OPR WORKING THREAD TWO

Happy Saturday.

- Memorandum for the Attorney General
- OPR Final Report (a searchable copy, courtesy of burnt, is here)
- OPR 1st Draft Report (a searchable copy, courtesy of burnt, is here)
- OPR 2nd Draft Report
- Yoo Response to OPR 2nd Draft
- Yoo Response to OPR Final Draft
- Bybee Response to OPR 2nd Draft
- Bybee Response to OPR Final Draft

OPR Report Second Draft

I will be starting with the Second Draft of the OPR memo. As before I will use the PDF page numbers, not the printed page numbers

PDF 6: OPR interviewed John Bellinger between the first draft (December 2008) and second draft (March 2009).

PDF 7: The first draft claimed that OPR didn't get the Combined memo until 2007. The second draft says they saw it in 2005, along with the Techniques memo.

PDF8: Bradbury said he didn't show OPR the CAT memo bc it didn't replace either of the Bybee memos; he claimed that was the entire scope of the OPR investigation.

PDF 8-9: The Second draft (written after receiving Mukasey's comments) notes that Mukasey had reviewed the Bradbury memos and found them legal. It is followed by a paragraph noting that Obama issued an order stating no one coudl rely on OLC guidelines from before his term.

PDF 10: Second draft notes that it did not rely on legal commentary or comments from other DOJ employees. Seems like Mukasey beat them up for letting Goldsmith or Comey's opinions matter.

PDF 11: Second draft withdrew recommendation to review Bradbury memos, saying that the Obama EO withdrawing everything made further review unnecessary.

PDF 12: Second draft makes a point of saying that Bybee didn't leave dept until March 28, 2003 (the first said he left right away). This may have relevance for the Yoo Memo.

PDF 12: Second draft notes that

PDF 16: Footnote 14 is changed to say that CIA had neither oral or written approval to use torture when it started; draft one had just said this was before the August 1 memo.

PDF 20: There is a longer redaction after the techniqes list in the second draft. Also note the explanation of Bellinger's discussion with Yoo now has a redacted half-paragraph. This is significant since Bellinger was interviewed between the two drafts. Also note that part of footnote 18 is redacted in the later draft, though from the spacing it appears to be the unredacted passage from the first draft explaining that oo did not know why Bellinger told him to avoid telling State. Presumably in the contect of the other Bellinger discussion, it is now too sensitive?

PDF 21: THere's a medium sized paragraph in the second draft that doesn't appear in the first, which seems to come from Bellinger. Bellinger notes that Yoo was under a great deal of pressure on this memo, and also says that over time there was significant pressure to rule that

the program was legal and could be continued (this seems to refer to Bradbury's timing). In any case, it seems to relate to pressure from the WH.

PDF 23: there is a much longer redaction in the description of the meeting talking about starting the opinion. Again, this must come from Bellinger.

PDF 26: Second draft adds a paragraph stating that Yoo said he was not under time pressure, except maybe at the end after they decide to do Bybee Two.

PDF 29: 2nd draft adds a comment from Chertoff stating that he clearly said there could be no advance declination.

PDF 32: 2nd drafts adds a sentence noting that Yoo did not send the refusal to give an advance declination.

PDF 52: In a few places in discussion of Gitmo techniques, the 2nd draft replaces "EITs" with "agressive techniques."

PDF 72: 2nd draft has more in the footnote on why EDVA didn't prosecute. After describing the timing of the declination (after the withdrawal of Bybee but before Hamdan), the footnote continues:

> Accordingly, the prosecutors may have relied upon OLC's erroneous determination that the War Crimes Act did not apply to suspected terrorists held abroad. We found no indication, however, that the EDVA declination decisions were revisited after Hamdan. In reviewing the declination decisions, the Department will have to determine whether prior OLC opinions and executive orders bar prosecution of these matters.

PDF 91: Adds language on Ashcroft's failure to object to the number of times KSM was tortured.

PDF 95: 2nd draft adds teh following language

instead of comment about Levin taking over on replacing memo.

