TheTortureReport.org, February 26, 2010, http://www.thetorturereport.org/diary/new-information-%E2%80%9Cmock-burials%E2%80%9D. These techniques were proposed by CIA psychologists who assisted in the United States Military's Survival, Evasion, Resistance, and Escape (SERE) training. Although many of the same techniques proposed for use on Zubaydah were based upon ones used on U.S. military members in training them to resist interrogations by enemy captors, in contrast to the goal of the Zubaydah interrogation, SERE exercises were not permitted to develop in the trainee a feeling of "learned helplessness." OPR Report, *supra* note 3, at 34.

47. OPR REPORT, *supra* note 3, at 37. There is some dispute about whether some of these proposed techniques were used on Zubaydah prior to receiving OLC's opinions. *Id.* at 33.

48. Michael Hatfield, *Professionalizing Moral Deference*, 104 Nw. U. L. REV. COLLOQUY 1, 3 (2009); *see also* Interview with Jack Goldsmith, *Frontline*, "Cheney's Law, http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/goldsmith.html# ixzz1OFcgSapS ("The opinions had an unusually tendentious quality that was not really consistent with the norms of opinion writing in the Office of Legal Counsel. They were obviously stretching to reach a result rather than doing a more impassioned analysis."); Anthony Lewis, *Making Torture Legal*, THE NEW YORK REVIEW OF BOOKS, July 15, 2004 ("The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.").

49. OPR REPORT, *supra* note 3, at 37 (citing Bybee Memorandum, *supra* note 2, at 1-2).

scholars.[50]

The OLC opinions were rife with questionable legal reasoning, omissions, and mischaracterization. For example, the Bybee Memo provides that in order to constitute a violation of the torture statute, the infliction of physical pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[51] In providing this definition of "severe pain" the opinion inexplicably relies on a "statute defining an emergency medical condition for the purpose of providing health benefits."[52] Relying upon the health benefits statute was unreasonable because the objectives of that statute are wholly unrelated to those of the torture statute.[53] General rules of statutory construction provide that relying on such an unrelated statute is not a reliable method for divining legislative intent.[54] Moreover, the analysis suggests that anything short of organ failure or death does not constitute torture, an interpretation unsupported, to be sure, by the health benefits statute.[55]

The Bybee Memo also offers an overly facile analysis of specific intent. In order to run afoul of the torture prohibition, the Memorandum provides, the infliction of severe physical pain or severe mental pain or suffering must be the "defendant's precise objective." Even if a defendant knows that severe pain will result from his actions, he may lack specific intent if "causing such harm is not his objective, even though he does not act in good faith."[56] The Memorandum ignores the fact that federal case law surrounding the meaning of specific intent is ambiguous and unclear.[57] In addition, it improperly suggests that motive of the interrogator could impact the analysis even though the interrogator knowingly inflicts severe physical pain.[58]

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50. *See* Memorandum from Acting Assistant Att'y Gen. Daniel Levin to Deputy Att'y Gen. James B. Comey, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, 2 (December 30, 2004) [hereinafter Levin Memorandum], *available at* http://www.justice.gov/olc/18usc23402340a2.htm ("This memorandum supersedes the August 2002 Memorandum in its entirety."); Memorandum from Acting Assistant Att'y Gen. David J. Barron to Att'y Gen. Eric Holder, Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions 1 (April 15, 2009), *available at* http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf. Upon reviewing the Yoo memorandum, the then incoming head of OLC, Assistant Attorney General Jack Goldsmith described it as "flawed in so many important respects that it must be withdrawn." OPR Report, *supra* note 3, at 85. Then Acting Assistant Attorney General Daniel Levin recalls that after he first read the Bybee Memo he thought: "'This is insane, who wrote this?'" *Id.* at 92. Then Yale Law School Dean, and current State Department Legal Adviser, Harold Koh called the Bybee Memo "perhaps the most clearly erroneous legal opinion I have ever read." JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR BECAME A WAR ON AMERICAN IDEALS 152 (2008).

51. OPR REPORT, *supra* note 3, at 67 (quoting Bybee Memorandum, *supra* note 2, at 1).

52. Bybee Memorandum, *supra* note 2, at 6 (quoting 18 U.S.C. § 1395w-22(d)(3)(B) (2000)).

53. OPR REPORT, *supra* note 3, at 128-133.

54. *Id.* at 183 (citing NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION §53:05 (6th ed. 2000)).

55. *See id.* at 133.

56. *Id.* at 257 (quoting Bybee Memorandum, *supra* note 2, at 3).

57. *See* OPR REPORT, *supra* note 3, at 136.

58. OPR REPORT, *supra* note 3, at 137.

In some instances, the Bybee Memo draws additional conclusions that are unsupported, defining "prolonged mental harm" as severe mental pain or suffering that must endure "for months or even years . . . such as seen in mental disorders like posttraumatic stress disorder."[59] The Memo cites no authority, legal or otherwise, for this conclusion.[60]

The Memo also ignores legal authority when it does not support a narrow definition of what constitutes torture. In its review of United States court decisions applying the Torture Victim Protection Act,[61] the Memorandum focuses only on instances of physical torture, of an especially cruel and even sadistic nature, ignoring conduct of a less extreme nature that was also found to constitute torture.[62]

The Bybee Memo also grossly mischaracterizes seminal international law decisions, interpreting the Israeli Supreme Court's decision in *PCATI v. Israel*,[63] to hold that certain interrogation techniques did not constitute torture.[64] Yet that issue was not before the Israeli high court. The court instead held that the interrogation techniques of violent shaking, the "frog crouch," the "shabach" position, excessive handcuffing, hooding, and sleep deprivation were illegal;[65] it did not attempt to define the techniques as either torture or other cruel, inhuman or degrading treatment.

Perhaps most excoriated have been the sections of the Memorandum that address possible instances in which interrogators do in fact torture detainees. The Bybee Memo opines that enforcement of the torture statute against interrogators "may be barred because [doing so] would represent an unconstitutional infringement of the President's authority to conduct war."[66] This view, referred to as the "Commander in Chief" override, and predicated on an unchecked executive power, fails to even discuss *Youngstown Sheet & Tube Co. v. Sawyer*, the seminal case on separation of powers during wartime.[67] In addition, it ignores the President's obligation to "take Care that the Laws be faithfully executed."[68]

Finally, the Bybee Memo states that the common law defenses of necessity and

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59. *Id.* at 67 (quoting Bybee Memorandum, *supra* note 2, at 1, 46).

60. OPR REPORT, *supra* note 3, at 139.

61. Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (1992).

62. *See* OPR REPORT, *supra* note 3, at 67 (citing Bybee Memorandum, *supra* note 2, at 24, 27); *see also* OPR REPORT, *supra* note 3, at 143. Courts have found that beating of hands alone, for example, amounts to torture under the TVPA. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420-423 (S.D.N.Y. 2002); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass 1995) (14 hours interrogation session constitutes torture).

63. HCJ Judgment Concerning the Legality of the General Security Service's Interrogation Methods 38 I.L.M. 1471 [1999] (Isr.).

64. OPR REPORT, *supra* note 3, at 146-49.

65. 38 I.L.M. at 1482-84.

66. OPR REPORT, *supra* note 3, at 68 (quoting Bybee Memorandum, *supra* note 2, at 2).

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

68. U.S. CONST., art. II, § 3; *see also* OPR Report, *supra* note 3, at 204.

self-defense "could provide justifications that would eliminate any criminal liability" for violations of the torture statute.[69] The memorandum provides virtually no case law in support of its conclusions and largely ignores critical components to the necessity defense, including imminence of threat and legal alternatives to violating the law.[70] The opinion also fails to address Article 2.2 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which provides: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."[71] The ratification history of CAT further supports the view that the U.S. government understood that there were no exceptions, including the defenses of necessity and self-defense, to the prohibition against torture.[72] This, too, was ignored in the opinion.

Despite the solitary names in the signature blocks, these opinions and their questionable conclusions were not crafted in isolation. Although Yoo and Bybee (as well as the junior lawyer assigned to work with Yoo, Jennifer Koester) were the primary drafters of the memoranda, many other lawyers in OLC, the Office of Attorney General, and throughout the government reviewed, or were briefed on, drafts of the opinions. A number of lawyers provided comments and edits; some raised objections. But ultimately none objected sufficiently to prevent any of the ultimate conclusions set forth above from becoming part of binding opinions that approved waterboarding and other interrogation tactics.

C. SUPERVISION OF THE TORTURE MEMORANDA

A review of the process by which the torture memoranda were crafted provides useful insights into senior government lawyers' passivity when presented with OLC lawyers' opinions relating to the most significant constitutional, national security, and human rights matters. This review raises questions as to what engenders such passivity in high-level government lawyers and is the basis for my proposal that such lawyers be tasked with clear responsibility that can be both affirmatively structured as well as regulated.

Initial discussions shortly after Zubaydah's capture about the advice needed included not only Yoo, who was OLC's "resident expert" on national security and foreign policy,[73] but also National Security Council Legal Adviser John Bellinger, Assistant Attorney General and head of the Criminal Division Michael

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69. OPR REPORT, *supra* note 3, at 68 (quoting Bybee Memorandum, *supra* note 2, at 46).

70. *See* OPR REPORT, *supra* note 3, at 157-72.

71. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, Dec. 10, 1984, 1465 U.N.T.S. 85.

72. *See* OPR REPORT, *supra* note 3, at 164-66.

73. *Id.* at 26.

Chertoff, and CIA attorneys.[74] Attorney General John Ashcroft, upon being made aware of the request, limited access to information on the matter to Attorney General Counselor Adam Ciongoli, Deputy Attorney General Larry Thompson, Bybee, and OLC Deputy Assistant Attorney General Patrick Philbin.[75] Yoo took on primary responsibility for drafting the memo, with junior attorney Koester, who was assigned to work under him.[76] Philbin was named "second Deputy" on the opinions, with the responsibility to review the opinions before they were finalized.[77] Yoo and Koester produced several different draft opinions over the course of the next four months.[78]

Several government lawyers beyond OLC were either provided copies of the memo drafts or were briefed on its content. Yoo provided the National Security Council a copy of the memo for comment. It also appears that Yoo met with and provided a copy of the memo to Chertoff, White House Counsel Alberto Gonzales, Deputy White House Counsel Timothy Flanigan, and Counsel to the Vice President David Addington.[79]

The actions, and lack thereof, by Ashcroft and Chertoff merit special attention here, given both their positions of authority and their particular roles in the opinion drafting process. In mid-July, 2002, Chertoff informed the CIA that the Criminal Division would not issue a declination to prosecute or pre-activity pardons for CIA interrogations violating the torture statute.[80] After Chertoff refused to provide the CIA with an advance pardon, Yoo added two new sections to the memorandum, setting forth the Commander in Chief power to override the prohibition against torture and defenses to violations of the statute.[81]

Chertoff apparently provided comments on drafts of the opinion dated as late as July 23, 2002.[82] Yoo may have sought out Chertoff's comments after Philbin raised concerns about the specific intent analysis.[83] Chertoff acknowledged receiving a copy of the memo and reading and returning it on the same day.[84] Chertoff recalls expressing some misgivings about the specific intent analysis.[85] Chertoff stressed the need for additional research about the effects of the

74. *Id.* at 37.
75. *Id.* at 39.
76. *Id.*
77. *Id.* at 39 n.41.
78. OPR REPORT, *supra* note 3, at 43 n.48, 53, 59.
79. *Id.* at 45-46. The memorandum was also provided to the FBI and CIA. *Id.* at 45.
80. *Id.* at 47-48.
81. *Id.* at 50-51. It is unclear exactly why the sections were added, though Yoo acknowledged the CIA may have suggested to him the need to answer questions about what would happen if the CIA did in fact torture someone "inadvertently." *Id.* at 51. The Vice President's counsel Addington testified that he told Yoo during a meeting with Gonzales that he was pleased that these issues were being addressed in the memorandum. *Id.* at 52.
82. *Id.* at 53, 57.
83. *Id.* at 57.
84. OPR REPORT, *supra* note 3, at 58.
85. *Id.* at 58-59.

interrogation techniques in order to bolster a good faith defense but he did not look "particularly closely" at the common law defenses.[86] As to the Commander in Chief section, he recalls telling Yoo, "I'm not saying I disagree, but I'm not in a position to sign onto this."[87]

With respect to the Attorney General's role, then-National Security Adviser Condoleezza Rice said that she asked Ashcroft "personally to review and confirm" the OLC opinions.[88] Yoo also stated that he briefed Ashcroft and his counselor Ciongoli on a regular basis about the draft memoranda.[89] On July 24, 2002, Yoo informed CIA General Counsel John Rizzo that Ashcroft authorized him to tell Rizzo that the interrogation techniques of attention grasp, walling, facial hold, facial slap, cramped confinement, and wall standing, were lawful and could be used on Zubaydah.[90] Also in late July, Yoo gave both Ashcroft and Ciongoli copies of the Bybee Memo but, according to Yoo, Ashcroft neither read nor provided any comments.[91] According to Ciongoli, Ashcroft read the Classified Bybee Memo on interrogation techniques and had "vigorous discussion" with Yoo about the opinion.[92] Ashcroft ultimately concluded that "Yoo's position [on waterboarding] was aggressive, but defensible."[93] The Bybee Memo and Classified Bybee Memo were shortly thereafter signed and became the effective Executive law of the land.[94]

II. HOLDING GOVERNMENT LAWYERS ACCOUNTABLE FOR LEGAL ADVICE

The revelation of the Bybee Memo, together with the disclosure of other

86. *Id.* at 59.

