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Advising Clients to Commit War Crimes with Impunity: An Unethical Practice

Cover Page Footnote

Thanks to Ngai Pindell for organizing, and John Sims for presenting, on this panel.

Advising Clients to Commit War Crimes with Impunity: An Unethical Practice

Marjorie Cohn*

“In situations like this you don’t call in the tough guys; *you call in the lawyers.*”

—Former Central Intelligence Agency
Director, George Tenet¹

During the Bush administration, lawyers in the US Department of Justice’s Office of Legal Counsel (OLC) crafted memoranda that advised the executive how it could avoid criminal liability under US law for the torture and abuse of detainees in the “global war on terror.” Rather than providing candid legal advice, these lawyers advocated for a specific interpretation of the law. This essay will analyze some of the most egregious torture memos and explain why they violate the American Bar Association (ABA) Model Rules of Professional Conduct and Justice Department guidelines, as well as US and international law. The lawyers who wrote these memos should be investigated and prosecuted under our criminal laws, not only to achieve accountability for their roles in the cruel

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¹ GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 241 (2007) (emphasis added).

treatment of other human beings, but also to discourage future administrations from engaging in this behavior by sending a clear message that they will be held accountable for their lawbreaking. The bar associations that licensed these attorneys to practice law should also investigate them and take appropriate action for violations of ethics rules. Using the ethical rules about advising clients in the analysis below, the Bush lawyers will be used as negative examples of how lawyers should behave.

I. INTRODUCTION: THE TORTURE MEMOS

John Yoo, former Deputy Assistant Attorney General in the OLC,² and Jay Bybee, former Assistant Attorney General in the OLC,³ did not merely interpret the law in response to a request for guidance about interrogation procedures. Instead, in an August 2002 memorandum, they argued that it was legally permissible to torture and abuse detainees by redefining torture more narrowly than US law requires.⁴ They advocated for legal defenses to torture despite the categorical legal prohibition on torture, and they failed to cite relevant legal precedents in their memos.

Another Bush OLC lawyer, Acting Assistant Attorney General Steven G. Bradbury, wrote memos that authorized, among other techniques, waterboarding.⁵ Bradbury admitted that waterboarding “induces a sensation

² John Yoo is currently a law professor at the University of California, Berkeley School of Law.

³ Jay Bybee is currently serving a life term as a judge on the United States Circuit Court of Appeals for the Ninth Circuit.

⁴ Memorandum from Jay Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice Off. of Legal Couns., to Alberto R. Gonzalez, Counsel Couns. to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Bybee Memorandum]. It is widely known that although Bybee signed the memo, Yoo authored it. The two lawyers also authored a second memo dated August 1, 2002. See *infra* text and accompanying notes 57–62.

⁵ See e.g., Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Off. of Legal Couns., to John A. Rizzo, Senior Deputy Gen. Couns., Cent. Intelligence Agency (May 10, 2005),

of drowning . . . based on a deeply rooted physiological response.”⁶ It is well-settled, however, that waterboarding constitutes torture,⁷ a fact unmentioned in the Bradbury memos.⁸ Although the United States hung Japanese leaders after World War II for waterboarding,⁹ Bush officials and lawyers approved of its use.¹⁰

The Justice Department’s Office of Professional Responsibility (OPR) conducted a five-year investigation that focused on advice provided to the Bush administration by Yoo, Bybee, and Bradbury.¹¹ The 2010 OPR report confirms that Yoo added the most egregious and flawed parts of the August 2002 memo after the Justice Department’s criminal division refused to give the Central Intelligence Agency (CIA) the legal authority it sought to use torture as an interrogation technique.¹² The day after this refusal, Yoo

<http://www.fas.org/irp/agency/doj/olc/techniques.pdf>. [hereinafter Bradbury Memorandum].

⁶ *Id.*

⁷ For example, see US federal and state court opinions and US Country Reports on Human Rights Practices in Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 n.69 (2009).

⁸ See Bradbury Memorandum, *supra* note 5.

⁹ John Frank, *History Supports McCain’s Stance on Waterboarding*, POLITIFACT.COM (Dec. 18, 2007), <http://www.politifact.com/truth-o-meter/statements/2007/dec/18/john-mccain/history-supports-mccains-stance-on-waterboarding/>.

¹⁰ Paul Owen, *George Bush Admits U.S. Waterboarded 9/11 Mastermind*, GUARDIAN, June 3, 2010, <http://www.guardian.co.uk/world/2010/jun/03/george-bush-us-waterboarded-terror-mastermind>; John Perr, *Bush Follows Cheney in Admitting War Crimes*, CROOKS & LIARS (June 3, 2010), <http://crooksandliars.com/jon-perr/bush-follows-cheney-admitting-war-crimes>; John Yoo, *Obama Made a Rash Decision on Gitmo: The President Will Soon Realize That Governing Involves Hard Choices*, WALL ST. J., Jan. 29, 2009, at A15, available at <http://online.wsj.com/article/SB123318955345726797.html>. [These collective sources shall hereinafter be referred to as the *War Crimes Articles*.]