> On July 14, 2004, then Associate Deputy AG Patrick Philbin testified before the House Permanent Select Committee on Intelligence as to the legality of the 24 interrogation methods that had been approved for use by the Defense Department. Sometime thereafter, the Defense Department reportedly informed OLC that it no longer needed a replacement for the Yoo Memo.

PDF 96: 2nd draft takes out Bradbury's comment that someone needed to exercise adult supervision.

PDF 100: What is footnote 80 in the 2nd draft (footnote 79 in the first) is redacted only in the first draft. The footnote pertains to Levin's questions about how detainees were kept in stress positions. In the conclusions, OPR notes that there was the distinct possibility that people were beat to keep them in stress positions.

PDF 101: 2nd draft adds the language about Levin's restrictions on waterboarding being consistent with the classified Bybee Memo (Bybee Two).

PDF 101: The footnote describing the 6 techniques Levin found to be legal is unredacted in the second draft but not the first.

PDF 106: This may or may not be significant. but note the footnote stating that Bradbury was acting AAG from February 5 (when Levin resigned) to February 14, 2005. We should look for some crazy stuff then. But also of note: that's when EDVA first (orally) declined to prosecute al-Janabi's murder.

PDF 106: Note, too, that the first draft raises some doubts whether Levin started on the Combined memo before he left or not, the second draft states he did with no question.

PDF 107: 1st draft says Levin never got a copy of the CAT memo. 2nd draft has footnote saying that Bradbury remembers personally delivering it to Levin's office in NSC (with text amended to say that Levin did not remember receiving it).

PDF 107: The language changed from saying Techniques "authorized" the torture techniques to saying it "found them to be legal."

PDF 114: 2nd draft adds the language specifying that, by approving the Techniques memo, Comey approved forced nudity, sleep deprivation, and waterboarding. (Note, this is precisely the argument made by those who leaked Comey's emails to the NYT, making it much more likely that those emails came from Yoo's camp.)

PDF 115: The second draft has substantial pushback from Bradbury in the footnotes. The following is all new:

> Bradbury told us that Comey's assertion that he was susceptible to pressure because he was seeking the President's nomination to be AAG of OLC was incorrect. Bradbury asserted that the President's formal approval of his nomination occurred in early to mid-April 2005, prior to Comey's email. We were unable to confirm this date. In addition, we were unable to ascertain if any pressure was applied to Bradbury prior to the date of his formal nomination.

In teh second part of that footnote 97, following "comments ignored" this is an addition:

> However, Bradbury told us that Philbin's concerns centered on the Combined Technique Memo's conclusion, identical to that of the Levin Memo, that "severe physical suffering" was a separate concept from "severe physical pain." Philbin reportedly urged Bradbury to adopt the more permissive view of the

> Classified Bybee Memo, which had concluded that there was no difference between severe physical pain and severe physical suffering. Bradbury told us that he responded to Philbin's comments by expanding the discussion of severe physical suffering and by further refining the memorandum's analysis, although he did not change his ultimate conclusion that "pain" and "suffering" were distinct concepts.

And all of footnote 98 is new:

> Bradbury told us that he mistakenly understood the instruction to mean that a joint decision had been reached by Gonzales and Comey in consultationw ith the White House and possibly the CIA, which woudl involved only a short delay in the issuance of the opinion. According to Bradbury, when he learned that the instruction came from Comey alone and that Comey believed the Combined Techniques Memo should not be issued, he did not consider that to be an acceptable option.

PDF 117 The paragraph of Bradbury denying any pressure is new.

PDF 121-122: Has a lot more differing memories about who saw the CAT memo. Of note, the 2nd draft adds a comment from Bellinger saying that the CAT memo for him was a turning point.

PDF 122: Amends the involvement/communications with McCain that pertained to the removal of waterboarding from list of techniques.

PDF 148: Second draft removed section on prolonged mental harm.

PDF 159: Second draft notes that Yoo told Koester that he wasn't going to do an exec power section on the 15th, then had his meeting with Addington.