87. *Id.*

88. *See* S. ARMED SERVICES COMM., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 35 (2008) [hereinafter S. ARMED SERVICES COMM., INQUIRY], *available at* http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April% 2022%202009.pdf.

89. OPR REPORT, *supra* note 3, at 49. Yoo also recalls advising Ashcroft that the CIA had sought assurances that the CIA would not be prosecuted for using the proposed interrogation techniques. The number two official in the Department of Justice, Deputy Attorney General Larry Thompson, was apparently briefed on the Bybee memo at some point though no other details on the nature of his awareness of the memo are known. *Id.* at 60 n. 59. Bybee recalls that Ashcroft never requested to see a copy of the memo. *Id.* at 49 n. 52.

90. *Id.* at 53.

91. *Id.* at 60.

92. *Id.*

93. *Id.*

94. This Article focuses on the roles and responsibility of senior Executive branch lawyers in relation to OLC lawyers. Executive branch lawyers acting entirely removed from OLC could be viewed as having different obligations with respect to neutrality. For example, as Daniel Levin said of the White House Counsel, "[P]art of their job is to push, you know, and push as far as you can. Hopefully, not push in a ridiculous way, but they want to make sure you're not leaving any executive power on the table." *Id.* at 131. However, Bruce Ackerman has questioned the legitimacy of the Office of White House Counsel, for precisely its inherent loyalty (and lack of objective and candid advice) to the President, and has advocated abolishing the Office. *See* Bruce Ackerman, *Abolish the White House Counsel*, SLATE, Apr. 22, 2009, http://www.slate.com/id/ 2216710/. Although many of the same issues are implicated by OLC and White House Counsel, the latter office merits its own separate analysis elsewhere.

opinions and the images and reports of torture and abuse at Abu Ghraib, Guantanamo, and at CIA black sites, spurred intense interest in the responsibility of lawyers, and condemnation of the objectivity, quality, and accuracy of the opinions.[95] The concern over the quality and culpability of lawyers has spurred a number of approaches that may be characterized as reform-minded, which seek *ex post* or *ex ante* accountability in OLC.

First, people alleging harm caused by interrogation techniques authorized in the Bybee memoranda may seek to hold lawyers responsible for these opinions civilly liable for the harms the victims have suffered. The lawsuit, *Padilla v. Yoo*,[96] offers a useful window into the potential for such lawsuits leading to changes in OLC and holding lawyers accountable for their opinions. Second, current and former OLC lawyers, as well as scholars, have recommended structural changes within OLC and in other Executive agencies to prevent the issuance of opinions lacking sufficient breadth, objectivity, and candor.[97] Finally, some have sought professional sanctions against the lawyers involved in the drafting of the Bybee Memo.[98] Such sanctions might entail disbarment or lesser penalties including censure or suspension of one's license to practice law. The OPR investigation,[99] an ultimately very public one, reflects the professional disciplinary approach, and offers a useful example by which to examine both the merits and flaws of this route. In addition, there have been efforts in Spain, thus far ineffective, to hold former United States government officials, including Yoo and Bybee, criminally liable for their role in the torture and coercive interrogation of detainees.[100] Each of these approaches may assist in ensuring greater improvement in the quality of legal opinions, but none of them goes far enough in fostering a sustained dialogue between lawyers at the most senior level in the Department of Justice so that each lawyer is wrested from his passivity and held accountable for the opinions issued by OLC.

A. CIVIL LIABILITY

Civil lawsuits may be employed to effect changes in lawyering and a firm's infrastructure,[101] whether they are suits asserting malpractice claims or in some

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95. *See, e.g.*, LUBAN, *supra* note 27, at 162-205 (pages cited are from chapter titled "The Torture Lawyers of Washington"); *Guidelines*, *supra* note 4, at 1578; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 120 (2005).

96. 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

97. *See Guidelines*, *supra* note 4, at 1.

98. *See* OPR REPORT, *supra* note 3, at 12.

99. *Id.*

100. The Center for Constitutional Rights provides links to various documents connected to the Spanish criminal investigation into U.S. torture. *See* "The Spanish Investigation into U.S. Torture", CENTER FOR CONSTITUTIONAL RIGHTS, *available at* http://www. ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture.

101. Ted Schneyer, *Professional Discipline for Law Firms?* 77 CORNELL L. REV. 1, 38 (1991).

cases, claims for the conduct and resulting harms that were predicated on the advice of lawyers. In 2008, Jose Padilla and his mother filed a lawsuit against John Yoo, asserting *Bivens* claims based upon the harms Padilla suffered while held as an enemy combatant, including harsh interrogations, which, Padilla alleges were "proximately and foreseeably" caused by Yoo's drafting of opinions including the Bybee Memo and Classified Bybee Memo.[102] The district court denied Yoo's motion to dismiss on all claims except one, for which the court granted leave to amend.[103] Significantly, the court found that Yoo's alleged role as a high-level government lawyer involved in policy determinations and his alleged knowledge about Padilla's detention made Padilla's ultimate treatment, including being subjected to harsh interrogation, a foreseeable result of Yoo's legal advice.[104] At first blush, this might suggest that civil liability may be a good route for holding supervisory lawyers accountable and deterring professional misconduct.[105] However, the Supreme Court's decision in *Ashcroft v. Iqbal*[106] has created significant hurdles, if not made it impossible, for people to bring claims asserting supervisory responsibility claims against federal government lawyers.

In *Iqbal* the Supreme Court addressed claims of the plaintiff, a Pakistani Muslim immigrant, that a number of federal officials including Ashcroft and FBI Director Robert Mueller crafted a policy after 9/11 that led to his detention on account of his race, religion, and national origin and harsh conditions of confinement in violation of the First and Fifth Amendment.[107] The Court held, however, that the plaintiff could not bring *Bivens* actions based solely upon Ashcroft's and Mueller's alleged "'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.'"[108] Misconduct on the part of the superior must be alleged, not simply knowledge of the subordinate's misdeed.[109]

Professor Judith Resnik explains that based upon this narrowing of *Bivens* claims, as well as the Court's new requirement that district courts assess the plausibility of pleadings in a complaint, high-level government officials are

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102. Complaint at 18, *Padilla v. Yoo*, (N.D. Cal. Jan. 4, 2008), 633 F. Supp. 2d 1005, 1012-18 (N.D. Cal. 2009) No. C08-00035 (JSW).

103. *Padilla*, 633 F. Supp. 2d at 1039.

104. *Id.* at 1032-34.

105. For a fuller discussion of the challenges such a suit may face, see John Steele, *Jose Padilla and his mother sue John Yoo (former OLC lawyer)*, LEGALETHICSFORUM.COM, January 4, 2008, http://legalethicsforum-.typepad.com/blog/2008/01/jose-padilla-su.html; David Luban, *Much Ado about* Padilla v. Yoo, BALKINIZATION, Jan. 13, 2008, http://balkin.blogspot.com/2008/01/much-ado-about-padilla-v-yoo.html.

106. 129 S. Ct. 1937 (2009).

107. *Id.* at 1942-43.

108. *Id.* at 1949 (quoting Brief of Respondent at 46).

109. *Id.* ("Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.").

effectively insulated from liability.[110] Justice Souter was no less sanguine about the prospect of holding senior officials responsible for their failure to properly supervise subordinates, stressing in his dissent: "Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."[111]

The *Iqbal* decision may be seen as part of a continuing retrenchment of *Bivens* over the past thirty years as well as a near dissolution of means to bringing claims in the national security context since 9/11.[112] In addition to the hurdle posed by *Iqbal*, courts have generally foreclosed all *Bivens* claims by foreign citizens concerning treatment suffered outside of the United States, thereby limiting the pool of potential claimants who suffered abusive interrogations.[113] Thus the limited prospects of holding supervisors responsible for mistreatment based upon legal advice crafted by subordinates suggests civil liability may not be a fruitful route for obtaining accountability and changing the legal culture in OLC.

B. CHANGES TO OFFICE OF LEGAL COUNSEL

Following the disclosure of the Bybee Memo, a group of nineteen former OLC attorneys drafted *Principles to Guide the Office of Legal Counsel* ("Guidelines") a proposed set of guidelines for OLC.[114] Most of these suggestions concern structural and procedural changes to the Office, based upon the view that "regularized internal processes and mechanisms are critical to maintaining ['accurate and honest legal appraisals, unbiased by policymakers' preferred

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110. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 632 (2010). There have, however, been deviations from the expected drumbeat of cases following *Iqbal*. Similar to *Padilla*, the United States District Court for the Northern District of Illinois denied former Secretary of Defense Donald Rumsfeld's motion to dismiss a *Bivens* claim asserting cruel and inhumane treatment. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010). The district court held that two American citizens' allegations of abusive treatment in connection with their detention in Iraq and allegations of Rumsfeld's authorization of new harsh interrogation tactics and his awareness of resulting mistreatment of detainees in U.S. custody in Iraq constituted sufficient personal involvement to overcome the hurdles posed by *Iqbal*. *Id.* at 963-65.

111. *Iqbal*, 129 S. Ct. 1937 at 1957 (Souter, J., dissenting). It appears that, depending upon the purposive involvement of the superiors and possibly the cause of action asserted, a *Bivens* cause of action might be permitted by the Court.

112. *See* Stephen I. Vladeck, *National Security and* Bivens *after* Iqbal, 14 LEWIS & CLARK L. REV. 255, 266-68 (2010).

113. *See, e.g.*, In re Iraq and Afghanistan Detainees Litig., 479 F. Supp. 2d 85, 103 (D.D.C. 2007); Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009), *cert. denied*, 2009 U.S. LEXIS 8982 (Dec. 14, 2009); Arar v. Ashcroft, 532 F.3d 157, 181-82 (2d Cir. 2007), *vacated and rev'd, en banc*, 585 F.3d 559 (2009), *cert. denied*, 130 S. Ct. 3409 (2010). Indeed, in turning back Yoo's arguments that a *Bivens* claim should not be permitted because foreign relations concerns or special factors were implicated, the court distinguished the allegations of Padilla against Yoo from this line of cases because the facts in *Padilla* involved the treatment of an American citizen on American soil. *Padilla*, 633 F. Supp. 2d at 1024-25, 1029-30.

