INTRODUCTION: A TALE OF TWO MEMOS

In the fall of 2001, the Bush administration was looking for a place to imprison and interrogate alleged al Qaeda members away from the prying eyes of other countries and insulated from the supervision of United States courts. The Defense Department believed that the Naval Base at Guantánamo Bay, Cuba might work, so it asked the Justice Department’s Office of Legal Counsel (OLC) whether federal courts would entertain habeas corpus petitions filed by prisoners at Guantánamo, or whether they would dismiss such petitions as beyond their jurisdiction. On December 28, 2001, OLC responded with a thorough and balanced analysis of how the federal courts were likely to resolve the jurisdictional question. The memorandum prepared by OLC explained the arguments against such jurisdiction, but it also explored possible strengths in the opposing position. The memorandum predicted that
federal courts would not exercise jurisdiction but explained the risk of a contrary ruling.5 Acting in reliance on this memorandum, the government started imprisoning and interrogating alleged al Qaeda members at Guantánamo the following month, cognizant of the risk that a federal court might find habeas jurisdiction.

In 2004, the Supreme Court considered habeas corpus claims by prisoners at Guantánamo, and reached a result contrary to that predicted by the Justice Department memorandum, ruling that the district court did have jurisdiction.6 The fact that the Court came to a different conclusion than that advanced by OLC does not, however, mean that the OLC attorneys failed to fulfill their professional obligations to their client. The authors appropriately explained the risk of an adverse decision, and they provided enough information for the client to understand that risk and make decisions accordingly.7

Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client.8 The authors of the Guantánamo Memorandum certainly met that standard.9

During the summer of 2002, CIA officials had grown frustrated with the interrogation of al Qaeda member Abu Zubaydah, who had stopped cooperating with his interrogators.10 The CIA wanted to use harsher

5. Id. at 1 (“We conclude that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantánamo Bay, Cuba]. Nonetheless, we cannot say with absolute certainty that any such petition would be dismissed for lack of jurisdiction.”).


7. See Guantánamo Memorandum, supra note 2, at 1 (“While we believe that the correct answer is that federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States, there remains some litigation risk that a district court might reach the opposite result.”).

8. See infra Section II.

9. 1 GEOFFREY C. HAZARD, JR. & WILLIAM W. HODES, THE LAW OF LAWYERING §3.2, at 3-5 (3d ed. 2001) (“A thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong. . . . On the other hand, . . . failure to ascertain readily accessible precedents . . . may . . . be a [violation] of [Model] Rule 1.1.”) [hereinafter HAZARD & HODES].

10. Michael Hirsh, John Barry & Daniel Klaidman, A Tortured Debate, NEWSWEEK, June 21, 2004; Dana Priest, CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review, WASH. POST, June 27, 2004, at A1 (“The memorandum was drafted . . . to help the CIA determine how aggressive its interrogators could be during sessions with suspected al Qaeda members.”).
interrogation techniques against Zubaydah, and it sought the imprimatur of the Justice Department for those techniques.\textsuperscript{11} In particular, agency officials were concerned that certain harsh techniques might violate the international Convention Against Torture and implementing federal legislation, which makes it a crime to engage in torture under color of law outside the United States.\textsuperscript{12} White House Counsel Alberto Gonzales commissioned OLC to provide legal advice about the scope of the torture statute.\textsuperscript{13} Gonzales specifically asked that OLC explore two of the elements of the crime of torture: (1) infliction of severe pain or suffering and (2) specific intent.\textsuperscript{14} Deputy Assistant Attorney General John Yoo drafted a memorandum that was signed in August 2002 by Assistant Attorney General Jay Bybee, and which will be referred to here as the “Bybee Memorandum.”\textsuperscript{15} The memorandum

