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TORTURED LOGIC: WHY ATTEMPTING TO PUNISH THE AUTHORS OF THE “TORTURE MEMO” IS UNPRECEDENTED AND UNJUSTIFIED

by Catharine Richmond*

I. INTRODUCTION

Who tortured prisoners captured in the Iraq war? Reasonable guesses might include members of the military, prison guards, or CIA operatives. Some might argue even the President himself, in his roles as Commander-in-Chief and Chief Executive, is ultimately the person who should bear responsibility. Most guesses, however, would probably not include lawyers from the Office of Legal Counsel, which, until very recently, was a relatively obscure office in the U.S. Department of Justice (DOJ) known as the “OLC.” Human rights accusations leveled against the Bush Administration for its conduct of the Iraq war have now brought the OLC out of obscurity.1 These accusations cast a spotlight on OLC lawyers who authored a memorandum meant to provide “top secret” attorney-client privileged answers to questions posed by their client,

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the CIA, concerning the legality of certain interrogation techniques.\(^2\) As these OLC lawyers are increasingly threatened with personal consequences for the interrogation techniques used by their client, the CIA, a question arises: to what degree should the OLC lawyers be held accountable for the advice they gave their client in a memo?

While OLC lawyers must adhere to certain ethical and legal standards, they should not be held accountable for the actions of their client, the CIA, if the advice they gave was legally justified. Nevertheless, public outcry has raised the issue of what possible grounds exist to hold the OLC lawyers accountable for interrogation techniques used by the CIA.\(^4\) At least five grounds have been advanced on which possible punishment for the OLC lawyers could be considered.

First, and most logically, the CIA, as a client, could allege legal malpractice against the OLC lawyers, essentially claiming the OLC lawyers acted unreasonably in providing their legal advice. Although this would be the normal approach for holding lawyers accountable for legal advice provided to clients, this remedy has not been sought, first, because the CIA is presumably not dissatisfied with the advice it received from the OLC, and second, because of

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\(^3\) There are several memoranda that are often, and incorrectly, referred to as the “Torture Memo.” This paper will address only the August 1, 2002 memo from the OLC to the CIA’s acting general counsel John Rizzo, id., as it was the only memo that was directly addressed to the CIA. The context for the claims and accusations against the lawyers is based on the attorney-client relationship between the OLC and CIA. As such, this particular memo best represents the communications within that relationship.

procedural complications inherent in potential malpractice claims between two parts of the Executive Branch.

Second, the District of Columbia Bar, or some other appropriate state bar, could attempt to discipline or disbar the OLC lawyers on grounds they had violated ethical rules, such as the rules requiring the application of skill and care to attorneys’ work. Such complaints have been filed against both Jay Bybee and John Yoo, who are the signatory and principal author of the so-called “Torture Memo,” respectively.

Third, one of the OLC lawyers, Jay Bybee, who was subsequently appointed to a federal judgeship, could possibly face impeachment. There have already been public calls for impeachment, although no formal congressional action has been taken as of yet.

Fourth, the enemy combatants on whom the interrogation techniques were used could try to file lawsuits claiming damages for violation of their constitutional rights against OLC lawyers as individuals. This kind of litigation has already been initiated against Yoo.

Fifth, the U.S. Attorney General could try to prosecute the lawyers for participating in a conspiracy to torture prisoners. Public calls for such criminal charges have already been made.

Following a background section and a section about responsibility, this Note will examine each of these five potential bases for punishment, and will end with a discussion of what action, if any, is appropriate given the circumstances. For the sake of clarity and convenience, a diagram appears at the end of this Note, depicting the interrelationships among the various branches and offices of the federal government and the five potential bases for punishment.

II. BACKGROUND

In the wake of the 9/11 terrorist attacks in 2001, the President committed “every tool of intelligence” toward “the destruction and

to the defeat of the global terror network.” In the following months, the CIA captured enemy combatants associated with terrorist activities. The CIA asked the U.S. Attorney General for legal advice about certain enhanced interrogation techniques it wanted to use on particular Al Qaeda combatants. The Attorney General delegated the responsibility of responding to the request to the OLC, which is an office in the Department of Justice that answers legal questions arising within the Executive Branch. The OLC prepared a memo within a few days of the request and submitted it to the CIA in August 2002. The memo, which was written by OLC lawyer John Yoo, was signed by the head of OLC at the time, Jay Bybee. Although there were subsequent OLC memos on the same or similar subjects, this particular memo has come to be known as the “Torture Memo” and is the focus of this Note. The label “Torture Memo” is, of course, prejudicial, but nonetheless widely accepted. The Torture Memo was released to the public in early 2009.