¹¹ DEP’T OF JUSTICE OFF. OF PROF. RESP. REP., 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 254 (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

¹² ALLIANCE FOR JUSTICE, OPR REPORT ON THE TORTURE MEMOS, <http://www.afj.org/connect-with-the-issues/accountability-for-torture/opr-report-on-the-torture-memos.html> (last visited Dec. 15, 2011) (“It seems the CIA requested a DOJ

attended a meeting at the White House with White House Counsel Alberto Gonzales and possibly Vice President Cheney's lawyer, David Addington, and Gonzales' deputy, Tim Flanigan, after which Yoo added the "two most biased and flawed sections to his most notorious memo."¹³ The Bush lawyers knew their advice would be relied upon to interrogate detainees.¹⁴ Indeed, Secretary of State Donald Rumsfeld relied heavily on the "torture memos" to promulgate his list of aggressive interrogation procedures for use at the Guantánamo Bay naval base where "enemy combatants" were being held.¹⁵ Major General Geoffrey Miller also brought the harsh techniques to Iraq, where they were used on prisoners in US custody there.¹⁶

By justifying these cruel interrogation methods, Yoo, Bybee, and the other OLC lawyers who counseled Bush (on how his administration could torture detainees and get away with it) have not only committed ethical violations, but they have also participated in a common plan with Bush officials to violate US and international laws. They must be held accountable for their ethical and legal violations, both to achieve justice and to deter other lawyers from engaging in similar conduct in the future.

[Department of Justice] criminal declination letter providing advance blanket immunity from criminal prosecution before beginning interrogations in order to ensure that no CIA interrogator would be prosecuted for torture. Michael Chertoff, then Assistant AG [Attorney General] in charge of DOJ's criminal division, found the request unreasonable, and refused to provide a blanket protection against criminal prosecution.").

¹³ *Id.*

¹⁴ See, e.g., John M. Richardson, *Is John Yoo a Monster?*, ESQUIRE (Aug. 24, 2009), <http://www.esquire.com/features/john-yoo-0608>.

¹⁵ See FINAL REPORT OF INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 911 (Aug. 2004), available at <http://www.c-span.org/pdf/prisonerfinalreport.pdf>.

¹⁶ See Douglas Jehl, *U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to GI's*, N.Y. TIMES, June 22, 2004, at A7, available at <http://departments.bloomu.edu/crimjust/pages/leo/penology/AbuGhreib3.htm>.

II. THE TORTURE MEMOS VIOLATE THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

The American Bar Association's Model Rules of Professional Conduct were adopted by the ABA House of Representatives in 1983. They serve as models in most states for how lawyers should behave in the course of representing their clients.¹⁷

Rule 1.1 of the ABA's Model Rules requires a lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."¹⁸ The Bush OLC lawyers, at a minimum, provided incompetent representation because their memoranda were not thorough; they omitted important relevant principles of law.¹⁹ The memos demonstrated a lack of legal knowledge and skill, including a rewriting of the torture definition conflicting with US law.²⁰

Rule 1.2(d) prohibits lawyers from assisting clients engage in crime or fraud.²¹ Yet, lawyers in the Bush administration's OLC crafted memoranda to justify interrogations that violated US law.²²

Rule 2.1 provides that a lawyer "shall exercise independent professional judgment and render candid advice" when representing a client.²³ The rule

¹⁷ See MODEL RULES OF PROF'L CONDUCT (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html [hereinafter MRPC].

¹⁸ *Id.* at 1.1.

¹⁹ See *infra* text accompanying note 61.

²⁰ See *infra* text accompanying notes 51–54.

²¹ Rule 1.2(d) reads as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MRPC, *supra* note 17, at R. 1.2(d).

²² See *infra* text accompanying notes 26–30.

further states that, in addition to referring to the law, a lawyer may also reference other relevant considerations such as moral, economic, social, and political factors when rendering advice.²⁴ Although it is permissible to refer to political factors, ideological considerations trumped legality for these lawyers. The Bush OLC lawyers gave the advice the administration wanted; the advice was far from candid, and they omitted from their intricate memos any discussion of the morality of torturing and abusing detainees.

III. AGAINST FEDERAL LAW: TORTURE IS ALWAYS ILLEGAL

Moreover, the unethical advice these lawyers provided also violated US treaty law.²⁵ When the United States ratifies a treaty, it becomes part of US law under the Supremacy Clause of the US Constitution.²⁶ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”)²⁷ has been ratified by the United States.²⁸ It provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”²⁹ That ban is unequivocal; there are no circumstances in which torture is permissible.³⁰

²³ See MRPC, *supra* note 17, at R. 2.1.

²⁴ *Id.*

²⁵ See *infra* notes 26–37.

²⁶ U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”).

²⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

²⁸ 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

²⁹ See Torture Convention, *supra* note 27, at art. 2(2).

³⁰ The prohibition against torture is also considered *jus cogens*, which is Latin for “higher law” or “compelling law.” This means that no country, whether or not it has ratified the Torture Convention, can enact any law that permits torture. There can be no

All detainees, without exception, must be treated humanely according to the Geneva Conventions, which the United States has also ratified.³¹ Under Common Article 3 of the Geneva Conventions, prisoners must be protected against torture, mutilation and cruel treatment.³² In *Hamdan v. Rumsfeld*, the US Supreme Court struck down the Bush administration’s military commissions because they did not comply with due process guarantees in the Uniform Code of Military Justice and the Geneva Conventions.³³ The Court rejected the Bush administration’s argument that Common Article 3 does not protect the prisoners at Guantánamo.³⁴ Common Article 3 requires that prisoners be treated humanely; it forbids outrages on personal dignity, in particular humiliating and degrading treatment.³⁵ President George W.

immunity from criminal liability for violation of a *jus cogens* prohibition. Other *jus cogens* norms include prohibitions on slavery, genocide, and wars of aggression.