\begin{enumerate}
\item David Johnston, Neil A. Lewis & Douglas Jehl, \textit{Nominee Gave Advice To C.I.A. on Torture Law}, N.Y. TIMES, Jan. 29, 2005, at A1 (“C.I.A. lawyers went to extraordinary lengths beginning in March 2002 to get a clear answer from the Justice Department about which interrogation techniques were permissible in questioning Abu Zubaydah and other important detainees. . . . ‘Nothing that was done was not explicitly authorized,’ a former senior intelligence said.”).
\item Mike Allen & Dana Priest, \textit{Memo on Torture Draws Focus to Bush; Aide Says President Set Guidelines for Interrogations, Not Specific Techniques}, WASH. POST, June 9, 2004, at A3. 18 U.S.C. §2340A provides: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” Torture within the United States could already be prosecuted under existing federal and state laws prohibiting assault, maiming, and other forms of brutality. The extraterritorial reach of the federal torture statute was necessary to implement the Convention Against Torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].
\item \textit{Id.} at 3 (“You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering.”).
\item John Yoo, \textit{Behind the 'Torture Memos'; As Confirmation Hearings Near, Lawyer Defends Wartime Policy}, SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1P (acknowledging that he “helped draft” the Bybee Memorandum); Toni Locy & Joan Biskupic, \textit{Interrogation Memo To Be Replaced}, USA TODAY, June 23, 2004, at 2A (identifying Yoo as “the memo’s principal author”).
\end{enumerate}

There have been news reports of another August 2002 memorandum on torture issued by a different office within the Justice Department, analyzing the legality of specific proposed interrogation techniques. This other torture memorandum has not yet been leaked or otherwise made available to the public.
defined torture narrowly, developed defenses that might be raised in any future
torture prosecution, and asserted that the President could authorize torture
despite the treaty and statute prohibiting it. The government apparently acted
in reliance on this memorandum in setting interrogation policies for alleged al
Qaeda members.  

The Bybee Memorandum purported to provide objective legal advice to
government decision makers. Nevertheless, its assertions about the state of
the law are so inaccurate that they seem to be arguments about what the
authors (or the intended recipients) wanted the law to be rather than
assessments of what the law actually is. The following section will describe
the substantive inaccuracies in the memorandum. Section II will examine the
legal ethics implications of those inaccuracies, with particular attention to the
distinction between legal advocacy and legal advice.

I. THE SUBSTANTIVE INACCURACIES IN THE BYBEE MEMORANDUM

The Bybee Memorandum consists of 50 pages of text supporting three
assertions: (1) the federal criminal statute prohibiting torture is very narrow in
The memorandum is divided into six sections. The first four sections address the scope of the torture statute and argue that only treatment that results in the most extreme pain constitutes torture. Section I examines the torture statute itself. Section II, which examines the ratification history of the Convention Against Torture, argues that the legal distinction between torture, on the one hand, and cruel, inhuman, and degrading treatment, on the other, supports the narrow definition of torture claimed in the first section. Section III, which examines cases decided under the Torture Victims Protection Act, and Section IV, which examines European and Israeli court decisions, also discuss the distinction between torture and cruel, inhuman and degrading treatment. Section V makes the separation of powers argument, and Section VI describes the defenses of necessity and self-defense and asserts that they will be available to interrogators who are prosecuted under the torture statute.

The first major inaccuracy is in the memorandum’s assertion that the federal criminal statute prohibiting torture applies only where a government official specifically intends to and actually causes pain so severe that it “rise[s] to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions.” This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture. It comes from a Medicare statute setting out the conditions under which hospitals must provide emergency medical care. That statute mentions severe pain as one possible indicator that a person is in a condition calling for such care. The statute goes on to define...
“emergency medical condition” as one in which failure to provide medical care could result in “serious jeopardy” to an individual’s health, “serious impairment to bodily functions,” or “serious dysfunction of any bodily organ or part.” The Bybee Memorandum twists this legal standard, and asserts that “severe pain” occurs only in connection with a “serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”22 It purports to give interrogators wide latitude to cause any kind of pain short of that associated with “death, organ failure, or serious impairment of body functions.”