III. ATTORNEY-CLIENT PRIVILEGE ISSUE AND DETERMINING RESPONSIBILITY

The release of the Torture Memo, and subsequent memos on the same subject, raises interesting questions itself. According to attorney-client privilege law, a client, but not the attorney, has the right to release its own confidential materials. As a client, the Executive Branch (which the CIA is a part of) was the holder of this privilege, and could decide to waive the privilege that would have otherwise

6 Address of President Bush Before a Joint Session of the Congress of the United States: Response to the Terrorist Attacks of Sept. 11, 2001, PUB. PAPERS 1140, 1142 (Sept. 20, 2001) (reporting the president’s answer to his rhetorical question, “how will we fight and win this war” on terror?).


8 Torture Memo, supra note 2, at 18.
shielded the Torture Memo from public scrutiny.\textsuperscript{9} However, those same attorney-client privilege rules, at least as applied in a litigation setting, generally prohibit selective waiver; that is, the client cannot selectively reveal as a “sword” those privileged communications which favor the client, while continuing to “shield” those communications which are not favorable.\textsuperscript{10} Under these rules, the entirety of the OLC’s work, along with the CIA’s and White House’s work, on wartime interrogation arguably should have been released as well.\textsuperscript{11} This attorney-client privilege issue is not the focus of this Note, but it provides important context because without the disclosure of the Torture Memo, the OLC lawyers never would have been subjected to the considerable public criticism they have received; without the criticism, the possibility of punishments probably would never have been raised.

In addition to the questionable release of the Torture Memo, the choice of who to punish for wartime interrogation techniques appears arbitrary. The Wall Street Journal reported that “Mr. Obama drew a distinction between those who carried out the interrogations and those who argued for them, reiterating that he didn’t think those

\textsuperscript{9} Barry M. Sabin & Matthew R. Lewis, Protection of the Attorney-Client Privilege in Criminal Investigations, 8 SEDONA CONF. J. 105 (2007) (discussing issues regarding the Department of Justice Criminal Division).


\textsuperscript{11} In re Grand Jury Proceedings, 219 F.3d at 182; accord von Bulow, 828 F.2d 94, 103 (2d Cir. 1987); see also United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (discussing “fairness considerations” that arise when clients attempt to selectively waive the attorney-client privilege with respect to certain documents so that they can use them as “swords,” while declining to waive the privilege for other documents to “shield” them from disclosure).

\textsuperscript{12} The White House, CIA, and OLC would be obligated to release their work because they are all part of the Executive Branch. However, it is possible that protective motions could be filed in an attempt to prevent the release of certain documents if the issue was raised in a litigation context.
who followed legal guidance should be prosecuted.” As a result, the CIA was prematurely absolved from any wrongdoing. A subsequent report by the CIA Inspector General showed, however, that the CIA, without the approval of the OLC, greatly increased the degree of severity of the interrogation techniques originally approved by the OLC. If someone will suffer consequences for the use of the enhanced interrogation techniques, it seems recently revealed information, like the Inspector General’s report, should be considered in determining who is responsible and who should be punished.

Nevertheless, the OLC lawyers still face the possible consequences of a malpractice suit, disbarment, impeachment, civil litigation, or criminal charges. Each of these possible punishments is considered in turn.


14 Central Intelligence Agency, Office of Inspector General, Special Review, 1-7, 24, 25, 37, 42, 43, 44 (May 7, 2004) (admitting that the CIA’s Inspector General’s “review of the [interrogation] videotapes revealed that the waterboarding technique applied at [REDACTED] was different from the techniques as described in the DOJ opinion and used in SERE [military] training . . .. One of the psychologists/interrogators acknowledged that the Agency’s use of the technique differed from that used in SERE training . . . .” This acknowledgement came after members of the CIA repeatedly denied the OLC was unaware of the increase in severity of the interrogation techniques (23, 24, 36)).

15 Id. In addition, the Inspector General’s report states: “individuals interviewed during the Review identified other techniques that caused concern because the DOJ had not specifically approved them . . .. For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination regarding the facts. Thus, although these allegations are illustrative of the nature of concerns held by individuals associated with the CTC Program . . . they did not warrant separate investigations or administrative action.”
IV. Argument

A. Legal Malpractice Liability

The first, and most natural, consequence that might flow from the OLC lawyers offering legal advice to their client is a legal malpractice suit. A malpractice suit is a lawsuit a client files against its lawyer alleging professional misconduct; allegations of misconduct usually arise from negligence or inattention, but occasionally result from incompetence. Legal malpractice suits are not generally used in a government context and are typically limited to private litigation; nonetheless, as a technical matter, the CIA as a client could consider alleging legal malpractice against its legal advisors, the OLC attorneys. It is important to review the possibility of a malpractice suit for two reasons: (1) it is the most recognized way in which clients seek redress from their lawyers for bad legal advice, and (2) it highlights the difficulties inherent in applying other, more tenuous forms of punishment against the OLC lawyers.