³¹ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention].

³² See *id.* All four Geneva Conventions have the same article 3 in common; hence, the moniker “Common Article 3.”

³³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁴ *Id.* at 631–32.

³⁵ Common Article 3 reads as follows:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading

Bush maintained that the Geneva Conventions did not apply to members of Al-Qaeda because they were not prisoners of war.³⁶ In *Hamdan*, the Supreme Court affirmed that Common Article 3 protects *all* prisoners, not just prisoners of war.³⁷

Justice Kennedy, in a separate concurrence joined by Justices Souter, Breyer, and Ginsburg, noted that Common Article 3 “is part of a treaty the United States has ratified and thus accepted as binding law.”³⁸ Justice Kennedy underscored that Congress made violations of Common Article 3 war crimes in the US War Crimes Act.³⁹ Justice Kennedy was spot-on here because, while treaties are international law, they are also part of US law under the Supremacy Clause.⁴⁰

On February 7, 2002, Bush, relying on a memo from Yoo and special counsel Robert J. Delahunty,⁴¹ announced that Common Article 3 did not apply to alleged members of the Taliban and Al-Qaeda.⁴² Bush added, however, that “as a matter of policy, the United States Armed Forces shall

treatment;

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

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

See Geneva Convention, *supra* note 31.

³⁶ Memorandum from President George W. Bush to the Vice President et al., (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf [hereinafter Bush Memorandum].

³⁷ *See Hamdan*, 548 U.S. at 630, 642.

³⁸ *Id.* at 642.

³⁹ *Id.*; *see* 18 U.S.C. § 2441 (2006).

⁴⁰ U.S. CONST. art. VI, § 2.

⁴¹ Memorandum from John Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Off. of Legal Couns., & Robert J. Delahunty, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Off. of Legal Couns., to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 9, 2002) [hereinafter Yoo Memorandum I].

⁴² *See* Bush Memorandum, *supra* note 36.

continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva.”⁴³ By qualifying his commitment to treat detainees consistent with the Geneva Conventions unless there is a military necessity, Bush was reserving the right to order torture. Yet, torture is never allowed under the Torture Convention, and Geneva permits no inhumane treatment of a detainee under any circumstances.⁴⁴

Torture, cruel or inhumane treatment, mutilation or maiming, intentionally causing serious bodily injury, including rape, sexual assault, and other forms of abuse, are punishable as war crimes under the US War Crimes Act.⁴⁵ The US Torture Statute provides for twenty years of imprisonment, life in prison, or the death penalty if the torture victim dies—for anyone who commits, attempts, or conspires to commit torture outside the United States.⁴⁶ A 2008 report of the Senate Armed Services Committee on the Treatment of Prisoners in CIA Custody concluded that the torture memos “distorted the meaning and intent of the anti-torture laws” and “rationalized the abuse of detainees in [US] custody.”⁴⁷ The committee criticized the Bush lawyers for redefining torture and cited “profound mistakes” in legal analysis.⁴⁸

⁴³ *Id.* (emphasis added).

⁴⁴ Torture Convention, *supra* note 27, art. 2.2; Geneva Convention, *supra* note 31.

⁴⁵ 18 U.S.C. § 2441 (2006); *see also* 18 U.S.C. §§ 818, 3231 (2006).

⁴⁶ 18 U.S.C. § 2340A (2006).

⁴⁷ U.S. SENATE ARMED SERVS. COMM., SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Dec. 11, 2008), *available* *at*

<http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20081211.pdf>.

⁴⁸ *Id.*

IV. AGAINST AGENCY RULES: THE TORTURE MEMOS CONTRADICT OLC GUIDELINES

Former OLC attorneys developed ten principles to guide lawyers in that office.⁴⁹ The first three principles are most relevant here. The first one reads, in pertinent part, as follows:

When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.⁵⁰

Contrary to this guidance, the advice in the August 2002 Bybee-Yoo memo relied on an incorrect definition of torture and advocated bogus defenses to criminal prosecution.⁵¹ The Torture Convention defines torture as the intentional infliction of severe physical or mental pain or suffering.⁵² But in the memo, Yoo and Bybee redefined torture much more narrowly than the way the Torture Convention and Torture Statute define torture.⁵³ This narrow definition required that the victim experience intense pain or

⁴⁹ See Dawn E. Johnsen, *Symposium: War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century—“Guidelines for the President’s Legal Advisors,”* 81 IND. L.J. 1345, 1348 (2006) [hereinafter *Guidelines*]; see generally Dawn F. Johnsen, *Symposium: Constitutional “Niches”: The Role of Institutional Context in Constitutional Law—“Faithfully Executing the Laws: Internal Legal Constraints on Executive Power,”* 54 UCLA L. REV. 1559 (2007).