A second major inaccuracy is found in the memorandum’s discussion of defenses available to those who might be prosecuted for violating the federal torture statute.23 The Bybee Memorandum discusses two affirmative defenses – necessity and self-defense – that could justify an interrogator’s decision to torture a prisoner in order to extract information about al Qaeda’s plans to attack other Americans. The memorandum’s analysis of the self-defense option is somewhat measured. It acknowledges that the self-defense option would be unconventional in two ways. First, the interrogator would not engage in torture to prevent harm to the interrogator himself. Rather, he would be preventing harm to other Americans who could be injured by a terrorist attack.24 Second, the prisoner to be tortured would not actually be in a position to harm anyone at all. Instead, it is assumed that he would have information about an attack plan that would be carried out by others.25 The Bybee Memorandum asserts that a government official charged with violating the torture statute could make a self-defense (or defense of another) argument, but it does not assert that such an affirmative defense...
would necessarily succeed. The memorandum also asserts that an interrogator charged with torture might well be able to gain an acquittal using the necessity defense. Yet as David Luban has noted, the memorandum never mentions the fact that the Convention Against Torture itself seems to proscribe such a defense when it declares that “[n]o exceptional circumstances whatsoever, whether a state of war or . . . any other public emergency, may be invoked as a justification of torture.” At a minimum, the Bybee Memorandum leaves the reader with the false impression that it is likely that an interrogator will be able to avoid a torture conviction by claiming the necessity defense.

A third major inaccuracy is found in the memorandum’s discussion of presidential authority. The Bybee Memorandum asserts that the President can, at least under some circumstances, authorize torture despite the federal statute prohibiting it. This position is based on an expansive view of inherent executive power, but the memorandum does not even mention – let alone address – Youngstown Sheet & Tube Co. v. Sawyer, the leading Supreme Court case on this aspect of separation of powers. Youngstown, colloquially known as the Steel Seizure Case because it invalidated President Truman’s seizure of the nation’s steel mills during the Korean War, seriously undermines any claim of unilateral executive power. The Bybee Memorandum does not even acknowledge that the Constitution explicitly grants to Congress the powers to define “Offences against the Law of Nations; . . . make Rules concerning Captures on Land and Water; . . . [and] make Rules for the Government and

26.  See id. at 42 (“a defendant could . . . appropriately raise a claim of self-defense”); id. (“we assume self-defense can be an appropriate defense to an allegation of torture”); id. at 43 (“Under the current circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another. . . . Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made”); id. at 45 (“we conclude that a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack”); id. at 46 (“we believe that [the defendant] could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack”).

27.  Id. at 40 (“It appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a Section 2340A violation.”); id. at 41 (“While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances could support such a defense.”).

28.  Luban, supra note 19, at 66 (quoting Article 2(2) of the Convention Against Torture, supra note 12).


Regulation of the land and naval Forces,” all of which suggest that Congress was well within its constitutional authority in banning torture.

On each of these three points – the threshold of pain that constitutes torture, the necessity defense, and unilateral executive power – the Bybee Memorandum presents highly questionable legal claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors – including courts – would reject them. Despite these obvious weaknesses, the memorandum apparently became the basis for the CIA’s use of extreme interrogation methods, including “waterboarding,” and shaped Defense Department interrogation policy. In fact, much of the memorandum was used verbatim in an April 2003 Defense Department Working Group Report on interrogation methods, which then became the basis for Defense Department policy.

The legal analysis in the Bybee Memorandum was so indefensible that it could not – and did not – withstand public scrutiny. Press reports about and excerpts from the memorandum began to surface in early June, 2004, and there was a wave of criticism. The Justice Department resisted congressional pressure to turn over the memorandum, insisting that the President had a right to confidential legal advice. When The Washington Post posted the complete text of the memorandum on its Web site, the wave of criticism turned into a flood. Eight days later, the Bush administration disavowed the memorandum.
memorandum.\textsuperscript{38} Six months later, in December 2004, OLC issued a new torture memorandum that offered legal analysis that was more accurate, repudiating the Bybee Memorandum’s analysis of “specific intent” and “severe pain,” adopting a broader definition of torture, and omitting the troublesome sections claiming inherent presidential power to disregard the torture prohibition and the ready availability of criminal defenses to torture charges.\textsuperscript{39}