A malpractice suit must first begin with a dissatisfied client. However, as far as it is known, the CIA has no complaints about the advice it received from the OLC with respect to the use of enhanced interrogation techniques. With a satisfied client, there is normally no further consideration given to the confidential and privileged advice provided by attorneys. The CIA asked for legal advice, received it, and presumably was satisfied. No other person beyond the client asked for the advice, received it, or acted on it. To the extent anyone was or is dissatisfied with what the CIA did with the advice, the focus of the dissatisfaction should be on the client, not on the lawyer. Although there is no evidence of a dissatisfied client, public outcry suggests that an analysis of whether malpractice was committed is nevertheless warranted.

The rules governing malpractice suits are determined state by state. Since the OLC lawyers worked at the Department of Justice (DOJ) in Washington, D.C., malpractice statutory law in the District of Columbia applies. According to D.C. attorney-client law, Article 45, Section 107, “an informed professional judgment made with
reasonable care and skill cannot be the basis of a legal malpractice claim.” That is, even if the CIA was a dissatisfied client, a malpractice suit could not be brought against the OLC lawyers simply because their client did not like the professional advice the lawyers provided. The CIA, as client, would have to demonstrate that the attorney acted unreasonably or incompetently; if the attorney acted competently with skill and care, there would be no claim.

Attorneys are obligated to properly and competently research their clients’ issues. This includes doing enough research to author “well-founded opinions.” Especially if a body of law is unsettled with respect to a particular issue (i.e., it is an area of confusion), an attorney has a responsibility to research the applicable body of law before offering the client advice. Here, the area of law the OLC lawyers were asked to examine is not a clearly developed body of law; as recognized by a commentator in the *Santa Clara Law Review*, “a true definition of what constitutes ‘torture’ under international law has yet to be determined.” Although determining whether or not a written legal analysis is well researched is somewhat subjective, there are several strong indicators that the Torture Memo was well researched. To start, the Torture Memo referenced several existing treaties and laws on torture. In addition, the treaties and laws referenced were not obscure, nascent documents; they were widely recognized as the determining body of law, however minimal, on torture at that time. Also, the Torture Memo’s advice was not arbitrary

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17 Id.
18 Smith v. Lewis, 13 Cal. 3d 349 (1975).
19 Id.
22 Id.
or haphazard. The law was applied, as best it could be determined by the authoring individuals, to a precise set of facts supplied by the CIA. This application of law resulted in “an informed opinion.” There is nothing that prevents lawyers from offering their clients informed opinions, despite the fact that those opinions may be based on murky or undeveloped law. Hence, lawyers can give opinions in areas of law that are not fully developed as long as they act in good faith and apply skill and care to their work.

This is important. Legally, the Torture Memo was not required to be perfectly substantiated and entirely correct—it was only required to be good enough. As the commentator in the North Dakota Law Review recognized, “an attorney is not an insurer of a good result. Nor is he the insurer of his opinions. Application of the standard of care to an attorney’s conduct does not require perfect results. A non-negligent mistake or error in judgment in an area which is subject to dispute does not create liability.” Although lawyers must give “informed professional judgment[s],” which were “made with reasonable care and skill,” perfection is not required. Attorneys must apply skill and care “as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.” “By definition, reasonable skill does not mean that the highest degree of skill and care must be exercised;” it only means the median skill level of all attorneys must be applied.

Although it could be argued that attorneys should be held to the highest professional standard possible, demanding such a high standard would create a discrepancy between the realistic results an attorney can be expected to produce and an idealized standard of work, not readily attainable. The result is that if the median level of care and skill are applied, “a decision made in an area of confusion, if made in good faith, will probably not result in the attorney being

26 Houser, supra note 23, at 196.
held responsible.” Thus, the authors of the Torture Memo were not expected to produce perfect results; they were only expected to act with reasonable skill and care such that they could provide an “informed professional judgment.”

There are some who allege that the OLC lawyers acted without care or skill. H. Marshall Jarrett, counsel for the Justice Department’s Office of Professional Responsibility (OPR), explained that in addition to whatever was required by District of Columbia law, his office would also be “examining whether the legal advice in these memoranda was consistent with the professional standards that apply to Department of Justice attorneys.” The OPR’s report was released early in 2010, after nearly seven years of investigation. The report, which was changed several times, initially concluded that both Bybee and Yoo committed professional misconduct. After reviewing the OPR report, however, the Deputy Attorney General’s office rejected the report’s conclusions, finding the OLC lawyers committed no

27 Id. at 198.
29 Gillers, supra note 1, at 1.
misconduct and that no discipline was warranted.\footnote{U.S. Dep’t of Justice, Off. Leg. Affairs, Letter to the Honorable John Conyers, Jr., (Feb. 19, 2010) (reporting that Assistant Attorney General Ronald Weich reported to John Conyers, who is the Chair of the House Committee on the Judiciary, that David Margolis from the Deputy Attorney General’s office did not support the conclusions of the OPR report), available at http://judiciary.house.gov/hearings/pdf/Weich100219.pdf.} This internal DOJ finding effectively negated OPR’s conclusions and exonerated the lawyers of misconduct by their own Department’s standards.