114. *See Guidelines*, *supra* note 4, at 1576-79.

outcomes.']"[115] A number of the Guidelines stress the importance of providing independent advice to the Executive, though they contain internal inconsistencies, encouraging support for executive initiatives and yet counseling against partiality.[116]

Many of these proposals advocate increased transparency, supporting both publication of the standards governing the drafting of OLC opinions and public disclosure of opinions.[117] Proponents contend that the "likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law by deterring 'excessive claims of executive authority.'"[118] One legislative proposal, for example, that Congress ultimately failed to pass, the "OLC Reporting Act of 2008," required the Attorney General to report to Congress instances in which OLC concludes that a federal statute is unconstitutional or that a federal statute does not apply to the Executive Branch.[119] In addition, the Guidelines encourage a greater involvement of other affected government agencies and Justice Department divisions before providing an opinion.[120]

Unfortunately the transparency provisions are riddled with caveats. Although the Guidelines call for public disclosure when an opinion advises that the Executive need not adhere to a federal statutory requirement, they permit exceptions based upon "the most compelling need for secrecy."[121] In our post-9/11 world, an executive of any political stripe will readily assert these

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115. *Id.* at 1595 (quoting *id.* at 1608). Spaulding endorses the *Guidelines* as well, though he harbors skepticism that "major structural guarantees of independence" can be implemented in the Office of the Attorney General. *See* Spaulding, *supra* note 22, at 1968-69. In order to effect structural changes, however, Spaulding advocates making the guidelines enforceable (though he is unclear on how to do so), publicly disclosing opinions, limiting the office's political accountability to the President, and a resolution of the tensions between such political accountability and the lawlessness that that breeds. *See id.* at 1978-79. Other proposals regarding the structure of OLC have been more combative and condemnatory, suggesting an entire revamping of the office. For example, Professor Bruce Ackerman proposes dispensing with OLC, and establishing in its place, an "executive tribunal." Comprised of nine "judges for the executive branch," who serve twelve-year terms, and must be Senate-confirmed, congressional committees would challenge proposed executive actions before the tribunal, prior to such actions becoming law for the executive branch. *See* Bruce Ackerman, *How to Keep Future John Yoos under Control*, WASH. POST., February 23, 2010.

116. *See* discussion of OLC, *supra* at Part II.A.

117. *See Guidelines*, *supra* note 4.

118. *Id.*

119. *See* S. REP. NO. 10-528 (2008). As might have been expected, and without a trace of irony, the OLC opined that the proposed legislation was unconstitutional because it interferes with the President's authority over classified information and because it impinges on confidential legal advice protected by executive privilege. *See* Memorandum from Michael Mukasey, Att'y Gen., Re: U.S. Dep't of Justice, Constitutionality of the OLC Reporting Act of 2008 1-4 (Nov. 14, 2008), *available at* http://www.justice.gov/olc/2008/olc-reporting-act.pdf.

120. *Guidelines*, *supra* note 4, at 1600; *see also* Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 411 (2010) (recommending rule requiring State Department's Legal Adviser's advice on matters concerning international law).

121. *See Guidelines*, *supra* note 4, at 1607.

secrecy justifications.[122] The Guidelines similarly qualify a presumption for disclosure, stating that there is "some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters."[123] Thus, in matters of national security and the limits of executive power and authority—the very areas where there have been, and remain, the greatest potential for abuse—the Guidelines would appear to sanction a *de facto* secrecy rule.

In addition to potential weaknesses in the substance of the Guidelines and other proposals, there are concerns about their lack of enforceability. For example, the recommendation that other government agencies and Justice Department components be consulted in the crafting of an opinion is sound. However, without requiring that the opinions of other agencies and components be afforded significant weight or that those individuals bear responsibility in some form, there is little reason to think that this proposal will change the status quo. In fact, as the OPR account of the drafting of the memoranda reveals, members of the CIA, FBI and National Security Council were consulted. The Justice Department Criminal Division head, Michael Chertoff, provided comments to drafts; yet the Bybee Memo still emerged, largely unaffected by any criticisms. The problem was not that not enough lawyers were consulted, but that not enough of them may have felt sufficiently responsible for the underlying opinion which they reviewed in some form or another.

C. INDIVIDUAL LAWYER PROFESSIONAL MISCONDUCT

Notwithstanding the wide net cast by the OPR in its investigation of OLC memoranda on interrogations, the focus was ultimately myopic, training its attention on individual lawyers' misconduct, rather than looking more broadly, with an eye toward the institutional and institutional leaders' actions, and, in many cases more importantly, inaction. The OPR Report concluded that as the person "primarily responsible" for the Bybee Memo and Classified Bybee Memo,[124] "Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."[125]

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122. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied* 2011 U.S. LEXIS 3575(2011) (affirming dismissal of case based upon government's assertion of state secrets privilege). Notwithstanding the Obama administration's purportedly different policies regarding state secrets, "officials at the 'highest levels of the Department of Justice' of the new administration" determined the state secrets privilege invoked by the Bush administration in the case was appropriate. *See id.* at 1078.

123. *Guidelines*, *supra* note 4, at 1607-08. The Guidelines further provide that "OLC should consider the views regarding disclosure of the client agency that requested the advice." *Id.* at 1608. One envisions agencies working on national security issues, including clandestine agencies such as the CIA, rarely favoring public disclosure.

124. OPR REPORT, *supra* note 3, at 251.

125. *Id.* at 260.

OPR also concluded that Bybee committed professional misconduct because he recklessly disregarded "his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."[126] OPR determined that as "head of OLC and signator" of the memoranda, he bore personal responsibility for providing "thorough, objective, and candid" legal advice.[127]

In his review of the OPR Report, however, David Margolis reversed the findings, determining that neither lawyer had committed professional misconduct.[128] Margolis found that both Bybee and Yoo had "exercised poor judgment" but ultimately determined that their actions did not merit a Justice Department referral to a state bar disciplinary authority.[129] As framed by Margolis, the issue was whether Yoo and Bybee fulfilled their "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."[130]

Margolis acknowledged Yoo's own misconduct was "a close question."[131] He criticized Yoo for espousing his extreme views on executive power in his opinion to the detriment of his institutional client.[132] Margolis further noted that the "memos 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."[133] The 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."[134] Regarding Bybee, Margolis found that his supervisory role mitigated any finding of misconduct, and determined that "the preponderance of the evidence does not support a finding that he knowingly or recklessly provided incorrect advice or

126. *Id.* at 260. The role of Patrick Philbin is an interesting one here. *See id.* at 257-58. He appears to have fulfilled his second Deputy responsibilities as envisioned, reporting his reservations up the chain of command to Bybee, the head of OLC. Although Philbin may have walked back somewhat from his criticisms, he had provided enough information to Bybee such that Bybee *should have known* that there were sufficient problems in the memorandum that merited redress. In Goldsmith's account, it was Philbin who brought to his attention the problems in the OLC opinions. GOLDSMITH, *supra* note 5, at 142. While Philbin may be viewed as having done all that could be expected of him, the failure to make significant changes reflects a need for additional checks and balances in the form of enhanced supervisory responsibility, perhaps requiring explicit articulation of the concerns and countervailing views in the memo itself. *See* Margolis Memorandum, *supra* note 3, at 20-21.

127. OPR REPORT, *supra* note 3, at 255.

128. Margolis Memorandum, *supra* note 3, at 67-68.

129. *Id.* at 68.

130. *Id.* at 27.

131. *Id.* at 67.

132. *Id.*

133. Margolis Memorandum, *supra* note 3, at 67.

134. *Id.* at 68.

that he exercised bad faith."[135] Notwithstanding the reversal on findings of professional misconduct, Margolis characterized the torture memoranda as "an unfortunate chapter in the history of the Office of Legal Counsel."[136]

Notably, OPR did not find that any other lawyers who reviewed or were briefed on the opinions committed professional misconduct.[137] Although OPR repeatedly found that Justice Department officials *should* have acted in response to the opinions in various ways, it appears to have ultimately concluded that their passivity was reasonable in light of OLC's authority to provide binding opinions.

> We found Michael Chertoff, as AAG of the Criminal division, and Adam Ciongoli, as counselor to the AG, *should have* recognized many of the Bybee Memo's shortcomings and *should have* taken a more active role in evaluating the CIA program. John Ashcroft, as Attorney General, was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program. Ashcroft, Chertoff, Ciongoli, and others *should have* looked beyond the surface complexity of the OLC memos and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound. However, we cannot conclude that, as a matter of professional responsibility, it was unreasonable for senior Department officials to rely on advice from OLC.[138]

Based on this line of reasoning, a senior Justice Department lawyer could reasonably acquiesce in any and all opinions offered by OLC lawyers, never speaking up or objecting because of the exalted station the OLC lawyer occupies. Such reasoning is outcome determinative and ignores the interactive and social process by which legal opinions are crafted. It is hard to understand why the Attorney General and Assistant Attorney General—highly experienced government attorneys with particular criminal expertise—should have properly relied on opinions of this level of consequence, particularly criminal matters, drafted primarily by Yoo—a relatively youthful and inexperienced lawyer without any criminal expertise.

OPR's narrowly focused findings concerning individual lawyers' professional misconduct, to say nothing of the Margolis Memo reversing OPR's findings, may reflect the inevitably political nature of any inquiry of government lawyers, but also demonstrate, what is for many, the inherently limited nature of the current state of regulation of lawyers.[139]

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135. *Id.* at 64.

136. *Id.* at 67.

137. OPR REPORT, *supra* note 3, at 259.

138. *Id.* (emphasis added). Because OPR made no findings of misconduct with respect to these senior lawyers, Margolis did not address their roles in his memorandum.

139. Much of Margolis's criticism of the OPR Report is based upon his view that OPR relied on the more aspirational aspects of the Best Practices memoranda and the Guidelines in finding that Yoo and Bybee committed professional misconduct, rather than identifiable and lower standards in the *D.C. Professional Rules of Conduct*. *See* Margolis Memorandum, *supra* note 3, at 12-13, 14-27, 68.

A broader inquiry asks for judgments on high level lawyers, which is of course politically sensitive, but it also treads upon larger policy questions, and veers from a formalistic rule based approach to ethics to one addressing the legal framework and the normative foundation of the legal process in OLC and the Justice Department. Ultimately, the limited findings reveal one of the weaknesses in the external regulation of lawyers' professional conduct, which, having been focused on the bad man or bad lawyer, lack an aspirational or normative element, that was found in earlier iterations of codes addressing the conduct of lawyers.[140] Specifically, scholars have complained that the OPR report and Margolis Memo never addressed whether the OLC opinions, and not simply the Bybee Memo, but the later opinions written by successor OLC chiefs, were correct in their analysis of torture but instead just addressed the manner of the analysis, dodging the moral question of torture.

III. THE CURRENT SYSTEM OF REGULATION OF LAWYERS

Critics of the *Model Rules of Professional Conduct* argue that the Rules focus too much on the Holmesian "bad man" and, by extension, the "bad lawyer," rather than articulating a more aspirational view of lawyering that had been set forth in the *Code of Professional Responsibility*, and its predecessor, the *Canons of Professional Ethics*.[141] The problem is that the regulation of lawyers is now primarily a formalistic and instrumentalist inquiry rather than a normative one. Put another way, the rules now focus only on the manner of lawyering and ignore the substantive legal determinations. Form is elevated over substance. The narrow focus on individual bad lawyering ignores the underlying legal issues that may permit or even foster that singular misconduct. Practically, it remains less than clear whether the sanctions on individual lawyers have a deterrent effect on individual lawyers' conduct let alone the bar, a firm, or a government agency. A more holistic approach is recommended by some, an inquiry and framework that would also consider the collective nature of lawyering that enables such individual conduct.

A. FORMALISM AND DETERRENCE VS. NORMS AND ASPIRATIONS

The *Model Rules of Professional Conduct* emerged in 1983, in large measure, in response to criticisms of the "equivocal aspirational ambitions" and "interpretive dilemmas" in the earlier Canons' and Model Codes' ethical consider-

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140. Discussed *infra* in Part III.A.

141. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CALIF. L. REV. 1273, 1283 [hereinafter Rostain, *Ethics Lost*] (1998); *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 (1978).

ations.[142] Now, some have argued, the pendulum has swung too far in the other direction. The *Model Rules* eschew the early formulations of legal ethics for a perceived more simple approach.[143] In so doing, critics contend, the adoption of the *Model Rules* lead to greater reliance on external agency regulation and a focus on disincentives to overcome lawyers' acting in their own self-interest.[144] This sort of regulation of the legal profession will meet only middling success, however, because it lacks a "normative foundation that ties law practice to broader collective values."[145]

Professor Tanina Rostain argues that current regulation of lawyers adheres too closely to a behavioral economics polestar. The behavioral economics model posits that lawyers will advocate for their clients in unscrupulous fashion because it is in their economic self-interest to do so.[146] Lawyers will craft whatever murky legal arguments are needed in support of their clients' objectives, in pursuit of financial reward, but under the guise of zealous advocacy. Only by punishing, and thereby disincentivizing, overzealous advocacy will the misconduct be deterred.

