Just as we had with the request from the CIA/NSC in 2002, OLC notified the components in our chain of command within DOJ about DOD's request for an opinion. As in 2002, OLC circulated drafts of the proposed opinion to the Offices of the Deputy Attorney General, the Attorney General, and the Criminal Division. The process of researching, drafting, and editing within OLC and within the Justice Department was the same as with the 2002 opinion. Although the Working Group did not know of the CIA/NSC 2002 request for similar advice, our 2003 opinion would be substantially similar to our August 2002. In fact, it had to be if OLC were to follow its own internal precedent. I met with the working group, composed of both military officers and Defense Department civilians, to discuss legal issues. Our final opinion was delivered to DOD on March 14, 2003.

That April, the Working Group issued a report that incorporated sections of OLC's opinion as part of a broader analysis of the legal and policy issues regarding interrogations at Guantanamo Bay. The Working Group, after carefully considering all the issues, approved a set of 26 well-known tactics in oral questioning while reserving anything more aggressive for use only on specific detainees with important information subject to senior commander approval. It required that any interrogation plan take into account the physical and mental condition of the detainee, the information that they might know, and environmental and historical factors. It reiterated President Bush's 2002 executive order that all prisoners be treated humanely and consistent with the principles of the Geneva Conventions. The Working Group report also outlined the potential costs of exceptional interrogation methods—loss of support among allies, weakened protections for captured U.S. personnel, confusion among interrogators about approved methods, and weakening of standards of conduct and morale among U.S. troops.

As it turned out, it appears that the Secretary of Defense refused to authorize these exceptional interrogation methods for Guantanamo Bay with the sole exception of isolation. The Secretary struck out the use of blindfolds and even mild, non-injurious physical contact from the list of conventional interrogation techniques. I repeat—of the exceptional methods, it appears that the Secretary of Defense authorized only one: isolation. He allowed it only if it generally would not be longer than 30 days. That was it. He never approved any use of dogs, physical contact, slapping, sleep deprivation, or stress positions.

Let me be clear, again, that we in OLC never proposed or selected any specific interrogation methods, either for the CIA or DOD. These difficult decisions were the province of the policymakers. But, again, judging from published reports of our intelligence successes, it appears clear those decisions almost certainly thwarted near terrorist attacks upon our citizenry.

In closing, I believe that it is important to avoid the pitfalls of Monday morning quarterbacking. It may seem apparent today–at least to some—that other choices would have led to better outcomes, though I am not so sure. In facing the questions that were posed to us, we appropriately kept in mind that the homeland of the United States had been attacked by a dangerous, unconventional enemy. But we did not make policy, and we called the legal questions as we saw them. There is little doubt that these are difficult questions, about which reasonable people can differ in good faith. Yet, the facts remain that the United States has successfully frustrated al Qaeda's efforts to carry out follow-on attacks on the Nation, and that the interrogation of captured al Qaeda leaders have been a critical part of that effort. It may be convenient to criticize those of us who had to make these difficult decisions, but it is an important exercise to ask whether others would truly have made a different decision, under the

circumstances that existed in early 2002 and early 2003—and whether, if they had, the Nation would have been as successful in averting another murderous attack upon our citizens.

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[1] The email guidance reads:

> The Department of Justice does not object to Prof. Yoo's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 8, 2008 from Chairman Conyers, subject to the limitations set forth herein. Specifically, the Department authorizes Prof. Yoo to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department (such as the unclassified August 1, 2002 opinion addressing the anti-torture statute, the published December 30, 2004 opinion addressing the anti-torture statute, and the declassified March 14, 2003 opinion to the Department of Defense addressing interrogation standards). As a special accommodation of Congress's interests in this particular area, he may discuss in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record. He is not authorized, however, to discuss specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch.

[2] Most of the details of the formation and execution of the 9/11 attacks are directly attributed in the Commission Report's text and footnotes to their interrogations. See the note on Detainee Interrogation Reports in The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attakcs Upon the United States 146 (2004).

Mr. NADLER. I thank the witness.

Now recognized for 5 minutes for an opening statement, Professor Schroeder.

TESTIMONY OF CHRISTOPHER SCHROEDER, CHARLES S. MURPHY PROFESSOR OF LAW AND PUBLIC POLICY STUDIES AT DUKE UNIVERSITY

Mr. SCHROEDER. Thank you, Chairman Nadler.

Mr. NADLER. Use your mic, please.

