



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Torture Whitewash by Andy Worthington

The long-awaited report by the OPR (the Justice Department’s Office of Professional Responsibility) into the conduct of the lawyers in the OLC (Office of Legal Counsel), regarding their role in approving the use of torture, has finally been published ([PDF](#)).

The report largely focuses on [two memos dated August 1, 2002](#), and [a third dated March 14, 2003](#). Widely known as the “torture memos,” these notorious documents sought to redefine torture so that it could be used by the CIA (and by the U.S. military in the March 2003 memo), and the report concludes that the primary author of the memos, John Yoo, an OLC lawyer who is now a law professor at Boalt Hall, the University of California’s School of Law in Berkeley, and the senior official who signed the August 2002 memos, Assistant Attorney General Jay S. Bybee, who is now a judge in the Ninth Circuit Court of Appeals, were guilty of “professional misconduct.”

As the report explained, in no uncertain terms:

Based on the results of our investigation, we concluded that former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.

We found that AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.

A footnote added, “Pursuant to Department policy, we will notify bar counsel in the States where Yoo & Bybee are licensed” — with the clear sub-text that these notifications would almost certainly lead to both men being disbarred, and that Bybee might find himself impeached. These actions might then have led to the possibility of prosecutions taking place for those who

engineered America's emergence, in the summer of 2002, as a nation that officially sanctioned the use of torture.

Unfortunately, as [Newsweek](#) reported three weeks ago, the devastating conclusions of the report — which took four years to complete — were swept aside by Associate Deputy Attorney General David Margolis, who downgraded the report's conclusions. In a 69-page memo to Attorney General Eric Holder, dated January 5, 2010 ([PDF](#)), Margolis, a career official who has worked at the DoJ for 17 years and has [a history of shielding officials](#) from allegations of misconduct, asserted that Yoo and Bybee had only shown “poor judgment.” As a result, two slaps on the wrist are all that have emerged from an investigation into one of the darkest periods of modern American history.

This, of course, is disgraceful. One of the techniques approved by Yoo and Bybee was waterboarding, a form of controlled drowning that was referred to by the torturers of the Spanish Inquisition as “tortura del agua.” Even more significantly, both Barack Obama and Attorney General Eric Holder are on record as stating that waterboarding is torture. As I explained in [an article last March](#):

In [an interview with ABC News](#) on January 11, [2009,] President-Elect Obama responded to a recent CBS interview with Dick Cheney, in which the then-Vice President had sounded his usual alarms about the need for “extraordinary” policies to deal with terror suspects, by stating, “Vice President Cheney I think continues to defend what he calls extraordinary measures or procedures and from my view waterboarding is torture. I have said that under my administration we will not torture.”

Two days later, at his confirmation hearing, Eric Holder reinforced Obama's opinion. Noting, as the [New York Times](#) described it, that waterboarding had been used to torment prisoners during the Inquisition, by the Japanese in World War II, and in Cambodia under the Khmer Rouge, and adding, “We prosecuted our own soldiers for using it in Vietnam,” he stated unequivocally, “Waterboarding is torture,” and [reiterated his opinion](#) [on March 2, 2009], in a speech to the Jewish Council of Public Affairs in Washington. “Waterboarding is torture,” he said again, adding, “My Justice Department will not justify it, will not rationalize it and will not condone it.”

As a result of Margolis' intervention, however, it now appears that, although torture was clearly authorized, *no one* is to be held accountable.

Moreover, although Margolis tried to claim in his memo that it was important to remember that Yoo and Bybee were working to prevent another major terrorist attack, which led him to claim, “Among the difficulties in assessing these memos now over seven years after their issuance

is that the context is lost,” this is a pitiful argument. OPR lawyers are obliged to provide objective legal advice to the Executive branch on all constitutional questions, and, as OPR head Mary Patrice Brown explained in [an early draft of the report](#), “Situations of great stress, danger and fear do not relieve department attorneys of their duty to provide thorough, objective and candid legal advice, even if that advice is not what the client wants to hear.”