While the OPR’s report, and its subsequent rejection by the DOJ, is significant, it does not alter the CIA’s legal rights to any malpractice claim against its lawyers. The OPR’s findings on this matter are only one of several authorities to which the courts would look in deciding whether malpractice was committed. If the CIA wanted to assert malpractice, it could still rely on the other authorities to do so.

While a malpractice claim is theoretically possible, it seems unlikely. Although a malpractice suit seems to be the most appropriate and natural consequence flowing from advice received by a dissatisfied client, assuming there was one, it is unclear how one executive department of the federal government could effectively pursue a malpractice claim against another. The President is expected to settle disputes within the Executive Branch; internal Executive Branch disagreements are sometimes aired in the press, but not in the courts. It is difficult to see how the CIA could pursue a court case leading to an award of damages against the OLC lawyers as it would simply result in the reallocation of the federal budget. Apart from being unprecedented, the CIA has never expressed dissatisfaction with its lawyers’ advice. Therefore, it seems unlikely that the CIA would pursue any type of malpractice claim.

B. Bar Association Discipline

The second possible consequence that could result from the legal advice provided by the OLC lawyers is disciplinary action by a state bar; such complaints have already been filed against Bybee and Yoo. Each state has a bar association that regulates and disciplines lawyers in that state or, in this instance, the District of Columbia. Each bar is subject to its own rules and maintains complete autonomy over controlling who is admitted to the bar and allowed to practice law in that state. With potentially more severe consequences than a malpractice suit, lawyers can be referred for discipline to the bar under which they practice for various reasons including unethical behavior, misconduct, or incompetence. In this case, the OLC


37 Disciplinary action by a bar association could potentially be more severe than a malpractice suit because a bar association can revoke or suspend a lawyer’s license to practice law—this would render the lawyer ineligible to practice law whereas a malpractice suit could result only in damages against the lawyer, but leave him or her free to continue practicing.
lawyers, presumably, were members of the District of Columbia Bar and hence would be subject to its requirements.  

With respect to unethical behavior, the D.C. Bar delineates seven areas of unethical behavior that would constitute misconduct:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) Engage in conduct that seriously interferes with the administration of justice; (e) State or imply an ability to influence improperly a government agency or official; (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or (g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Putting aside other possible grounds, one area of relevance might be found in section 8.4(c), which prohibits “dishonesty, fraud, deceit,

38 Relatively few lawyers are admitted to the D.C. Bar via successful completion of the District of Columbia’s Bar Examination. The D.C. Bar has a fairly lenient “waive-in” policy. That is, lawyers can take the bar examination for a different state (say California or Massachusetts), and if they pass with a sufficiently high score on the multi-state portion of the examination, request to be “waived-in” to the D.C. Bar. If the OLC lawyers were punished, or even disbarred, in the District of Columbia, this would not necessarily result in discipline by the bar associations of other states, even from those states from which they “waived-in” into the D.C. Bar. However, discipline by the D.C. Bar could certainly be the basis for a complaint to another bar association. Interestingly, it appears that Yoo has had a bar complaint filed against him in Pennsylvania but not in D.C.

or misrepresentation.” To implicate the OLC lawyers for acting “dishonestly” or “fraudulently,” evidence would need to be discovered proving that the lawyers intended to mislead the CIA. Here, the legal statutes and case law used in the Torture Memo both existed and were relevant. They were not misrepresented such that the client was subject to dishonest or fraudulent information. Without evidence, there can be no claim; and, as of yet, no such evidence of dishonesty or fraudulence has been provided. Consequently, the OLC lawyers should be cleared of being dishonest or fraudulent.

The question remains whether the lawyers were deceitful or misrepresented their client or the law. The lawyers had an obligation not to be deceitful to their client—the CIA. The Torture Memo was written in response to particular questions, based on a supplied set of facts, to a specific client. The conclusions answered specific questions. The OLC lawyers were not deceitful to their CIA client in answering these questions according to the D.C. Bar’s rules. Public commentary about the alleged deceitfulness of the Torture Memo’s conclusions is irrelevant to the question of their defensibility from an ethical standpoint. As explained by a National Review author, “some types of treatment of prisoners, while perhaps not acceptable either to the administration or to the American public, might nonetheless be legally defensible under both international and American law.” The Torture Memo did not say whether the CIA should employ the various means of interrogation; it only stated whether the CIA could

40 Id. at 8.A(c).
41 Torture Memo, supra note 2, at 15-18.
employ them, based on the available facts and legal authorities.\textsuperscript{43} It was up to the CIA or the White House to decide whether the enhanced interrogation techniques, although legal in the OLC’s opinion, should actually be employed. Thus, despite how others may feel, the OLC lawyers did not deceive their CIA client under the Bar’s standards.