Mr. SCHROEDER. Thank you, Chairman Nadler and Mr. Franks and Mr. Chairman. It is a privilege to be here today.

I am not here to question anyone's good faith, either my two colleagues here before us today or anyone else who worked in the Administration under what were extraordinarily difficult circumstances.

We are all eager in providing the country the best and most effective defense against any additional attacks.

At the same time, it has become clear, as events have unfolded and been revealed, that events have taken place with respect to how detainees have been treated, with respect to how military commissions have been established and their procedures with respect to how surveillance activities have been undertaken by the National Security Agency, that we find out, as events unfold, that behind each of these occurrences, these policy decisions, there has frequently been a substantial legal analysis from the Office of Legal Counsel.

And I have to say, reluctantly, that I think a number of these analyses have serious mistakes in them. And so I think it is important to look back in an effort so that going forward, we can establish methods whereby the President will be getting the best legal advice in good times, as well as bad, and to do that to the extent that it is humanly possible.

So I would just make three points about the memorandum, and this is mildly repetitive of my prepared statement, which you have, but just let me emphasize three points.

One I think the memoranda reflect, starkly reflect an extreme view of absolute and uncontrollable presidential power that has been pursued by this Administration, not without dissent among the lawyers inside the Justice Department and other places, but it seems that those dissenting voices don't remain around for very long and that the prevailing view has been one in which the President is purported to have almost un-definable limits on the power that he apparently is entitled to exercise as commander in chief to control the conduct and operations of a war.

Now, this power, if it is applied to the war on terror, is breathtaking in its scope, because the President, first, has warned us, and I think it is plausible to believe, that the war on terror is going to be going on for a long time.

Secondly, we have defined, as we ought to, that the battlefield of this war on terror includes the United States, as much as Iraq or Afghanistan.

And, third, the tactical strategic decisions about how to go after terrorists, about how to interrogate them once you have detained them, about whether they can be detained for some period of time

or have to be put on trial, if they are tried, what the conditions of those trials ought to be, are enormous authorities.

And for the President to assert that in each and every of these respects affecting American citizens, as well as foreign nationals, as well as aliens who have never set foot in this country, that the President has unilateral and unreviewable authority, even to disobey the criminal statutes that the Congress has passed and a President has ratified, is a position that is far outside the mainstream of jurisprudence in this country, of what the Supreme Court has held, and, indeed, what prior Presidents have asserted.

The second point I want to say is this is not a criticism that has been raised simply by President Bush's political opponents or by liberal law professors.

Jack Goldsmith is a staunch Republican. When he came into the Office of Legal Counsel and reviewed some of these memos, he called them "deeply flawed, sloppily reasoned, and overbroad."

When the Attorney General, the acting Attorney General, Mr. Goldsmith, the director of the FBI were confronted with the national security surveillance program, they refused to reauthorize it.

They refused to agree with the analysis that had been done earlier that purported to find that this was also something within the President's constitutional authority, and our understanding is that they and perhaps several other high ranking officials in the Justice Department threatened to resign over this legal analysis.

You have Mr. Goldsmith telling a story in his book of needing to review and eventually to revise or reauthorize, under quite different legal analyses, what he calls "a small stack" of these memoranda.

So this is not just outsiders carping at the President. This is reflective, I think, of a deeply flawed view of the jurisprudence that ought to be applied in understanding both the strengths and the limits of what the President can do in the face of statutory prohibitions.

And the last point I will mention is just with respect to how these memos have been put together.

In my testimony, I express some concerns that they don't seem to have followed internally in the Office of Legal Counsel the good practices that the office has tried to pursue over the years.

Mr. Yoo supplied some information and some more details, which I am glad to have received, in his prepared testimony. I think they still leave a number of questions, in my mind, that would be worth pursuing, but I see my red light is on and I will stop at this point and perhaps be able to say more in response to some of your questions.

Thank you.

[The prepared statement of Mr. Schroeder follows:]

PREPARED STATEMENT OF CHRISTOPHER H. SCHROEDER

Christopher H. Schroeder

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

Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives
June 26, 2008
2141 Rayburn House Office Building

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] 548 U.S. 557, 126 S. Ct. 2749.

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

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

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

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

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

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

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[12] Id., at 2774.

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

[14] John C. Yoo. Memorandum for William J. Haynes IT, General Counsel of the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003), footnote 13) (citing a 2002 OLC memo that apparently rested on this argument).

[15] *Hamdan*, at 2798.

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

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

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

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

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

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

[17] See the sources cited in note 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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