Even more significant is Mary Patrice Brown’s reference to “the client.” Although George W. Bush evades scrutiny in the report, former Vice President [Dick Cheney](#) is mentioned as putting “great pressure” on the OLC regarding revised memos issued in May 2005, and consultations with Cheney’s Legal Counsel, [David Addington](#), and White House Deputy Counsel Tim Flanigan are mentioned in 2002. It is surely in the context of this relationship between the OLC and the White House that the report’s authors stated, damningly, “We also found evidence that the authors of the Bybee Memo and the Yoo Memo tailored their analysis to reach the result desired by the client.”

Anyone with any doubts regarding how closely Yoo worked with the White House should read Philippe Sands’ book [Torture Team](#), which establishes that, following the 9/11 attacks, a “War Council” of lawyers met regularly to plan and implement the legal strategies they wanted for the “war on terror” — largely without any outside consultation — and that this “War Council” consisted of just six men: Addington, White House Counsel Alberto Gonzales, Flanigan, Yoo, [William J. Haynes II](#), the Pentagon’s general counsel, and his deputy, Daniel Dell’Orto.

The report’s authors added that, “In many instances the authors [of the memos] exaggerated or misstated the significance of cited legal authority, failed to acknowledge or fairly present adverse authority, took inconsistent approaches to favor the desired result, and advanced convoluted or frivolous arguments.” They had no hesitation in concluding, as a result, that, when it came to tailoring their advice to a preordained outcome —rather than providing objective advice — Yoo and Bybee “violated their duty” under the OLC’s rules, “to provide a straightforward, candid and realistic assessment of the law.”

This was not all. Elsewhere in the report, the authors also expanded on the “numerous failures of scholarship and analysis,” which resulted in violations of the OLC’s rules. “While it may be that no single one of those failures, considered in isolation, would compel a finding of less than competent representation,” they wrote, “we concluded that the many instances of unsupported arguments, incomplete analysis, failure to discuss adverse authority, and mischaracterization of precedent compelled the conclusion that the authors of the Bybee Memo and the Yoo Memo failed to meet their obligations [under the OLC’s rules] and thus committed misconduct.”

Furthermore, the authors of the report also drew on damning criticisms made by Michael Mukasey, the attorney general from November 2007 until Bush left office, and by other senior OLC officials, after Yoo and Bybee had left the department: in particular, Jack Goldsmith, the assistant attorney general from 2003 to 2004, who [attracted the wrath of the White House](#) by

ordering the “torture memos” to be withdrawn; Daniel Levin, who served as acting AAG from 2004 to 2005; and even Stephen Bradbury, the acting AAG from 2005 to 2007 (and the senior appointed official overseeing the OLC until Bush left office), who managed to escape censure for his own role in the torture program, as the author of [three vile memos](#) endorsing “enhanced interrogation” in May 2005. As the authors explained, “Mukasey acknowledged that the Bybee Memo was ‘a slovenly mistake,’ even though he urged us not to find misconduct.” They also stated:

Our view that the memoranda were seriously deficient was consistent with the comments made by some of the former Department officials we interviewed, even though those individuals would not necessarily agree with some of our findings in this matter. Levin stated that when he first read the Bybee Memo, “[I had] the same reaction I think everybody who reads it has — ‘this is insane, who wrote this?’” Jack Goldsmith found that the memoranda were “riddled with error,” concluded that the key portions were “plainly wrong,” and characterized them as a “one-sided effort to eliminate any hurdles posed by the torture law.” Bradbury told us that Yoo did not adequately consider counter arguments in writing the memoranda and that “somebody should have exercised some adult leadership” with respect to Yoo’s section on the Commander-in-Chief powers [a section in which Yoo claimed that the president, as commander-in-chief, could override the federal law banning torture].