PDF 159: This is a really fascinating rationalization from Yoo (it doesn't show up in the first draft), not least bc it suggests they were trying to avoid putting Presidential orders in writing.

> Yoo denied to OPR that the Commander-in-Chief sections provided blanket immunity to CIA agents who crossed the lines laid out by the torture statute. He asserted that the Commander-in-Chief defense could not be invoked by a defendant unless there was an order by the President to take the actions for which the defendant was charged. Yoo admitted, however, that the Bybee Memo did not specify that the use of the Commander-in-Chief defense required a presidential order. He stated: "I'm pretty sure we would have made it clear. I don't know—we might have made it clear orally." Yoo admitted, however, that the section was probably not as explicit as it could have been.

PDF 184: The second draft redacts both the mock burial reference and the quotation that w/o waterboarding the program would lose 50% of its efficacy.

PDF 191: The second draft adds a paragraph saying that they might not consider this a problem if it happened on less important an issue.

PDF 195: This footnote is new:

> Bellinger told OPR that he pushed for years to obtain information about whether the CIA interrogation program was effective. He said he urged AG Gonzales and WH Counsel Fred Fielding to have a new CIA team review the program, btu that the effectiveness reviews consistently relied on the originators of the program. He said he was unable to get information from the CIA to show

> that, but for the enhanced techniques, it would have been unable to obtain the information it believed necessary to stop potential terrorist attacks.

PDF 198-199: The effectiveness sections is much expanded in 2nd draft. Also note the reference to the junk intell that Ibn Sheikh al-Libi gave.

PDF 201: There's also more on "shocks the conscience." Notably, how Bradbury had no affirmative evidence that the torture program didn't shock the conscience.

PDF 202: This footnote is new (though the Comey reference had been in the text):

> Apart from concerns Comey communicated orally to Gonzales about the Combined Techniques Memo, we are unaware of whether the Department formally considered or identified any of the many policy issues that were implicated by the Department's approval of the CIA interrogation program. However, attorneys from the Criminal Division complained to us that they were left out of the process and that the effects of the CIA program on international relations in the criminal and human rights arena have been profound.

PDF 203: Bradbury got himself out of doodoo with whatever OLC said in its review of the document. The first draft made this conclusion on him:

> Finally, we recommend that the Department review the Bradbury Memos carefully and consider whether the memoranda appropriately relied upon CIA representations, whether they provided reasonable and objective legal advice, and whether the Department has identified and evaluated all relevant moral and policy consideration associated with the CIA interrogation program. Any such review should, we

> believe, consider the views of the Criminal Division, the National Security Division, the Department of State, and the intelligence community, including the FBI and the United States military.

It was changed to this in the second draft:

> Finally, although we had substantial concerns about the reasonableness and objectivity of certain aspects of the Bradbury Memos, as discussed above, we did not find the shortcomings we identified rose to the level of professional misconduct. Because President Obama's January 22, 2009 Executive Order rendered the Bradbury Memos inoperative, we do not believe further review by the Department is necessary.

The Mukasey/Filip Letter

Mukasey and Filip actually make a few appropriate but cheap points (my sense is that Mukasey and Filip are better lawyers than the OPR lawyers, and they know it and are exploiting it).

But their section on whether Yoo and Bybee were inappropriately influenced is terribly weak, particularly since they don't even mention the meeting with Gonzales (and probably Addington and Flanigan). Which is why this is so interesting.

> Given classification concerns it is difficult to discuss what OPR appears to view as the most relevant evidence that Bybee and Y00 failed to provide their independent and candid legal advice.

Now maybe the Gonzales/Addington meeting has since been declassified. But is there some other reason to believe Addington pressed this conclusion?

Here's what Mukasey and Filip say about declinations.