Another potential area the D.C. Bar could examine is whether the OLC lawyers were incompetent. According to the D.C. Bar, “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”\textsuperscript{44} More specifically,

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.\textsuperscript{45}

However, “a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the

\textsuperscript{43} Id. (In fact, the Torture Memo suggests that the CIA should have “the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary [to do so]; it is assumed that the waterboarding technique in question is the same one ‘used in SERE training,’ which is standard U.S. military training; it is also assumed, based on the CIA’s supplied set of facts, that the CIA had “conducted the due diligence [and]… reviewed the relevant literature on the subject and consulted with outside psychologist” in determining whether the techniques would inflict prolonged mental harm.”).


\textsuperscript{45} Id. at § 1.1.1.
lawyer is unfamiliar.”46 Most important, the “competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”47

Were the OLC lawyers who authored the Torture Memo “incompetent” based on these standards, or did they act and perform in a manner that demonstrated reasonable competence? There is little dispute that the OLC lawyers were not recognized experts on torture. But lawyers are often not experts on the topic on which they are offering advice. Moreover, the D.C. Bar does not expect lawyers to be experts in order to be competent enough to give counsel on any particular topic.48 What the D.C. Bar does expect is “inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”49 If lawyers are not expected to be experts, but are expected only to demonstrate proper “inquiry and analysis” into a matter, did the OLC lawyers fulfill these requirements of competency? The answer is found in the Torture Memo itself. The Torture Memo is of significant length and discusses pertinent case law. It addresses the applicable sections in Title 18 of the U.S. Code and the United Nations’ Convention Against Torture.50 The analysis and commentary on these laws is specific and thorough. Even though the contents of the Torture Memo are not universally agreed upon, the fact that

46 Id. at § 1.1.2.
47 Id. at §1.1.5.
48 American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, Rule 1.1, Comment 2 (2009) (explaining that “a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar . . . . Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems . . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.”), available at http://www.abanet.org/cpr/mrpc/rule_1_1_comm.html.
49 Id.
50 Torture Memo, supra note 2, at 15-18.
it was thoroughly researched and analyzed, even if only from one
given perspective, satisfies the requirement for competence.

That leaves the question whether the Torture Memo’s conclu-
sions were otherwise appropriate. The conclusions did not have to
be “right” in the sense that there was only one correct way of an-
swering the questions posed. In other words, legal reasoning is not a
science: it requires interpretation, which can lead to results that can
be both reasonable and different at the same time. Individual inter-
pretation of the law is the bedrock of the legal system, and differing
opinions do not constitute incompetence. In his book, The Terror
Presidency, Jack Goldsmith, who succeeded Bybee as head of the
OLC and is now a political scholar at Harvard, criticized the Torture
Memo as being “legally flawed, tendentious in substance and tone,
and overbroad.”51 Yet even these accusations fail to substantively
demonstrate the OLC lawyers were incompetent. All they prove is
that Goldsmith disagrees with the conclusions; they do not prove that
the conclusions were outside the realm of reasonable conclusions. In
fact, in a later interview Goldsmith acknowledged,

I don’t impugn the integrity of anyone. I really do believe
that everyone . . . w[as] acting in good faith. . .. We were all
acting under intense pressure. . .. Therefore, we had to try as
hard as we could. . .. We all have our own views of the law
and how to approach the legal principles. And in some sense
it was a legal dispute.52

Thus, although there may be legitimate grounds to dispute the con-
cclusions of the Torture Memo, those disputes are not sufficient evi-
dence of incompetence on the part of the OLC lawyers.

Although it would be difficult to prove incompetence, a dis-
ciplinary investigation by the Bar is nonetheless a real possibility
as evidenced by the complaints that have already been filed. Had
the OPR’s report of gross professional misconduct under the DOJ’s
standards been accepted, the Bar may have more easily determined

52 Daniel Klaidman, ‘The Law Required It,’ Newsweek, Sept. 8, 2007, at 4,
that the lawyers also failed to satisfy the Bar’s standards. As previ-
ously mentioned, however, the Bar and the OPR have different stan-
dards—as a result, the lawyers could still be disciplined or disbarred
under the Bar’s different standards as described above.

C. Impeachment

The third possible consequence is the impeachment of Judge
Bybee, who signed off on the Torture Memo as the head of the OLC at the time.53 President Bush appointed Jay Bybee to the United
States Court of Appeals for the Ninth Circuit in 2003.54 A federal
judgeship is an Article III lifetime appointment; to be removed from
this office a judge must be impeached by the House of Represen-
tatives and stand trial in the Senate.55 Article II, Section Four of
the United States Constitution establishes that “the President, Vice
President, and all other civil Officers of the United States shall be
removed from Office on Impeachment for, and Conviction of, Trea-
son, Bribery, or other High Crimes and Misdemeanors.”56 Judges
are rarely impeached, and when they are, their crimes are usually
gross in nature, such as taking bribes or committing other serious
felonies that would erode confidence in the judiciary.57 In over two

53 While it may seem odd to impeach a judge for a crime committed before
taking the bench, this action is not specifically prohibited. It would cer-
tainly be a rare, and unconventional, approach, but as of yet, has not been
established as improper.