⁵⁰ *Id.*

⁵¹ See Jordan J. Paust, *Criminal Responsibility of Bush Administration Officials With Respect to Unlawful Interrogation Tactics and the Facilitating Conduct of Lawyers,* in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 281, 284–92 (Marjorie Cohn ed., 2011) [hereinafter *Criminal Responsibility*]; JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 11 (2007).

⁵² Torture Convention, *supra* note 27, art. 1.

⁵³ The US Torture Statute defines torture as conduct specifically intended to inflict severe physical or mental pain or suffering. See 18 U.S.C. §§ 2340, 2340A (2006).

suffering equivalent to pain associated with serious physical injury so severe that death, organ failure or permanent damage resulting in loss of significant body functions will likely result.⁵⁴ Yoo also wrote that self-defense or necessity could be used as defenses to war crimes prosecutions for torture,⁵⁵ notwithstanding the Torture Convention's absolute prohibition against torture in all circumstances.

The second OLC principle provides:

OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.⁵⁶

Another Bybee-Yoo memo, also dated August 1, 2002,⁵⁷ omits reference to two sets of federal statutes—the War Crimes Act⁵⁸ and 10 U.S.C. § 818—that permit prosecution for violation of relevant customary international law and treaties on the laws of war for the commission of torture or cruel and inhumane treatment. Section 818 incorporates all the laws of war and covers any war crime committed by any person.⁵⁹ In addition, 18 U.S.C. § 3231 reaches “all offenses against the law of the

⁵⁴ See Bybee Memorandum, *supra* note 4.

⁵⁵ Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Couns., to William J. Haynes II, Gen. Couns. of the Dep't of Def. (Mar. 14, 2003), available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf [hereinafter Yoo Memorandum II].

⁵⁶ See *Guidelines*, *supra* note 49.

⁵⁷ Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Couns., to John Rizzo, Acting Gen. Couns. of the Cent. Intelligence Agency (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf [hereinafter Bybee Memorandum II].

⁵⁸ 18 U.S.C. § 2441 (2006).

⁵⁹ 10 U.S.C. § 818 (2006).

United States.”⁶⁰ However, there was no reference to the laws of war in the second Bybee-Yoo memo.⁶¹ The memo also incorrectly construed the US Torture Statute.⁶² At a minimum, this is shoddy legal work. “OLC’s obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC’s advice is unlikely to be subject to review by the courts.”⁶³

The Bush administration relied on the torture memos in formulating a common plan to violate treaty-based and customary international law in the interrogation of prisoners.⁶⁴ To the author’s knowledge, there has been no judicial review of the advice in the memos. In light of his shamefully expansive view of executive power,⁶⁵ it is likely Yoo did not anticipate that any court would review the work of the OLC. Furthermore, Yoo astoundingly commented in an interview that, “just because the statute says—that doesn’t mean you have to do it.”⁶⁶ Yoo told *New Yorker* journalist Jane Mayer that Congress “can’t prevent the president from ordering torture.”⁶⁷ When Mayer asked Yoo whether any law could stop the president from “crushing the testicles of the person’s child,” Yoo responded, “No treaty.”⁶⁸ When she asked him if another law could forbid it, Yoo said, “I think it depends on why the president thinks he needs to do that.”⁶⁹ Yoo apparently ignored the Torture Convention’s absolute

⁶⁰ 18 U.S.C. § 3231 (2006) (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, for all offenses against the laws of the United States.”).

⁶¹ See *Criminal Responsibility*, *supra* note 51, at 287.

⁶² See *infra* text accompanying notes 51–54.

⁶³ See *Guidelines*, *supra* note 49.

⁶⁴ See *Criminal Responsibility*, *supra* note 51, at 281.

⁶⁵ See *infra* text accompanying notes 67–70.

⁶⁶ EXCLUSIVE: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, *ESQUIRE* (Apr. 3, 2008, 12:18 PM), <http://www.esquire.com/the-side/qa/john-yoo-responds>.

⁶⁷ JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 153 (2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

prohibition on torture in all circumstances. Yoo also told the OPR that the president's wartime power is so vast that the president could order the massacre of an entire village full of civilians.⁷⁰

In memos dated August 1, 2002, and March 14, 2003, Yoo and Bybee advised the Bush administration that the Department of Justice would not enforce the US criminal laws against torture, assault, maiming, and stalking in the detention and interrogation of enemy combatants.⁷¹ The federal maiming statute makes it a crime for someone with the intent to torture, maim, or disfigure, to cut, bite, or slit the nose, ear or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person.⁷² It further prohibits individuals from throwing or pouring upon another person any scalding water, corrosive acid, or caustic substance with like intent.⁷³ Thus, by the Yoo-Bybee reasoning, if an interrogator maimed a detainee, that interrogator would not be prosecuted.

V. THE MOST NOTORIOUS TORTURE MEMO RESCINDED

After the first memo of August 1, 2002, became public, the Department of Justice likely knew the memo could not be legally defended because the memo was withdrawn as of June 1, 2004, by Jack Goldsmith, who succeeded Bybee as OLC Assistant Attorney General.⁷⁴ Goldsmith wrote that the memo contained "cursory and one-sided legal arguments."⁷⁵ A new

⁷⁰ Michael Isikoff, *Report: Bush Lawyer Said President Could Order Civilians to Be 'Massacred,'* DAILY BEAST (Feb. 19, 2010), <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/02/19/report-bush-lawyer-said-president-could-order-civilians-to-be-massacred.html>.