> The Draft Report recommends that "the Department reexamine certain declinations of prosecution regarding incidents ofdetainee abuse referred to the Departmentby the CIA OIG." [Id at 9.] As the Draft Report itself recognizes, the question whether to prosecute matters addressed in the CIA OIG report has been addressed independently by two sets of prosecutors, first in the Counterterrorism Section (then located in the Criminal Division) and later in the U.S. Attorney's Office for the Eastern District of Virginia In both cases, the declinations were based on a variety of prosecutorial considerations, many of which seemingly would be unaffected by any infonnation in the Draft Report and most of which seemingly would have been known to prosecutors at the time of their decisions. 11 Indeed, prosecutors in the Eastem District of Virginia made their decision to decline prosecution in 2005, well after the 2002 Bybee Memo had been withdrawn by the Department. In addition, if and when OPR's report is finalized (whether with or without any professional misconduct referrals), the prosecutors could be given access to it, and could re-evaluate their decisions as they saw fit. In light ofthese facts, we believe it is unnecessary for OPR to recommend reconsideration.
>
> Some of these considerations arc discussed in classified portions of the Draft Report.

A couple of things. M/F are pointing to the Bybee memo as the problem—and not the Legal Principles, which is one of the bigger problems with the torture cases. They also point to Bybee

One, and not Bybee Two, in spite of the evidence that the torturers exceeded Bybee Two's guidelines.

But the other is just as interesting—what information are they hiding behind classifications that relates to the prosecutions?

This is one of the most telling comments in the M/F letter:

> The Dmft Report also recommends that the Department review certain Bradbury Memos. The Draft Report, however, does not acknowledge a key fact-that the Attorney General himself already reviewed the Bradbury Memos. This was undertaken, in what we believe was an unprecedented effort, in response to congressional requests for the Attorney General to do so. That fact alone, which is not even mentioned in the Draft Report, makes the recommendation seem inapposite.

Mukasey is basically saying, Hell no, we're not going to review something with the risk that my judgment could be second-guessed. But what is so interesting about it is that he does not reference any report. Did he assess Bradbury's use of legal authorities? Did he really engage with the way that Bradbury eliminated the possibility that torture would shock the conscience? I don't think he did such a report. Thus, Mukasey here is conflating his own review—his judgment—with an actual legal analysis of the opinions.

Mostly, though, he doesn't want his own judgment questioned, it appears.

Finally, there's this, what I find to be the sickest assertion in the M/F letter.

> Nonetheless, it is also impossible to believe that govemment lawyers called on in the future to provide only their best

> legal judgment on sensitive and grave national security issues in the time available to them will not treat such a recommendation as a cautionary tale-to take into account not only what they honestly conclude, but also the personal and professional consequences they might face ifothers, with the leisure and benefit of years of hindsight, later disagreed with their conclusions. Faced with such a prospect, we expect such lawyers to trim their actual conclusions accordingly. Nor, if the recommendation of professional discipline stands, could the Department reasonably be expected to readily attract, as it does now, the kinds of lawyers who could make such difficult decisions under pressure without the lingering fear that ifthose decisions appear incorrect when reconsidered, not only their conclusions but also their competence and honesty might be called into question. OLC lawyers might be willing to subject themselves to the inevitable public second guessing of their work that occurs years later in a time of relative calm. But we fear that many might be unwilling to risk their future professional livelihoods.

Mukasey and Filip are arguing that lawyers serving the public cannot, should not, be subject to any consequences, and that they must all proceed with confidence that nothing they can do in the service of power can affect their future livelihoods (which, the example of Koester and Bradbury make clear, will otherwise be a straight ticket to partner at a big firm, if not higher, even if they write historically embarrassing opinions). This is a recipe for a repeat of what we've just gotten, a total abuse of the law.

Yoo's First Response

What's notable about the response immediately is

that in significant part it is based on the Mukasey/Filip Letter—leaving the impression that this is a collective enterprise to get Yoo excused for his crimes.The Yoo response parrots the Mukasey/Filip letter in that it:

- Attacks the OPR lawyers
- Suggests that if Yoo is referred DOJ will never get good lawyers (citing Mukasey)

The Yoo response makes an attack on OPR wrt statutes of limitations.