54 Nominations Submitted to the Senate, 49 WEEKLY COMP. PREP. DOC. 1
(Jan. 10, 2003).

55 U.S. CONST. art. 3, § 2.

56 U.S. CONST. art. 4, § 2.

gov/history/home.nsf/page/topics_ji_bdy?OpenDocument (detailing mis-
conduct for which judges have been impeached for including: intoxication
on the bench (J. John Pickering); waging war against the U.S. government
(J. West H. Humphreys); improper business relationship with litigants (J.
Robert W. Archbald); tax evasion and of remaining on the bench follow-
ing criminal conviction (J. Harry E. Claiborne); perjury and conspiring to
solicit a bribe (J. Alcee L. Hastings)) (last visited Dec. 9, 2009).
hundred years, only thirteen federal judges have been impeached, and of those only seven convicted.\textsuperscript{58}

Considering that the only evidence against Judge Bybee is a government memorandum, and the subsequent seven-year analysis by the OPR resulted in a finding of no misconduct and recommended no discipline, the House would probably not have substantial grounds to impeach him. To gain political cover, investigating House committees may wait until other legal action has been taken against him, such as formal sanctioning or disbarment from the D.C. Bar. While impeachment seems an extreme action to take against a judge based on the contents of a memorandum written long before the judge took the bench, the power of public outcry may nevertheless prompt continued calls for the impeachment of Judge Bybee.\textsuperscript{59} Indeed, the chairman of the House Judiciary Committee, John Conyers, announced on February 19, 2010, that his committee would hold hearings because, in his view, the OPR’s report and related materials “make plain that those memos were legally flawed and fundamentally unsound, and may have been improperly influenced by a desire to tell the Bush White House and the CIA what it wanted to hear.”\textsuperscript{60} Another member of that committee, Jerry Nadler, is already on record that Judge Bybee “ought to be impeached.”\textsuperscript{61}

Thus, even though the Executive Branch, through the OPR, has found no misconduct and no grounds for discipline, Congress remains free to conduct hearings and, potentially, to impeach Judge Bybee.

\textsuperscript{58} Id.


D. Civil Litigation

The fourth possible consequence could be a civil lawsuit filed against the OLC lawyers, as individuals, alleging they purposefully violated the rights of detainees. Such a lawsuit has already been filed; Jose Padilla, an accused terrorist, has sued Yoo for allegedly violating his constitutional rights.62 The case was allowed to proceed beyond a dismissal motion in a federal district court and is now on appeal to the Ninth Circuit.63 64 In spite of the OPR’s open investigation at the time, the DOJ’s Civil Division filed an amicus brief on behalf of Yoo in the Ninth Circuit as it had in the district court.65

Typically, government officials are immune from being sued as individuals under the common law tradition of sovereign immunity inherited from England. As it was adopted in American law, government officials are protected by qualified immunity. The qualified immunity granted to government officials in the United States provides them with protection from being sued for damages as individuals, but only insofar as they did not knowingly or willfully violate any person’s constitutional rights. “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”66 However, the Supreme Court has failed to adopt

64 Padilla v. Yoo, No. 09-16478 (9th Cir. notice of appeal filed July 9, 2009).
65 Amicus Curiae Brief for Defendant-Appellant, Padilla, No. 09-16478 (9th Cir. filed Dec. 30, 2009).
clear guidelines on qualified immunity, and “the result has been incoherent, inconsistent, and often counterintuitive decisions.”\textsuperscript{67}

The first, and most significant, Supreme Court ruling on qualified immunity was nearly four decades ago in the \textit{Bivens} case.\textsuperscript{68} In \textit{Bivens}, the Supreme Court laid out a two-part test to determine whether a remedy could be sought against government officials for monetary damages: (1) whether alternative remedies existed, and (2) whether there were “special factors” that should be considered.\textsuperscript{69} In the 39 years since \textit{Bivens}, the Supreme Court has narrowly extended it only twice—once in a due process case and once in an Eighth Amendment case.\textsuperscript{70} The Supreme Court has repeatedly ruled that Congress is vested with the appropriate powers to address such matters.\textsuperscript{71} Especially “where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage action if it so chooses.”\textsuperscript{72}