⁷¹ See Bybee Memorandum, *supra* note 4; Yoo Memorandum II, *supra* note 55.

⁷² 18 U.S.C. § 114 (2006).

⁷³ *Id.*

⁷⁴ Bruce Ackerman, *Impeach Jay Bybee: Why Should a Suspected War Criminal Serve as a Federal Judge?*, YALE L. SCH. BLOG (Jan. 13, 2009), www.law.yale.edu/news/8722.htm.

⁷⁵ JACK LANDMAN GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 149 (2007).

opinion, dated December 30, 2004,⁷⁶ specifically rejects Yoo's definition of torture by stating: "Under the language adopted by Congress under sections 2340-2340A [the Torture Statute], to constitute 'torture,' the conduct in question must have been 'specifically intended to inflict severe physical or mental pain or suffering.'" ⁷⁷ The new memo also admits that a defendant's motives to protect national security will not shield him from a torture prosecution.⁷⁸ The rescission of the August 2002 memo constitutes an implicit admission that the advice it contained was wrong. Yet, the memo remained in effect for twenty-two months. Many commentators, including Goldsmith, criticized the torture memos.⁷⁹ Goldsmith called them a "golden shield" designed to protect Bush officials from criminal prosecution for their harsh interrogation program.⁸⁰ British barrister and professor Philippe Sands described the lawyers who wrote the torture memos as providing "legal cover for their political masters."⁸¹ Anthony Lewis likened the counsel in the torture memos to "the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."⁸² Both the content of the memos and the manner in which they were written were unethical. The behavior of these lawyers should give pause to attorneys who seek to twist the law to reach an ideological result that is inconsistent with US and international law.

⁷⁶ Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice Off. of Legal Couns., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See e.g., *Criminal Responsibility*, *supra* note 51, at 281.

⁸⁰ GOLDSMITH, *supra* note 75, at 144.

⁸¹ Philippe Sands, *Terrorists and Torturers*, in *THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE* 261, 277 (Marjorie Cohn ed., 2011).

⁸² Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, available at <http://www.nybooks.com/articles/archives/2004/jul/15/making-torture-legal/?pagination=false>.

VI. DISCIPLINARY ACTION WRONGLY WITHHELD FOR AT-FAULT LAWYERS

John Bellinger, legal adviser to the National Security Council and the State Department in the Bush administration, told the OPR that the conclusion in the August 2002 memo was “so contrary to the commonly held understanding of the [anti-torture] treaty that he considered that the memorandum was ‘written backwards’ to accommodate a desired result.”⁸³ Bellinger made this statement to the agency that was investigating Yoo, Bybee, and Bradbury for ethics violations in connection with the torture memos they wrote during the Bush administration.⁸⁴ After a four-year investigation, the OPR concluded that Yoo “committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.”⁸⁵ The OPR further determined that 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.”⁸⁶ The OPR also found that Yoo and Bybee violated Rules 1.1 and 2.1.⁸⁷ It recommended that both Yoo and Bybee be referred to their respective state bar associations for discipline.⁸⁸ The OPR report states that senior White House officials improperly pressured Bybee, Yoo, and Bradbury to “come up with an answer” in the torture memos to justify the ongoing interrogation program, determine that it was legal, and permit it to

⁸³ David Cole, *They Did Authorize Torture, But . . .*, N.Y. REV. BOOKS, Apr. 8, 2010, available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1332&context=facpub>.

⁸⁴ See *supra* text accompanying note 12.

⁸⁵ See U.S. DEP'T OF JUSTICE, *supra* note 11, at 260.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

continue.⁸⁹ But the lawyers had an ethical duty to provide independent advice based in the law.⁹⁰

However, in 2010, Associate Deputy Attorney General David Margolis overruled these OPR findings. While determining that Yoo and Bybee exercised “poor judgment,” Margolis concluded that the OPR should not refer them for discipline because they did not knowingly give false legal advice and, thus, did not commit professional misconduct. Margolis did, however, criticize the two lawyers.⁹¹ He also called the issue of whether Yoo engaged in misconduct a “close question” and described this as “an unfortunate chapter in the history of the Office of Legal Counsel.”⁹² Margolis further wrote that he was afraid “Yoo’s loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power.”⁹³

In a February 19, 2010, letter to the Chairman of the House Committee on the Judiciary,⁹⁴ Assistant Attorney General Ronald Welch explained the analytical framework that the OPR typically uses to evaluate allegations of attorney misconduct; it distinguishes between poor judgment and professional misconduct:

An attorney exercises *poor judgment* when, faced with alternative courses of action, he or she chooses a course of action that is in

⁸⁹ *Id.* at 39.

⁹⁰ MRPC, *supra* text and accompanying notes 17–19, 23–24.