Rostain criticizes the regulation of lawyers tethered to a behavioral economics model as both unrealistic and undesirable. Rostain contends that first, "people obey laws not primarily because they fear sanctions but because they have internalized commitments to legal institutions and values."[147] Second, a set of rules predicated on legal representation of the "bad man" and that promote "neutral partisanship" lacks a normative foundation.[148] Rostain does not despair of any and all utility of the regulation of lawyers; the focus on rules should, however, "reflect and communicate a collective understanding of the appropriate parameters of professional relationships, separate from how frequently or rarely they are enforced."[149] Thus rules may embody and inculcate infrastructural changes and norms, facilitating at once aspirational and deterrent objectives.

What constitutes a normative foundation remains a hotly contested terrain. What should govern situations confronting any lawyer, let alone an OLC lawyer and her supervisors? Luban has asserted that an individual's morality must orient the lawyer's decisions, contending, for example, "Lawyers should approach laws defending basic human dignity with fear and trembling."[150] A number of scholars

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142. *See* STEPHEN GILLERS, REGULATION OF LAWYER: PROBLEMS OF LAW AND ETHICS 10 (8th ed. 2009); Rostain, *Ethics Lost*, *supra* note 141, at 1292-1303.

143. *Id.* at 1302-03.

144. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44-53 (1995); Rostain, *Ethics Lost*, *supra*, note 141, at 1299.

145. Rostain, *Ethics Lost*, *supra* note 141, at 1302-03.

146. *Id.* at 1276-77, 1302-03.

147. *Id.* at 1303.

148. *Id.* at 1312-13.

149. Tanina Rostain, *Partners and Power: The Role of Law Firm Organizational Factors in Attorney Misconduct*, 19 GEO. J. LEGAL ETHICS 281, 287 [Hereinafter Rostain, *Partners and Power*] (2006).

150. LUBAN, *supra* note 27, at 205.

have criticized Luban's privileging of individual morality in these situations, raising concerns over subjectivity, moral pluralism and suggesting he unjustifiably disregards the values of the legal and political systems.[151] In the end, one fears, we are simply left in an unsatisfying, "'lonely subjective world' of inchoate personal value."[152] The discomfort with establishing individual morality as a normative foundation for lawyering is understandable. Yet a norm of fealty to the client owing to professional obligation, tempered only by a strict *Model Rules of Professional Conduct*-based consciousness and occasional regulation is not a sufficient normative foundation either.

Luban's approach is more nuanced than his critics would acknowledge. Luban does not simply insist that individual morality should trump professional obligations in all instances. Rather, he insists that by requiring "moral activism" on the part of lawyers, lawyers cannot defend all of their conduct based simply on their obligations to the client when confronting legal ethical questions.[153] Facing exceptional circumstances, in particular, lawyers must weigh their own morality against their "professional role morality," *i.e.*, their obligations to the client.[154]

Though verging on the metaphysical for some, Luban's approach is especially salient for the OLC attorney. More than most lawyers, the OLC lawyer faces significant pressure to realize his client's objective; the client is, after all, the President, and the advice sought is of national import, often relating to national security. Moreover, the questions frequently entail very difficult ethical questions, like whether particular interrogation techniques constitute torture. Many times, the legal answers are not clear and are mixed with questions of policy.

Former lawyers from OLC insist that there is an institutional culture and sense of integrity at the office that serves as normative foundation, which will generally withstand the potential pressures associated with having a President as client.[155] But they acknowledge and endorse the need to serve the client, suggesting that the fealty to the client may at times tip the balance in favor of deference to the Executive's preferred course of action. In addition, in a post-9/11 world, there

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151. An extensive discussion and debate over Luban's emphasis on the individual lawyer's conscience over the institutional system's values may be found in a colloquium on Luban's LEGAL ETHICS AND HUMAN DIGNITY. *See* Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311 (2008); Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343 (2008); William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365 (2008); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377 (2008); W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 CORNELL L. REV. 1413 (2008). Goldsmith also would consider this invitation to moral inquiry an improper expansion of OLC's brief. GOLDSMITH, *supra* note 5, at 147-48 ("OLC's ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.").

152. Rostain, *Ethics Lost*, *supra* note 141, at 1298 (quoting Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133, 140 (1992)).

153. David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1444-45 (2008).

154. *Id.* at 1445.

155. *See supra* note 38 and accompanying text.

may also be an inclination on the part of OLC to provide the Executive Branch client what it wants, out of a fear of otherwise being perceived as risk-averse.[156] Should the OLC counsel against the client's desired course of action too often, the client may stop seeking its legal advice. What may be the only thing standing in the way of giving the President exactly what he wants are OLC lawyers' own morality.[157]

B. REGULATION OF OLC OPINION AUTHORS AND SUPERVISORS

The OPR Report and Margolis Memorandum's failure to address the soundness of the opinions' conclusions, for example, whether it was correct to conclude that Congress could not prohibit the President from ordering torture, reflects the absence of a normative foundation in current regulation of lawyers. It also explains, in part, why succeeding OLC opinions on interrogation and their authors were not subject to the same criticism by OPR.

With respect to the scope of inquiry, OPR made clear its purely instrumentalist approach: "We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result."[158] Or, as Margolis put it, "OPR found Yoo and Bybee to have engaged in misconduct not because they were wrong, but because they were not thorough."[159] This limited focus intentionally misses the bigger picture.[160]

Later OLC opinions, intended to supersede the Bybee Memo, did not arrive at different conclusions, yet they largely escaped criticism. For example, then Acting Assistant Attorney General Daniel Levin authored a replacement memo (the "Levin Memo") on December 30, 2004, characterizing the Bybee Memo's discussion of the President's commander in chief power and defenses to liability as "unnecessary" and "inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[161] The Levin Memo also modified the Bybee Memo's analysis of "severe pain," expanding it to include pain beyond only that associated with "organ failure."[162] However, in a footnote,

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156. *See* GOLDSMITH, *supra* note 5, at 91-98, 163-64 (discussing risk-averse effect of legal opinions on intelligence operations).

157. Psychologists studying impulses toward obedience similarly suggest locating an alternative source of authority in order to resist automatic obedience, such as one's "religious, spiritual, political, or philosophical commitments." PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 556 (2010) (citing PHILIP G. ZIMBARDO & MARK R. LIEPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 75 (1991)).

158. OPR REPORT, *supra* note 3, at 160.

159. Margolis Memorandum, *supra* note 3, at 21.

160. *See* David Cole, *They Did Authorize Torture, But . . .*, THE NEW YORK REVIEW OF BOOKS, April 8, 2010, at 42 ("In a more fundamental sense, however, both the OPR Report and Margolis failed to confront the real wrong at issue. They focused exclusively on the *manner* by which Yoo and Bybee arrived at their result, rather than the result itself.").

161. Levin Memorandum, *supra* note 50, at 2.

162. *Id.*

the Levin Memo noted that notwithstanding the disagreements with the Bybee Memo's analysis of legal standards, the conclusions themselves would not be disturbed.[163] In other words, all interrogation techniques, including waterboarding, were still legal.

Luban suggests that the Levin Memo escaped the same criticism and judgment only because it "*sounded* more moderate than Bybee."[164] But in fact, "the Levin memo makes only minimum cosmetic changes to the bits of Bybee that drew the worst publicity."[165] Luban further contends that succeeding opinions also failed to provide objective analyses and instead were, rather, "aggressive advocacy briefs" intended to support the CIA interrogation regime.[166]

Professor David Cole explains OPR's agnostic approach to the issue of torture as a means of avoiding a collective indictment. Addressing "the legality of the brutality itself . . . would have implicated not only John Yoo and Jay Bybee, but all of the lawyers who approved these methods over the five-year course of their application."[167] That finding would have simply been too politically fraught.[168] Moreover, a finding of illegality would have raised questions about the interrogation program itself and CIA interrogators' reliance on the memoranda and their potential culpability for actions taken based upon the legal opinions.[169] What these outcomes reflect then are the limits of the current legal regulatory framework, which permits even external regulators to avoid making findings when confronted by certain political pressures.

It is this Article's contention, however, that the professional responsibility project should be reoriented in its application to OLC. Application of professional rules to OLC should examine the collective legal process that is responsible for the misconduct, which necessarily requires an inquiry into

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163. *Id.* at 2 n. 8.

164. LUBAN, *supra* note 27, at 180.

165. *Id.* For a contrary opinion on the positive impact and changes made by the Levin Memo, see GOLDSMITH, *supra* note 5, at 144-51, 163-65, in which he explains the decision to withdraw the Bybee Memo. Goldsmith indicates that his primary concern regarding the opinions was that the overbroad arguments could be employed to justify "much more aggressive" interrogations than the ones specifically authorized. *Id.* at 151. The Levin Memo's changes should have dispelled at least that possibility.

166. LUBAN, *supra* note 27, at 198.

167. Cole, *supra* note 160, at 42.

168. Oddly enough, Yoo and Bybee have in many ways become the "scapegoats" of the torture memoranda. It is they, and they alone, according to the OPR Report, and, it would seem, the popular narrative, who bear responsibility for any misconduct that led to the crafting of the opinions authorizing waterboarding and other interrogation techniques. They are the proverbial "bad apples."

169. The reliance of the intelligence community and CIA operatives on the OLC's opinions bedeviled Goldsmith as he contemplated withdrawing the Bybee Memo, and the ultimate withdrawal apparently affected intelligence gathering due to ambiguity over the legal analysis. GOLDSMITH, *supra* note 5, at 152, 163-65. Notwithstanding the Obama administration's withdrawal of many Bush-era OLC opinions on interrogation, Attorney General Eric Holder addressed these same concerns of criminal culpability, stating that the Justice Department would "'not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.'" Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought over CIA Tapes*, N.Y. TIMES, November 9, 2009.

supervisors' responsibility for the opinions and a discussion of underlying OLC norms.[170] This collective analysis is particularly necessary in the case of OLC, which renders opinions that not only have the force of law but authorize policies of national and international import. Limiting ethics reviews of OLC opinions to an instrumental analysis of simply the drafters' manner of analysis ignores the very real effect that these legal opinions have in the world. A properly formulated conception of reasonable supervision of OLC opinions demands greater accountability for high-level lawyers. Such accountability will compel a discussion between lawyers of the normative foundations of the drafting of the opinions, and a confrontation with the memorandum's real world consequences.

IV. SUPERVISORY RESPONSIBILITY AS A BRIDGE FROM SIMPLE RULE ENFORCEMENT TO STRUCTURAL, NORM GENERATION

The idea of supervisory responsibility arises from, what would seem, the uncontroversial position that every case of professional discipline raises the question of reasonable supervision.[171] A lawyer's misconduct simply precipitates the logical inquiry: who was his boss? What was she doing while the subordinate lawyer acted unethically? This relatively simple concept recognizes that, outside of the solo-legal practice, no lawyer is an island. The *Restatement on the Law Governing Lawyers*, in its articulation of the rules on supervision of lawyers, observes that lawyers in law firms, law departments of corporations, and government agencies do not "operate as free agents in their work relating to the representation of clients."[172] In essence, this is simply the "general principle of personal responsibility for acts of another."[173]

The Model Rule of Professional Conduct 5.1 on "Responsibilities of Partners, Managers, And Supervisory Lawyers," provides in its entirety:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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170. *See* Rostain, *Ethics Lost*, *supra* note 141, at 1337-38.

171. Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 285 (1994).

172. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: SUPERVISION OF LAWYERS AND NONLAWYERS WITHIN AN ORGANIZATION (2000) (Introductory Note) [hereinafter RESTATEMENT].