\section*{II. Ethical Analysis of the Bybee Memorandum}

The substantive inaccuracies in the Bybee Memorandum are so serious that they implicate the legal ethics obligations of its authors.\textsuperscript{40} In analyzing the legal ethics implications, it is important to make three preliminary observations. First, lawyers who work for the federal government are subject to state ethics rules. In the late 1980s and early 1990s, Attorneys General Richard Thornburgh and Janet Reno asserted that the Constitution’s Supremacy Clause gave the Justice Department the authority to exempt its lawyers from state ethics rules.\textsuperscript{41} In 1998, however, Congress passed the McDade Amendment, making it clear that federal government lawyers must...
comply with state ethics rules in the states where they represent the government. Both Jay Bybee and John Yoo were subject to the D.C. Rules of Professional Conduct. Bybee is licensed by the District of Columbia and thus was and is directly subject to those rules. Yoo is licensed by Pennsylvania but was subject to the D.C. Rules by operation of the McDade Amendment, because he practiced in D.C. when he worked for the Office of Legal Counsel.

Second, these OLC lawyers had as their client an organization – the executive branch of the United States government – rather than any individual officeholder. Although White House Counsel Alberto Gonzales requested the Bybee Memorandum, he was not the client. Instead, he was simply a constituent of the organizational client. Ordinarily, lawyers must accept the decisions made by such constituents when those constituents are authorized to act on behalf of the organization. But where a lawyer knows that a constituent is acting illegally and that conduct could be imputed to the organization, the lawyer must take action to prevent or mitigate that harm.

42. 28 U.S.C. § 530B(a) (2000). The McDade Amendment provides:
An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

43. See http://www.dcab.org/find_a_member (indicating that Bybee has been a member since December 21, 1981).

44. When visited on June 16, 2005, the Web site for Boalt Hall School of Law at the University of California at Berkeley, http://www.law.berkeley.edu/cenpro/ils/faculty/YooCV.PDF, indicated that Yoo is licensed by the Commonwealth of Pennsylvania. That information is no longer posted at the site.

An important but sometimes overlooked aspect of the McDade Amendment is that it subjects federal government lawyers to the rules not of their state of licensure, but those of each state where they are practicing on behalf of the government. See, e.g., Zacharias & Green, supra note 41, at 225 n.179 (assuming, incorrectly, that the McDade Amendment makes federal prosecutors subject to regulation of state where they are licensed). Thus, a federal government lawyer licensed in Pennsylvania but working for the Justice Department in Washington, D.C. is subject to the D.C. Rules of Professional Conduct.


46. Id. cmt. 4 (“When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.”).

47. Id. Comment 4 to Rule 1.13 sets out the lawyer’s obligations:
[When the lawyer knows that the organization may be substantially injured by tortious or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization or that might result in substantial injury to the organization . . . it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the
Where the constituent can exercise control over the lawyer’s future career, taking such action may jeopardize the lawyer’s advancement. Nevertheless, the legal ethics rules require lawyers to take action to protect entity clients from harm committed by their constituents.

Third, in analyzing the performance of the lawyers who wrote the Bybee Memorandum, it is important to analyze whether they were acting as legal advisors or as legal advocates. Different ethics rules apply to these two distinct functions. The role of the lawyer as an advocate before a tribunal is a familiar one. In that role, the lawyer may make any legal argument as long as it is not frivolous. She does not need to give the court her honest assessment of how the law applies in the case. Her only obligation of candor regarding legal argument is that if her opponent fails to mention directly adverse controlling authority, she must bring it to the tribunal’s attention.

When a lawyer gives legal advice, on the other hand, she has a professional obligation of candor toward her client. One finds this obligation in Rule 2.1, which states that in representing a client, “a lawyer shall . . . render candid advice.” In advising a client, the lawyer’s role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her best assessment of what

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48. D.C. Rule of Professional Conduct 3.1 states: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.” D.C. RULES, supra note 45, R. 3.1 ABA Model Rule 3.1 is identical. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003) [hereinafter ABA MODEL RULES]; see also FED. R. CIV. PROC. 11(b)(2) (“By presenting to the court . . . a pleading, . . . an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the . . . legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .”)..