⁹¹ 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 Prof’l Misconduct in the Off. of Prof’l Responsibility’s Rep. of Investigation into the Off. of Legal Couns, Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 67 (Jan. 5, 2010), *available at* <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The House Judiciary Committee was then chaired by the Honorable John Conyers, Jr., (D-MI).

marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from *professional misconduct* in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard.⁹⁵

Georgetown law professor David Luban criticized Margolis' decision to downgrade the OPR findings regarding Yoo and Bybee to "poor judgment."⁹⁶ Specifically, Luban writes,

Margolis strikes a blow against accountability. Margolis gets a lot wrong in his memo, but he did get one thing right. "OPR's findings and my decision are less important than the public's ability to make its own judgments about these documents and to learn lessons for the future." One lesson from this sorry episode is that in America we don't do accountability for government officials who approve torture.⁹⁷

Indeed, President Barack Obama signaled his intention that those responsible for setting the Bush administration's interrogation policy not be held accountable. He stated on February 9, 2009, that he believes "nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but that generally speaking, I'm more interested in looking forward than I am in looking backwards."⁹⁸ Attorney General Eric Holder commenced an investigation

⁹⁵ Letter from Ronald Welch, Assistant Att'y Gen., to the Hon. John Conyers, Jr., Chairman of the Comm. on the Judiciary (Feb. 19, 2010), available at <http://judiciary.house.gov/hearings/pdf/Weich100219.pdf>.

⁹⁶ David Luban, *David Margolis Is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, SLATE, Feb. 22, 2010, http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html.

⁹⁷ *Id.*

⁹⁸ The President's News Conference, Admin. of Barack H. Obama, 2009 DAILY COMP. PRES. DOC. 72 (Feb. 9, 2009), <http://www.gpo.gov/fdsys/pkg/DCPD-200900073/pdf/DCPD-200900073.pdf> [hereinafter Obama Press Conf.].

of interrogators who allegedly utilized techniques that were not allowed by the torture memos. The narrow scope of that investigation disturbingly implies that the advice in the torture memos is correct because only the people who went beyond the scope of conduct prohibited in the memos were investigated.⁹⁹

Yet, no officials or lawyers from the Bush administration have been the subject of criminal investigation in the United States for their roles in the interrogation policy. In fact, Holder announced on June 30, 2011, that his office will investigate only two instances of detainee mistreatment. He said the department “has determined that an expanded criminal investigation of the remaining matters is not warranted.”¹⁰⁰ Thus, Holder has granted immunity to those who authorized, provided legal cover, and carried out the “remaining matters.”

Both of the incidents that Holder agreed to investigate involved egregious treatment of prisoners and resulted in deaths. In one case, Gul Rahman froze to death in 2002 after being stripped and shackled to a cold cement floor in a secret American prison in Afghanistan known as the Salt Pit.¹⁰¹ The other man, Manadel al-Jamadi, died in 2003 at Abu Ghraib prison in Iraq.¹⁰² He was suspended from the ceiling by his wrists, which were bound behind his back. Tony Diaz, a military police officer who witnessed al-Jamadi’s torture, reported that when al-Jamadi was lowered to the ground,

⁹⁹ Glenn Greenwald, *Eric Holder Announces Investigation Based on Abu Ghraib Model*, SALON.COM (Aug. 24, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/08/24/holder.

¹⁰⁰ Statement of the Att’y Gen. Re: Investigation Into the Interrogation of Certain Detainees (Jun. 30, 2011), available at <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>.

¹⁰¹ Adam Goldman & Kathy Gannon, *Death shed light on CIA ‘Salt Pit’ near Kabul: Handling of terror suspect led to inquiry by agency’s inspector general*, MSNBC.COM (Mar. 28, 2010), http://www.msnbc.msn.com/id/36071994/ns/us_news-security/t/death-shed-light-cia-salt-pit-near-kabul/.

¹⁰² Seth Hettena, *Iraqi Died While Hung From Wrists by U.S.*, RENSE.COM (Feb. 17, 2005), <http://www.rense.com/general63/weie.htm>.

blood gushed from his mouth like “a faucet had turned on.”¹⁰³ These two deaths ought to be investigated—and those responsible punished in accordance with the law.

The investigation must also have a much broader scope than focusing only on these two incidents. General Barry McCaffrey has stated that “[w]e tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the [CIA].”¹⁰⁴ More than one hundred detainees have died in US custody, many as a result torture.¹⁰⁵ Additionally, untold numbers of detainees were subjected to torture and cruel treatment in violation of both US and international law. Detainees were forced into stress positions, including being chained to the floor, slammed against walls, placed into small boxes with insects, subjected to extremely cold and hot temperatures as well as diet manipulation, blaring music, and threats against them and their families.¹⁰⁶ At least three men¹⁰⁷ were subject to waterboarding, a technique that makes the subject feel as though he is drowning.¹⁰⁸ Pursuant to the Bush administration’s efforts to create a link between Saddam Hussein and Al-Qaeda, Khalid Sheikh Mohammed was subjected to waterboarding 183 times.¹⁰⁹ Abu Zubaydah

¹⁰³ *Id.*

¹⁰⁴ Scott Horton, *The Bush Era Torture-Homicides*, HARPER’S MAG. (May 7, 2009), <http://harpers.org/archive/2009/05/hbc-90004921>.

¹⁰⁵ Glenn Greenwald, *The suppressed fact: Deaths by U.S. torture*, SALON.COM (June 30, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/06/30/accountability.