173. MODEL RULES R. 5.1 cmt. 4.

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
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> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[174]

Sections (a) and (b) of Rule 5.1 detail the duties of supervisory lawyers to both craft general firm or law department practices and policies that ensure ethical conduct by all lawyers and take specific actions to ensure ethical conduct when directly overseeing a lawyer's work. The drafters of Rule 5.1 did not, however, intend to establish a form of vicarious liability that imputes liability based upon the subordinate lawyer's misconduct.[175] Rather, these sections establish an "independent duty of reasonable supervision in Rule 5.1 [that] is affirmative and absolute; the failure to provide such reasonable supervision constitutes the lawyer's own independent violation which is the unethical conduct warranting professional discipline."[176]

Section (c)(1) of Rule 5.1 sets forth what has been characterized as a form of "accessorial liability" for a lawyer who ratifies or orders her subordinates' misconduct.[177] Section (c)(2) creates a "duty to rectify" misconduct when a supervisor learns of it and the consequences of which can be prevented or minimized.[178] Concerning the latter, the extent of the supervisor's remedial obligation depends upon the "immediacy" of his "involvement and the seriousness of the misconduct."[179] The supervisor must take whatever steps are required to preclude "avoidable consequences" of the wrongdoing.[180]

Both subsections of 5.1(c) predicate a supervising lawyer's responsibility on knowledge of the misconduct. Under the model rules, knowledge is defined as "actual knowledge of the fact in question,"[181] though, "[a] person's knowledge may be inferred from circumstances."[182] In addition, the drafting history of Rule 5.1(c)(1) makes clear that the drafters "intended to remove any possibility of

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174. MODEL RULES R. 5.1. Section 11 of The (Third) Restatement of the Law Governing Lawyers, *supra* note 172, provides essentially the same responsibilities for a supervising lawyer that are provided in Model Rule 5.1, though it includes the responsibilities as they also relate to non-lawyers, which are set forth in Model Rule 5.3.

175. Miller, *supra* note 171, at 276-77; *see supra* notes 79-84 and accompanying text for useful discussion of resistance to holding supervising lawyers vicariously responsible for other lawyers.

176. Miller, *supra* note 171, at 277-78.

177. RESTATEMENT, *supra* note 172, at § 11 cmt. e (discussing sec. 3(a), equivalent of 5.1(c)(1)).

178. Miller, *supra* note 171, at 278 n. 86 (acknowledging the relationship between the prevention function in Rule 5.1(a) and (b) and the curative function of Rule 5.1(c)).

179. MODEL RULES R. 5.1, cmt. 5.

180. MODEL RULES R. 5.1, cmt. 5.

181. MODEL RULES R. 1.0(f).

182. MODEL RULES R. 1.0(f).

supervisory responsibility being imposed on a lawyer who had no knowledge of specific conduct."[183]

However, a discernible "knowledge creep" has been noted in the way ethics committees and courts have interpreted this requirement.[184] Courts and regulatory authorities have been loathe to find a lack of knowledge when supervising lawyers have not complied with their affirmative and preventive obligations under 5.1(a) and (b); if a lawyer fails to take the necessary steps to prevent misconduct, he cannot subsequently claim ignorance when the misconduct in fact occurs.[185] Similarly, the Restatement commentary explains that "[l]ack of awareness of misconduct" does not excuse a supervising lawyer who has not taken "reasonable measures" to ensure the subordinate's compliance with professional standards.[186] For example, a federal district court held in addressing Rule 5.3(c), the analogous rule for supervision of non-lawyers, that a supervising lawyer "without actual knowledge of" a paralegal's misconduct is "responsible for the conduct where the attorney would have known about the conduct but for the attorney's negligence or recklessness."[187] To some extent, these cases and opinions hold that a supervising lawyer can be said to have constructive knowledge of misconduct, and therefore be obligated to remedy consequences of that conduct.[188] Only two jurisdictions—New York and the District of Columbia—have explicitly embraced this constructive knowledge standard in their rules, holding a managing and supervising lawyer responsible for another lawyer's misconduct not simply when the supervisor *knows* of misconduct but also when she *should know* of the improper actions.[189]

Rule 5.2, which governs a subordinate's responsibility, supports the notion that supervisors should take a more active role in deliberations of close matters. Rule 5.2(b) provides: "A subordinate lawyer does not violate the *Rules of Professional Conduct* if that lawyer acts in accordance with a supervisory lawyer's reasonable

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183. Miller, *supra* note 171, at 276 n.79 (quoting E. REICH, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 153-54 (1987)).

184. Arthur J. Lachman, *What You Should Know Can Hurt You: Management and Supervisory Responsibility for the Misconduct of Others under Model Rules 5.1 and 5.3*, 18 ABA PROF. LAW. 1 (2007) (discussing cases and ABA ethics opinions).

185. *Id.*

186. RESTATEMENT, *supra* note 172, at § 11, cmt. c.

187. Richards v. Jain, 168 F. Supp. 2d 1195, 1203 n.4 (W.D.Wa. 2001).

188. *See id.* at 1203; Lachman, *supra* note 184, at 1. Constructive knowledge is defined as ["k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." BLACK'S LAW DICTIONARY, at 888 (4th ed. 2004). Adoption of this more expansive definition of knowledge differs from the Model Rules of Professional Conduct, which defines knowledge as "actual knowledge of the fact in question." MODEL RULES R. 1.0(f). However, the definition allows that "[a] person's knowledge may be inferred from circumstances." MODEL RULES R. 1.0(f).

189. *See* N.Y. R.P.C. 5.1(d)(2)(ii) (holding supervising or managing lawyer responsible for a lawyer's misconduct, if the superior "in the exercise of reasonable management or supervisory authority should have known of the conduct."); D.C. R.P.C. 5.1(c)(2) (holding supervising or managing lawyer responsible for a lawyer's misconduct if the superior "reasonably should know of the conduct").

resolution of an arguable question of professional duty."[190] In fact, the comment to the Rule suggests, in instances entailing a close question, that it is the supervisor who should decide the course of action.[191] The Rule thus encourages subordinate lawyers to consult superiors on close questions of law and places the onus on the superior to resolve the matter. Where the question is not a close one but would clearly constitute a violation of legal ethics, a subordinate cannot seek to excuse his or her conduct by having relied on a superior's order or approval.[192]

Significantly, Rule 5.1 has rarely been enforced, particularly against large law firm practices.[193] Professor Ted Schneyer attributes the infrequency of disciplinary proceedings against large law firm lawyers to (1) the difficulty in assigning blame to particular individual lawyers because of the nature of collective effort in legal work;[194] (2) the reluctance to scapegoat individual lawyers when any lawyer in that position might have done the same thing;[195] and (3) the "ethical infrastructure" of the firm itself, which "may have at least as much to do with causing and avoiding unjustified harm as do the individual values and practice skills of their lawyers."[196]

Based in part on these explanations for lax enforcement of regulations concerning supervisors' individual responsibility, Schneyer proposed a collective firm obligation and responsibility, modeled on the concept of corporate criminal responsibility.[197] Corporate liability is premised, in part, upon the idea that if only individuals are held liable, "owners will often have no incentive to prevent, detect, or remedy such crimes."[198] But if the corporation is instead punished and its profits diminished, owners will be incentivized to deter the unlawful behavior.[199]

A variation of Schneyer's concept of general firm responsibility may be found in Professor Irwin Miller's proposal to "expand[] the ethical duty of reasonable supervision to the firm, the breach of which constitutes the firm's independent violation justifying discipline."[200] While sharing the same objective to address a firm's responsibility for supervision of lawyers' conduct, this approach may be

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190. MODEL RULES R. 5.2(b).

191. MODEL RULES R. 5.2 cmt. 2.

192. MODEL RULES R. 5.2(a). The rule removes the possibility of a junior lawyer invoking a "Nuremberg defense" in the disciplinary process.

193. *See* Schneyer, *supra* note 101, at 1; Lachman, *supra* note 184, at 1.

194. Schneyer, *supra* note 101, at 9.

195. *Id.* at 10.

196. *Id.* Rostain has suggested that 5.1(a), the requirement that supervising lawyers "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct," "is largely unenforceable because it is difficult and likely to be perceived as unfair to hold specific individuals responsible for the structural defects of the organization." Rostain, *Partners and Power*, *supra* note 149, at 282 n.3.

197. Schneyer, *supra* note 101, at 12.

198. *Id.* at 25.

199. *Id.*

200. Miller, *supra* note 171, at 305.

more palatable given its less expansive reach and the general hostility toward a disciplinary rule that would hold a firm or law department vicariously liable for lawyers' misconduct.[201] Notably, New York and New Jersey are alone among the states to adopt this approach in their variations of Rule 5.1, holding firms, not simply managing and supervising attorneys, responsible for taking affirmative steps to ensure that lawyers in a firm conform to professional rules.[202]

In order to deter misconduct by a firm or law department and its individual lawyers, an expanded conception of lawyer responsibility is required. First, the firm or law department should be held responsible for supervision. Second, managing and supervising lawyers must be held to a constructive knowledge standard which imposes liability on them for their subordinates' misconduct if they knew, had reason to know, or should have known about the misconduct and failed to prevent the misconduct or rectify its effects.[203] Such a rule has the great advantage of prescribing "the parameters of lawyers' professional relationships in their workplaces," regardless of enforcement.[204] This sort of rule fosters an ethical infrastructure in a firm or law department in which superiors cannot ignore or avoid ultimate decisions or render plausible denials of responsibility and knowledge of conduct.[205]

V. A SPECIALIZED RULE 5.1 FOR THE OFFICE OF LEGAL COUNSEL

This Article argues that the dictates of Model Rule 5.1 do not sufficiently address supervision of OLC legal opinions. Rather, a new rule governing supervision of OLC lawyers should be adopted that includes four key elements: (1) enforceable rules that facilitate compliance with professional rules and establish a normative framework for the office, including the duty to provide independent advice; (2) structural changes to the OLC, including a two-year limitation on the tenure of the Assistant Attorney General in charge of the office, the creation of an OLC ethics adviser, and a requirement that the Attorney General sign particular opinions; (3) a constructive knowledge standard; and (4) a broad definition of supervisor, which includes Justice Department component chiefs and Executive agency legal advisers, and a requirement that the relevant supervisors be consulted for legal advice. In addition, building upon the comments to Model Rule 5.1, a supervisor may be obligated to take more

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201. *Id.*

202. N.Y. R.P.C. 5.1(a); N.J. R.P.C. 5.1(a). *See also* N.Y. R.P.C. 5.1(c) (New York also holds law firms responsible for properly supervising lawyers).

203. New York is the only jurisdiction that has adopted both of these elements—the more expansive definition of knowledge or duty to know and entity or firm responsibility. *See* N.Y. R.P.C. 5.1.

204. Rostain, *Partners and Power*, *supra* note 149, at 287.

205. Lachman, *supra* note 184, at 6 ("Absent imposition of a constructive knowledge standard under subsection (c)(2) of Rules 5.1 and 5.3, supervisors and managers practicing in a firm environment have an incentive simply not to 'know.'").

significant steps aimed at curbing the misconduct when the matter concerns a potential violation of law.[206] Also, based upon Model Rule 5.2, when an issue of professional judgment about an ethical duty arises in the course of crafting an opinion, the supervisor should be responsible for making the judgment.

Whether the supervising lawyer is within OLC, another Justice Department component, or another Executive agency, steps to rectify misconduct must include bringing concerns to the attention of officials as high as the Attorney General.[207] A duty to rectify misconduct is not mitigated by the fact that the work constitutes an OLC Opinion. As a supervising lawyer, whose duties may include reviewing and commenting on the opinion, he or she may not be "bound" by the opinion. Otherwise the delegation of authority to OLC amounts to an unacceptable abdication of responsibility by senior Executive lawyers.[208]

The proposed rule seeks to exemplify Judge James E. Baker's description of executive process in national security law. As Baker explains, "[p]rocess identifies the official responsible for the decision and for the outcome, as well as the criteria to measure effect. Without such legal process, national security decision-making might be all speed, secrecy, and silence."[209] In contrast to the torture memoranda writing process, the proposed rule would ensure a more inclusive process that involves a diversity of experts and "critical views and facts," and provide more legitimacy to the opinions by requiring that they be signed off by politically accountable actors.[210]

A. RULES ESTABLISHING NORMS AND COMPLIANCE WITH PROFESSIONAL RULES AND STRUCTURAL CHANGES

The first element of the proposed rule requires that affirmative steps be taken to craft a culture of reasonable supervision within the Office. A set of norms must be articulated to govern and provide for independent legal advice. Much of the work here has been articulated in the OLC Guidelines and Best Practices memoranda, though there remain some internal inconsistencies, as discussed above, that

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206. Similarly, OPR considered the nature of the subject in its assessment of Bybee's responsibility, observing "this was not a routine project that simply required Bybee to sign off as an administrative matter." OPR REPORT, *supra* note 3, at 256-57. The seriousness of the subject—torture—and the extreme legal positions—prosecution as an infringement of Presidential power—merit a broader view of responsibility and an obligation to correct the misconduct.