> Second, it must be said that if OPR's conclusion actually were valid-which it manifestly is not-then OPR has itself exhibited extraordinary incompetence by allowing the statute of limitations to expire despite working on this investigation for approximately two years before that deadline came and went. Allowing a limitations period to run is, of course, a quintessential competence issue subject to bar discipline. See, e.g., In re Outlaw, 917 A.2d 684 (D.C. 2007).

Of course, this inquiry was launched in 2004 solely because the unclassified Bybee One memo became public: that is, the people being hurt by Yoo's bad judgment (aside from those people being tortured—I'm talking about the American people) were prevented from knowing about the abuses that Yoo had committed. Shortly thereafter, Ashcroft was ousted as AG, to be replaced by Alberto Gonzales. Who, of course, is directly implicated in Yoo's abuses (particularly bc one of the most important parts of the abuse is that Yoo let his opinion be directed at a July 16, 2002 meeting with Gonzales and probably Addington and Flanigan). That is, the success of this investigation was directly influenced by a guy implicated in it!!

And while OPR does not tell of any obstruction of their investigation save Yoo and Philbin's destroyed emails and Bradbury's delay in alerting them to his crappy CAT opinion until—you guessed it!!—two years after the fact, we do know that Alberto Gonzales, with the help of Bush, was deliberately stalling a parallel investigation into the warrantless wiretap program by refusing to give OPR's lawyers clearances to do this work.

This is funny. It's not until PDF38 that Yoo's first response gets around to responding to responding to the most explosive charge against him: that on Addington's orders, he basically turned the Bybee Memo into a blank check.

> OPR takes issue with the Bybee Memo's discussion ofthe Commander-in-Chief powers and of possible defenses to torture. The premise for this argument is that, while "earlier sections" of the memorandum "were generally responsive to the CIA's request for advice," these "last two sections went beyond that request." D.R. 155. John Rizzo advised OPR that the CIA "did not ask OLC to include those sections," but OPR notes that David Addington, who was then Counsel to the Vice President of the United States, expressed satisfaction to learn that these issues would be addressed in the memorandum. Id at 156. OPR further notes that "these sections were drafted after the Criminal Division" advised the CIA that it would not agree to an
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> "advance declination" of prosecution for the CIA's use of enhanced interrogation techniques. Id "Based on this sequence of events," OPR contends, it is "likely" that OLC and White House lawyers engaged in a conspiracy to include these additional sections in the memorandum as the way "to achieve indirectly the result desired by the client-immunity

> for those who engaged in the application of BITs." Id (emphasis added). Thus, according to OPR, "these sections in effect constituted and advance declination of prosecution for future violations ofthe torture statute, notwithstanding Criminal Division AAG Chertoffs refusal to provide a formal declination." Id at 155.
>
> One might be saddened but not be surprised to find reckless contentions of this type in the fever swamps of the Internet, where it evidently has become customary to ascribe all manner of wrongdoing to the Bush Administration simply as a matter of course.

I pretty much treat gratuitous attacks on the Internet in the pursuit of trying to dismiss a well-founded argument to be a pretty good signt the argument cannot be refuted.

From there, they go onto make a self-contradictory argument.

> In fact, the evidence available to OPR discloses that the client did ask for a discussion of these matters to be included in the memorandum. The Bybee Memo itself begins the constitutional discussion by referencing "your request for legal advice." Bybee Memo at 31. Moreover, while OPR cites Mr. Addington's testimony before the Judiciary Committee that he was pleased to hear the memorandum would address constitutional issues and potential defenses (D.R. 156), it omits Mr. Addington's more relevant and direct answers that explain why he might have felt that way-i.e., that he had asked for these issues to be covered. In particular, Mr. Addington explained in his House testimony that, in his official capacity, he was "essentially … the client on this opinion," and he

> responded to criticism of the Bybee Memo's discussion of these issues thusly: "[i]n defense ofMr. Yoo, I would simply like to point out that [this] is what his client asked him to do." From the Department ofJustice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III), Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties ofthe House Comm. on the Judiciary, 110th Congo 38,42 (June 26, 2008). ("House Hearing") (emphasis added). [CA*6] Even the evidence cited by OPR is to the same effect; it shows that Professor Y00 initially determined not to discuss these subjects in the Bybee Memorandum, but he changed course after a mid-July meeting at the White House and, in an obvious reference to the client's wishes, advised a colleague who inquired about these new issues that "they want it in there." D.R. 15556. As Mr. Addington noted before the House of Representatives, "it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on." House Hearing at 42.