¹⁰⁶ Marjorie Cohn, *Avoiding Impunity: The Need to Broaden Torture Prosecutions*, JURIST (July 8, 2011), <http://jurist.law.pitt.edu/forum/2011/07/marjorie-cohn-torture-investigation.php>.

¹⁰⁷ See John F. Scanlon, *Torture Update 2010-12-15*, DAILY KOS (Jun. 30, 2011), <http://www.dailykos.com/story/2011/07/01/990357/-Torture-Update2010-12-15>.

¹⁰⁸ Merriam-Webster defines waterboarding as “an interrogation technique in which water is forced into a detainee’s mouth and nose so as to induce the sensation of drowning.” Waterboarding Definition, MERRIAM-WEBSTER ENGLISH DICTIONARY, *available at* <http://www.merriam-webster.com/dictionary/waterboarding> (last visited Oct. 1, 2011).

¹⁰⁹ No such link was ever established. Scanlon, *supra* note 107.

received this treatment on eighty-three occasions.¹¹⁰ It now appears that five additional men were subjected to waterboarding by the US military.¹¹¹

Under the well-established doctrine of universal jurisdiction, Spain investigated six Bush administration lawyers—John Yoo, Jay Bybee, David Addington, William Haynes, Alberto Gonzales, and Douglas Feith—for the roles they played in the torture and abuse of prisoners.¹¹² Countries will not investigate and prosecute foreign nationals if the home country of the suspects is undertaking an investigation.¹¹³ On January 28, 2011, Spanish Judge Eloy Velasco issued an order, which set a deadline of March 1, 2011, for the United States to inform him whether a prosecutor had been appointed to investigate the abuses at Guantánamo.¹¹⁴ On March 1, 2011, the Justice Department’s Criminal Division of the Office of International Affairs sent a letter to the Spanish Minister of Justice, citing the results of the Margolis OPR finding and the limited investigation authorized by

¹¹⁰ *Id.*

¹¹¹ See Jeffrey Kaye, *Despite New Denials by Rumsfeld, Evidence Shows U.S. Military Used Waterboarding-Style Torture*, TRUTHOUT (Aug. 2, 2011), <http://www.truthout.org/despite-rumsfeld-denial-evidence-shows-us-military-use-waterboarding-style-torture/1312225772>.

¹¹² Universal jurisdiction is a well-established doctrine that countries employ to investigate and prosecute foreign nationals for crimes that shock the conscience of the global community. It provides a critical tool to hold accountable those who commit crimes against the law of nations, including war crimes and crimes against humanity. Without universal jurisdiction, many notorious criminals would go free. See Marjorie Cohn, *Spain Investigates What America Should*, HUFFINGTON POST, Apr. 8, 2009, http://www.huffingtonpost.com/marjorie-cohn/spain-investigates-what-a_b_183801.html; see also Scott Horton, *The Bush Six to Be Indicted: Spanish prosecutors will seek criminal charges against Alberto Gonzales and five high-ranking Bush administration officials for sanctioning torture at Guantánamo*, DAILY BEAST, (Apr. 13, 2009), <http://www.thedailybeast.com/articles/2009/04/13/the-bush-six-to-be-indicted.html>.

¹¹³ See Cohn, *supra* note 112.

¹¹⁴ Juzgado Central de Instrucción N° 6, A.N., Madrid (Spanish High Court), Diligencias Previa [preliminary investigations] 134/2009 (Jan. 28, 2011), unofficial English translation available online at <http://ccrjustice.org/files/28%20January%202011%20Order%20English.pdf>.

Holder.¹¹⁵ The letter stated that there was no basis for a criminal investigation of the six lawyers.¹¹⁶ Soon thereafter, for apparently political reasons,¹¹⁷ the Spanish court dropped the universal jurisdiction investigation.¹¹⁸

On July 12, 2011, Human Rights Watch issued a 107-page report recommending the investigation and prosecution of Bush, Cheney, Rumsfeld, Tenet, Condoleezza Rice, John Ashcroft, and the administration lawyers for torture under the War Crimes Act and for federal criminal conspiracy.¹¹⁹ According to the report,

There is enough strong evidence from the information made public over the past five years to not only suggest these officials authorised and oversaw widespread and serious violations of [US] and international law, but that they failed to stop mistreatment, or punish those responsible after they became aware of serious abuses.¹²⁰

By allowing those responsible for the program of torture and abuse to escape accountability, there is nothing that will stop officials and their lawyers in future administrations from authorizing cruel treatment. They will expect to set their interrogation policies with impunity.

¹¹⁵ See Letter from Mary Ellen Warlow to Ms. Paula Mongé Royo (Mar. 1, 2011), available at <http://ccrjustice.org/files/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf>.

¹¹⁶ See *id.*

¹¹⁷ Daniel Tencer, *Obama White House pressured Spain to drop Bush torture prosecution, leaked cable shows*, RAW STORY (Dec. 1, 2010), <http://www.rawstory.com/rs/2010/12/01/obama-spain-bush-torture-prosecution/>.

¹¹⁸ Press Release, Spanish Judge Drops Case Against Bush Lawyers, Ctr. for Const. Rts. (Apr. 14, 2011), available at <http://ccrjustice.org/newsroom/press-releases/spanish-judge-drops-case-against-bush-lawyers>.