207. The obligation to "report up" the chain of command other government lawyers' misconduct is also consistent with, and may be compelled by, MODEL RULES R. 1.13(b) ("Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law."). *See also* MODEL RULES R. 1.13(b) at cmt. 9 (noting applicability of MODEL CODE OF PROF'L CONDUCT R. 1.13 to governmental organizations).

208. *See* Miller, *supra* note 171, at 277 n.80 (quoting Geoffrey C. Hazard, Jr., *Firm Culture Sets the Tone on Behavior*, NAT'L L.J., Feb. 20, 1989, at 15, 18).

209. BAKER, *supra* note 29, at 24.

210. *Id.* at 24-25.

should be addressed to make clear that adherence to independence and objectivity trumps loyalty to the Executive client.[211]

Second, these rules should be made enforceable, or, at least buttressed, through the insertion of a permanent ethics advisor within OLC. Lawyers who are uncertain about particular assignments, analyses, or other potential misconduct may notify the adviser. The adviser would serve as a knowledgeable and independent check on OLC lawyers' impulses toward approving Executive Branch positions, an approach recommended by psychologists for resisting reflexive obedience.[212] The adviser would also be authorized to audit OLC legal opinions, reviewing completed, but undisclosed memoranda for their legal ethical compliance.

The ethics advisor should be an OLC lawyer, at the Deputy Assistant Attorney General level, in order to ensure greater deference to that lawyer's views. Such insertion within OLC is necessary because federal regulations provide that OPR's findings cannot affect the functions or override the authority of OLC.[213] Currently, Justice Department employees have a regulation prescribed duty to report to their supervisor or to OPR allegations of misconduct by DOJ attorneys, which includes legal advice.[214] Supervisors may also be required to report the misconduct to OPR as well or to a higher ranking official.[215]

Third, the Assistant Attorney General may only serve as head of OLC for two years. After completion of a two-year term, the President must appoint a new chief for the office, requiring Senate confirmation. A transition at the top of the office ensures that another powerfully vested set of eyes within one particular administration reviews and evaluates the substance and quality of legal opinions issued by the office. The example of Jack Goldsmith, as an incoming, mid-administration OLC chief, and his withdrawal of particular OLC opinions, illustrates the salutary effects of imposing an internal check in the OLC opinion process.[216] Goldsmith's dispassionate and critical approach to the memoranda may be explained, in part, by the fact that he came on board as head of OLC after the opinions had been written. This retroactive examination of legal analysis ensures that poor legal advice is at least corrected, even if after the initial basis for the analysis and opinion, limiting, at least, the precedential effect of such opinions. In addition, the Senate confirmation process affords an external check on the OLC opinion process, facilitating some legislative scrutiny of OLC as

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211. *See supra* Part II.B; Part III.A.

212. BREST & KRIEGER, *supra* note 157, at 556 (citing PHILIP G. ZIMBARDO & MARK R. LIEPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 75 (1991)).

213. 28 C.F.R. § 0.129 (2005).

214. 28 C.F.R. § 45.12 (2006); U.S. ATTORNEYS' MANUAL [Hereinafter USAM], 1-400, Allegations of Misconduct by Department of Justice Employees—Reporting Misconduct Allegations.

215. USAM, *supra* note 214.

216. *See* GOLDSMITH, *supra* note 5, at 141-172 (describing his review of, and decision to withdraw, the Bybee Memorandum and Classified Bybee Memorandum).

well.[217]

Finally, formal opinions determining that laws may not constrain executive action or that authorize significant deviations in government policies must be signed off on by the Attorney General and not simply by the Assistant Attorney General for OLC. This formal allocation of responsibility to the most senior Justice Department official recognizes the policy implications of legal opinions; decisions of great political consequence must be made by *public* figures who have been vetted by Congress, and who are therefore politically and publicly accountable.[218] The designation of signing authority may be viewed by some as going beyond supervisory responsibility, and holding the Attorney General personally responsible because he is now "actively engaged in promoting conduct that may violate at least the spirit of existing law,"[219] or directing changes in government policies. At the very least, the signature requirement makes abundantly clear that the Attorney General is ordering or ratifying the suspect conduct and should therefore be viewed as a supervisor under any iteration of Model Rule 5.1(c)(1).

B. CONSTRUCTIVE KNOWLEDGE

The constructive knowledge standard is critical to ensuring that OLC's ultimately binding and often secret legal opinions are rigorously vetted. As discussed above, variants of this standard have already been introduced into the New York and District of Columbia Rules of Professional Conduct.[220] The similar concept of willful blindness has been recognized in American law in a variety of criminal and civil contexts dating back to the late-nineteenth century.[221] The constructive knowledge standard also has roots in the doctrine of command responsibility, under which superiors may be held responsible for war crimes committed by their subordinates.[222]

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217. Another, but less likely politically palatable approach might be to require that OLC heads serve terms that are not aligned with a particular administration. Thus the OLC head could, for example, be appointed by the President to serve seven or fourteen year terms, similar to the Board of Governors of the Federal Reserve. The OLC chief might then be less likely to over identify with the client and be more inclined to say no. For a contrasting view, and a generally supportive view of OLC fealty to precedent, see Morrison, *supra* note 13.

218. The formal signature requirement will also preclude future Attorneys General from claiming ignorance as a defense, a fairly implausible claim that Ashcroft has propounded. *See* Yoo, *supra* note 30, at 186-87.

219. Zacharias, *supra* note 29, at 360.

220. *See supra* Part IV, discussing N.Y. R.P.C. 5.1(d)(2)(ii) and D.C. R.P.C. 5.1(c)(2).

221. *See, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 U.S.2060, 2068-69 (2011) (holding that the doctrine of willful blindness applies in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b)). The willful blindness doctrine precludes individuals from evading statutory knowledge or willfulness requirements by intentionally keeping from themselves evidence of wrongdoing. *Id.*

222. The United States Supreme Court approved the doctrine of command responsibility in *In re Yamashita*, 327 U.S. 1, 14-16 (1946), upholding a military tribunal's charges against a Japanese general for breaching his duty "to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified." Nazi officials were also prosecuted under the doctrine. *See, e.g.*, Case No.

Under the proposed rule, superiors shall be prompted to engage in a dialogue of greater meaning with the subordinate lawyer because they may be held accountable for the opinions. When senior lawyers are provided with draft opinions concerning their areas of expertise or specialization,[223] they may be viewed as supervisors and their actions should therefore be analyzed under a standard that asks *what they knew, had reason to know, or should have known* concerning flaws in the opinion.[224] In addition, a supervisor should show the opinion to lawyers with relevant expertise, even if outside of OLC.[225] Supervisors must then take steps to correct the flaws and mitigate any consequences of the flawed legal reasoning. Supervisors may be sanctioned for the same misconduct that their subordinates may be punished for in connection with opinions. In addition, they can be sanctioned for failing to properly supervise the

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47: The Hostages Trial: Trial of Wilhelm List and Others, 8 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949). More recently, the Military Commissions Act of 2009 codified the doctrine, providing:

> Any person is punishable as a principal under this chapter who is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

§ 950q(3), Title XVIII of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84, 123 Stat. 2190, enacted October 28, 2009). International treaties have codified the doctrine as well. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, as adopted by S.C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., at art. 7(3) U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 192, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (holding superior criminally responsible for subordinate's violations of the laws or customs of war, genocide, and crimes against humanity "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."); Rome Statute of the International Criminal Court, at art. 28, U.N. Doc. A/Conf. 183/9 (1998), http://untreaty.un.org/cod/icc/statute/romefra.htm (providing criminal responsibility for a military commander or person who "(i) either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) *** failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."). For an excellent discussion of command responsibility, *see* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 120-31 (2005).

223. *See infra* Part V.C; *see also Guidelines*, *supra* note 4, at 1600 (recommending that OLC involve relevant government agencies and Department of Justice components in drafting legal opinions); Scharf, *supra* note 120, at 411 (proposing that OLC seek opinion from State Department Legal Adviser on international law matters).

224. Interestingly, it would appear that OPR, in its assessment of Bybee's responsibility, employed the duty to know standard found in the D.C. Professional Rules of Conduct and concluded that he "should have known" or "should have questioned and recognized" flaws in Yoo's reasoning. OPR REPORT, *supra* note 3, at 256-57. Nowhere, however, is Rule 5.1 invoked, and this analysis seems to have been folded into an assessment of Bybee's personal responsibility. In contrast, Margolis treated Bybee's role as a supervisor as a mitigating factor in his analysis of Bybee's responsibility. Margolis Memorandum, *supra* note 3, at 100. As noted earlier, see *supra* Part II.C., OPR also determined senior lawyers including Ashcroft and Chertoff, should have known about certain errors and should have acted, yet did not address whether they had violated Rule 5.1.

225. *See* GOLDSMITH, *supra* note 5, at 167 (observing that failure to share opinion with others, in particular the State Department, "was done to control outcomes in the opinions and minimize resistance to them").

subordinate lawyer.

Without a constructive knowledge standard, supervisors of OLC lawyers have less motivation to learn of any weaknesses in the opinions, and would, therefore, have less reason to correct deficiencies.[226] That may well explain what occurred with the torture memoranda. As Goldsmith has criticized the manner in which the opinions were crafted, Yoo's superiors—Bybee, Ashcroft, and the White House—failed to supervise him because they liked the answers and they deferred to his purported expertise in international law.[227]

A superior, high-level lawyer's desire, or sympathy, for a certain policy or programmatic outcome—liking the answers—need not, however, result in automatic acceptance of the legal opinion, though the internal and external pressures to accede to the reasoning may be great. Goldmsith's legal analysis and reevaluation of the Terrorist Surveillance Program after he arrived at OLC, and the resulting change of view as to the program's legality by Justice Department officials, including Attorney General Ashcroft and Director of the FBI Robert Mueller, demonstrate that political appointee lawyers can be swayed by correct and independent legal analysis.[228]

The surveillance program was already a signature part of counterterrorism efforts when Goldsmith raised questions about the underlying legal bases for the program.[229] In fact, the program had been renewed on a regular basis by the Justice Department, with the Attorney General certifying to its legality.[230] Yet when Goldsmith questioned the legal opinions supporting the program, an official as high as Ashcroft ultimately recognized the flaws in the opinions and

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226. There is, of course, a practical concern that superiors should not have to be involved at every level of production of opinions and know every bit of minutiae within them. That is fair; the duty to know need not apply to minutiae and marginalia. Presumably, such matters would not be the basis for ethical misconduct charges.

227. GOLDSMITH, *supra* note 5, at 169. Undoubtedly, the role of "groupthink" also explains the lack of any significant objections to the torture memoranda. Groupthink is "'a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity override their motivation to realistically appraise alternative courses of action.'" Ronald R. Sims, *Linking Groupthink to Unethical Behavior in Organizations*, JOURNAL OF BUSINESS ETHICS 11:651, 653 (1992) (quoting IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972)). A hallmark of groupthink is an internal pressure to achieve consensus resulting in selective biases that ignore countervailing views. MARGARET HEFFERNAN, WILLFUL BLINDNESS: WHY WE IGNORE THE OBVIOUS AT OUR PERIL 137 (2011). To be sure the pressure to approve torture and other extreme interrogation techniques was significant, and the legitimacy and efficacy of torture unquestioned by many policymakers and high-level lawyers at the time of the memoranda's crafting. *See, e.g.*, President Bush Speech, *supra* note 45; JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 22-27 (2006).

228. GOLDSMITH, *supra* note 5, at 177-82; *Hearing on U.S. Attorney Firings Before the Senate Judiciary Comm.*, 110th Cong. (2007) (statement of James B. Comey, Former Dep. Att'y Gen) *available at* http://gulcfac.typepad.com/georgetown_university_law/ files/comey.transcript.pdf.