Padilla’s case should have been dismissed on both parts of the \textit{Bivens} test. First, alternative remedies existed. Padilla claimed he was mistreated and illegally held in a Navy brig. Two days after being taken into custody, Padilla filed for a writ of habeas corpus.\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{68} \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388 (1971).
\item \textsuperscript{69} \textit{Id}.
\item \textsuperscript{70} \textit{Davis v. Passman}, 442 U.S. 228 (1979); \textit{Carlson v. Green}, 446 U.S. 14 (1980).
\item \textsuperscript{71} \textit{Western Radio Services v. U.S. Forest Service}, 578 F.3d 1116, 1119 (9th Cir. 2009) (recognizing that “the Supreme Court has focused increased scrutiny on whether Congress intended the courts to devise a new \textit{Bivens} remedy, and in every decision since \textit{Carlson}, across a variety of factual and legal contexts, the answer has been ‘no’”).
\item \textsuperscript{72} \textit{Amicus Curiae Brief for Defendant-Appellant, Padilla}, No. 09-16478, 2 (9th Cir. filed Dec. 30, 2009).
\item \textsuperscript{73} \textit{Padilla v. United States}, 542 U.S. 426 (2004).
\end{itemize}
His writ was initially denied due to improper filing, but was later declared moot anyways by the Supreme Court due to his relocation to a federal prison. This clearly shows Padilla had a reasonable and alternate legal remedy available to him. As the DOJ’s amicus brief recognizes, “the fact that the habeas statute provides no damage remedy or redress against Yoo personally, is not a ground for supplementing that remedy with a judicially-created money-damage claim.” Apart from legal remedy, Padilla also could have reported the lawyers to the Bar or the OPR, which others have already done.

Second, there are numerous “special factors” involved in this case. First, the potential limiting of the President’s war powers is a critical factor weighing against permitting a suit against the OLC lawyers. As the DOJ’s amicus brief points out, “there can be little question that the claims here directly implicate war powers of the President, with respect to the military’s detention and treatment of those determined to be enemies during an armed conflict, that have never been the subject of money-damages actions in our nation’s long history.” In addition, “courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs” because they are ill equipped to do so. The DOJ’s amicus brief explains, “recognizing a Bivens action in this context is especially inappropriate because the plaintiff is seeking to impose liability for legal advice relating to war powers and national security.”

A second factor weighing against a private lawsuit is that allowing a Bivens action could influence foreign policy decision making—Padilla’s designation as an enemy combatant influences how future policy will be shaped in defining wartime enemies. “To

75 Amicus Curiae Brief for Defendant-Appellant, Padilla, supra note 73, at 24.
76 Id. at 20, 21.
77 Id. at 15.
79 Amicus Curiae Brief for Defendant-Appellant, Padilla, supra note 73, at 3.
determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking.”

A third factor is that the military would be forced to turn over sensitive information to the courts regarding wartime practices if the case proceeds. This would endanger the security and usefulness of information about current wartime military practices.

A fourth factor is the “threat . . . such claims could deter the invaluable, frank, and full discussion within the Executive Branch . . . [and] the need for candid advice . . . is vital.” As a commentator states:

Rather than fully devote themselves to counseling members of the Executive Branch, and aid in policymaking efforts, executive lawyers—who are frequently called upon to grapple with activities that push the ill-defined boundaries of illegality and constitutionality—will be preoccupied with avoiding personal liability. Once the primary means of conveying legal concepts and advising others, the legal memoranda may instead be viewed as potentially incriminating evidence. The prospect of litigation also chips away at the confidentiality of executive legal advice—a cornerstone of the legal profession.

Apart from limiting presidential powers, the possibility of deterring frank legal advice in the Executive Branch could be the most lasting damaging effect of allowing private suits against the OLC lawyers.

Fifth, and finally, extending a Bivens remedy against Bybee and Yoo would explore new areas of constitutional law. It has been long recognized by the Supreme Court that “if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable.” More specifically, in ac-

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80 Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005).
81 Amicus Curiae Brief for Defendant-Appellant, Padilla, supra note 73, at 18, 19.
82 Percival, supra note 67, at 12.
cordance with the constitutional avoidance doctrine, “the court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.” 84

Although Padilla claims his constitutional rights were violated, seeking a money-damages remedy through a Bivens action is not the proper course to pursue. Potential threats to limiting presidential wartime powers, unduly influencing foreign policy, revealing sensitive military information, limiting frank legal advice in the Executive Branch, and establishing new constitutional law are all factors weighing against imposing civil damages on the OLC lawyers.

E. Criminal Charges

The fifth possible consequence could be criminal charges filed against the OLC attorneys by the Attorney General or a U.S. Attorney alleging participation in a conspiracy. Such allegations have already been made. Stephen Rohde of the American Civil Liberties Union (ACLU) recently suggested filing such charges in a public Federalist Society debate with John Eastman. 85 Rohde recommended the OLC lawyers be scrutinized under the same laws they used to justify enhanced interrogation techniques for the CIA, which is found in section 2340 of Title 18 in the U.S. Code. The Patriot Act modified section 2340 to include anyone who conspires to commit a crime be charged with the same penalties. 86 If carefully read, however, the code states there must be “an act committed by a person” which carries “the threat of imminent death” to constitute a violation; here, those who committed these alleged acts have already

been absolved by the President.\textsuperscript{87} \textsuperscript{88} In addition, the code states that “whoever outside the United States commits or attempts to commit torture” will be charged under this section.\textsuperscript{89} It seems that the OLC lawyers, who certainly did not commit an act of torture outside the United States, could not be possibly charged as if they had. Rohde, however, maintains that the Torture Memo was prepared as a cover for conduct that was already occurring, and was the “lynch-pin” in a conspiracy to commit torture.\textsuperscript{90} If the lawyers can be charged at all, a “conspiracy” must first be proved to exist; as of yet, no such conspiracy has been uncovered.