First, a couple of housekeeping points. In their response to the OPR report, Yoo and his lawyer do not contest that Yoo had no intention of putting in a Commander in Chief or defenses section before the meeting at the White House. Further, they go much further than the OPR report, and accept as given that Addington attended that meeting (in Addington's testimony, he only says he was at a meeting during the drafting of the memo, not that he was at this one).

So in accepting (indeed, asserting where the OPR report had not, with respect to Addington's presence at the meeting) those two points, the Yoo response actually strengthens OPR's case. But here's what Addington's testimony actually

says, in part:

> Mr. ADDINGTON. That The Washington Post said that?
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> Mr. NADLER. No, not that The Washington Post said it. Is The Washington Post correct in saying that?
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> Mr. ADDINGTON. Could you repeat it? I have to listen closely before I answer.
>
> Mr. NADLER. That you advocated what was considered the memo's most radical claim that the President may authorize any interrogation method, even if it crosses the line into torture.
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> Mr. ADDINGTON. No, I don't believe I did advocate that. What I said was, in the meeting we had with Mr. Gonzales and Mr. Yoo and me present, Mr. Yoo ran through ''here are the topics I am going to be addressing,'' one of which is the constitutional authority of the President, separate from issues of statutes. My answer is, ''Good, I am glad you are addressing these issues.''
>
> Mr. NADLER. So in other words, you didn't advocate any position. You simply said, ''I am glad you are going over these topics.''
>
> Mr. ADDINGTON. Correct.

Yet the Yoo response has already conceded that Yoo walked into that meeting with the intent of not covering those two issues.

Short of providing some explanation of how Yoo changed his mind simply by walking across the threshold of the White House complex—or provides some other explanation for his change of heart—then it becomes clear that Addington is lying. And the reference to Addington being Yoo's client? (Aside from the fact that Gonzales, not Addington, was the client on that memo.) It would only be relevant if, after

saying he wasn't going to cover Commander-in-Chief and defenses, Addington (or Gonzales) then said, "no, we want you to cover these." That's not what the underlying question was, it's not what Yoo was covering before Chertoff refused the CIA advance declination. And yet no one wants to admit that Addington TOLD Yoo to cover the content.

The argument on Commander in Chief powers is also problematic. It retreats to the claim that it only applies to conduct specifically ordered by the President. But as Yoo admits elsewhere, there's no paperwork showing that the President ordered this. The only finding in place, for the whole period in which Yoo was working on these issues, authorized capture and detention, but not interrogation. So this argument is totally moot.

> In fact, OPR does not appear to dispute that the constitutional discussion was premised on potential actions the President might take personally, or that Professor Y00 conveyed this understanding to the CIA, but merely notes that Professor Y00 "admitted" that the memorandum itself "was probably not as explicit as it could have been." D.R. 156. Yet the Bybee Memo signaled this understanding clearly enough for the sophisticated audience to which this discussion was addressed. The memo notes, for example, "[S]ection 2340A, as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-inChiefpower would be unconstitutional." Bybee Memo at 39 (emphasis added); see also id. at 36 ("[C]ongress cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority.") (emphasis added); id at 38 ("The President's complete discretion in exercising the Commander-in-Chief authority has been recognized by the courts.") (emphasis

> added); id at 38-39 (“Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation’s history, including recent conflicts such as the Gulf, Vietnam, and Korean wars.”) (emphasis added). This proposition, moreover, would be quite familiar to the White House Counsel, since it comports with well-established precedent in related contexts. See, e.g., Common Cause v. Nuclear Regulatory Comm ‘n, 674 F.2d 921,935 (D.C. Cir. 1982) (“Only the President, not the agency, may assert the presidential privilege ….”) (citing Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 447-49 (1977)).