229. GOLDSMITH, *supra* note 5, at 182.

230. *Hearing on U.S. Attorney Firings Before the Senate Judiciary Comm.*, 110th Cong. (2007) (statement of James B. Comey, Former Dep. Att'y Gen) *available at* http://gulcfac.typepad.com/georgetown_university_law/ files/comey.transcript.pdf.

thus the program, and refused to recertify the program.[231]

This rule seeks to replicate and systemize the incisive legal analysis and dialogue undertaken by Goldsmith and Justice Department officials on that occasion. The rule requires senior lawyers to probe deep enough so that they may be aware of the best, independent legal advice rather than the opinion which simply supports the Executive Branch action.

Requiring sustained and substantive dialogue between superiors and subordinates also addresses the problem of *sub silentio* communications common to many hierarchical organizations.[232] In many corporate offices, superiors do not provide precise instructions to subordinates, relieving themselves of knowledge, permitting them to "declare that a mistake was made."[233] Binding opinions on matters of the most sensitive nature should not be crafted out of senior Executive lawyers' manufactured ignorance or willful blindness.

While Justice Department officials Ashcroft and Chertoff took part in some discussions about the memoranda, their actions were ultimately passive.[234] Despite apparent misgivings, neither took any corrective action.[235] By increasing responsibility, they become duty bound to defend the opinions. As studies of accountability indicate, the "expectation that [people] will have to justify their decision leads people to think more carefully and logically, and not to be satisfied with using unarticulated criteria or unsubstantiated empirical judgments to arrive at answers."[236]

Under the new rule, senior lawyers would be obligated to discern deficiencies and to remonstrate with the author over the flawed analysis, and to either bring the errors to a superior's attention or refuse to sign the memoranda. It is precisely Ashcroft's and Chertoff's insufficiently engaged and passive role that the proposed rule seeks to transform into one of active engagement. Superiors need to state explicitly what they want done, direct a set of actions that accords with professional rules, and prevent or correct unethical conduct when they know of it or should have known of it.

C. EXPANDED DEFINITION OF SUPERVISOR

The new rule defines supervisor to include not only the direct supervisor and those with managerial responsibility at OLC, *i.e.*, the Assistant Attorney General who heads OLC, but also attorneys in other components of the Justice Department and the Executive Branch. For example, the Assistant Attorney

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231. *Id.*

232. *See* Rostain, *Partners and Power*, *supra* note 149, at 285.

233. *See id.* at 285 n.18 (quoting ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 201 (1988)).

234. *See supra* Part I.C.

235. *See id.*

236. BREST & KRIEGER, *supra* note 157, at 628.

General in charge of the Criminal Division, the State Department legal adviser, or the Department of Defense General Counsel, who each review OLC opinions relating to their areas of expertise, would be considered the opinion authors' supervisors as well, and would be held to the same constructive knowledge standard as other supervisors.

An emphasis on supervisory responsibility by its very nature expands the universe of concerns beyond just one bad lawyer's self-interest to look at the institution, which is represented by the supervisors. The supervisors are asked to be regulators themselves, and are not permitted to focus simply on their own "self-interest" as the critique goes.[237] By clarifying that senior lawyers bear supervisory responsibility when they review and comment on the drafting of memoranda, these lawyers will be compelled to criticize problems more forcefully and take steps to prevent the finalization of problematic advice into a formal opinion.

The expanded definition of supervisor also addresses the "fundamentally social character" and "professional culture" of the opinion drafting process,[238] recognizing that senior lawyers from government offices play significant roles in the drafting of OLC memoranda. No OLC opinion is drafted in isolation.

1. THE APATHETIC BYSTANDER PROBLEM

To be clear, the purpose of the proposed rule is not to numerically expand the people responsible. Indeed as social scientists have observed, increasing the number of people aware of a problem may diffuse responsibility for acting.[239] For example, the infamous 1964 case of Kitty Genovese, in which a woman was repeatedly stabbed and eventually killed in earshot of 38 people, may be seen not as an example of the decay of moral values, but as an instance of bystander "apathy."[240]

Studies animated in part by that dreadful incident have drawn the conclusion that people in groups who are faced with a problem will often assume that

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237. *See* Rostain, *Ethics Lost*, *supra* note 141, at 1302-03.

238. *Id.* at 1337-38.

239. *See* MALCOLM GLADWELL, THE TIPPING POINT 28 (2002); John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 8, 377–383 (1968), *available at* http://www.wadsworth.com/psychology_d/templates/student_resources/0155060678_rathus/ps/ps19.html.

240. Darley & Latane, *supra* note 239, at 377-383; *see also* Stanley Milgram & Paul Hollander, "The Murder They Heard" *The Nation*, June 15, 1964, Volume 198, No. 25 ("[D]id the witnesses remain passive because they thought it was the right thing to do, or did they refrain from action despite what they thought or felt they should do? We cannot take it for granted that people always do what they consider right. It would be more fruitful to inquire why, in general and in this particular case, there is so marked a discrepancy between values and behavior."); BREST & KRIEGER, *supra* note 157, at 544-45 (drawing conclusion from Genovese case that idleness by others leads individuals to think corrective action or intervention is inappropriate).

someone else will address the problem or that there is not in fact any problem.[241] As we also saw in the crafting of the torture memoranda, a number of attorneys who were briefed on, or reviewed, the opinions, did not take significant steps to rectify the many flaws. This failure to act may be attributed to a dangerous default position common to many in the lawyering profession, what Professor Robert K. Vischer terms "moral disengagement," "the tendency of lawyers to disclaim any responsibility for the moral dimension of the representation."[242] The lack of action can further be attributed to the likely awareness that no one else had objected strenuously to the contents of the memo.[243] Accordingly, the goal here is to ensure that the many social interactions that an opinion's drafting elicits are not ones with passive or apathetic bystanders, but instead are meaningful exchanges, in which those who are supervisors understand that they are in fact responsible and act based upon a set of ethical values. In short, they own the memoranda too; they are responsible for their subordinates' work product.

In the OLC context, concerns over bystander apathy are more pronounced because of OLC's role as expositor of Executive law. Senior lawyers advising on draft OLC opinions cannot assume a passive or apathetic role in the face of misconduct. And yet it appears this is precisely the deferential relationship OPR approved in its report in its exoneration of Ashcroft, Chertoff, and others.[244]

2. PUBLIC LEGAL OFFICIAL ACCOUNTABILITY

Expanding supervisory responsibility to include politically appointed lawyers who require Senate confirmation increases the likelihood that the underlying norms and culture of OLC will be clarified.[245] Holding political appointees accountable, who may be public figures, makes it more politically difficult for these lawyers to invoke a purely instrumentalist defense of simply serving the

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241. Gladwell, *supra* note 239, at 28; Darley & Latane, *supra* note 239, at 377-83; BREST & KRIEGER, *supra* note 157, at 539-49 (discussing literature on social conformity).

242. Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33 (2009).

243. The failure to object in the workplace is not unique to the legal profession. Employees, even at executive levels, rarely raise problems that they perceive in an organization with their superiors. *See* HEFFERNAN, *supra* note 227, at 93-94 (citing Frances J. Milliken & Elizabeth W. Morrison, et al., *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, JOURNAL OF MANAGEMENT STUDIES 40(6): 1453-1476 (2003) (finding that 85 percent of executives reported instances of being unable to raise issue or concerns with their bosses). *See also* Sims, *supra* note 227, at 652 (discussing Onyx Corporation case study and the employees' failure to express reservations).

244. *See* OPR REPORT, *supra* note 3, at 259.

245. Professor Cassandra Burke Robertson raises questions over whether lawyers involved as policymakers can ever provide independent legal advice. Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 25-27 (2009). Robertson suggests that it was Yoo's policy role that helps explain his aggressive opinions in the service of the Executive client. *Id.* In contrast, Goldsmith, who was not involved in policies, could view the memo from a dispassionate stance, and ultimately decide to withdraw the Bybee Memo. *Id.*

client and making a purely defensible legal analysis. Indeed, the public is far less likely than the professional bar to stomach professional role obligations as a basis for suspect legal analysis. By making it difficult for high level attorneys to simply hide behind legal analyses of subordinates, it requires that legal opinions be informed by a normative foundation reflecting moral values, rather than simply anchoring them in the ethic of zealous client advocacy.[246]

High level government lawyers might be expected to adhere to what Spaulding terms an "ethic of professional independence."[247] It is not unreasonable to expect that lawyers, who have been approved by Congress, and are therefore, in some sense more accountable, be more predisposed to "embody the attributes of responsibility (proportionality, detachment, sensitivity to social consequences, etc.) even when they see themselves as internally animated by the same ultimate ends held by the politicians they serve."[248] A more expansive definition of supervisor requires that senior legal officials be held responsible for maintaining an appropriate balance of these tensions.

Indeed, it is desirable that decisions of such magnitude as whether interrogation techniques constitute torture be made by lawyers at senior levels who are more accountable to the public by virtue of their public profile and political appointment.[249] These unique lawyers who straddle the intersection of law and policy (and lawmaking and policymaking) should be expected to engage in "a moral dialogue" within the Executive Branch as they craft and oversee legal opinions of great import.[250] The proposed rule ensures their participation and ultimate accountability.

This latter benefit of a more expansive and rigorous formulation of reasonable supervision would obviate the critique of the OPR report (and, by extension, the

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246. Increasing the number of lawyers involved in an opinion whose roles and responsibility are carefully delineated may also improve the quality of the opinion. Researchers have found that the measurable collective intelligence of groups can exceed that of the groups' individual members' intelligence. *See* Anita Williams Woolley, et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, SCIENCE 330, 686, 687 (2010), *available at* http://www.sciencemag.org/content/330/6004/686.full.pdf?keytype=ref&siteid=sci&ijkey=i18Ab9gV6Wr9o. Furthermore, "groups where a few people dominated the conversation were less collectively intelligent than those with a more equal distribution of conversational turn-taking." *Id.* at 688. Thus, rather than allow any one OLC lawyer to dominate in writing the opinion, the opinion should be vetted by a group of lawyers with equal say on the content of the opinion to ensure the highest caliber opinion.

247. Spaulding, *supra* note 22, at 1952.

248. *Id.* at 1952; *see also* BAKER, *supra* note 29, at 25 ("In a constitutional democracy, who makes the decision can be as important as the substance of the decision . . . . Where the capacity to decide is discretionary, good process guides decisions to appropriate actors, who are accountable and who may invoke electoral or appointive legitimacy and credibility."); BEST & KRIEGER, *supra* note 157, at 627-29 (discussing approaches to improving decision making and accountability).

249. *See* Zacharias, *supra* note 29, at 346; BAKER, *supra* note 29, at 25.

250. Vischer contends that it is "[e]specially in cases where the governing law is indeterminate," such as those the OLC often confronts, "lawyers need to be able to engage their clients in a moral dialogue, which requires both familiarity with, and sensitivity to, moral reasoning." Vischer, *supra* note 242, at 37-38. Higher level accountability makes that engagement more likely as senior lawyers are more likely to have the temerity and gravitas to confront and oppose other senior policymakers.

over-individualized nature of external regulation of lawyers in general)—that it addressed only the manner, and not the result, of the torture memoranda. By holding more lawyers responsible for ensuring that memoranda are thoroughly and independently crafted, a more substantive discourse between lawyers and policymakers will occur. At the very least, it should elicit a debate, perhaps a public one, over whether "aggressive, but defensible" is both an acceptable basis for policy and lens through which to assess legal reasoning for the Executive.

D. APPLICATION OF THE PROPOSED RULE—CASE STUDIES

Had the proposed rule been in place at the time of the drafting of the Bybee Memorandum, a broader group of supervisors would have been held responsible for the Memorandum's errors. These individuals had reason to know, or should have known, of the opinion's flaws, but failed to correct them, and also failed to mitigate their consequences.