¹¹⁹ HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES (July 2011), available at <http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf>.

¹²⁰ *Id.* at 2.

VII. CONCLUSION

Bush, Cheney, and Yoo have all acknowledged that they participated in the decision to subject detainees to waterboarding, and that if given the opportunity they would do it again.¹²¹ Thus, they have admitted the commission of war crimes because waterboarding is torture—and torture is a war crime. Major General Anthony Taguba, who directed the investigation of mistreatment at Abu Ghraib, wrote that “there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”¹²² Taguba’s question has been answered. None of those lawyers or officials will be brought to justice.¹²³ Outgoing CIA Director Leon Panetta said, “we are now finally about to close this chapter of our agency’s history.”¹²⁴ Ominously, David Petraeus, incoming CIA Director, told Congress there might be circumstances in which a return to “enhanced interrogation” is warranted.¹²⁵ That means torture may well continue during Obama’s tenure as president.

The Constitution requires that the president “shall take Care that the Laws be faithfully executed.”¹²⁶ When the United States ratified the Torture Convention, we promised to extradite or prosecute those who commit, or are complicit in the commission, of torture.¹²⁷ The Geneva Conventions also mandate that we prosecute or extradite those who commit, or are complicit

¹²¹ See *War Crimes Articles*, *supra* note 10.

¹²² Warren P. Strobel, *General who probed Abu Ghraib says Bush officials committed war crimes*, MCCLATCHY (June 18, 2008), <http://www.mcclatchydc.com/2008/06/18/41514/general-who-probed-abu-ghraib.html>.

¹²³ See Obama Press Conf., *supra* note 98; Greenwald, *supra* note 99; Statement of the Att’y General, *supra* note 100.

¹²⁴ *U.S. to Probe Deaths of 2 Detainees*, USA TODAY, June 30, 2011, http://www.usatoday.com/news/washington/2011-06-30-cia-interrogation-probe_n.htm.

¹²⁵ Stephanie Condon, *Petraeus: Congress should discuss interrogation techniques for “ticking time bomb scenario,”* CBS NEWS (June 24, 2011), http://www.cbsnews.com/8301-503544_162-20074092-503544.html.

¹²⁶ U.S. CONST. art. 2, § 3.

¹²⁷ Torture Convention, *supra* note 27, at art. 7.

in the commission of torture.¹²⁸ There are two federal criminal statutes for torture prosecutions—the US Torture Statute¹²⁹ and the War Crimes Act;¹³⁰ the latter punishes torture as a war crime.¹³¹ The Torture Convention is unequivocal: nothing, including a state of war, can be invoked as a justification for torture.¹³²

There is precedent for holding lawyers criminally liable for giving legally erroneous advice that results in great physical or mental harm or death. For example, in *United States v. Altstoetter*, Nazi lawyers were convicted of war crimes and crimes against humanity for advising Hitler on how to “legally” disappear political suspects to special detention camps.¹³³ Both *Altstoetter* and the case of the Bush lawyers dealt with people who were detained during wartime, yet who were not prisoners of war. In both cases, it was reasonably foreseeable that the advice they provided would result in serious physical or mental harm—or even death to many prisoners. And the advice was legally erroneous in both cases.¹³⁴

After the Watergate scandal, American law schools made professional responsibility courses mandatory for all students.¹³⁵ State bar examinations test prospective lawyers on ethics as well as substantive law.¹³⁶ But the duty

¹²⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹²⁹ 18 U.S.C. § 2340A (2006).

¹³⁰ 18 U.S.C. § 2441 (2006).

¹³¹ *Id.*

¹³² Torture Convention, *supra* note 29.

¹³³ See *United States v. Altstoetter (the “Justice Case”)*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 I, 1–6 (U.S. Gov’t Printing Office 1951), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-crime-Vol-III.pdf.

¹³⁴ See Marjorie Cohn, *Introduction: An American Policy of Torture*, in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 1, 16 (Marjorie Cohn ed., 2011).

¹³⁵ See HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* 72 (2009).

¹³⁶ *Id.*

of a lawyer requires more than abiding by ethical obligations: an attorney has an obligation to act morally as well.

There are many negative examples to draw from the Bush lawyers who crafted meticulous arguments to rationalize torture and abuse. The torture memos enabled the administration to conduct its unlawful interrogation program with impunity. OLC lawyers, including Yoo and Bybee, gave the “green light” to torture and abuse.¹³⁷ Nowhere did they express concern for what this treatment would do to human beings. Dan Coleman, a former FBI agent, said, “brutalization doesn’t work. We know that. Besides, you lose your soul.”¹³⁸ The legal mercenaries who worked for Bush may never be brought to justice for what they did, but they have lost their souls.

¹³⁷ Philippe Sands, *The Green Light*, VANITY FAIR, (May 2008), <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>; see generally PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); Jeanne Mirer, *The Law of Torture and Accountability of Lawyers Who Sanction It*, in *THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE* 241 (Marjorie Cohn ed., 2011).

¹³⁸ Jane Mayer, *Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program*, in *THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE* 137, 146 (Marjorie Cohn ed., 2011).