49. D.C. Rule 3.3(a)(3) states: “A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client . . . .” D.C. RULES, supra note 45, R. 3.3(a)(3). ABA Model Rule 3.3(a)(2) is nearly identical. ABA MODEL RULES, supra note 48, R. 3.3(a)(2).

50. D.C. RULES, supra note 45, R. 2.1. ABA Model Rule 2.1 is identical. ABA MODEL RULES, supra note 48, R. 2.1.
the law requires or allows. Similarly, Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.

David Luban has described this obligation of candor in the following way: In many areas of law, there is not absolute agreement among lawyers about the state of the law. In those situations, knowledgeable lawyers’ opinions about the law usually fall somewhere in a range similar to the familiar bell curve. If a lawyer advises a client that the law is at an extreme end of that bell curve (rather than that the state of the law is where most knowledgeable lawyers would view it), then the obligation to give candid legal advice requires the lawyer to inform the client that the lawyer’s interpretation is at the extreme end and not shared by most knowledgeable lawyers.

51. Comment 1 to D.C. Rule 2.1 states that “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” D.C. RULES, supra note 45, R. 2.1 cmt. 1. Model Rule 2.1 is identical. ABA MODEL RULES, supra note 48, R. 2.1. cmt. 1. A leading treatise on legal ethics explains:

[A] client may consult a lawyer to have her own preconceptions confirmed rather than to seek genuine advice. A lawyer may be tempted to play sycophant to such a client, to ensure continued employment. Rule 2.1 prohibits such an approach, however, first by requiring that a lawyer’s advice be candid; and second, by requiring the lawyer to exercise judgment that is both independent and professional.

1 HAZARD & HODES, supra note 9, §23.2; see also ABA/BNA Lawyers’ Manual on Professional Conduct 704 (“lawyers must . . . resist the urge to tell the client only what the client wants to hear and instead must give honest and straightforward advice, regardless of how unpleasant or unpalatable that advice might be.”); Timothy L. Hall, Moral Character, the Practice of Law, and Legal Education, 60 MISS. L.J. 511, 533 (1990) (“Rule 2.1 relieves an attorney of any notion that serving as a client’s ‘yes man’ is required.”).

52. D.C. Rule 1.4(b) states: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” D.C. RULES, supra note 45, R. 1.4(b). Model Rule 1.4(b) is identical. ABA MODEL RULES, supra note 48, R. 2.1. See 1 HAZARD & HODES, supra note 9, §7.4 (“If the client is to make turning-point decisions about his legal affairs, he must be armed with sufficient information for intelligence decisionmaking.”); Bilder & Vagts, supra note 31, at 693 (“unless public officials are given competent, objective, and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent policy judgments or properly balance the national interests involved”).

53. Telephone conversation with David Luban, Dec. 15, 2004. See David Luban, Selling Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President’s Torture Lawyers, SLATE, Feb. 14, 2005 (“Independence means saying what the law is – as mainstream lawyers and judges understand it – regardless of what the client wishes it to be. Candor requires lawyers with eccentric theories to warn their clients whenever their legal advice veers away from the mainstream.”), available at www.slate.com/id/2113447; see also W. Bradley Wendel, Professionalism as Interpretation, 99 NW. U.L. REV. 1167 (2005) (arguing that “professionalism” requires lawyers who advise clients contrary to the views of the prevailing professional interpretive community to warn their clients of such inconsistency).
In giving legal advice, a lawyer may provide advice that is contrary to the weight of authority, spinning out imaginative, even “forward-leaning” legal theories for the client to use. When doing so, however, the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion. A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations.