While conspiracy charges seem to be a remote possibility, the public nature of their allegation suggests they could become more likely in the future.

V. APPROPRIATE ACTIONS

If the above actions, namely a malpractice suit, Bar discipline, impeachment, civil litigation, or criminal charges, are not the proper actions to be taken, what are, if any?

First, it bears repeating that the Torture Memo was a privileged and confidential document prepared in an attorney-client relationship. All of the threatened consequences for the authors of the Torture Memo have either been suggested by parties outside that relationship or have not been pursued by the client. Tellingly, the CIA has never sought any remedy against the OLC—presumably because the CIA was satisfied with the advice provided by the OLC lawyers. Had the CIA been dissatisfied with the advice provided by the OLC, it could have raised malpractice accusations or reported the lawyers to the Bar or OPR. The continued pursuit of punishment for the OLC lawyers through alternate methods suggests a desperate attempt of those outside the

\begin{itemize}
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Statement of President Barack Obama on Release of OLC Memos, 263 \textit{Weekly Comp. Pres. Doc.} 1 (Apr. 16, 2009).
\item \textsuperscript{89} 18 U.S.C. § 2340.
\item \textsuperscript{90} Debate, \textit{supra} note 85.
\end{itemize}
privileged attorney-client relationship to punish lawyers who gave advice in a murky area of law under wartime pressures.

In addition to those possibilities, there have also been suggestions in the media and by members of Congress that congressional hearings are in order.\textsuperscript{91} Had other remedies not been sought, this might have been a legitimate option to pursue. In light of the extensive OPR report and possible Bar and judiciary action, however, it seems redundant for Congress to initiate its own inquiry. It would also waste government funds—the OPR has already spent valuable funds investigating this matter for seven years. Those in the government who are responsible for maintaining ethics have already made a substantial inquiry into this matter. The ultimate conclusion of that inquiry was absolving for the OLC lawyers. Any further investigation would seem to be redundant and a waste of resources.

VI. CONCLUSION

The legal advice in the Torture Memo has been widely criticized, and was even later rejected by the OLC itself.\textsuperscript{92} Although the client, the CIA, was entirely satisfied with the OLC lawyers’ advice, it is now clear that many government officials were not. Dissatisfaction does not prove wrongdoing or incompetence, however. The subsequent criticism of the Torture Memo is similar to military historians


\textsuperscript{92} Off. Legal Counsel, Memorandum for the Attorney General, Re: Withdrawal of Office of Legal Counsel Opinion (June 11, 2009) (announcing that the Torture Memo, and subsequent memos on the same topic, were officially being withdrawn because they “no longer represent[] the views of the Office of Legal Counsel.” It is important to note that the memos were withdrawn because of a discrepancy of opinion, not fact.), available at http://www.justice.gov/olc/2009/memo-barron2009.pdf.
who criticize decisions made in battles long ago—it is always easier to see the flaws of others from a safe and retrospective distance.

Punishing the OLC lawyers would have significant consequences. If the lawyers are punished, there is a risk that every subsequent administration’s lawyers could be aggressively pursued for perceived problems with the administration’s policies. Legally, it would be establishing a dangerous precedent in which lawyers could be held accountable for the actions of their clients. Punishing the OLC lawyers would set a precedent of false accountability. Lawyers would have to live in fear of authoring any legal opinion, as they could potentially be held accountable for any foreseeable or unforeseeable consequences of their opinions, as implemented by their autonomous clients.93

The OLC does not establish or carry out executive policy. Instead, the OLC provides legal advice to its government clients, which they are free to accept or reject, in whole or in part, as they see fit. The OLC is not, and should not be, responsible for the morality of actions the government takes based on its legal advice if the advice was legally justified. Authoring the Torture Memo and implementing its advice are two separate issues. Although the lawyers may have provided a legal justification for what some believe to be torture, they in no way endorsed it. Pursuing punishment for lawyers who have authored legal opinions in good faith is a dangerous precedent to set, especially at the federal level.

93 John Yoo, My Gift to the Obama Presidency, WALL ST. J., Feb. 24, 2010, available at http://online.wsj.com/article/SB10001424052748704188104575083473537079844.html (publishing Yoo’s rhetorical question and answer in an Op-Ed piece: “why bother fighting off an administration hell-bent on finding scapegoats for its policy disagreements with the last president? . . . I did it to help our president—President Obama, not Bush. . . . He will call upon men and women serving under his command to make choices as hard as the ones we faced. They cannot meet those challenges with clear minds if they believe that a bevy of prosecutors, congressional committees, and media critics await them when they return from the battlefield.”); see also Weisman, supra note 14, at 1 (responding to possible impending legal action, Democratic lawyer Stanley Brand quipped, “it’s the ultimate slippery slope to criminalize a lawyer’s opinion. Where does that end?”).