So what happens next? Both the [New York Times](#) and the [Washington Post](#) tried to claim at the weekend that the publication of the report spells the end of attempts to hold to account senior Bush administration officials and lawyers who turned America into a “torture nation.” The *Post* called it “the end of a 5-year internal battle” at the Justice Department, and the *Times* claimed that it “brings to a close a pivotal chapter in the debate over the legal limits of the Bush administration’s fight against terrorism and whether its treatment of Qaeda prisoners amounted to torture.”

This is nonsense, however. Margolis’ intervention may shield Yoo and Bybee in the short term, but he was unable to quash the report’s devastating findings, and it is clear that the DoJ will now find itself under close scrutiny. As soon as the report was issued, Rep. John Conyers (D-Mich.), the chair of the House Judiciary Committee, who [made the documents publicly available](#) as soon as they were provided to him by the DoJ, [stated](#):

For years, Bush administration officials who approved torture and abuse of detainees have hidden behind legal memos issued by the Department of Justice’s

Office of Legal Counsel. Today's report makes plain that those memos were legally flawed and fundamentally unsound. Even worse, it reveals that the memos were not the independent product of the Department of Justice, but were shaped by top officials of the Bush White House. It is nothing short of a travesty that prisoners in U.S. custody were abused and mistreated based on legal work as shoddy as this. It is a blight on our national honor.

The Office of Legal Counsel has a proud tradition of providing independent, high-quality legal advice to the executive branch. Today's report makes clear that the lawyers who wrote the torture memos did not live up to that tradition, and dishonored their office and the entire Department of Justice. While the report concludes that the lawyers did not breach their minimum professional obligations, I certainly hold top lawyers at OLC to a higher standard than that, as all Americans should.

Conyers promised to hold hearings in the near future, but was beaten to it by Sen. Patrick Leahy (D-Vt.), of the Senate Judiciary Committee, who set a date for hearings on Friday (February 26). In [a statement](#), Sen. Leahy explained:

The report from the Office of Professional Responsibility is a condemnation of the legal memoranda drafted by key architects of the Bush administration's legal policy, including Jay Bybee and John Yoo, on the treatment of detainees. The deeply flawed legal opinions proffered by these former OLC officials created a "golden shield" that sought to protect from scrutiny and prosecution the Bush administration's torture of detainees in U.S. custody. In drafting and signing these unsound legal analyses, OLC attorneys sanctioned torture, contrary to our domestic anti-torture laws, our international treaty obligations and the fundamental values of this country.

I have serious concerns about the role each of these government lawyers played in the development of these policies. I have said before that if the Judiciary Committee, and the Senate, knew of Judge Bybee's role in creating these policies, he would have never been confirmed to a lifetime appointment to the federal bench. The right thing to do would be for him to resign from this lifetime appointment.

As a United States Senator, as a former prosecutor, and as an American citizen, I am offended by the premeditated approach taken by former high-ranking officials in

the Office of Legal Counsel in constructing the legal underpinnings of seriously flawed national security policies.

Clearly, then, we have not yet heard the end of this story, and unless the United States is to become a country in which torture was authorized, but no one was actually responsible, this is as it should be. It may take years, but those who authorized torture must be held accountable, and claims that cynical lawyers like John Yoo were responsible only for exercising “poor judgment” cannot be allowed to overrule the OPR Report’s far more damaging conclusions.

Note: As well as releasing the final report, “Investigation Into The Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Terrorist Suspects,” dated July 23, 2009, and Margolis’ memo, the DoJ also released two earlier drafts, the first dated December 22, 2008 ([PDF](#)) and the second dated March 4, 2009 ([PDF](#)), as well as John Yoo’s responses to the second draft ([PDF](#)) and the final report ([PDF](#)), and Jay Bybee’s responses to the second report ([PDF](#)) and the final report ([PDF](#)).

Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America’s Illegal Prison](#) (published by Pluto Press) and serves as policy advisor to the Future of Freedom Foundation. Visit his website at: www.andyworthington.co.uk.

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