1. MICHAEL CHERTOFF

In his review of the Bybee Memo, Assistant Attorney General and chief of the Criminal Division Michael Chertoff did not make substantial efforts to prevent the inclusion of the Specific Intent or Commander-in-Chief sections. To whatever extent he expressed disagreement with the analysis, Chertoff apparently communicated his concerns only to Yoo.[251] If he felt that this should not have been a binding legal opinion that would support interrogation techniques and potentially function as an effective declination to prosecute, he did not take sufficient steps to prevent the signing. It is not clear whether OPR considered Chertoff's responsibility under Rule 5.1. Arguably, Chertoff was not Yoo's supervisor or managing attorney because of his position within the Criminal Division, a division distinct from the OLC. However, under the proposed rule, Chertoff would have to be considered a supervisor given his hierarchical position and, more importantly, the role that he took in advising Yoo. Chertoff was sought out for his legal advice because of his authority as the head of the Criminal Division and his expertise. His role should be seen as similar to that of a partner who specializes in criminal litigation brought in to advise on the criminal ramifications of a transaction structured by the merger and acquisitions group. He cannot abdicate responsibility to supervise that work, particularly as it relates to his area of advice.

As a supervisor under the new rule Chertoff should have known that the weaknesses in the Bybee Memo lacked independence and constituted professional misconduct. He should have scrutinized the drafts at a greater level than he apparently did. And, where the memoranda veered from the rules' requirements of objectivity and candor, for example, he should have taken steps to edit them

251. *See* OPR REPORT, *supra* note 3, at 59.

accordingly, or prevented the signing of the memoranda. The national security and human rights implications of the subject of the Memo would also argue for action to be taken by Chertoff. Given the sensitive subject matter, it is hardly too taxing to require a high level lawyer to review closely the Memo and to be held accountable for failing to reasonably supervise its crafting.

In addition, Model Rule 5.2 provides that it would have been Chertoff, as the head of the Criminal Division, who should have been responsible for the advice in the memo concerning criminal matters. As a lawyer with little to no criminal experience, Yoo sought Chertoff's opinion on specific intent. Assuming this was a close question, it was Chertoff's responsibility to advise against adoption of the cramped interpretations, not Yoo's.

As for the Commander-in-Chief section, Chertoff was well aware that the CIA had sought an advance pardon for instances in which the CIA violated the torture statute. In fact, it was Chertoff who had refused as head of the Criminal Division to issue an advance pardon, yet here he was in effect acquiescing in an opinion that would be utilized to defend against charges of torture. Indeed Chertoff delivered a somewhat opaque comment, "I'm not in a position to sign onto this."[252] Taken either as refusal to sign off on the view or a denial of responsibility (*i.e.*, "it is not my place to sign this"), Chertoff did not take sufficient action to prevent these sections from being inserted as it does not appear he communicated this to anyone besides Yoo. Under the new rule it would be abundantly clear that Chertoff would be expected to know and to act by virtue of his stature, expertise, and involvement in the opinion drafting process, as well as the significance of the issue. He would be expected to bring any concerns to the attention of the Attorney General and even to the President.

2. JOHN ASHCROFT

John Ashcroft would also have failed to reasonably supervise Yoo and Bybee under the proposed rule.[253] According to the OPR Report, it would appear that Ashcroft never read the Bybee Memo.[254] However, Ashcroft was briefed on the contents of the opinion. Under the Model Rule one could plausibly contend that Ashcroft lacked actual knowledge of the weaknesses in the opinion because he never read the Bybee Memo. Under the proposed rule, however, the inquiry is whether Ashcroft had reason to know or should have known of the weaknesses. Failing to read the memorandum is no defense; he should have read the opinion,

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252. OPR REPORT, *supra* note 3, at 59.

253. *See* Power, *supra* note 13, at 89-97 (discussing Ashcroft's responsibility under Rule 5.1). Recall also that Condoleezza Rice claims she told Ashcroft "personally to review and confirm" the drafts. *See also* S. Armed Services Comm., Inquiry, *supra* note 88, at 35.

254. Under the proposed rule, the import of the Bybee Memorandum, particularly its determination that the torture statute could not limit Executive action, would have necessitated the Attorney General's signature. *See* Bybee Memorandum, *supra* note 2, at 31.

and he should have probed more deeply. His role as supervisor would be even more pronounced given that he did in fact read the Classified Bybee Memo and authorized the interrogation techniques. One critical purpose of the proposed rule is to encourage meaningful participation by superiors in the most critical legal matters. On such an important matter, Ashcroft should have read the Bybee Memorandum particularly where he would authorize the techniques. He would then be deemed to have constructive knowledge of the flaws in the underlying analysis. To the extent Ashcroft might seek to justify his authorization based upon the view that the analysis was "aggressive, but defensible," any ethics inquiry would necessarily address this explanation, thereby engaging in a discourse on the norms governing Executive law and lawyers.

E. OBJECTIONS

One concern posed by the suggested rule is that it would dilute the authority of OLC opinions by recognizing lawyers outside of OLC as supervisors and requiring that they correct analyses drafted by OLC lawyers.[255] The intent of the proposed rule is not to diminish the weight of OLC opinions; rather, the objective is to ensure that *drafts* of the opinion are not regarded as unassailable, and thereby encourage meaningful criticisms on drafts by supervisors to ensure that the ultimate and binding memo is correct.[256] This rule recognizes yet another structural limitation of OLC—not all matters can be addressed by a small office of twenty-five attorneys in secret; nor should they be.

A second related concern raised by the proposed rule is that in opening up the heretofore relatively isolated OLC lawyers to the supervision of other offices' lawyers, their objectivity and neutrality would be threatened.[257] There is perhaps potential for this, but it also sheds light on the fantasy that twenty-five lawyers can or should make the law in isolation. Indeed, as described above, it may be

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255. *See, e.g.*, Morrison, *supra* note 13, at 1462. Morrison contends that OLC's advice carries more weight than other agencies' legal opinions precisely because the latter—notwithstanding their expertise—are "in-house legal staff," with a greater self-interest in appeasing the agency client, whereas OLC is external to any agency, and thus has less pressure to ingratiate itself with the client. *Id.* at 1461-63, 1465.

256. The *Principles to Guide the Office of Legal Counsel* reflect the same ameliorative objective to ensure greater accuracy by recommending OLC's solicitation of relevant agencies' expertise. *Guidelines*, *supra* note 4, at 1609 ("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."). Obtaining alternative views helps address the potentially homogenous views of OLC lawyers, which can foster the willful blindness of an institution. *See* HEFFERNAN, *supra* note 227, at 233.

257. As with the first objection, OLC's authority is predicated upon its purported independence due to the fact that it is not aligned with an Executive agency; it is not "in-house" counsel for any one agency. Morrison, *supra* note 13, at 1461-63. Of course, OLC may be viewed as "in-house" counsel for the President, which presents tremendous countervailing pressures on its independence and objectivity, as is discussed throughout this Article.

unrealistic to think that OLC ever was, or ever will be, walled off from the influences of lawyers of other agencies. Certainly Yoo was influenced by, or at least not removed from, the views of the CIA counsel and advocates of aggressive interrogation techniques in the White House. Defining supervisor to include senior lawyers from other agencies and Justice Department components who must review or comment on the draft opinions recognizes the inherently social and collective nature of the legal process.[258] The requirement that views outside of OLC be considered ensures a modicum of diversity and dissent that may temper the risk of groupthink.[259] Entrusting additional legal officials with greater responsibility also places another potential check against undue influence from the Executive client, particularly when it is the President.

A third objection to the proposed rule is that it is predicated upon the conceit that the crafting of the memoranda reflects a normative void and was solely the product of client-centered advocacy, untethered to rule of law concerns.[260] Instead, however, the opinions might be better viewed as the outgrowth of what OLC lawyers and their superiors considered "an appropriate new legal framework," aggressively focused on modern terrorism.[261] These lawyers were not then acting without conscience, as Luban has suggested. To the contrary, Spaulding argues, "they acted as moral activists or 'cause lawyers,' seeking to vindicate, not disregard, their own strongly held moral, political, and legal views."[262] To the extent Spaulding's observation is correct, and I think there is much merit to it, what corrective or alternative norm might be expected to be generated out of a compelled discourse of superiors?

While it is true that many in the Bush Administration, including senior lawyers, believed ardently in the need for a "New Normal" in confronting twenty-first century terrorism,[263] I contend that compelling greater supervisory responsibility for the supporting secret legal analyses by lower level lawyers would have ensured modulation of the opinions. John Yoo may well have

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258. *See Guidelines*, *supra* note 4, at 1609.

259. *See* Sims, *supra* note 227, at 660-61 (discussing approaches that organizations should employ to reduce the likelihood of groupthink).

260. *See, e.g.*, Spaulding, *supra* note 22, at 1974-1975 (contending "a more complex set of sources" explains OLC's "professional failure").

261. *Id.* at 1976; *see also id.* at 1975-76 (characterizing problem as "an excess of purposivism, not an excess of narrowly client-centered lawyering").

262. *Id.* at 1975; *see also* Vischer, *supra* note 242, at 33 ("There is no reason to believe, however, that Yoo's moral intuition would have led him to reject the conclusions set forth in the memos, and there is some evidence that his moral intuition helped shape his analysis.").

263. *See, e.g.*, Ben Fenton, *Cheney Returns With Warning on 'New Way of Life,'* THE TELEGRAPH, October 27, 2001; Memorandum from Alberto Gonzales, White House General Counsel to President George W. Bush, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, 2 (January 25, 2002), *available at* http://news.findlaw.com/hdocs/docs/torture/gnzls 12502mem2 gwb2.html ("[T]he war against terrorism is a new kind of war. . . . In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions . . .").

sincerely believed in the President's wartime authority to override congressional enactments, but it is another matter to expect the Attorney General and other senior Executive lawyers to all have been prepared to "sign onto" that extreme legal framework. Nor should it be acceptable to cede this legal authority to a politically unaccountable lawyer such as Yoo.

Delineating clearly the roles of supervisors and their attendant duties to establish standards of ethical conduct and independence, but also their duties to know of, and to rectify, misconduct, ensure that politically accountable senior lawyers understand in greater detail the legal bases that purport to support any new normative foundation. As the Terrorist Surveillance Program incident illustrated, partisan senior lawyers can be dissuaded from a policy decision when it is demonstrated that the legal analysis undergirding that policy is suspect.

Holding senior lawyers responsible as supervisors under a constructive knowledge standard forces senior lawyers to determine whether an "aggressive, but defensible" standard is the appropriate norm by which to measure OLC opinions. Their own moral judgments may come into play, as Luban would encourage, and as may be appropriate given their roles in often deciding mixed questions of law and policy. Senior Executive lawyers cannot adopt an apathetic bystander position or push down OLC opinions. The memoranda do not serve as mere functionary components of a bureaucracy but rather are the effective law of the Executive. Accordingly, senior Executive lawyers must regard the memoranda in their capacities as regulators of subordinate lawyers, and as publicly accountable lawmakers, with a primary "obligation to see that justice is done."[264]

CONCLUSION

In the post-9/11 landscape, the Executive will continue to seek greater authority and power, often in secret, in the name of national security. With infrequent external checks and balances from the other branches of government, an effective, internal executive process is critical to guaranteeing the legality of Executive actions. The OLC torture memoranda demonstrate that the process is deficient. These opinions, and the aftermath of proposed OLC reforms and ethics investigations, evidence too great a concern for the prerogatives and authority of the Executive, particularly during crisis periods, at the expense of the best, independent legal advice. Holding senior lawyers accountable for the work of their OLC subordinates is critical to ensuring that opinions are of the finest and most independent quality.

A precisely defined executive process is necessary to ensure that the Executive is provided independent legal advice rather than relying solely upon amorphous OLC cultural norms and professional integrity. However, a limited focus on

264. *Berger v. United States*, 295 U.S. 78, 88 (1935).

professional misconduct by the individual OLC lawyers who draft the opinions is insufficient. By requiring a two-year rotation of OLC chiefs, installing an ethics adviser within OLC, and requiring the Attorney General's signature on novel opinions, the proposed rule would establish a process better suited to providing independent advice. These structural changes would better insulate legal opinions from the tendency to automatically approve Executive positions and would delineate greater authority and responsibility to more accountable actors. In addition, the new rule would make clear the obligation to provide independent legal advice and widen the zone of responsibility for OLC subordinates' opinions, holding senior lawyers responsible for unethical conduct when they had reason to know, or should have known, of the deficiencies, and failed to correct the errors or rectify the consequences. The proposed rule and process make clear that OLC cannot write a blank check for the Executive Branch.