If a lawyer fails to candidly advise a client, she harms the client and may harm others affected by the client’s actions. A lawyer who inaccurately advises a client that a proposed legal action is illegal may be foreclosing an option that should be open to the client’s consideration, usurping the client’s role in an attempt to limit the client’s options. Similarly, a lawyer who inaccurately advises a client that proposed illegal action is legal also harms the client. On one level, a client may want to hear that conduct she wants to engage in is legal, since that makes it easier for the client to engage in the desired activity. But the client may face serious long-term consequences for

An alternative approach would allow a government lawyer to opine that the state of the law is at the extreme as long as she publicly explains and defends that position, allowing the public to assess and critique it. See The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association, 85 AM. J. INT’L L. 358, 363 (1991) (“the most effective check on government advocacy of dubious or irresponsible legal positions will be the willingness of the Legal Adviser to publicly state, defend and be accountable for such arguments before other officials and Congress, the public and the community of international lawyers”).

54. See Golden, supra note 1 (“‘Legally, the watchword became “forward-leaning,”’” said a former associate White House counsel, Bradford Berenson, “by which everybody meant: ‘We want to be aggressive. We want to take risks.'”); Michael Isikoff, Daniel Klaidman & Michael Hirsh, Torture’s Path, NEWSWEEK, Dec. 27, 2004 (quoting Alberto Gonzales as asking a meeting of White House and Justice Department lawyers regarding the preparation of this memo, “Are we forward-leaning enough on this?”) An unnamed lawyer who participated in the meeting recalled, “That’s a phrase I heard Gonzales use many times.” Id. But, at his confirmation hearings as the nominee to be Attorney General, Gonzales denied using that phrase.

SEN. KENNEDY: . . . did you ever talk to any members of the OLC while they were drafting the memoranda? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture? Did you ever, as reported in the newspaper?

MR. GONZALES: Sir, I don’t recall ever using the term sort of leaning forward in terms of stretching what the law is.

Panel I of a Hearing of the Senate Judiciary Committee: The Nomination of Alberto Gonzales To Be Attorney General, FEDERAL NEWS SERV., Jan. 6, 2005.

such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer’s false assurance that the conduct is legal.

The harm to the client from failing to advise about the illegal character of proposed conduct may be even greater when the client is an entity rather than an individual. Indeed, a lawyer working for an entity client has an enhanced obligation to guard the interests of the entity against wrongdoing by the entity’s constituents.56

The Bybee Memorandum purports to offer legal advice. Its authors, Jay Bybee and John Yoo, had an obligation to be candid with their client, the executive branch. The constituent who requested the Bybee Memorandum, then White House Counsel Alberto Gonzales, may have wanted a particular answer to his questions about the torture statute. But the OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client’s constituent wanted to hear it. Based on the available facts, it appears that Bybee and Yoo failed to give candid legal advice, violating D.C. Rule 2.1, and that they failed to inform their client about the state of the law of torture, violating D.C. Rule 1.4.

Because of the secrecy surrounding the Bush administration’s torture policy, we do not know exactly what techniques have been used against prisoners, or whether CIA interrogators or managers were informed of the Bybee Memorandum. With Congress controlled by the President’s party and no Independent Counsel statute in place, it is unclear how or when the facts surrounding the torture policy will be revealed.57

If bar disciplinary authorities investigate Yoo and Bybee, these two attorneys will have an opportunity to explain or defend their actions. In that setting, they might assert that the ethical obligations of candor and adequately informing their client did not apply because the Bybee Memorandum was never intended as legal advice in the traditional sense. In fact, David Luban and other scholars have speculated that this Bybee Memorandum was not intended as legal advice at all, but instead as an immunizing document, to ensure that CIA officials who engage in torture would not be prosecuted for that conduct.58 Indeed, the Bybee Memorandum might prove helpful to

57. A few members of Congress are seeking to establish an independent commission to examine allegations of interrogation abuse, but the Bush administration has resisted such efforts. Josh White & R. Jeffrey Smith, White House Aims To Block Legislation on Detainees, WASH. POST, July 23, 2005, at A1.
58. See Luban, supra note 19, at 55.
torturers in avoiding domestic criminal accountability. It is unlikely that even a future administration would prosecute government officials who relied on an OLC memorandum for the legality of their actions, because to do so would undermine future government officials’ reliance on OLC opinions more generally.

But if the authors of the Bybee Memorandum intended to immunize torturers in this way, they might have violated a different ethical rule, D.C. Rule 1.2(e), which prohibits an attorney from assisting a client’s criminal conduct. So even if their memorandum successfully immunizes torturers from criminal prosecution, it might jeopardize its authors’ licenses to practice law.

CONCLUSION

Why would otherwise competent and skilled lawyers ever risk violating the ethics rules that require candid legal advice and adequate informing of clients? Yoo has publicly defended the Bybee Memorandum in general terms but has not addressed its substantive inadequacies. Bybee, now a judge on the United States Court of Appeals for the Ninth Circuit, has remained silent. Perhaps Yoo and Bybee thought that they would never have to explain their legal advice because the Bybee Memorandum would never be made public. Perhaps they thought that Bush administration actions based on their advice...
would never come to light. 63 Perhaps this advice reflected what they sincerely believed the law should be.

Bybee and Yoo are not the only government lawyers for whom the Bybee Memorandum may raise ethical concerns. 64 News reports indicate that several White House lawyers reviewed drafts of the Bybee Memorandum. 65 Did the White House lawyers object to the flawed analysis in the memorandum, or did they instead actually insist that the memorandum include such analysis? 66 Still other Bush Administration lawyers, DOD General Counsel William Haynes and Department of the Air Force General Counsel Mary Walker read the final Bybee Memorandum and insisted that it become the basis of Defense Department interrogation policy, despite the glaring legal inaccuracies apparent on its face. 67 The Defense Department’s Working Group on Detainee Interrogations adopted the Bybee Memorandum nearly verbatim in its April 2003 report. 68 The Defense Department withdrew that Report in March, 2005, three months after the Justice Department issued a replacement of the August

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63. In contrast, the Bush administration recognized that it would likely face a court challenge of its decision to house prisoners in Guantánamo, and hence needed an accurate assessment of how courts would rule in such a case.

64. The Bybee Memorandum is not the only memorandum on torture issued by the Justice Department in August 2002. Another Justice Department memorandum written the same month and addressing the legality of specific proposed interrogation techniques has not yet been made public. Douglas Jehl, C.I.A. Says Approved Methods of Questioning Are All Legal, N.Y.TIMES, March 19, 2005, at A7; Johnston, Lewis & Jehl, supra note 11 (“when the [Central Intelligence A]gency asked about specific [interrogation] practices, Mr. Bybee responded with a second memorandum, which is still classified.”). We do not know whether that memorandum did a better job than the first in providing candid legal advice.

65. Other Bush administration lawyers reviewed the draft memorandum before it was finalized. Dana Priest, CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review, WASH. POST, June 27, 2004, at A1 (reporting that the memorandum was reviewed by lawyers at the National Security Council, by deputy White House counsel Timothy E. Flanigan, and by David S. Addington, counsel to the Vice President).

During the Senate Judiciary Committee’s hearing on his nomination to be Attorney General, Alberto Gonzales resisted answering questions about his role in shaping the memorandum. See Johnston, Lewis & Jehl, supra note 11 (referring to “Gonzales’s unwillingness to discuss his legal advice on the issue” of torture).

66. Dana Priest, supra note 65 (reporting that lawyer David Addington was “particularly concerned” that the memorandum “include a clear-cut section on the president’s authority”);

Neil A. Lewis & Eric Schmitt, Lawyers Decided Bans on Torture Didn’t Bind Bush, N.Y. TIMES, June 8, 2004, at A1 (reporting that Addington was involved in Defense Department discussions of interrogation policy, which ultimately resulted in adoption verbatim of much of the language of the Bybee Memorandum).

67. See Lewis & Schmitt, supra note 66.

68. See Working Group Report, supra, note 16; Appendix to this article.
2002 Bybee Memorandum.\(^{69}\)

Not all government lawyers accepted the patently inaccurate claims of the Bybee Memorandum. Career military lawyers who were involved in developing Defense Department interrogation policy objected to the Bybee Memorandum, and they went up the chain of command to register their objections.\(^{70}\) The contrast between the career military lawyers, who objected to the Bybee Memorandum, and most of the politically appointed lawyers, who championed it, is quite striking, and it is worthy of more detailed study as more facts become public.\(^{71}\)

This article’s conclusion – that John Yoo and Jay Bybee apparently failed to comply with their ethical obligations to provide candid legal advice and to adequately inform their client – might seem somewhat insignificant compared to the serious human rights violations that have occurred in Guantánamo, Afghanistan, Iraq, and at secret CIA interrogation sites.\(^{72}\) There will likely be long delays before any government officials are held criminally or otherwise accountable for those human rights violations. But bar disciplinary authorities have a responsibility to examine the conduct of the high-level Bush administration lawyers who wrote and propagated the Bybee Memorandum, and to hold them accountable if they violated their professional obligations.

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70. \textit{Id.} (“the judge advocate generals (JAGs) for the Army, Air Force and Marines” expressed their opposition in letters to Defense Department’s general counsel, but “the JAG concerns ultimately were overruled by the general counsel’s office”).

71. Not all politically appointed lawyers accepted the Justice Department’s position on torture. See Lewis & Schmitt, \textit{supra} note 66 (noting that the State Department’s chief lawyer, William H. Taft, objected to the Justice Department’s conclusions); Jane Mayer, \textit{The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted}, \textit{NEW YORKER}, Feb. 27, 2006, at 32 (Alberto J. Mora, General Counsel of the Navy, opposed adoption of John Yoo’s arguments in Defense Department’s Working Group Report).

## Appendix

Comparison of
DOD Working Group Report (April 2, 2003) and
Bybee Memorandum (Aug 1, 2002)

<table>
<thead>
<tr>
<th>Topic</th>
<th>DOD Rpt §</th>
<th>Bybee Memo §</th>
<th>Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific intent III.A.1.a</td>
<td>I.A.</td>
<td></td>
<td>Verbatim, except for one change of tense</td>
</tr>
<tr>
<td>Severe pain/suffering III.A.1.b</td>
<td>I.B.</td>
<td></td>
<td>Verbatim except DOD omits ¶ referring to hospital emergencies for pain</td>
</tr>
<tr>
<td>Severe mental pain/suffering III.A.1.c</td>
<td>I.C.</td>
<td></td>
<td>Verbatim</td>
</tr>
<tr>
<td>Prolonged mental harm III.A.1.c.i</td>
<td>I.C.1</td>
<td></td>
<td>Verbatim, except DOD alters last sentence, including saying that “may be” a complete defense where OLC said it “is” a complete defense</td>
</tr>
<tr>
<td>Harm caused by or resulting from predicate acts III.A.1.c.ii</td>
<td>I.C.2</td>
<td></td>
<td>Verbatim, except for minor stylistic changes</td>
</tr>
<tr>
<td>Commander-in-Chief authority III.A.3.a</td>
<td>V.B.</td>
<td></td>
<td>Verbatim, with minor stylistic changes, except DOD:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• refers to DOJ in 3rd person rather than 1st person</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• omits citations to previous OLC opinions</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• omits OLC n.19 (citing OLC opinion) &amp; n.22 (discussing detention of enemy combatants, including OLC opinion)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• omits last sentence in first ¶ of §</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• omits § heading on p. 22</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• refers to “unlawful” combatants rather than “battlefield” combatants on p. 24</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• adds final ¶ on p. 24</td>
</tr>
<tr>
<td>Necessity defense III.A.3.b</td>
<td>VLA</td>
<td></td>
<td>Verbatim, except minor stylistic changes</td>
</tr>
<tr>
<td>Self-defense III.A.3.c</td>
<td>VLB</td>
<td></td>
<td>Verbatim, except</td>
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<td></td>
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<td></td>
<td>• minor stylistic changes</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• DOD adds cite to article by Alan Dershowitz on p. 29</td>
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